Hearing Date: September 27, 2007
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ITEM 11

TEST CLAIM
FINAL STAFF ANALYSIS

Education Code Sections 44110 - 44114, and 87160 - 87164

Statutes 2000, Chapter 531
Statutes 2001, Chapter 159
Statutes 2001, Chapter 416
Statutes 2002, Chapter 81

Reporting Improper Governmental Activities (02-TC-24)
San Juan Unified School District and Santa Monica Community College District, Claimants

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ITEM 11

TEST CLAIM
FINAL STAFF ANALYSIS

Education Code Sections 44110 - 44114, and 87160 - 87164

Statutes 2000, Chapter 531
Statutes 2001, Chapter 159
Statutes 2001, Chapter 416
Statutes 2002, Chapter 81

Reporting Improper Governmental Activities (02-TC-24)
San Juan Unified School District and Santa Monica Community College District, Claimants

EXECUTIVE SUMMARY

Background

This test claim addresses the procedures used to protect kindergarten through 12th grade (K-12) and community college employees and applicants for employment from employees, officers, or administrators who intentionally engage in acts of reprisal, or coercion against an employee or applicant for employment who has disclosed improper governmental activity of the employer.

In these circumstances, the test claim statutes, allow K-12 and community college employees or applicants for employment to file a complaint with local law enforcement agencies. Supervisors, administrators, or employers that have been found to have engaged in retaliatory or coercive activities are subject to disciplinary actions, civil and criminal liabilities, and punitive damages. In any civil action or administrative proceeding, a shift in the burden of proof occurs when an employee or applicant for employment can show by a preponderance of evidence that the employee or applicant's whistleblowing was a contributing factor in the supervisor, administrator, or employer's alleged actions. The supervisor, administrator, or employer then must show by clear and convincing evidence that his/her actions were taken for legitimate and independent reasons. Community college employees and applicants for employment are provided the additional protection of being allowed to file their complaint with the State Personnel Board, which then must conduct a hearing or investigation to investigate and remedy these complaints.

Claimants contend that the test claim statutes impose new requirements on K-12 school districts and community college districts resulting in increased costs. These new requirements include: (1) establishing policies and procedures; (2) receiving, filing, and maintaining written complaints; (3)investigating or cooperating with law enforcement investigations; (4) disciplining employees, officers, or administrators found to have engaged in retaliatory activities; (5) responding, appearing and defending in any civil action; and (6) paying any court ordered damages. In addition, claimants assert that the test claim statutes impose activities on community college districts associated with a State Personnel Board hearing or investigation initiated by a community college employee or applicant for employment. As a result, claimants

assert the test claim statutes constitute a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution.

The California Community Colleges, Chancellor's Office (Chancellor's Office) asserts that claimants are possibly entitled to reimbursement for activities associated with the State Personnel Board hearings and orders made in the course of those hearings, because prior to the enactment of the test claim statutes there was no requirement for a State Personnel Board hearing in community college whistleblower cases.

The Department of Finance (Finance) argues that the test claim statutes do not constitute a reimbursable state-mandated program for the following reasons: (1) the language of the test claim statutes do not require the activities claimed; (2) the activities do not constitute a new program or higher level of service, as they were required by existing law; and (3) collective bargaining agreements are entered into voluntarily, and therefore, "any resulting costs incurred by the district for activities which exceed those required by the Education Code would be voluntary and are not reimbursable."

Staff Findings

Staff finds that the plain language of Education Code sections 44110 – 44114 does not legally or practically compel K-12 school districts to engage in any state-mandated activities, and thus, these statutes do not constitute a state-mandated program subject to article XIII B, section 6 of the California Constitution.

However, in regard to community college employees and applicants for employment, staff finds that Education Code section 87164 imposes reimbursable state-mandated activities upon community college districts relating to the State Personnel Board hearings required by Education Code section 87164.

Conclusion

Staff concludes that Education Code section 87164, subdivision (f), as added by Statutes 2001, chapter 416, and subdivisions (c)(1), and (c)(2), as added and amended by Statutes 2002, chapter 81, constitutes a reimbursable state-mandated program on community college districts within the meaning of article XIII B, section 6 of the California Constitution, and Government Code section 17514, for the following specific new activities when an employee or applicant for employment files a complaint with the State Personnel Board:

- Beginning January 1, 2003, fully comply with the rules of practice and procedure of the State Personnel Board. This includes serving the employee or applicant for employment and the State Personnel Board with a written response to the applicant for employment's complaint addressing the allegations, and responding to investigations or attending hearings, and producing documents during investigations or hearings (Ed. Code, § 87164, subd. (c)(1)).
- Beginning January 1, 2003, pay for all costs associated with the State Personnel Board hearing regarding a complaint filed by an employee or applicant for employment (Ed. Code, § 87164, subd. (c)(2)).
- Beginning January 1, 2002, if the State Personnel Board finds that a supervisor, community college administrator, or public school employer has violated Education Code section 87163, to make an entry into that individual's official personnel file by placing a

copy of the State Personnel Board's decision in that individual's official personnel file (Ed. Code, § 87164, subd. (f)).

Staff further concludes that Education Code sections 44110 – 44114, as added and amended by Statutes 2000, chapter 531, and Statutes 2001, chapter 159 do not impose any state-mandated activities upon K-12 school districts and, thus, are not subject to article XIII B, section 6 of the California Constitution.

Any other test claim statute and allegation not specifically approved above, does not impose a reimbursable state-mandated program subject to article XIII B, section 6 of the California Constitution.

Recommendation

Staff recommends the Commission adopt this staff analysis and partially approve this test claim.

STAFF ANALYSIS

Claimants

San Juan Unified School District and Santa Monica Community College District

Chronology

06/05/03	Claimants, San Juan Unified School District and Santa Monica Community College District, file test claim with the Commission on State Mandates (Commission)
06/19/03	Commission staff issues completeness letter and requests comments
07/08/03	The California Community Colleges, Chancellor's Office (Chancellor's Office) and the Department of Finance (Finance) request extensions of time for comments
07/08/03	Commission staff grants extension of time for comments to August 18, 2003
09/08/03	The Attorney General, on behalf of Finance, requests an extension of time for comments
09/09/03	Commission staff grants extension of time for comments to October 8, 2003
10/23/03	The Attorney General, on behalf of Finance, requests an extension of time for comments
10/24/03	Commission staff grants extension of time for comments to December 18, 2003
10/31/03	Finance requests an extension of time for comments
11/07/03	Commission staff grants extension of time for comments to February 7, 2004
02/18/04	Finance requests an extension of time for comments
02/18/04	Commission staff grants extension of time for comments to May 18, 2004
03/16/04	The Chancellor's Office files comments to the test claim
04/05/04	Claimants file response to comments by the Chancellor's Office
06/14/04	Finance requests an extension of time for comments
06/14/04	Commission staff grants extension of time for comments to August 9, 2004
09/09/04	Finance requests an extension of time for comments
09/14/04	Commission staff grants extension of time for comments to December 9, 2004
09/24/04	The Attorney General requests to be removed from the test claim mailing list

12/24/04	Finance requests an extension of time for comments
12/28/04	Commission staff grants extension of time for comments to March 9, 2005
03/15/05	Finance requests an extension of time for comments
03/17/05	Commission staff grants extension of time for comments to June 9, 2005
10/03/05	Commission staff grants extension of time for comments to December 1, 2005
02/03/06	Finance requests an extension of time for comments
02/07/06	Commission staff grants extension of time for comments to April 3, 2006
03/13/07	Finance files comments to the test claim
03/22/07	Commission staff issues request for comments from the State Personnel Board by April 23, 2007
04/23/07	The State Personnel Board files comments to the test claim
07/24/07	Commission staff issues draft staff analysis
08/14/07	Claimants file response to draft staff analysis
09/14/07	Commission staff issues final staff analysis

Background

This test claim addresses the procedures used to protect kindergarten through 12th grade (K-12) and community college employees and applicants for employment from employees, officers, or administrators who intentionally engage in acts of reprisal, or coercion against an employee or applicant for employment who has disclosed improper governmental activity of the employer.

Test Claim Statutes

The legislative intent behind the test claim statutes, Education Code sections 44110 – 44114 and 87160 – 87164, as added and amended in 2000, 2001, and 2002, is for K-12 and community college employees[1] and applicants for employment to disclose improper governmental activities. The test claim statutes define "improper governmental activities" as activities by an employee in the performance of the employee's official duties, whether within the scope of the employee's duties or not, that violates state or federal law or regulation, or that is economically wasteful, or involves gross misconduct, incompetency, or inefficiency.[2]

The Legislature enacted Statutes 2000, chapter 531, adding Education Code sections 44110 – 44114 and 87160 – 87164, which adopted and adapted existing "whistleblower protection" laws to apply to K-12 school districts and community college districts. These statutes create a crime

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[1] Education Code section 44112, subdivision (a), defines employee as "any person employed by any public school employer except persons elected by popular vote, persons appointed by the Governor of this state, management employees, and confidential employees." Education Code section 87162, subdivision (a) construes this definition to include community college employees.

[2] Education Code sections 44112, subdivisions (c)(1) and (2), and 87162, subdivisions (c)(1) and (2).

and establish a personal cause of action against a person who engages in acts of reprisal, retaliation, threats, or coercion toward a K-12 or community college employee or applicant for employment for disclosing improper governmental activities.

Under the test claim statutes, K-12 and community college employees are prohibited from using official authority to influence, intimidate, threaten, or coerce any person for the purpose of interfering with the right of that person to make a protected disclosure.[3] A K-12 or community college employee or applicant for employment that files a written complaint with his/her supervisor, school administrator, or employer alleging acts of reprisal, retaliation, threats, or coercion for refusing to obey an illegal order or for disclosing improper governmental activities, may also file a complaint with local law enforcement within 12 months of the most recent act of reprisal that is the subject of the complaint.[4] A person who intentionally engages in acts of reprisal, retaliation, threats, or coercion is subject to the criminal penalties of a fine up to $10,000 and imprisonment for a period of no more than one year.[5] An employee, officer, or administrator who engages in acts of reprisal, retaliation, threats, or coercion is also subject to discipline by his/her employer.[6] If no disciplinary action is taken and it is determined that there is reasonable cause to believe that an act of reprisal occurred, the local law enforcement agency may report the nature and details of the activity to the governing board of the district.[7]

In addition to criminal and administrative sanctions, a person who engages in acts of reprisal, threats, or coercion, is liable for civil damages in an action brought against him/her.[8] A court may also order punitive damages and reasonable attorney's fees.[9] The test claim statutes define "person" to include "any state or local government, or any agency or instrumentality of any of the forgoing."[10] As a result, K-12 school districts and community college districts are also subject to a civil action for damages brought by an employee or applicant for employment under the test claim statutes.

The test claim statutes also provide a shift in the burden of proof in any civil action or administrative proceeding brought by an employee or applicant for employment against an

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[3] Education Code sections 44113 and 87163. See Education Code sections 44112, subdivision (e), and 87162, subdivision (e), defining "protected disclosure" as a good faith communication that discloses: (1) improper governmental activities, and (2) any condition that may significantly threaten the health or safety of employees or the public for the purpose of remedying that condition.

[4] Education Code sections 44114, subdivision (a) and 87164, subdivision (a), as added by Statutes 2000, chapter 531.

[5] Education Code sections 44114, subdivisions (b), and 87164, subdivisions (b), as added by Statutes 2000, chapter 531.

[6] *Ibid.*

[7] *Ibid.*

[8] Education Code sections 44114, subdivisions (c), and 87164, subdivisions (c), as added by Statutes 2000, chapter 531.

[9] *Ibid.*

[10] Education Code sections 44113, subdivision (d), and 87163, subdivision (d).

employer for violation of the statute. Specifically, once an employee or applicant for employment has demonstrated by a preponderance of the evidence that the employee or applicant's disclosure of a supervisor, school administrator, or K-12/community college employer's improper governmental activity was a contributing factor in the alleged retaliatory actions against the employee or applicant for employment, the supervisor, school administrator, or K-12/community college employer has the burden of proof to demonstrate by clear and convincing evidence that the alleged retaliatory actions would have occurred for legitimate reasons independent of the employee or applicant for employment's disclosure.[11] In addition, if the supervisor, school administrator, or K-12/community college employer fails to meet this burden of proof in an adverse action against the employee or applicant for employment in any administrative review, challenge, or adjudication, the employee or applicant for employment shall have a complete affirmative defense in the adverse action.

Education Code sections 44114 and 87164 also provide that if the provisions of the code sections are in conflict with the terms of a memorandum of understanding (MOU) between the school district and its employees, the terms of the MOU are controlling.[12]

Statutes 2001, chapter 159, sections 68 and 84, made technical changes to Education Code sections 44114, subdivision (b), and 87164, subdivision (b), respectively. After the enactment of Statutes 2001, chapter 159, no further changes were made to Education Code sections 44110 – 44110.

Statutes 2001, chapter 416, section 1, amended Education Code section 87164 to add the requirement that the State Personnel Board initiate an informal hearing or investigation within 10 working days of the submission of a community college employee or applicant for employment's written complaint of reprisal or retaliation. If the State Personnel Board's findings resulting from an investigation or formal hearing set forth acts of alleged misconduct by the accused supervisor, administrator, or employer, the supervisor, administrator, or employer may request a hearing regarding the State Personnel Board's findings.[13] If after the hearing the State Personnel Board determines that the alleged misconduct did occur, or no hearing is requested, the board may order any appropriate relief, including, but not limited to, reinstatement, backpay, and expungement of any adverse records of the employee who was subjected to the alleged acts of misconduct.[14] In addition, if the State Personnel Board finds that a community college supervisor, administrator, or employer has engaged in misconduct, it shall cause an entry to be made in his/her official personnel record to that effect.[15] Education Code section 87164, subdivision (c) also provides that the hearing shall be conducted in accordance with Government Code section 18671.2, which provides that the State Personnel Board shall be reimbursed for all costs associated with the hearing, and that the State Personnel Board may charge "the

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[11] Education Code sections 44114, subdivision (e), and 87164, subdivision (e), as added by Statutes 2000, chapter 531.

[12] Education Code sections 44114, subdivision (g), and 87164, subdivision (g), as added by Statutes 2000, chapter 531.

[13] Education Code section 87164, subdivision (d), as added by Statutes 2001, chapter 416.

[14] Education Code section 87164, subdivision (e), as added by Statutes 2001, chapter 416.

[15] Education Code section 87164, subdivision (f), as added by Statutes 2001, chapter 416.

appropriate state agencies for the costs incurred in conducting hearings involving employees of those state agencies."

Education Code section 87164 was amended again by Statutes 2002, chapter 81, section 1, to specify which entity will be responsible for the financial costs of the State Personnel Board hearings. Education Code section 87164, subdivision (c)(2), provides that all costs of the State Personnel Board hearings shall be charged directly to the community college district that employs the complaining employee or with whom the complaining applicant for employment has filed his or her employment application.[16]

Prior Law

Prior law provides public and private employees and applicants for employment, who disclose violations of statutes and regulations, or gross misconduct by an employer or potential employer, with many of the same protections provided by the test claim statutes.[17] These protections, however, are provided in a piecemeal manner, and therefore, certain protections were available to some types of employees and not to others. For example, Labor Code section 1101 et seq. provides most of the test claim statutes' protections from retaliation for disclosing violations of state or federal statute, rule or regulation, to both public employees (including K-12 school district and community college)[18] and private employees,[19] but not applicants for employment. Government Code section 53296 et seq. provides "whistleblower" protection to both employees and applicants; however, the protection does not include a shift in the burden of proof during civil actions or administrative proceedings.

Claimant's Position

The claimants, San Juan Unified School District and Santa Monica Community College District, contend that the test claim statutes constitute a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and seek reimbursement to implement Education Code sections 44110 – 44114 and 87160 – 87164.

The claimants state that prior to January 1, 1975, there were no state statutes or executive orders in effect which required school districts to establish procedures to protect employees or applicants for employment or to discipline employees, officers, or administrators who intentionally engaged in acts of reprisal, retaliation, threats, or coercion against an employee or applicant for employment who disclosed improper governmental activities. However, after the enactment of the test claim statutes (beginning with Statutes 2000, chapter 531) the claimants were required to establish procedures to protect employees or applicants for employment and to discipline employees, officers, or administrators who intentionally engaged in acts of misconduct.

(1) policy + procedure to protect
(2) response to complaint
(3) discipline

[16] Education Code section 87164, subdivision (c)(2), as added by Statutes 2002, chapter 81, section 1.

[17] Labor Code sections 1101 et seq., Government Code section 53296 et seq., Government Code section 8547 et seq., and Government Code section 9149.20 et seq.

[18] Labor Code section 1106, provides that "'employee' includes, but is not limited to, any individual employed by … any school district, community college district… ."

[19] Exhibit G, *Collier v. Superior Court* (1991) 228 Cal.App.3d 1117.

The claimants assert that meeting the new requirements of Education Code sections 44110 – 44114 and 87160 – 87164 as added and amended by the test claim statutes, required increased costs to implement the following activities:

K-12 School Districts and Community College Districts

- establish policies and procedures to implement Education Code sections 44110 – 44114 and 87160 – 87164, and to periodically update those policies and procedures;
- receive, file and maintain written complaints filed by school employees or applicants for employment alleging actual or attempted acts of reprisal, retaliation, threats, coercion or similar improper acts for having disclosed improper governmental activities or refusing to obey an illegal order (pursuant to Ed. Code, §§ 44114, subd. (a) and 87164, subd. (a));
- investigate or to cooperate with law enforcement investigations of written complaints (pursuant to Ed. Code, §§ 44114, subd. (b) and 87164, subd. (b));
- discipline, as may be required by law or the district's MOU, any employee, officer or administrator who is found to have engaged in actual or attempted acts of reprisal, retaliation, threats, coercion or similar improper acts against an employee or applicant for employment who refused to obey an illegal order or who has disclosed improper governmental activities (pursuant to Ed. Code, §§ 44114, subd. (b) and 87164, subd. (b));
- respond, appear, and defend in any civil action, directly or derivatively, when named as a party or otherwise required by the MOU, brought by an employee or applicant for employment alleging improper acts (pursuant to Ed. Code, §§ 44114, subd. (c) and 87164, subd. (h)); and
- pay damages, directly or derivatively, including attorney's fees, when ordered by the court based upon the liability of the district, or as otherwise defined by the MOU (pursuant to Ed. Code, §§ 44114, subd. (c) and 87164, subd. (h)).

Community College Districts

- appear and participate in hearings and investigations initiated by the State Personnel Board (pursuant to Ed. Code, § 87164, sub. (c));
- request a hearing before the State Personnel Board when the adverse findings of the State Personnel Board hearing officer are incorrect (pursuant to Ed. Code, § 87164, subd. (d));
- "comply with any ordered relief [by the State Personnel Board] including, but not limited to, reinstatement, backpay, restoration of lost service credit, and the expungement of any adverse records of the employee or [applicant for employment] who was the subject of the acts of misconduct"[20] (pursuant to Ed. Code, § 87164, subd. (e));
- cause an entry into the supervisor's, administrator's, or employer's official personnel record when the State Personnel Board has determined he or she has engaged in acts of misconduct (pursuant to Ed. Code, § 87164, subd. (f)); and
- reimburse the State Personnel Board for all of the costs associated with its hearings (pursuant to Ed. Code, § 87164, subd. (c)(2)).

[20] Exhibit A, Test Claim, p. 125.

The claimants filed comments, dated August 14, 2007, in response to the draft staff analysis. These comments will be addressed, as appropriate, in the analysis below.

California Community Colleges, Chancellor's Office Position (Chancellor's Office)

The Chancellor's Office asserts that community college districts are not entitled to reimbursement for the majority of activities that the claimants have associated with Education Code section 87164, as added and amended by the test claim statutes.

The Chancellor's Office argues that establishing policies and procedures to implement the act and periodically updating those policies and procedures; investigating or cooperating with law enforcement investigations of written complaints; and responding, appearing, and defending in civil actions are not mandated by the language of the test claim statutes.

In addition, the Chancellor's Office contends that receiving, filing and maintaining written complaints filed by school employees or applicants for employment; disciplining any employee, officer, or administrator who is found to have engaged in or attempted acts of misconduct; responding, appearing, and defending in civil actions; and paying damages are not new activities as compared to Government Code section 53296 et seq., Labor Code section 1102.5, and other "whistleblower" protection laws.

The Chancellor's Office further asserts that "with regard to the requirements for employee discipline, the impact upon the districts would be minimal."[21] Additionally, in regard to litigation costs, including payment of damages, the Chancellor's Office contends that there is a "question as to whether this claim is ripe for review, as the districts have not indicated that they have been required to defend in civil actions brought pursuant to the Act."[22]

The Chancellor's Office does, however, indicate that the claimants may be entitled to reimbursement for the following activities the claimants have associated with Education Code section 87164, as added and amended by the test claim statutes:

- appearing and participating in hearings and investigations initiated by the State Personnel Board when complaints alleging violations of Education Code sections 87160 – 87164 have been filed;
- requesting a hearing before the State Personnel Board when the adverse findings of the hearing officer are incorrect;
- complying with any ordered relief by the State Personnel Board;
- causing an entry into the violating employees' record when the State Personnel Board has determined that the employee has violated Education Code sections 87160 – 87164; and
- reimbursing the State Personnel Board for all costs associated with its hearings.

The Chancellor's Office states that Education Code sections 87160 – 87164 appear to mandate a new program or higher level of service upon the claimants in regard to these activities because prior to the enactment of Statutes 2001, Chapter 416, there were no requirements for State

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[21] Exhibit B, California Community Colleges – Chancellor's Office Comments, dated March 11, 2004, p. 169.

[22] *Ibid.*

Personnel Board hearings and orders regarding whistleblower complaints, and therefore no requirement to do the above activities.

Department of Finance's Position

The Department of Finance (Finance) filed comments dated March 9, 2007, disagreeing with the claimants' test claim allegations. Finance asserts that "the whole of this test claim is not a reimbursable mandate."[23] Finance contends that the language of the test claim statutes do not require the activities the claimants have alleged under Education Code sections 44110 – 44114 and 87160 – 87164. Also, Finance argues that the protections provided by Education Code sections 44110 – 44114 and 87160 – 87164 are the same as those provided by pre-existing whistleblower protection laws applicable to the claimants, and therefore, the requirements do not constitute a new program or higher level of service.

Finance acknowledges that Education Code section 87164, subdivision (c)(2) requires all costs associated with a State Personnel Board hearing to be charged to the community college district that employs the complaining employee or considered employing the applicant for employment. However, Finance contends that the language of Education Code section 87164, subdivision (c)(2) does not require community college districts to undertake any new program or provide a higher level of service, and that costs alone do not constitute a reimbursable state mandate.

In addition, Finance notes that collective bargaining agreements (MOUs) are entered into voluntarily and that Education Code sections 44114, subdivision (g), and 87164, subdivision (l), provide that if any of the provisions of Education Code sections 44110 – 44114 and 87160 – 87164 are in conflict with provisions of the school districts' MOU, the terms of the MOU supersede the Education Code sections. Therefore, "any resulting costs incurred by the districts for activities which exceed those required by the Education Code would be voluntary and are not reimbursable."[24]

As a result, Finance argues that the test claim statutes do not constitute a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution.

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[23] Exhibit D, Department of Finance Comments, dated March 9, 2007, p. 186.

[24] *Ibid.*

Discussion

The courts have found that article XIII B, section 6 of the California Constitution[25] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[26] "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."[27] 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.[28] 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.[29]

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.[30] 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.[31] A "higher level of service" occurs when there is "an increase in the actual level or quality of governmental services provided."[32]

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[25] California Constitution, 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."

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

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

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

[29] *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*).

[30] *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).

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

[32] *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.[33]

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.[34] 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."[35]

Issue 1: Do Education Code sections 44110-44114, and 87160-87164 constitute a state-mandated program subject to article XIII B, section 6 of the California Constitution?

In order for a 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 entities. If the statutory language does not mandate or require the claimants to perform a task, then article XIII B, section 6, does not apply.

When analyzing statutory language, the rules of statutory construction provide:

> In statutory construction cases, our fundamental task is to ascertain the intent of the lawmakers so as to effectuate the purpose of the statute. ... If the terms of the statute are unambiguous, we presume the lawmakers meant what they said, and the plain meaning of the language governs.[36]

Also, in *People v. Knowles* the California Supreme Court held:

> If the words of the statute are clear, the court should not add to or alter them to accomplish a purpose that does not appear on the face of the statute or from its legislative history.[37]

However, in cases in which the plain language of a statute does not mandate or "legally compel" claimants to engage in activities, the California Supreme Court in *Kern High School Dist.* held open the possibility that a state mandate might be found in circumstances short of legal compulsion; where "'certain and severe ... penalties', such as 'double ... taxation' and other 'draconian' consequences,'"[38] would result if the local entity did not comply with the program.

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[33] *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.

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

[35] *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.

[36] Exhibit H, *Estate of Griswold,* (2001) 25 Cal.4th 904, 910-911.

[37] Exhibit H, *People v. Knowles* (1950) 35 Cal.2d 175, 183.

[38] *Kern High School Dist., supra,* 30 Cal.4th 727, 751, quoting *City of Sacramento, supra,* 50 Cal.3d at p. 74.

Do Education Code Sections 44110 – 44114 Impose State-Mandated Activities on K-12 School Districts?

Education Code sections 44110 – 44113 set forth the short title, legislative intent, definitions, and prohibited activities of the code sections. Education Code section 44113 prohibits an employee from using or attempting to use "official authority or influence"[39] for the purpose of intimidating, threatening, coercing, commanding any person, or attempting to do so, for the purpose of interfering with the right of that person to disclose to an official agent improper governmental activities.

Education Code section 44114 is cited by claimants as the code section requiring most of the claimed activities for K-12 school districts. This section sets forth the procedures available to protect K-12 school district employees and applicants for employment that have disclosed improper governmental activities or refused to obey an illegal order, who allege actual or attempted acts of reprisal, retaliation, threats, coercion, or similar improper acts prohibited by Education Code section 44113. Education Code section 44114 provides:

> (a) A public school employee or applicant for employment with a public school employer who files a written complaint with his or her supervisor, a school administrator, or the public school employer alleging actual or attempted acts of reprisal, retaliation, threats, coercion, or similar improper acts prohibited by Section 44113 for having disclosed improper governmental activities[40] or for refusing to obey an illegal order[41] may also file a copy of the written complaint with the local law enforcement agency together with a sworn statement that the contents of the written complaint are true, or are believed by the affiant to be true, under penalty of perjury. The complaint filed with the local law enforcement agency shall be filed within 12 months of the most recent act of reprisal that is the subject of the complaint.
>
> (b) A person[42] who intentionally engages in acts of reprisal, retaliation, threats, coercion, or similar acts against a public school employee or applicant for employment with a public school employer for having made a protected disclosure is subject to a fine not to exceed ten thousand dollars ($10,000) and

[39] Education Code section 44113, subdivision (b) defines the use of "official authority or influence" as including promising to confer or conferring any benefit; affecting or threatening to affect any reprisal, or taking personnel action.

[40] Education Code section 44112, subdivision (c)(1) and (c)(2), defines "improper governmental activities" as an activity by a public school agency or employee that violates a state or federal law or regulation, or that is economically wasteful or involves gross misconduct, incompetency, or inefficiency.

[41] Education Code section 44112, subdivision (b), defines "illegal order" as any directive to violate or assist in violating a federal, state, or local law, rule, or regulation, or to work or cause others to work in conditions that would unreasonably threaten the health or safety of employees or the public.

[42] Education Code section 44112, subdivision (d), defines "person" as including any state or local government, or any agency or instrumentality of the state or local government.

imprisonment in the county jail for a period not to exceed one year. Any public school employee, officer, or administrator who intentionally engages in that conduct shall also be subject to discipline by the public school employer. If no adverse action is instituted by the public school employer and it is determined that there is reasonable cause to believe that an act of reprisal, retaliation, threats, coercion, or similar acts prohibited by Section 44113 occurred, the local law enforcement agency may report the nature and details of the activity to the governing board of the school district or county board of education, as appropriate.

(c) In addition to all other penalties provided by law, a person who intentionally engages in acts of reprisal, retaliation, threats, coercion, or similar acts against a public school employee or applicant for employment with a public school employer for having made a protected disclosure shall be liable in an action for damages brought against him or her by the injured party. Punitive damages may be awarded by the court where the acts of the offending party are proven to be malicious. Where liability has been established, the injured party shall also be entitled to reasonable attorney's fees as provided by law. However, an action for damages shall not be available to the injured party unless the injured party has first filed a complaint with the local law enforcement agency.

(d) This section is not intended to prevent a public school employer, school administrator, or supervisor from taking, failing to take, directing others to take, recommending, or approving a personnel action with respect to a public school employee or applicant for employment with a public school employer if the public school employer, school administrator, or supervisor reasonably believes the action or inaction is justified on the basis of evidence separate and apart from the fact that the person has made a protected disclosure as defined in subdivision (e) of Section 44112.

(e) In any civil action or administrative proceeding, once it has been demonstrated by a preponderance of evidence that an activity protected by this article was a contributing factor in the alleged retaliation against a former, current, or prospective public school employee, the burden of proof shall be on the supervisor, school administrator, or public school employer to demonstrate by clear and convincing evidence that the alleged action would have occurred for legitimate, independent reasons even if the public school employee had not engaged in protected disclosures or refused an illegal order. If the supervisor, school administrator, or public school employer fails to meet this burden of proof in an adverse action against the public school employee in any administrative review, challenge, or adjudication in which retaliation has been demonstrated to be a contributing factor, the public school employee shall have a complete affirmative defense in the adverse action.

(f) Nothing in this article shall be deemed to diminish the rights, privileges, or remedies of a public school employee under any other federal or state law or under an employment contract or collective bargaining agreement.

> (g) If the provisions of this section are in conflict with the provisions of a memorandum of understanding reached pursuant to Chapter 10.7 (commencing with Section 3540) of Division 4 of Title 1 of the Government Code, the memorandum of understanding shall be controlling without further legislative action.

For a test claim statute to constitute a reimbursable state-mandated program, the test claim statute must impose state-mandated activities on K-12 school districts. This imposition of activities on K-12 school districts must either "legally compel" or "practically compel"[43] a claimant to engage in an activity. The claimants assert that Education Code section 44114 requires K-12 school districts to: (1) receive, file, and maintain complaints; (2) investigate or cooperate with law enforcement investigations of written complaints; (3) discipline any employee, officer, or administrator who is found to have violated the test claim statutes; (4) respond, appear, and defend in any civil action; and (5) pay damages, including attorney's fees. The claimants further contend:

> The DSA [draft staff analysis] correctly states that the "legislative intent behind the test claim statutes … is for K-12 and community college employees and applicants for employment to disclose improper governmental activities." … Education Code sections 44114 and 87164 create a new legal entitlement and new cause of action for employees and employment applicants to file a written complaint against a school or community college district alleging retaliation for having disclosed improper governmental activities and to have that complaint administratively and judicially adjudicated. These code sections state the elements of the cause of action and the remedies available. The DSA agrees that the employee or applicant has the "right" to file the complaint. … But, the DSA concludes that no action is required by the district thereafter based on the "plain language" of the statute, that the district is not required to dispute the claim. … That conclusion is without merit.
>
> The legislative intent of the statute is for employees and applicants to disclose improper governmental activities. The statute establishes the right for employees and applicants to file a written complaint. The statute establishes remedies for the complainant. Therefore, with this establishment of legislative intent and process, there is a corresponding duty by the districts to respond to the complaint. The employee and applicant's right, due process, and remedy require the participation of the district. An objective construction of the "plain language" of the law imposes a duty for the governmental entity, which as subordinate to the state and subject to state law and the court system, to, as a necessary party, respond to the complaint.[44] [Citations omitted.]

For the reasons below, staff finds that Education Code section 44114 does not "legally" or "practically" compel school districts to engage in activities, and thus does not impose state-mandated activities upon K-12 school districts.

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[43] *Kern High School Dist.*, *supra*, 30 Cal.4th 727, 743 and 751.

[44] Exhibit I, Claimant Response to Draft Staff Analysis, dated August 14, 2007, p.305-306.

The plain language of Education Code section 44114, subdivision (a), cited above, gives employees or applicants for employment the right to file a complaint with the local law enforcement agency. Subdivision (b) sets forth the criminal and administrative penalties, including possible disciplinary action by the public school employer, which a person who violates the test claim statute may face, and the actions local law enforcement may take if the public school employer decides to take no disciplinary action (i.e. report the alleged activities to the governing body of the school district). Subdivision (c) sets forth the civil remedies of an employee or applicant for employment that was subject to acts of reprisal, retaliation, threats or coercion. As a result, subdivision (c) creates a personal cause of action for an employee or applicant for employment against a person or K-12 school district that engages in acts in violation of the test claim statute. Subdivision (d) provides that section 44114 is not intended to prevent taking personnel actions justified on the basis of evidence separate from the fact that an employee or applicant for employment made a protected disclosure. Subdivision (e) shifts the burden of proof in a civil action or administrative proceeding from an employee or applicant for employment to the supervisor, school administrator, or K-12 employer when the employee or applicant has demonstrated, by a preponderance of evidence, that the employee or applicant's whistleblowing was a contributing factor in the supervisor, school administrator, or K-12 employer's alleged actions. The supervisor, school administrator, or K-12 employer must then show by clear and convincing evidence that his/her actions occurred for legitimate, independent reasons of the whistleblowing activities. If the supervisor, school administrator, or K-12 employer fails to meet the burden of proof in an adverse action against the employee or applicant in an administrative review, challenge, or adjudication, the employee or applicant is given a complete affirmative defense in the adverse action. The plain language of subdivisions (g) and (f) provide that Education Code sections 44110 – 44114 do not impair the rights, privileges, or remedies of a public school employee under federal or state law, or those provided in a MOU. In addition, where the provisions of Education Code section 44114 conflict with the provisions of a MOU, the provisions of the MOU are controlling.

The claimants contend that the establishment of rights and a personal cause of action for employees and applicants for employment necessitate a finding that K-12 school districts have a corresponding duty to respond to the complaint, even though the plain language of the test claim statutes does not, on its face, require such activities. However, pursuant to the rules of statutory construction, where the language of a statute is clear, as is the case here, there is no need to engage in statutory "construction."[45] Instead, the interpretation of a statute ends with the words of the statute.[46] In addition, when the language of a statute is clear, courts should not add to or alter them to accomplish a purpose that does not appear on the face of the statute or from its legislative history.[47] In this case, there is no language in Education Code section 44114 or in the legislative history of the bill enacting the test claim statutes, Assembly Bill 2472,[48] that requires public school districts to engage in these activities. Thus, as a matter of law, the rules of

[45] Exhibit H, *People v. Howard* (2002) 100 Cal.App.4th 94, 97.

[46] *Ibid.*

[47] Exhibit H, *People v. Knowles, supra*, 35 Cal.2d 183.

[48] Exhibit J, Senate Rules Committee, Office of Senate Floor Analysis, Third Reading Analysis of Assembly Bill 2472 (2000-2001 Reg. Sess.) as amended August 25, 2000.

statutory construction prohibit a construction that finds requirements not present in the plain language of the test claim statutes. As a result, the plain language of Education Code section 44114 only establishes certain rights and a personal cause of action for employees and applicants for employment against a "person," including a school district, that engages in acts of reprisal or retaliation against the employee or applicant for employment.

The claimants assert that an employee and applicant for employment's "right, due process, and remedy require the participation of the district." However, there is no language in the test claim statute that conditions an employee or applicant for employment's "right, due process, and remedy" on the decision of a district to respond or not to respond. Additionally, the court in *San Diego Unified School Dist.*, found that a test claim statute "appears to constitute a state mandate, in that it establishes conditions under which the state, *rather than local officials*, has made the decision requiring a school district to incur the costs of an expulsion hearing."[49] Here, although a K-12 school district may decide it is beneficial for the districts to: (1) receive, file, and maintain complaints; (2) investigate or cooperate with law enforcement investigations of written complaints; (3) discipline any employee, officer, or administrator who is found to have violated the test claim statutes; and/or (4) litigate a claim brought pursuant to the test claim statutes; the ultimate decisions to engage in these activities is made by K-12 school districts, and not by the state. Therefore, based on the plain language of Education Code section 44114, the K-12 school districts are not "legally compelled" by the state to engage in any of the activities claimed above.

In *Kern High School Dist.*, the court held open the possibility that a reimbursable state mandate might be found in circumstances of practical compulsion. Practical compulsion is found where "'certain and severe ... penalties', such as 'double ... taxation' and other 'draconian' consequences,'"[50] would result if the local entity did not comply with the program. In this case, however, there is no evidence in the record that would indicate that claimants face certain and severe penalties such as double taxation and/or other draconian consequences for failing to engage in the activities claimed above for K-12 school districts.

As a result, staff finds that the plain language of Education Code sections 44110 – 44114 does not legally or practically compel K-12 school districts to engage in any state-mandated activities, and thus, these statutes do not constitute a state-mandated program subject to article XIII B, section 6 of the California Constitution.

Do Education Code Sections 87160 – 87164 Impose State-Mandated Activities on Community College Districts?

Education Code sections 87160 – 87163 set forth the short title, legislative intent, definitions, and prohibited activities of the code sections. Education Code section 87163 prohibits an employee from using or attempting to use "official authority or influence"[51] for the purpose of intimidating, threatening, coercing, commanding any person, or attempting to do so, for the purpose of

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[49] *San Diego Unified School Dist., supra*, 33 Cal.4th 859, 880.

[50] *Kern High School Dist., supra*, at p. 751.

[51] Education Code section 87163, subdivision (b) defines the use of "official authority or influence" as including promising to confer or conferring any benefit; affecting or threatening to affect any reprisal, or taking personnel action.

interfering with the right of that person to disclose to an official agent improper governmental activities.

Education Code section 87164 is cited by claimants as the code section requiring most of the claimed activities for community college districts. This section sets forth the procedures used to protect community college employees and applicants for employment that have disclosed improper governmental activities or refused to obey an illegal order, who allege actual or attempted acts of reprisal, retaliation, threats, coercion, or similar improper acts prohibited by Education Code section 87163. Education Code section 87164, as amended by Statutes 2002, chapter 81, provides in relevant part:[52]

> (a) An employee or applicant for employment with a public school employer who files a written complaint with his or her supervisor, a community college administrator, or the public school employer alleging actual or attempted acts of reprisal, retaliation, threats, coercion, or similar improper acts prohibited by Section 87163 for having disclosed improper governmental activities[53] or for refusing to obey an illegal order[54] may also file a copy of the written complaint with the local law enforcement agency, together with a sworn statement that the contents of the written complaint are true, or are believed by the affiant to be true, under penalty of perjury. The complaint filed with the local law enforcement agency shall be filed within 12 months of the most recent act of reprisal that is the subject of the complaint.
>
> (b) A person who intentionally engages in acts of reprisal, retaliation, threats, coercion, or similar acts against an employee or applicant for employment with a public school employer for having made a protected disclosure is subject to a fine not to exceed ten thousand dollars ($10,000) and imprisonment in the county jail for a period not to exceed one year. An employee, officer, or administrator who intentionally engages in that conduct shall also be subject to discipline by the public school employer. If no adverse action is instituted by the public school employer, and it is determined that there is reasonable cause to believe that an act of reprisal, retaliation, threats, coercion, or similar acts prohibited by Section 87163, the local law enforcement agency may report the nature and details of the activity to the governing board of the community college district.

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[52] Omitted Education Code section 87164, subdivision (g), which provides that the State Personnel Board must submit an annual report to the Governor and Legislature regarding complaints filed, hearings held, and legal actions taken, such that the Governor and Legislature may determine the need to continue or modify whistleblower protections.

[53] Education Code section 87162, defines "improper governmental activities" as an activity by a public school agency or employee that violates a state or federal law or regulation, or that is economically wasteful or involves gross misconduct, incompetency, or inefficiency.

[54] Education Code section 87162, defines "illegal order" as any directive to violate or assist in violating a federal, state, or local law, rule, or regulation, or to work or cause others to work in conditions that would unreasonably threaten the health or safety of employees or the public.

(c) (1) The State Personnel Board shall initiate a hearing or investigation of a written complaint of reprisal or retaliation as prohibited by Section 87163 within 10 working days of its submission. The executive officer of the State Personnel Board shall complete findings of the hearing or investigation within 60 working days thereafter, and shall provide a copy of the findings to the complaining employee or applicant for employment with a public school employer and to the appropriate supervisors, administrator, or employer. This hearing shall be conducted in accordance with Section 18671.2 of the Government Code,[55] this part, and the rules of practice and procedure of the State Personnel Board.[56] When the allegations contained in a complaint of reprisal or retaliation are the same as, or similar to, those contained in another appeal, the executive officer may consolidate the appeals into the most appropriate format. In these cases, the time limits described in this paragraph shall not apply.

(2) Notwithstanding Section 18671.2 of the Government Code, no costs associated with hearings of the State Personnel Board conducted pursuant to paragraph (1) shall be charged to the board of governors. Instead, all of the costs associated with hearings of the State Personnel Board conducted pursuant to paragraph (1) shall be charged directly to the community college district that employs the complaining employee, or with whom the complaining applicant for employment has filed his or her employment application.[57]

(d) If the findings of the executive officer of the State Personnel Board set forth acts of alleged misconduct by the supervisor, community college administrator, or public school employer, the supervisor, administrator, or employer may request a hearing before the State Personnel Board regarding the findings of the executive officer. The request for hearing and any subsequent determination by the board shall be made in accordance with the board's usual rules governing appeals, hearings, investigations, and disciplinary proceedings.

(e) If, after the hearing, the State Personnel Board determines that a violation of Section 87163 occurred, or if no hearing is requested and the findings of the executive officer conclude that improper activity has occurred, the board may order any appropriate relief, including, but not limited to, reinstatement, back pay, restoration of lost service credit if appropriate, and the expungement of any adverse records of the employee or applicant for employment with a public school

[55] Government Code section 18671.2 provides that the State Personnel Board shall be reimbursed for the entire costs of hearings and may bill the appropriate "state agencies" for the costs incurred in conducting hearings involving employees of those state agencies. Due to the fact that community college districts are not "state agencies," Statutes 2002, chapter 81, added subdivision (c)(2) to clarify that community college districts would be charged the costs associated with the State Personnel Board hearings.

[56] "...this part, and the rules of practice and procedure of the State Personnel Board," added by Statutes 2002, chapter 81.

[57] Education Code section 87164, subdivision (c)(2), added by Statutes 2002, chapter 81.

employer who was the subject of the alleged acts of misconduct prohibited by Section 87163.

(f) Whenever the State Personnel Board determines that a supervisor, community college administrator, or public school employer has violated Section 87163, it shall cause an entry to that effect to be made in the supervisor's, community college administrator's, or public school employer's official personnel records.

...

(h) In addition to all other penalties provided by law, a person who intentionally engages in acts of reprisal, retaliation, threats, coercion, or similar acts against an employee or applicant for employment with a public school employer for having made a protected disclosure shall be liable in an action for damages brought against him or her by the injured party. Punitive damages may be awarded by the court where the acts of the offending party are proven to be malicious. Where liability has been established, the injured party shall also be entitled to reasonable attorney's fees as provided by law. However, an action for damages shall not be available to the injured party unless the injured party has first filed a complaint with the local law enforcement agency. Nothing in this subdivision requires an injured party to file a complaint with the State Personnel Board prior to seeking relief for damages in a court of law.

(i) This section is not intended to prevent a public school employer, school administrator, or supervisor from taking, failing to take, directing others to take, recommending, or approving a personnel action with respect to an employee or applicant for employment with a public school employer if the public school employer, school administrator, or supervisor reasonably believes an action or inaction is justified on the basis of evidence separate and apart from the fact that the person has made a protected disclosure as defined in subdivision (e) of Section 87162.

(j) In any civil action or administrative proceeding, once it has been demonstrated by a preponderance of evidence that an activity protected by this article was a contributing factor in the alleged retaliation against a former, current, or prospective employee, the burden of proof shall be on the supervisor, school administrator, or public school employer to demonstrate by clear and convincing evidence that the alleged action would have occurred for legitimate, independent reasons even if the employee had not engaged in protected disclosures or refused an illegal order. If the supervisor, school administrator, or public school employer fails to meet this burden of proof in an adverse action against the employee in any administrative review, challenge, or adjudication in which retaliation has been demonstrated to be a contributing factor, the employee shall have a complete affirmative defense in the adverse action.

(k) Nothing in this article shall be deemed to diminish the rights, privileges, or remedies of an employee under any other federal or state law or under an employment contract or collective bargaining agreement.

(l) If the provisions of this section are in conflict with the provisions of a memorandum of understanding reached pursuant to Chapter 10.7 (commencing with Section 3540) of Division 4 of Title 1 of the Government Code, the memorandum of understanding shall be controlling without further legislative action.

Education Code section 87164, subdivisions (a), (b), (h), (j), (k), and (l) substantively mirror Education Code section 44114, subdivisions (a) – (c), (e), (f), and (g). Thus, like Education Code section 44114, the plain language of Education Code section 87164, subdivisions (a), (b), (h), (j), (k), and (l) does not impose any state-mandated activities upon community college districts.

However, unlike Education Code section 44114, section 87164 provides community college district employees and applicants for employment with the ability to submit complaints to the State Personnel Board, after which the State Personnel Board is required to initiate an informal hearing or investigation of the complaint within 10 working days. Education Code section 87164, subdivisions (c) – (f), set forth the procedures and available administrative actions of the State Personnel Board hearing or investigation.

Subdivisions (d) and (e) Do Not Impose Requirements on Community College Districts

The claimants contend that Education Code section 87164, subdivision (d), requires community college districts to request a hearing before the State Personnel Board when the adverse findings of the hearing officer are incorrect. However, the plain language of subdivision (d) only authorizes a community college district to request a hearing after the State Personnel Board has issued its findings from the investigation or informal hearing. As a result, Education Code section 87164, subdivision (d), does not impose any state-mandated activities upon community college districts.

Education Code section 87164, subdivision (e), gives the State Personnel Board the authority to order "any appropriate relief" upon a finding that a violation of Education Code section 87163 has occurred.[58] Subdivision (e) describes "any appropriate relief" as including, but not limited to, "reinstatement, back pay, restoration of lost service credit if appropriate, and the expungement of any adverse records of the employee or applicant for employment." The claimants request reimbursement for the cost of complying with an order for "appropriate relief" by the State Personnel Board pursuant to subdivision (e). In *Kern High School Dist.*, the court held that when analyzing state mandate claims, the Commission must look at the underlying program to determine if the claimant's participation in the underlying program is voluntary or legally compelled.[59] Although, strict adherence to this rule was later questioned by the court in *San Diego Unified School Dist.*, the court refused to overturn its prior holding establishing this rule, basing its decision in *San Diego Unified School Dist.* on alternative grounds.[60] In addition,

[58] Education Code section 87163 prohibits the use of official authority or influence for the purpose of intimidating, threatening, coercing, commanding, or attempting to said acts for the purpose of interfering with the right a an employee or applicant for employment to disclose improper governmental activities or conditions that may significantly threaten the health or safety of employees or the public.

[59] *Kern High School Dist.*, *supra*, 30 Cal.4th 727, 743.

[60] *San Diego Unified School Dist.*, *supra*, 33 Cal.4th 887-888.

as stated above, the court in *San Diego Unified School Dist.*, found that a test claim statute "appears to constitute a state mandate, in that it establishes conditions under which the state, *rather than local officials*, has made the decision requiring a school district to incur the costs of an expulsion hearing."[61] Here, the state has not made a decision that triggers any cost relating to relief on community college districts. Any "appropriate relief" ordered by the State Personnel Board would be a result of the underlying occurrence of a violation of section 87163 by a supervisor, community college administrator, or public school employer. Thus, the plain language of Education Code section 87164, subdivision (e), does not require community college districts to engage in any activities.

Subdivisions (c)(1), (c)(2) and (f) Impose Requirements on Community College Districts

Education Code section 87164, subdivision (c), as amended in 2001 (Stats. 2001, ch. 416), effective January 1, 2002, provided in relevant part:

> The State Personnel Board shall initiate a hearing or investigation of a written complaint of reprisal or retaliation as prohibited by Section 87163 within 10 working days of its submission. The executive officer of the State Personnel Board shall complete findings of the hearing or investigation within 60 working days thereafter and shall provide a copy of the findings to the complaining employee or applicant for employment with a public school employer and to the appropriate supervisors, administrator, or employer. This hearing shall be conducted in accordance with Section 18671.2 of the Government Code.

Claimants contend that Education Code section 87164, subdivision (c) requires claimants to appear and participate in hearings and investigations initiated by the State Personnel Board. However, the plain language of subdivision (c) indicates only that the State Personnel Board shall initiate a hearing or investigation of a community college employee or applicant for employment's complaint of reprisal. Government Code section 18671.2, which subdivision (c) incorporates by reference, requires that the State Personnel Board be reimbursed for the entire cost of hearings conducted by the hearing office pursuant to statutes administered by the board, or by interagency agreement. Thus, the plain language of Education Code section 87164, subdivision (c), as amended in 2001, does not require community college districts to appear and participate in State Personnel Board hearings or investigations. Effective, August 14, 2002, the State Personnel Board adopted California Code of Regulations, title 2, sections 56–57.4, to implement whistleblower laws, including Education Code sections 87160 – 87164. These regulations address the participation of community college districts in the State Personnel Board hearing and investigations processes, however, these regulations have not been pled by claimants. Therefore, staff makes no independent findings on the regulations.

Education Code section 87164 was amended again in 2002, replacing subdivision (c) with subdivisions (c)(1) and (c)(2). These amendments were effective January 1, 2003. Education Code section 87164, subdivision (c)(1), adds to subdivision (c) the language that the hearing *shall be conducted in accordance* with "the rules of practice and procedure of the State Personnel Board." The rules of practice and procedure are set forth by California Code of Regulations, title 2, sections 56-57.4, which implement whistleblower laws, including Education Code sections 87160 – 87164. The State Personnel Board regulations provide that community

[61] *Id.* at p. 880. (Emphasis added.)

college districts are required to cooperate fully with the State Personnel Board executive officer or investigator during an investigation or be subject to disciplinary action for impeding the investigation.[62] The regulations provide that investigators shall have authority to administer oaths, subpoena and require the attendance of witnesses and the production of books or papers, and cause witness depositions pursuant to Government Code section 18671.[63] If the State Personnel Board initiates an informal hearing, rather than an investigation, each named respondent to the complaint is required to serve on the complaining applicant and file with the State Personnel Board a written response to the complaint addressing the allegations contained in the complaint. During the informal hearing the administrative law judge (ALJ) conducting the hearing shall have full authority to question witnesses, inspect documents, visit state facilities in furtherance of the hearing, and otherwise conduct the hearing in a manner and to the degree he or she deems appropriate.[64] As a result, Education Code section 87164, subdivision (c)(1), as added by Statutes 2002, chapter 81, requires community college districts, beginning on January 1, 2003, to fully comply with the rules of practice and procedure of the State Personnel Board. This includes serving the employee or applicant for employment and the State Personnel Board with a written response to the complaint addressing the allegations contained therein for hearings, and responding to investigations or attending hearings, and producing documents during investigations or hearings.

Claimants further contend that Education Code section 87164, subdivision (c), as amended in 2001, requires community college districts to reimburse the State Personnel Board for all of the costs associated with its hearings. Education Code section 87164, subdivision (c), provides that the hearing shall be conducted in accordance with Government Code section 18671.2, which states that the State Personnel Board shall be reimbursed for the entire cost of hearings conducted by the hearing office and that the State Personnel Board "may bill appropriate *state agencies* for the costs incurred in conducting hearings involving *employees* of *those state agencies*."[65] However, because community college districts are not "state agencies," and community college employees and applicants for employment are not employees of "state agencies," the State Personnel Board does not have statutory authority to bill community college districts, under the 2001 statute. Thus, pursuant to the plain language of Education Code section 87164, subdivision (c), as amended in 2001, a community college district is not required to reimburse the State Personnel Board for all of the costs of State Personnel Board hearings resulting from a complaint brought by an employee or applicant for employment with that community college district.

In 2002, Education Code section 87164 was substantively amended to add subdivision (c)(2), which specifically provides:

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[62] Exhibit F, California Code of Regulations, title 2, section 56.3 Register 2006, No. 10 (March 10, 2006).

[63] *Ibid.* Staff notes that Government Code section 18678 provides that a failure to appear and testify or to produce books or papers pursuant to a State Personnel Board subpoena issued pursuant to State Personnel Board regulations constitutes a misdemeanor.

[64] Exhibit F, California Code of Regulations, title 2, section 56.4 Register 2006, No. 10 (March 10, 2006).

[65] Exhibit F, Government Code section 18671.2, subdivision (b). (Emphasis added.)

Notwithstanding Section 18671.2 of the Government Code ... all of the costs associated with hearings of the State Personnel Board ... shall be charged directly to the community college district that employs the complaining employee, or with whom the complaining applicant for employment has filed his or her employment application." [Emphasis added.]

Thus, staff finds that pursuant to the plain language of Education Code section 87164, subdivision (c)(2), effective January 1, 2003, a community college district is required to pay for all costs associated with a State Personnel Board hearing as a result of complaints filed by employees or applicants for employment with that community college district.

In 2001, subdivision (f) was added to Education Code section 87164. Effective January 1, 2002, subdivision (f) provides:

> Whenever the State Personnel Board determines that a supervisor, community college administrator, or public school employer has violated Section 87163, it shall cause an entry to that effect to be made in the supervisor's, community college administrator's, or public school employer's official personnel records.

It is unclear from the language of subdivision (f) how the State Personnel Board "shall cause an entry" to be made into the official personnel records kept by a community college district. Courts have held that when an administrative agency is charged with enforcing a particular statute, its interpretation of the statute will be accorded great respect by the courts and will be followed if not clearly erroneous.[66] The State Personnel Board regulations provide that in cases where the State Personnel Board finds that any community college administrator, supervisor, or public school employer, has engaged in improper retaliatory acts, the State Personnel Board shall order the community college district to place a copy of the State Personnel Board decision in that individual's official personnel file.[67] Thus, Education Code section 87164, subdivision (f) imposes a state-mandate upon community college districts to make an entry into a community college administrator, supervisor, or public school employer's official personnel file records by placing a copy of the State Personnel Board's decision in that individual's official personnel file.

Thus, staff finds that Education Code section 87164, subdivision (f), as added by Statutes 2001, chapter 416, and subdivision (c)(1) and (c)(2), as added and amended by Statutes 2002, chapter 81, require the following activities of community college districts when an employee or applicant for employment files a complaint with the State Personnel Board:

- Beginning January 1, 2003, fully comply with the rules of practice and procedure of the State Personnel Board. This includes serving the employee or applicant for employment and the State Personnel Board with a written response to the applicant for employment's complaint addressing the allegations, and responding to investigations or attending hearings, and producing documents during investigations or hearings (Ed. Code, § 87164, subd. (c)(1)).

[66] Exhibit H, *Giles v. Horn* (2002) 100 Cal.App.4th 206, 220.

[67] Exhibit F, California Code of Regulations, title 2, section 56.6, Register 2006, No. 10 (March 10, 2006).

- Beginning January 1, 2003, pay for all costs associated with the State Personnel Board hearing regarding a complaint filed by an employee or applicant for employment (Ed. Code, § 87164, subd. (c)(2)).
- Beginning January 1, 2002, if the State Personnel Board finds that a supervisor, community college administrator, or public school employer has violated Education Code section 87163, to make an entry into that individual's official personnel file by placing a copy of the State Personnel Board's decision in that individual's official personnel file (Ed. Code, § 87164, subd. (f)).

Does Subdivision (l) of Education Code Section 87164 Have any Effect on the Requirements of Subdivisions (c)(1), (c)(2), and (f)?

An issue as to the effect of subdivision (l) on Education Code section 87164 was raised in the draft staff analysis.[68] Staff finds, pursuant to the following discussion, that subdivision (l) of Education Code section 87164 does not have any effect on the mandate requirements of subdivisions (c)(1), (c)(2), and (f).

Subdivision (l) of Education Code section 87164 provides:

> If the provisions of [section 87164] are in conflict with the provisions of a [MOU] reached pursuant to Chapter 10.7 (commencing with Section 3540) of Division 4 of Title 1 of the Government Code, the [MOU] shall be controlling without further legislative action.

As a result, the provisions of a MOU control if in conflict with the provisions of Education Code section 87164.

Because a MOU reached pursuant to Government Code section 3540 et seq. is an agreement between a school district and the exclusive representatives of *employees* of that district, a community college district would not have any MOU with an applicant for employment. Thus, in regard to applicants for employment, Education Code section 87164, subdivision (1), has no effect on the mandate requirements of subdivisions (c)(1), (c)(2), and (f).

Additionally, in regard to community college employees, Civil Code section 3513 provides, "Any one [*sic*] may waive the advantage of a law intended solely for his benefit. But a law established for a public reason cannot be contravened by a private agreement." In interpreting Civil Code section 3513, the court in *Azteca Construction, Inc. v. ADR Consulting, Inc.* (2004) 121 Cal.App.4th 1156, held that section 3513 "prohibits a waiver of statutory rights where the 'public benefit [of the statute] is one of its primary purposes.'"[69] Here, Education Code sections 87160 – 87164 were established for the purpose of promoting the reporting of improper governmental activities within community college districts, and thus, benefiting the public. The right to State Personnel Board hearings and investigations, provided by Education Code section 87164, subdivisions (c) – (f), were made available to community college employees and applicants for employment as part of the remedies provided to promote reporting of improper governmental activities. The importance of the State Personnel Board hearings to this public

[68] Exhibit F, Draft Staff Analysis, p. 216.

[69] Exhibit K, *Azteca Construction, Inc. v. ADR Consulting, Inc.*, *supra*, 121 Cal.App.4th 1156, 1166.

benefit was indicated in the legislative history of Statutes 2001, chapter 416 (Assem. Bill (AB) No. 647), which added subdivisions (c) – (f) to Education Code section 87164. The legislative history acknowledged a concern that community college administrators, governing boards, and the Chancellor of the California Community Colleges may have "a conflict of interest in investigating whistleblower complaints."[70] Thus, a community college employee or applicant for employment's right to a State Personnel Board hearing, provided by Education Code section 87164, subdivisions (c)(1), (c)(2), and (f), was provided, in large part, to have an independent body available to investigate whistleblower complaints, which promotes the reporting of improper governmental activities to the benefit of the public.

As a result, pursuant to Civil Code section 3513, community college employees may not waive the rights provided by (c)(1), (c)(2), and (f), and therefore, the MOUs of community college employees cannot conflict with Education Code section 87164, subdivisions (c)(1), (c)(2), and (f), as those rights are unwaivable. Thus, staff finds that subdivision (l) of Education Code section 87164 does not have any effect on the mandate requirements of subdivisions (c)(1), (c)(2), and (f).

Therefore, staff finds that Education Code section 87164, subdivisions (a), (b), (d), (e), (h), (j), (k), and (l), do not impose any state-mandated activities upon community college districts. However, staff finds that Education Code section 87164, subdivision (f), as added by Statutes 2001, chapter 416, and subdivisions (c)(1) and (c)(2), as added and amended by Statutes 2002, chapter 81, impose the following state-mandated activities upon community college districts when an employee or applicant for employment files a complaint with the State Personnel Board:

- Beginning January 1, 2003, fully comply with the rules of practice and procedure of the State Personnel Board. This includes serving the employee or applicant for employment and the State Personnel Board with a written response to the applicant for employment's complaint addressing the allegations, and responding to investigations or attending hearings, and producing documents during investigations or hearings (Ed. Code, § 87164, subd. (c)(1)).
- Beginning January 1, 2003, pay for all costs associated with the State Personnel Board hearing regarding a complaint filed by an employee or applicant for employment (Ed. Code, § 87164, subd. (c)(2)).
- Beginning January 1, 2002, if the State Personnel Board finds that a supervisor, community college administrator, or public school employer has violated Education Code section 87163, to make an entry into that individual's official personnel file by placing a copy of the State Personnel Board's decision in that individual's official personnel file (Ed. Code, § 87164, subd. (f)).

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[70] Exhibit L, Assembly Committee on Appropriations, Analysis of Assembly Bill 647 (2001-2002 Reg. Sess.) as amended May 3, 2001. Staff notes the May 3, 2001 version of A.B. 647 amended Government Code section 8547 et seq., and proposed the use of the Public Employment Relations Board (PERB) to investigate complaints of retaliation filed by community college employees and applicants for employment.

Issue 2: Do the state-mandated activities in Education Code section 87164, subdivision (f), as added by Statutes 2001, chapter 416, and subdivisions (c)(1), and (c)(2), as added and amended by Statutes 2002, chapter 81, constitute a new program or higher level of service?

In order for state-mandated activities to constitute a "new program or higher level of service," the activities must carry out the governmental function of providing a service to the public, or impose unique requirements on local governments that do not apply to all residents and entities in the state in order to implement a state policy.[71] In addition, the requirements must be new in comparison with the pre-existing scheme and must be intended to provide an enhanced service to the public.[72] To make this determination, the requirements must initially be compared with the legal requirements in effect immediately prior to its enactment.[73]

Prior to the enactment of Statutes 2001, chapter 416, there was no requirement for the State Personnel Board to initiate a hearing or investigation into allegations of reprisal against an employee or applicant for employment who disclosed improper governmental information, and therefore no requirement for community college districts to comply with the activities required by Education Code section 87164, subdivisions (c)(1), (c)(2) and (f). Therefore, the requirements to fully comply with the rules of practice and procedure of the State Personnel Board, to reimburse the State Personnel Board for all costs associated with the hearings or investigations, and to make an entry into the official personnel record of a supervisor, community college administrator, or public school employer, who is found by the State Personnel Board to have violated Education Code section 87163, are new in comparison to the pre-existing scheme.

In addition, these activities impose unique requirements on community college districts that do not apply to all residents and entities in the state and which are intended to provide an enhanced level of service to the public. Education Code sections 87160 – 87164 encourage "employees and other persons [to] disclose…improper governmental activities"[74] by, among other things, providing a State Personnel Board hearing as a forum to hear complaints of acts of reprisal taken against an employee or applicant for employment for disclosing improper governmental activity. A protected disclosure under the code sections include activities that violate state or federal law, that are economically wasteful or involves gross misconduct, incompetency, or inefficiency, or that may significantly threaten the health or safety of employees or the public.[75] Thus, requiring community college districts' participation in State Personnel Board hearings and reimbursement of the State Personnel Board for all costs associated with the hearings imposes unique requirements upon community college districts and provides an enhanced service to the public by aiding disclosure of illegal, wasteful, or harmful activities.

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[71] *County of Los Angeles*, *supra*, 43 Cal.3d 46, 56.

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

[73] *Ibid.*

[74] Education Code section 87161.

[75] Education Code section 87162, subdivisions (c) and (e).

Therefore, staff finds that Education Code section 87164, subdivision (f), as added by Statutes 2001, chapter 416, and subdivisions (c)(1), and (c)(2), as added and amended by Statutes 2002, chapter 81, constitute a new program or higher level of service.

Issue 3: Does Education Code section 87164, subdivision (f), as added by Statutes 2001, chapter 416, and subdivisions (c)(1), and (c)(2), as added and amended by Statutes 2002, chapter 81, impose "costs mandated by the state" on community college districts within the meaning of article XIII B, section 6, and Government Code section 17514?

In order for the test claim statute to impose a reimbursable state-mandated program under the California Constitution, the test claim statutes must impose costs mandated by the state.[76] Government Code section 17514 defines "cost mandated by the state" as follows:

> [A]ny increased costs which a local agency or school district is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution.

Santa Monica Community College District, co-claimant, estimated that it "will incur approximately $1,000, or more, annually, in staffing and other costs in excess of any funding provided to school districts and the state for the period from July 1, 2001 through June 30, 2002"[77] to implement all duties alleged by the claimants to be mandated by the state.

In addition, the State Personnel Board has provided evidence of amounts charged to community college districts in the State Personnel Board comments, dated April 20, 2007. The State Personnel Board indicates that during the period between 2002 and 2007, 12 whistleblower complaints were filed with the State Personnel Board by community college district employees and/or applicants for employment. The State Personnel Board also indicates that as of April 20, 2007, community college districts have been charged $4,860.91 since 2002. This amount includes hearings for both community college employees and applicants for employment.

Thus, staff finds that the record supports the finding of costs mandated by the state and that none of the exceptions in Government Code section 17556 apply to deny this claim. As a result, staff finds that Education Code section 87164, subdivision (f), as added by Statutes 2001, chapter 416, and subdivisions (c)(1), and (c)(2), as added and amended by Statutes 2002, chapter 81, impose costs mandated by the state within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514 for the following activities when an employee or applicant for employment files a complaint with the State Personnel Board:

- Beginning January 1, 2003, fully comply with the rules of practice and procedure of the State Personnel Board. This includes serving the employee or applicant for employment and the State Personnel Board with a written response to the applicant for employment's complaint addressing the allegations, and responding to investigations or attending

[76] *Lucia Mar*, *supra*, 44 Cal.3d 830, 835; Government Code section 17514.

[77] Exhibit A, Test Claim, Exhibit 1, Declaration of Tom Donner, p. 139.

hearings, and producing documents during investigations or hearings (Ed. Code, § 87164, subd. (c)(1)).

- Beginning January 1, 2003, pay for all costs associated with the State Personnel Board hearing regarding a complaint filed by an employee or applicant for employment (Ed. Code, § 87164, subd. (c)(2)).
- Beginning January 1, 2002, if the State Personnel Board finds that a supervisor, community college administrator, or public school employer has violated Education Code section 87163, to make an entry into that individual's official personnel file by placing a copy of the State Personnel Board's decision in that individual's official personnel file (Ed. Code, § 87164, subd. (f)).

Conclusion

Staff concludes that Education Code section 87164, subdivision (f), as added by Statutes 2001, chapter 416, and subdivisions (c)(1), and (c)(2), as added and amended by Statutes 2002, chapter 81, constitutes a reimbursable state-mandated program on community college districts within the meaning of article XIII B, section 6 of the California Constitution, and Government Code section 17514, for the following specific new activities when an employee or applicant for employment files a complaint with the State Personnel Board:

- Beginning January 1, 2003, fully comply with the rules of practice and procedure of the State Personnel Board. This includes serving the employee or applicant for employment and the State Personnel Board with a written response to the applicant for employment's complaint addressing the allegations, and responding to investigations or attending hearings, and producing documents during investigations or hearings (Ed. Code, § 87164, subd. (c)(1)).
- Beginning January 1, 2003, pay for all costs associated with the State Personnel Board hearing regarding a complaint filed by an employee or applicant for employment (Ed. Code, § 87164, subd. (c)(2)).
- Beginning January 1, 2002, if the State Personnel Board finds that a supervisor, community college administrator, or public school employer has violated Education Code section 87163, to make an entry into that individual's official personnel file by placing a copy of the State Personnel Board's decision in that individual's official personnel file (Ed. Code, § 87164, subd. (f)).

Staff further concludes that Education Code sections 44110 – 44114, as added and amended by Statutes 2000, chapter 531, and Statutes 2001, chapter 159 do not impose any state-mandated activities upon K-12 school districts and, thus, are not subject to article XIII B, section 6 of the California Constitution.

Any other test claim statute and allegation not specifically approved above, does not impose a reimbursable state-mandated program subject to article XIII B, section 6 of the California Constitution.

Recommendation

Staff recommends the Commission adopt this staff analysis and partially approve this test claim.

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EXHIBIT A

TEST CLAIM FORM

Claim No. 02-TC-24

Local Agency or School District Submitting Claim

SAN JUAN UNIFIED SCHOOL DISTRICT and **SANTA MONICA COMMUNITY COLLEGE DISTRICT**

Contact Person

Keith B. Petersen, President
SixTen and Associates

Telephone Number

Voice: 858-514-8605
Fax: 858-514-8645

Claimant Address

San Juan Unified School District
P.O. Box 477
Carmichael, California 95609-0477

Santa Monica Community College District
1900 Pico Boulevard
Santa Monica, California 90405-1628

Representative Organization to be Notified

Dr. Carol Berg, Consultant, Education Mandated Cost Network
c/o School Services of California
1121 L Street, Suite 1060
Sacramento, CA 95814

Voice: 916-446-7517
Fax: 916-446-2011

This claim alleges the existence of a reimbursable state mandated program within the meaning of section 17514 of the Government Code and section 6, article XIII B of the California Constitution. This test claim is filed pursuant to section 17551(a) of the Government Code.

Identify specific section(s) of the chaptered bill or executive order alleged to contain a mandate, including the particular statutory code citation(s) within the chaptered bill, if applicable. **Reporting Improper Governmental Activities**

Chapter 81, Statutes of 2002	Education Code Section 44110	Education Code Section 87160
Chapter 416, Statutes of 2001	Education Code Section 44111	Education Code Section 87161
Chapter 159, Statutes of 2001	Education Code Section 44112	Education Code Section 87162
Chapter 531, Statutes of 2000	Education Code Section 44113	Education Code Section 87163
	Education Code Section 44114	Education Code Section 87164

IMPORTANT: PLEASE SEE INSTRUCTIONS AND FILING REQUIREMENTS FOR COMPLETING TEST CLAIM ON THE REVERSE SIDE.

Name and Title of Authorized Representative
Diana Halpenny
General Counsel
San Juan Unified School District

Telephone No.
(916) 971-7110

Signature of Authorized Representative

x Diana Halpenny

Date

May 21, 2003

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TEST CLAIM FORM

Claim No.

Local Agency or School District Submitting Claim

SAN JUAN UNIFIED SCHOOL DISTRICT and **SANTA MONICA COMMUNITY COLLEGE DISTRICT**

Contact Person

Keith B. Petersen, President
SixTen and Associates

Telephone Number

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This claim alleges the existence of a reimbursable state mandated program within the meaning of section 17514 of the Government Code and section 6, article XIII B of the California Constitution. This test claim is filed pursuant to section 17551(a) of the Government Code.

Identify specific section(s) of the chaptered bill or executive order alleged to contain a mandate, including the particular statutory code citation(s) within the chaptered bill, if applicable. **Reporting Improper Governmental Activities**

Chapter 81, Statutes of 2002	Education Code Section 44110	Education Code Section 87160
Chapter 416, Statutes of 2001	Education Code Section 44111	Education Code Section 87161
Chapter 159, Statutes of 2001	Education Code Section 44112	Education Code Section 87162
Chapter 531, Statutes of 2000	Education Code Section 44113	Education Code Section 87163
	Education Code Section 44114	Education Code Section 87164

IMPORTANT: PLEASE SEE INSTRUCTIONS AND FILING REQUIREMENTS FOR COMPLETING TEST CLAIM ON THE REVERSE SIDE.

Name and Title of Authorized Representative
Tom Donner
Executive Vice President - Business and Administration
Santa Monica Community College District

Telephone No.
(310) 434-4000

Signature of Authorized Representative

x

Date

May 26, 2003

Claim Prepared By:
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5252 Balboa Avenue, Suite 807
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BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

Test Claim of:	)	No. CSM ______________
San Juan UnifiedSchool District	)	Chapter 81, Statutes of 2002 Chapter 416, Statutes of 2001 Chapter 159, Statutes of 2001 Chapter 531, Statutes of 2000
and	)	
Santa Monica Community College District	)	Education Code Sections 44110, 44111 44112, 44113, 44114, 87160, 87161, 87162, 87163, 87164
Test Claimants	)	"Reporting Improper Governmental Activities"

PART 1. AUTHORITY FOR THE CLAIM

The Commission on State Mandates has the authority pursuant to Government Code section 17551(a) to "...hear and decide upon a claim by a local agency or school district that the local agency or school district is entitled to be reimbursed by the state for costs mandated by the state as required by Section 6 of Article XIII B of the California Constitution." San Juan Unified School District and Santa Monica Community College District are "school districts" as defined in Government Code section 17519.[1]

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[1] Government Code Section 17519, as added by Chapter 1459/84:

"School District" means any school district, community college district, or county

1 PART II. LEGISLATIVE HISTORY OF THE CLAIM

2 This test claim alleges mandated costs subject to reimbursement by the state for
3 school districts, county offices of education and community college districts to establish
4 and implement policies and procedures to comply with the "Reporting by School
5 Employees of Improper Governmental Activities Act" pursuant to Education Code
6 Sections 44110 through 44114 and for community college districts to comply with the
7 "Reporting by Community College Employees of Improper Governmental Activities Act"
8 pursuant to Education Code 87160 through 87164.

9 SECTION 1. LEGISLATIVE HISTORY PRIOR TO JANUARY 1, 1975

10 Prior to January 1, 1975 there was no state statute or executive order in effect
11 which required school districts, county offices of education, or community college
12 districts to establish procedures to protect employee or employee applicant
13 "whistleblowers" or to discipline employees, officers, or administrators who intentionally
14 engaged in acts of reprisal, retaliation, threats, or coercion against an employee or
15 employee applicant for having disclosed improper governmental activity.

16 SECTION 2. LEGISLATIVE HISTORY AFTER JANUARY 1, 1975

17 Chapter 531, Statutes of 2000, Section 1, added Article 5 to Chapter 1 of Part 25
18 of the Education Code, consisting of Sections 44110 through 44114. Section 44110[2]

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superintendent of schools."

[2] Education Code Section 44110, added by Chapter 531, Statutes of 2000, Section 1:

1 requires the article to be known as the Reporting by School Employees of Improper

2 Governmental Activities Act.

3 Section 44111[3] states a legislative intent that school employees and other

4 persons disclose improper governmental activities.

5 Section 44112[4] provides relevant definitions. Subdivision (a) defines an

---

"This article shall be known and may be referred to as the Reporting by School Employees of Improper Governmental Activities Act."

[3] Education Code Section 44111, added by Chapter 531, Statutes of 2000, Section 1:

"It is the intent of the Legislature that school employees and other persons disclose, to the extent not expressly prohibited by law, improper governmental activities."

[4] Education Code Section 44112, added by Chapter 531, Statutes of 2000, Section 1:

"For the purposes of this article, the following terms have the following meanings:

(a) "Employee" means a public school employee as defined in subdivision (j) of Section 3540.1 of the Government Code.

(b) "Illegal order" means any directive to violate or assist in violating a federal, state, or local law, rule, or regulation or an order to work or cause others to work in conditions outside of their line of duty that would unreasonably threaten the health or safety of employees or the public.

(c) "Improper governmental activity" means an activity by a public school agency or by an employee that is undertaken in the performance of the employee's official duties, whether or not that activity is within the scope of his or her employment, and that meets either of the following descriptions:

(1) The activity violates a state or federal law or regulation, including, but not limited to, corruption, malfeasance, bribery, theft of government property, fraudulent claims, fraud, coercion, conversion, malicious prosecution, misuse of government property, or willful omission to perform duty.

(2) The activity is economically wasteful or involves gross misconduct, incompetency, or inefficiency.

1 "employee" as a "public school employee," as defined in subdivision (j) of Section
2 3540.1[5] of the Government Code. Subdivision (b) defines an "illegal order" as a
3 directive to violate a federal, state, or local law, rule, or regulation or an order to work in
4 conditions that would unreasonably threaten the health or safety of employees or the
5 public. Subdivision (c) defines "improper governmental activity" as an activity
6 undertaken in the performance of official duties that violates a state or federal law or
7 regulation, including, corruption, malfeasance, bribery, theft, fraud, coercion, conversion,
8 malicious prosecution, misuse of government property, willful omission to perform duty
9 or an activity that is economically wasteful or involves gross misconduct, incompetency,
10 or inefficiency. Subdivision (d) defines "person" as any individual, corporation, trust,
11 association, any state or local government, or their agent. Subdivision (e) defines
12 "protected disclosure" as a good faith communication that discloses improper

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(d) "Person" means any individual, corporation, trust, association, any state or local government, or any agency or instrumentality of any of the foregoing.

(e) "Protected disclosure" means a good faith communication that discloses or demonstrates an intention to disclose information that may evidence either of the following:

(1) An improper governmental activity.

(2) Any condition that may significantly threaten the health or safety of employees or the public if the disclosure or intention to disclose was made for the purpose of remedying that condition.

(f) "Public school employer" has the same meaning as in subdivision (k) of Section 3540.1 of the Government Code."

[5] Subdivision (j) of Government Code Section 3540.1 defines "employee" as any person employed by a public school employer, except elected or appointed employees, management employees and confidential employees.

1 governmental activity or discloses a remedy to any condition that may significantly
2 threaten the health or safety of employees or the public. Subdivision (f) defines "public
3 school employer" as having the same meaning as in subdivision (k) of Government
4 Code Section 3540.1[6].

5 Section 44113[7], subdivision (a), prohibits an employee from using "official
6 authority or influence" to interfere with the right of a person to disclose improper
7 governmental activity to an official agent. Subdivision (b) defines "use of official authority

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[6] Subdivision (k) of Government Code Section 3540.1 defines "public school employer" or "employer" as the governing board of a school district, a school district, a county board of education, a county superintendent of schools, or a charter school that has declared itself a public school employer pursuant to subdivision (b) of Section 47611.5 of the Education Code.

[7] Education Code Section 44113, added by Chapter 531, Statutes of 2000, Section 1:

"(a) An employee may not directly or indirectly use or attempt to use the official authority or influence of the employee for the purpose of intimidating, threatening, coercing, commanding, or attempting to intimidate, threaten, coerce, or command any person for the purpose of interfering with the right of that person to disclose to an official agent matters within the scope of this article.

(b) For the purpose of subdivision (a), "use of official authority or influence" includes promising to confer or conferring any benefit; affecting or threatening to affect any reprisal; or taking, directing others to take, recommending, processing, or approving any personnel action, including, but not limited to appointment, promotion, transfer, assignment, performance evaluation, suspension, or other disciplinary action.

(c) For the purpose of subdivision (a), "official agent" includes a school administrator, member of the governing board of a school district or county board of education, county superintendent of schools, or the Superintendent of Public Instruction.

(d) An employee who violates subdivision (a) may be liable in an action for civil damages brought against the employee by the offended party.

(e) Nothing in this section shall be construed to authorize an individual to disclose information otherwise prohibited by or under law."

1 or influence" as promising any benefit, threatening any reprisal or taking any retaliatory
2 personnel action. Subdivision (c) defines "official agent" as a school administrator,
3 member of the governing board of a school district or county board of education, county
4 superintendent of schools, or the Superintendent of Public Instruction. Subdivision (d)
5 allows that a violator may be liable for civil damages to the offended party. Subdivision
6 (e) qualifies that this section should not be construed to authorize an individual to
7 disclose any information prohibited by law.

8 Section 44114[8], subdivision (a), provides an employee or applicant may file a

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[8] Education Code Section 44114, added by Chapter 531, Statutes of 2000, Section 1:

"(a) A public school employee or applicant for employment with a public school employer who files a written complaint with his or her supervisor, a school administrator, or the public school employer alleging actual or attempted acts of reprisal, retaliation, threats, coercion, or similar improper acts prohibited by Section 44113 for having disclosed improper governmental activities or for refusing to obey an illegal order may also file a copy of the written complaint with the local law enforcement agency together with a sworn statement that the contents of the written complaint are true, or are believed by the affiant to be true, under penalty of perjury. The complaint filed with the local law enforcement agency shall be filed within 12 months of the most recent act of reprisal that is the subject of the complaint.

(b) A person who intentionally engages in acts of reprisal, retaliation, threats, coercion, or similar acts against a public school employee or applicant for employment with a public school employer for having made a protected disclosure is subject to a fine not to exceed ten thousand dollars ($10,000) and imprisonment in the county jail for a period not to exceed one year. Any public school employee, officer, or administrator who intentionally engages in that conduct shall also be subject to discipline by the public school employer. If no adverse action is instituted by the public school employer and it is determined that there is reasonable cause to believe that an act of reprisal, retaliation, threats, coercion, or similar acts prohibited by Section 44113, the local law enforcement agency may report the nature and details of the activity to the governing board of the school district or county board of education, as appropriate.

1 written complaint with his or her supervisor, a school administrator, or public school

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(c) In addition to all other penalties provided by law, a person who intentionally engages in acts of reprisal, retaliation, threats, coercion, or similar acts against a public school employee or applicant for employment with a public school employer for having made a protected disclosure shall be liable in an action for damages brought against him or her by the injured party. Punitive damages may be awarded by the court where the acts of the offending party are proven to be malicious. Where liability has been established, the injured party shall also be entitled to reasonable attorney's fees as provided by law. However, an action for damages shall not be available to the injured party unless the injured party has first filed a complaint with the local law enforcement agency.

(d) This section is not intended to prevent a public school employer, school administrator, or supervisor from taking, failing to take, directing others to take, recommending, or approving a personnel action with respect to a public school employee or applicant for employment with a public school employer if the public school employer, school administrator, or supervisor reasonably believes the action or inaction is justified on the basis of evidence separate and apart from the fact that the person has made a protected disclosure as defined in subdivision (e) of Section 44112.

(e) In any civil action or administrative proceeding, once it has been demonstrated by a preponderance of evidence that an activity protected by this article was a contributing factor in the alleged retaliation against a former, current, or prospective public school employee, the burden of proof shall be on the supervisor, school administrator, or public school employer to demonstrate by clear and convincing evidence that the alleged action would have occurred for legitimate, independent reasons even if the public school employee had not engaged in protected disclosures or refused an illegal order.

If the supervisor, school administrator, or public school employer fails to meet this burden of proof in an adverse action against the public school employee in any administrative review, challenge, or adjudication in which retaliation has been demonstrated to be a contributing factor, the public school employee shall have a complete affirmative defense in the adverse action.

(f) Nothing in this article shall be deemed to diminish the rights, privileges, or remedies of a public school employee under any other federal or state law or under an employment contract or collective bargaining agreement.

(g) If the provisions of this section are in conflict with the provisions of a memorandum of understanding reached pursuant to Chapter 10.7 (commencing with Section 3540) of Division 4 of Title 1 of the Government Code, the memorandum of understanding shall be controlling without further legislative action."

1 employer alleging actual or attempted improper acts as prohibited by Section 44113 and
2 also allows the offended party to file a copy of the written complaint with local law
3 enforcement within 12 months of the most recent subject of complaint. Subdivision (b)
4 defines the criminal penalties for acts prohibited by Section 44113. This conduct shall
5 also be subject to discipline by the public school employer. If no adverse action occurs,
6 local law enforcement may report the activity to the governing board of the school district
7 or the county board of education. Subdivision (c) allows the filing of a civil action and the
8 court may award damages and reasonable attorney's fees. Subdivision (e) requires, in
9 any civil action or administrative proceeding, that the initial burden of proof is on the
10 employee or applicant to prove a prohibited activity was a contributing factor in the
11 alleged retaliation. Thereafter, the burden of proof rests on the supervisor, school
12 administrator, or public school employer to provide clear and convincing evidence that
13 the alleged action would have occurred for legitimate, independent reasons. Failure to
14 do so gives the public school employee a complete affirmative defense.
15 Chapter 531, Statutes of 2000, Section 2, added Article 6 to Chapter 1 of Part 51
16 of the Education Code, consisting of Sections 87160 through 87164. Section 87160[9]
17 requires the article to be known as the Reporting by Community College Employees of

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[9] Education Code Section 87160, added by Chapter 531, Statutes of 2000, Section 2:

"This article shall be known and may be referred to as the Reporting by Community College Employees of Improper Governmental Activities Act."

1 Improper Governmental Activities Act.

2 Section 87161[10] states a legislative intent that community college employees and

3 other persons disclose improper governmental activities.

4 Section 87162[11] provides relevant definitions. Subdivision (a) defines an

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[10] Education Code Section 87161, added by Chapter 531, Statutes of 2000, Section 2:

"It is the intent of the Legislature that community college employees and other persons disclose, to the extent not expressly prohibited by law, improper governmental activities."

[11] Education Code Section 87162, added by Chapter 531, Statutes of 2000, Section 2:

"For the purposes of this article, the following terms have the following meanings:
(a) "Employee" means a public school employee as defined in subdivision (j) of Section 3540.1 of the Government Code as construed to include community college employees.
(b) "Illegal order" means any directive to violate or assist in violating a federal, state, or local law, rule, or regulation or an order to work or cause others to work in conditions outside of their line of duty that would unreasonably threaten the health or safety of employees or the public.
(c) "Improper governmental activity" means an activity by a community college or by an employee that is undertaken in the performance of the employee's official duties, whether or not that activity is within the scope of his or her employment, and that meets either of the following descriptions:

(1) The activity violates a state or federal law or regulation, including, but not limited to, corruption, malfeasance, bribery, theft of government property, fraudulent claims, fraud, coercion, conversion, malicious prosecution, misuse of government property, or willful omission to perform duty.

(2) The activity is economically wasteful or involves gross misconduct, incompetency, or inefficiency.

(d) "Person" means any individual, corporation, trust, association, any state or local government, or any agency or instrumentality of any of the foregoing.
(e) "Protected disclosure" means a good faith communication that discloses or demonstrates an intention to disclose information that may evidence either of the

1 "employee" as a "public school employee," as defined in subdivision (j) of Section 3540.1
2 of the Government Code as construed to include community college employees.
3 Subdivision (b) defines an "illegal order" as a directive to violate a federal, state, or local
4 law, rule, or regulation or an order to work in conditions that would unreasonably
5 threaten the health or safety of employees or the public. Subdivision (c) defines
6 "improper governmental activity" as an activity undertaken in the performance of official
7 duties that violates a state or federal law or regulation, including, corruption,
8 malfeasance, bribery, theft, fraud, coercion, conversion, malicious prosecution, misuse
9 of government property, willful omission to perform duty or an activity that is
10 economically wasteful or involves gross misconduct, incompetency, or inefficiency.
11 Subdivision (d) defines "person" as any individual, corporation, trust, association, any
12 state or local government, or their agent. Subdivision (e) defines "protected disclosure"
13 as a good faith communication that discloses improper governmental activity or
14 discloses a remedy to any condition that may significantly threaten the health or safety
15 of employees or the public. Subdivision (f) defines "public school employer" as having
16 the same meaning as in Government Code Section 3540.1, subdivision (k), which

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following:

(1) An improper governmental activity.

(2) Any condition that may significantly threaten the health or safety of employees or the public if the disclosure or intention to disclose was made for the purpose of remedying that condition.

(f) "Public school employer" has the same meaning as in subdivision (k) of Section 3540.1 of the Government Code as construed to include community college districts."

1 includes community college districts.

2 Section 87163[12], subdivision (a), prohibits an employee from using "official
3 authority or influence" to interfere with the right of a person to disclose these matters to
4 an official agent. Subdivision (b) defines "use of official authority or influence" as
5 promising any benefit, threatening any reprisal or taking any retaliatory personnel action.
6 Subdivision (c) defines "official agent" as a community college administrator, member of
7 the governing board of a community college district, or the Chancellor of the California
8 Community Colleges. Subdivision (d) allows that a violator may be liable for civil
9 damages to the offended party. Subdivision (e) qualifies that this section should not be
10 construed to authorize an individual to disclose information if prohibited by law.

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[12] Education Code Section 87163, added by Chapter 531, Statutes of 2000, Section 2:

"(a) An employee may not directly or indirectly use or attempt to use the official authority or influence of the employee for the purpose of intimidating, threatening, coercing, commanding, or attempting to intimidate, threaten, coerce, or command any person for the purpose of interfering with the right of that person to disclose to an official agent matters within the scope of this article.

(b) For the purpose of subdivision (a), "use of official authority or influence" includes promising to confer or conferring any benefit; affecting or threatening to affect any reprisal; or taking, directing others to take, recommending, processing, or approving any personnel action, including, but not limited to appointment, promotion, transfer, assignment, performance evaluation, suspension, or other disciplinary action.

(c) For the purpose of subdivision (a), "official agent" includes a community college administrator, member of the governing board of a community college district, or the Chancellor of the California Community Colleges.

(d) An employee who violates subdivision (a) may be liable in an action for civil damages brought against the employee by the offended party.

(e) Nothing in this section shall be construed to authorize an individual to disclose information otherwise prohibited by or under law."

1 Section 87164[13], subdivision (a), provides that an employee or applicant may file

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[13] Education Code Section 87164, added by Chapter 531, Statutes of 2000, Section 2:

"(a) An employee or applicant for employment with a public school employer who files a written complaint with his or her supervisor, a community college administrator, or the public school employer alleging actual or attempted acts of reprisal, retaliation, threats, coercion, or similar improper acts prohibited by Section 87163 for having disclosed improper governmental activities or for refusing to obey an illegal order may also file a copy of the written complaint with the local law enforcement agency, together with a sworn statement that the contents of the written complaint are true, or are believed by the affiant to be true, under penalty of perjury. The complaint filed with the local law enforcement agency shall be filed within 12 months of the most recent act of reprisal that is the subject of the complaint.

(b) A person who intentionally engages in acts of reprisal, retaliation, threats, coercion, or similar acts against an employee or applicant for employment with a public school employer for having made a protected disclosure is subject to a fine not to exceed ten thousand dollars ($10,000) and imprisonment in the county jail for a period not to exceed one year. An employee, officer, or administrator who intentionally engages in that conduct shall also be subject to discipline by the public school employer. If no adverse action is instituted by the public school employer, and it is determined that there is reasonable cause to believe that an act of reprisal, retaliation, threats, coercion, or similar acts prohibited by Section 87163, the local law enforcement agency may report the nature and details of the activity to the governing board of the community college district.

(c) In addition to all other penalties provided by law, a person who intentionally engages in acts of reprisal, retaliation, threats, coercion, or similar acts against an employee or applicant for employment with a public school employer for having made a protected disclosure shall be liable in an action for damages brought against him or her by the injured party. Punitive damages may be awarded by the court where the acts of the offending party are proven to be malicious. Where liability has been established, the injured party shall also be entitled to reasonable attorney's fees as provided by law. However, an action for damages shall not be available to the injured party unless the injured party has first filed a complaint with the local law enforcement agency.

(d) This section is not intended to prevent a public school employer, school administrator, or supervisor from taking, failing to take, directing others to take, recommending, or approving a personnel action with respect to an employee or applicant for employment with a public school employer if the public school employer, school administrator, or supervisor reasonably believes an action or inaction is justified

1 a written complaint with his or her supervisor, a school administrator, or public school
2 employer alleging actual or attempted improper acts as prohibited by Section 87163 and
3 allows the offended party to file a copy of the written complaint with local law
4 enforcement within 12 months of the most recent subject of the complaint. Subdivision
5 (b) defines the criminal penalties for the acts prohibited by Section 87163. This conduct
6 shall also be subject to discipline by the public school employer. If no adverse action
7 occurs, local law enforcement may report the activity to the governing board of the
8 community college district. Subdivision (c) allows the filing of a civil action and the court
9 may award damages and reasonable attorney's fees. Subdivision (e) requires, in any

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on the basis of evidence separate and apart from the fact that the person has made a protected disclosure as defined in subdivision (e) of Section 87162.

(e) In any civil action or administrative proceeding, once it has been demonstrated by a preponderance of evidence that an activity protected by this article was a contributing factor in the alleged retaliation against a former, current, or prospective employee, the burden of proof shall be on the supervisor, school administrator, or public school employer to demonstrate by clear and convincing evidence that the alleged action would have occurred for legitimate, independent reasons even if the employee had not engaged in protected disclosures or refused an illegal order. If the supervisor, school administrator, or public school employer fails to meet this burden of proof in an adverse action against the employee in any administrative review, challenge, or adjudication in which retaliation has been demonstrated to be a contributing factor, the employee shall have a complete affirmative defense in the adverse action.

(f) Nothing in this article shall be deemed to diminish the rights, privileges, or remedies of an employee under any other federal or state law or under an employment contract or collective bargaining agreement.

(g) If the provisions of this section are in conflict with the provisions of a memorandum of understanding reached pursuant to Chapter 10.7 (commencing with Section 3540) of Division 4 of Title 1 of the Government Code, the memorandum of understanding shall be controlling without further legislative action."

1 civil action or administrative proceeding, that the initial burden of proof is on the
2 employee or applicant to prove a prohibited activity was a contributing factor in the
3 alleged retaliation. Thereafter, the burden of proof rests on the supervisor, school
4 administrator, or public school employer to provide clear and convincing evidence that
5 the alleged action would have occurred for legitimate, independent reasons. Failure to
6 do so gives the public school employee a complete affirmative defense.

7 Chapter 159, Statutes of 2001, Section 68, amended Education Code Section
8 44114, effective January 1, 2002, to make technical changes.

9 Chapter 416, Statutes of 2001, Section 1, amended Education Code Section
10 87164[14], effective January 1, 2002, to insert five new subdivisions (c), (d), (e), (f), and

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[14] Education Code Section 87164, as amended by Chapter 416, Statutes of 2001, Section 1, effective January 1, 2002,:

"(c) The State Personnel Board shall initiate a hearing or investigation of a written complaint of reprisal or retaliation as prohibited by Section 87163 within 10 working days of its submission. The executive officer of the State Personnel Board shall complete findings of the hearing or investigation within 60 working days thereafter and shall provide a copy of the findings to the complaining employee or applicant for employment with a public school employer and to the appropriate supervisors, administrator, or employer. This hearing shall be conducted in accordance with Section 18671.2 of the Government Code. When the allegations contained in a complaint of reprisal or retaliation are the same as, or similar to, those contained in another appeal, the executive officer may consolidate the appeals into the most appropriate format. In these cases, the time limits described in this subdivision shall not apply.

(d) If the findings of the executive officer of the State Personnel Board set forth acts of alleged misconduct by the supervisor, community college administrator, or public school employer, the supervisor, administrator, or employer may request a hearing before the State Personnel Board regarding the findings of the executive officer. The request for hearing and any subsequent determination by the board shall be made in accordance with the board's usual rules governing appeals, hearings, investigations,

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and disciplinary proceedings.

(e) If, after the hearing, the State Personnel Board determines that a violation of Section 87163 occurred, or if no hearing is requested and the findings of the executive officer conclude that improper activity has occurred, the board may order any appropriate relief, including, but not limited to, reinstatement, backpay, restoration of lost service credit if appropriate, and the expungement of any adverse records of the employee or applicant for employment with a public school employer who was the subject of the alleged acts of misconduct prohibited by Section 87163.

(f) Whenever the State Personnel Board determines that a supervisor, community college administrator, or public school employer has violated Section 87163, it shall cause an entry to that effect to be made in the supervisor's, community college administrator's, or public school employer's official personnel records.

(g) In order for the Governor and the Legislature to determine the need to continue or modify personnel procedures as they relate to the investigations of reprisals or retaliation for the disclosure of information by employees, the State Personnel Board, by June 30 of each year, shall submit a report to the Governor and the Legislature regarding complaints filed, hearings held, and legal actions taken pursuant to this section.

(h) In addition to all other penalties provided by law, a person who intentionally engages in acts of reprisal, retaliation, threats, coercion, or similar acts against an employee or applicant for employment with a public school employer for having made a protected disclosure shall be liable in an action for damages brought against him or her by the injured party. Punitive damages may be awarded by the court where the acts of the offending party are proven to be malicious. Where liability has been established, the injured party shall also be entitled to reasonable attorney's fees as provided by law. However, an action for damages shall not be available to the injured party unless the injured party has first filed a complaint with the local law enforcement agency. Nothing in this subdivision requires an injured party to file a complaint with the State Personnel Board prior to seeking relief for damages in a court of law.

(i) This section is not intended to prevent a public school employer, school administrator, or supervisor from taking, failing to take, directing others to take, recommending, or approving a personnel action with respect to an employee or applicant for employment with a public school employer if the public school employer, school administrator, or supervisor reasonably believes an action or inaction is justified on the basis of evidence separate and apart from the fact that the person has made a protected disclosure as defined in subdivision (e) of Section 87162.

(j) In any civil action or administrative proceeding, once it has been demonstrated by a preponderance of evidence that an activity protected by this article was a contributing factor in the alleged retaliation against a former, current, or prospective

1 (g). Subdivision (c) requires the State Personnel Board to initiate a hearing or
2 investigation of a written complaint within 10 working days. Findings shall be completed
3 within 60 workings days and a copy of the findings must be provided to the complaining
4 employee or applicant and the appropriate supervisors, administrator, or employer. The
5 hearing shall be conducted in accordance with Section 18671.2[15] of the Government

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employee, the burden of proof shall be on the supervisor, school administrator, or public school employer to demonstrate by clear and convincing evidence that the alleged action would have occurred for legitimate, independent reasons even if the employee had not engaged in protected disclosures or refused an illegal order. If the supervisor, school administrator, or public school employer fails to meet this burden of proof in an adverse action against the employee in any administrative review, challenge, or adjudication in which retaliation has been demonstrated to be a contributing factor, the employee shall have a complete affirmative defense in the adverse action.

(k) Nothing in this article shall be deemed to diminish the rights, privileges, or remedies of an employee under any other federal or state law or under an employment contract or collective bargaining agreement.

(l) If the provisions of this section are in conflict with the provisions of a memorandum of understanding reached pursuant to Chapter 10.7 (commencing with Section 3540) of Division 4 of Title 1 of the Government Code, the memorandum of understanding shall be controlling without further legislative action."

[15] Government Code Section 18671.2, as amended by Chapter 472, Statutes of 1996, Section 2:

"(a) The total cost to the state of maintaining and operating the hearing office of the board shall be determined by the board, in advance or upon any other basis as it may determine, utilizing information from the state agencies for which services are provided by the hearing office.

(b) The board shall be reimbursed for the entire cost of hearings conducted by the hearing office pursuant to statutes administered by the board, or by interagency agreement. The board may bill the appropriate state agencies for the costs incurred in conducting hearings involving employees of those state agencies, and employees of the California State University pursuant to Sections 89535 to 89542, inclusive, of the Education Code, and may bill the state departments having responsibility for the overall administration of grant-in-aid programs for the costs incurred in conducting hearings

1 Code. Subdivision (d) allows the employer to request a hearing before the State
2 Personnel Board to overrule adverse findings. Subdivision (e) requires the State
3 Personnel Board to order appropriate relief if it is determined that a violation has
4 occurred. Subdivision (f) requires that a violation of Section 87163 shall be made in the
5 supervisor's, administrator's, or employer's official personnel records. Former
6 subdivisions (c), (d), (e), (f), and (g) were re-lettered (h), (i), (j), (k), and (l), respectively.
7 Chapter 81, Statutes of 2002, Section 1, amended Education Code Section
8 87164[16], effective January 1, 2003, to split subdivision (c) into subparagraphs (1) and

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involving employees not administering their own merit systems pursuant to Chapter 1 (commencing with Section 19800) of Part 2.5. All costs collected by the board pursuant to this section shall only be used for purposes of maintaining and operating the hearing office of the board."

[16] Education Code Section 87164, as amended by Chapter 81, Statutes of 2002, Section 1, effective January 1, 2003:

"(c) (1) The State Personnel Board shall initiate a hearing or investigation of a written complaint of reprisal or retaliation as prohibited by Section 87163 within 10 working days of its submission.
The executive officer of the State Personnel Board shall complete findings of the hearing or investigation within 60 working days thereafter and shall provide a copy of the findings to the complaining employee or applicant for employment with a public school employer and to the appropriate supervisors, administrator, or employer. This hearing shall be conducted in accordance with Section 18671.2 of the Government Code, this part, and the rules of practice and procedure of the State Personnel Board. When the allegations contained in a complaint of reprisal or retaliation are the same as, or similar to, those contained in another appeal, the executive officer may consolidate the appeals into the most appropriate format. In these cases, the time limits described in this ~~subdivision~~ paragraph shall not apply.

(2) Notwithstanding Section 18671.2 of the Government Code, no costs associated with hearings of the State Personnel Board conducted pursuant to paragraph

1 (2). Subparagraph (1) made technical changes. Subparagraph (2) was added to
2 provide that the costs associated with hearings shall not be charged to the Board of
3 Governors but instead to the community college district that employs the complaining
4 employee or applicant.

5 PART III. STATEMENT OF THE CLAIM

6 SECTION 1. COSTS MANDATED BY THE STATE

7 The Statutes and Education Code sections referenced in this test claim result in
8 school districts incurring costs mandated by the state, as defined in Government Code
9 section 17514[17], by creating new state-mandated duties related to the uniquely
10 governmental function of providing public services and these statutes apply to school
11 districts and do not apply generally to all residents and entities in the state.[18]

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(1) shall be charged to the board of governors. Instead, all of the costs associated with hearings of the State Personnel Board conducted pursuant to paragraph (1) shall be charged directly to the community college district that employs the complaining employee, or with whom the complaining applicant for employment has filed his or her employment application."

[17] Government Code section 17514, as added by Chapter 1459/84:

"Costs mandated by the state" means any increased costs which a local agency or school district is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIIIB of the California Constitution.

[18] Public schools are a Article XIII B, Section 6 "program," pursuant to Long Beach Unified School District v. State of California, (1990) 225 Cal.App.3d 155; 275 Cal.Rptr. 449:

1 The new duties mandated by the state upon school districts, county offices of
2 education and community colleges require state reimbursement of the direct and indirect
3 costs of labor, materials and supplies, data processing services and software,
4 contracted services and consultants, equipment and capital assets, staff and student
5 training and travel to implement the following activities:

6 I) School Districts and County Offices of Education:

7 A) Pursuant to the Reporting by School Employees of Improper
8 Governmental Activities Act (Education Code Sections 44110 through
9 44114) to establish policies and procedures, and to periodically update
10 those policies and procedures, to implement the act.

B) Pursuant to Education Code Section 44114, subdivision (a), to receive, file
12 and maintain written complaints filed by school employees or applicants for
13 employment alleging actual or attempted acts of reprisal, retaliation,
14 threats, coercion or similar improper acts for having disclosed improper
15 governmental activities or for refusing to obey an illegal order.

16 C) Pursuant to Education Code Section 44114, subdivision (b), to investigate,
17 or to cooperate with law enforcement investigations of, written complaints

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"In the instant case, although numerous private schools exist, education in our society is considered to be a peculiarly government function. (Cf. Carmel Valley Fire Protection Dist. V. State of California (1987) 190 Cal.App.3d at p.537) Further, public education is administered by local agencies to provide service to the public. Thus public education constitutes a 'program' within the meaning of Section 6."

1 filed by school employees or applicants for employment alleging actual or
2 attempted acts of reprisal, retaliation, threats, coercion or similar improper
3 acts for having disclosed improper governmental activities or for refusing
4 to obey an illegal order.
5 D) Pursuant to Education Code Section 44114, subdivision (b), to discipline,
6 as may be required by law or the district's collective bargaining agreement,
7 any employee, officer or administrator, who is found to have engaged in
8 actual or attempted acts of reprisal, retaliation, threats, coercion or similar
9 improper acts for having disclosed improper governmental activities or for
10 refusing to obey an illegal order.
11 E) Pursuant to Education Code Section 44114, subdivision (c), to respond,
12 appear and defend in any civil action, directly or derivatively, when named
13 as a party or otherwise required by the collective bargaining agreement,
14 brought by a person alleging an employee or officer of the district has
15 engaged in actual or attempted acts of reprisal, retaliation, threats,
16 coercion or similar improper acts for having made a protected disclosure.
17 F) Pursuant to Education Code Section 44114, subdivision (c), to pay
18 damages, directly or derivatively, including attorney's fees, when ordered
19 by the court based upon the liability of the district, or as otherwise defined
20 by the collective bargaining agreement .
21 II) Community Colleges:

A) Pursuant to the Reporting by Community College Employees of Improper Governmental Activities Act (Education Code Sections 87160 through 87164) to establish policies and procedures, and to periodically update those policies and procedures, to implement the act.

B) Pursuant to Education Code Section 87164, subdivision (a), to receive, file and maintain written complaints filed by school employees or applicants for employment alleging actual or attempted acts of reprisal, retaliation, threats, coercion or similar improper acts for having disclosed improper governmental activities or for refusing to obey an illegal order.

C) Pursuant to Education Code Section 87164, subdivision (b), to investigate, or to cooperate with law enforcement investigations of, written complaints filed by school employees or applicants for employment alleging actual or attempted acts of reprisal, retaliation, threats, coercion or similar improper acts for having disclosed improper governmental activities or for refusing to obey an illegal order.

D) Pursuant to Education Code Section 87164, subdivision (b), to discipline, as may be required by law or the district's collective bargaining agreement, any employee, officer or administrator, who is found to have engaged in actual or attempted acts of reprisal, retaliation, threats, coercion or similar improper acts for having disclosed improper governmental activities or for refusing to obey an illegal order.

1 E) Pursuant to Education Code Section 87164, subdivision (h), to respond,
2 appear and defend in any civil action, directly or derivatively, when named
3 as a party or otherwise required by the collective bargaining agreement,
4 brought by a person alleging an employee or officer of the district has
5 engaged in actual or attempted acts of reprisal, retaliation, threats,
6 coercion or similar improper acts for having made a protected disclosure.
7 F) Pursuant to Education Code Section 87164, subdivision (h), to pay
8 damages, directly or derivatively, including attorney's fees, when ordered
9 by the court based upon the liability of the district, or as otherwise defined
10 by the collective bargaining agreement .
11 G) Pursuant to Education Code Section 87164, subdivision (c), for
12 Community College Districts to appear and participate in hearings and
13 investigations initiated by the State Personnel Board when complaints
14 alleging actual or attempted acts of reprisal, retaliation, threats, coercion or
15 similar acts for having made a protected disclosures have been filed with
16 the Board.
17 H) Pursuant to Education Code Section 87164, subdivision (d), for
18 Community College Districts to request a hearing before the State
19 Personnel Board when the adverse findings of the hearing officer are
20 incorrect.
21 I) Pursuant to Education Code Section 87164, subdivision (e), for

1 Community College Districts when, after a hearing, the State Personnel
2 Board determined that a violation has occurred, or if no hearing is
3 requested and the findings of the hearing officer conclude improper activity
4 has occurred, to comply with any ordered relief including, but not limited to,
5 reinstatement, backpay, restoration of lost service credit, and the
6 expungement of any adverse records of the employee or employee
7 applicant who was the subject of the acts of misconduct.

8 J) Pursuant to Education Code Section 87164, subdivision (f), for Community
9 College Districts, when the State Personnel Board determines that a
10 supervisor, administrator or employer has violated Section 87163, to cause
11 an entry to that effect to be made in the supervisor's, administrator's or
12 employer's official personnel records.

13 K) Pursuant to Education Code Section 87164, subdivision (c)(2), to
14 reimburse the State Personnel Board for all of the costs associated with its
15 hearings conducted pursuant to subdivision (c)(1).

16 SECTION 2. EXCEPTIONS TO MANDATE REIMBURSEMENT

17 None of the Government Code Section 17556[19] statutory exceptions to a finding

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[19] Government Code section 17556, as last amended by Chapter 589, Statutes of 1989:

"The commission shall not find costs mandated by the state, as defined in Section 17514, in any claim submitted by a local agency or school district, if, after a hearing, the commission finds that:

1 of costs mandated by the state apply to this test claim. Note, that to the extent school
2 districts may have previously performed functions similar to those mandated by the
3 referenced code sections, such efforts did not establish a preexisting duty that would
4 relieve the state of its constitutional requirement to later reimburse school districts when
5 these activities became mandated.[20]

(a) The claim is submitted by a local agency or school district which requested legislative authority for that local agency or school district to implement the program specified in the statute, and that statute imposes costs upon that local agency or school district requesting the legislative authority. A resolution from the governing body or a letter from a delegated representative of the governing body of a local agency or school district which requests authorization for that local agency or school district to implement a given program shall constitute a request within the meaning of this paragraph.

(b) The statute or executive order affirmed for the state that which had been declared existing law or regulation by action of the courts.

(c) The statute or executive order implemented a federal law or regulation and resulted in costs mandated by the federal government, unless the statute or executive order mandates costs which exceed the mandate in that federal law or regulation.

(d) The local agency or school district has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service.

(e) The statute or executive order provides for offsetting savings to local agencies or school districts which result in no net costs to the local agencies or school districts, or includes additional revenue that was specifically intended to fund the costs of the state mandate in an amount sufficient to fund the cost of the state mandate.

(f) The statute or executive order imposed duties which were expressly included in a ballot measure approved by the voters in a statewide election.

(g) The statute created a new crime or infraction, eliminated a crime or infraction, or changed the penalty for a crime or infraction, but only for that portion of the statute relating directly to the enforcement of the crime or infraction."

[20] Government Code section 17565, added by Chapter 879, Statutes of 1986:

"If a local agency or a school district, at its option, has been incurring costs which are subsequently mandated by the state, the state shall reimburse the local agency or school district for those costs incurred after the operative date of the mandate."

1 SECTION 3. FUNDING PROVIDED FOR THE MANDATED PROGRAM

2 No funds are appropriated by the state for reimbursement of these costs
3 mandated by the state and there is no other provision of law for recovery of costs from
4 any other source.

5 PART IV. ADDITIONAL CLAIM REQUIREMENTS

6 The following elements of this claim are provided pursuant to Section 1183, Title
7 2, California Code of Regulations:

8 Exhibit 1: Declaration of Diana Halpenny
9 General Counsel
10 San Juan Unified School District
11

12 Declaration of Tom Donner
Executive Vice President - Business and Administration
Santa Monica Community College District
15

16 Exhibit 2: Copies of Statutes Cited
17
18 Chapter 81, Statutes of 2002
19 Chapter 416, Statutes of 2001
20 Chapter 159, Statutes of 2001
21 Chapter 531, Statutes of 2000
22

23 Exhibit 3: Copies of Code Sections Cited

24 Education Code Section 44110
25 Education Code Section 44111
26 Education Code Section 44112
27 Education Code Section 44113
28 Education Code Section 44114

1

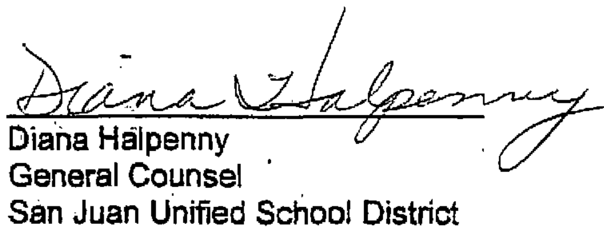
2 Education Code Section 87160
3 Education Code Section 87161
4 Education Code Section 87162
5 Education Code Section 87163
6 Education Code Section 87164

7

PART V. CERTIFICATION

I certify by my signature below, under penalty of perjury, that the statements made in this document are true and complete of my own knowledge or information and belief.

Executed on May 21, 2003, at Carmichael, California by:

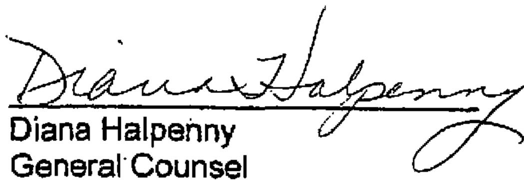


Diana Halpenny
General Counsel
San Juan Unified School District

Voice: (916) 971-7110
Fax: (916) 971-7704

PART VI. APPOINTMENT OF REPRESENTATIVE

San Juan Unified School District appoints Keith B. Petersen, SixTen and Associates, as its representative for this test claim.



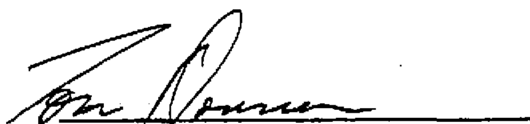
Diana Halpenny
General Counsel

5/21/03
Date

PART V. CERTIFICATION

I certify by my signature below, under penalty of perjury, that the statements made in this document are true and complete of my own knowledge or information and belief.

Executed on May 26, 2003, at Santa Monica, California by:

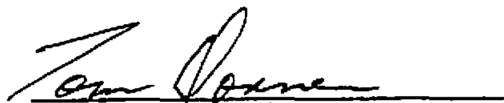


Tom Donner
Executive Vice President
Santa Monica Community College District

Voice: (310) 434-4000
Fax: (310) 434-4386

PART VI. APPOINTMENT OF REPRESENTATIVE

Santa Monica Community College District appoints Keith B. Petersen, SixTen and Associates, as its representative for this test claim.



Tom Donner
Executive Vice President

5/26/03
Date

EXHIBIT 1
DECLARATIONS

DECLARATION OF DIANA HALPENNY

San Juan Unified School District

Test Claim of San Juan Unified School District
and of Santa Monica Community College District

COSM No. ______________

Chapter 81, Statutes of 2002
Chapter 416, Statutes of 2001
Chapter 159, Statutes of 2001
Chapter 531, Statutes of 2000

Education Code Sections 44110
Education Code Sections 44111
Education Code Sections 44112
Education Code Sections 44113
Education Code Sections 44114

Education Code Sections 87160
Education Code Sections 87161
Education Code Sections 87162
Education Code Sections 87163
Education Code Sections 87164

Reporting Improper Government Activities

I, Diana Halpenny, General Counsel, San Juan Unified School District, make the following declaration and statement.

In my capacity as General Counsel to San Juan Unified School District , I am responsible for the district's compliance with the reporting of improper governmental activities. I am familiar with the provisions and requirements of the Statutes and Education Code Sections enumerated above.

These Statutes and Education Code sections require the San Juan Unified School District to:

A) Pursuant to the Reporting by School Employees of Improper

Governmental Activities Act (Education Code Sections 44110 through 44114) to establish policies and procedures, and to periodically update those policies and procedures, to implement the act.

B) Pursuant to Education Code Section 44114, subdivision (a), to receive, file and maintain written complaints filed by school employees or applicants for employment alleging actual or attempted acts of reprisal, retaliation, threats, coercion or similar improper acts for having disclosed improper governmental activities or for refusing to obey an illegal order.

C) Pursuant to Education Code Section 44114, subdivision (b), to investigate or cooperate with law enforcement written complaints filed by school employees or applicants for employment alleging actual or attempted acts of reprisal, retaliation, threats, coercion or similar improper acts for having disclosed improper governmental activities or for refusing to obey an illegal order.

D) Pursuant to Education Code Section 44114, subdivision (b), to discipline any employee, officer or administrator, as may be required by law or the district's collective bargaining agreement, who is found to have engaged in actual or attempted acts of reprisal, retaliation, threats, coercion or similar improper acts for having disclosed improper governmental activities or for refusing to obey an illegal order.

E) Pursuant to Education Code Section 44114, subdivision (c), to respond,

appear and defend in any civil action, directly or derivatively, when named as a party or otherwise required by the collective bargaining agreement, brought by a person alleging an employee or officer of the district has engaged in actual or attempted acts of reprisal, retaliation, threats, coercion or similar improper acts for having made a protected disclosure.

F) Pursuant to Education Code Section 44114, subdivision (c), to pay damages, directly or derivatively, including attorney's fees, when ordered by the court based upon the liability of the district, or as otherwise defined by the collective bargaining agreement .

It is estimated that the San Juan School District, to the extent improper activities may be reported, will incur approximately $1,000, or more, annually, in staffing and other costs in excess of any funding provided to school districts and the state for the period from July 1, 2001 through June 30, 2002 to implement these new duties mandated by the state for which the school district has not been reimbursed by any federal, state, or local government agency, and for which it cannot otherwise obtain reimbursement.

The foregoing facts are known to me personally and, if so required, I could testify to the statements made herein. I hereby declare under penalty of perjury that the

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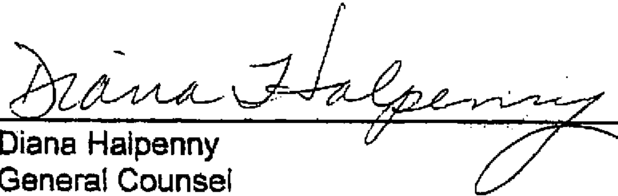
foregoing is true and correct except where stated upon information and belief and where so stated I declare that I believe them to be true.

EXECUTED this 21 day of May, 2003, at Carmichael, California.



Diana Halpenny
General Counsel
San Juan Unified School District

DECLARATION OF TOM DONNER

SANTA MONICA COMMUNITY COLLEGE DISTRICT

Test Claim of San Juan Unified School District
and of Santa Monica Community College District

COSM No. ____________

Chapter 81, Statutes of 2002
Chapter 416, Statutes of 2001
Chapter 159, Statutes of 2001
Chapter 531, Statutes of 2000

Education Code Sections 44110
Education Code Sections 44111
Education Code Sections 44112
Education Code Sections 44113
Education Code Sections 44114

Education Code Sections 87160
Education Code Sections 87161
Education Code Sections 87162
Education Code Sections 87163
Education Code Sections 87164

Reporting Improper Governmental Activities

I, Tom Donner, Executive Vice President - Business and Administration, Santa Monica Community College District, make the following declaration and statement.

In my capacity as Executive Vice President - Business and Administration, I am responsible for the district's compliance with the reporting of improper governmental activities. I am familiar with the provisions and requirements of the Statutes and Education Code Sections enumerated above.

These Statutes and Education Code sections require the Santa Monica Community College District to:

A) Pursuant to the Reporting by Community College Employees of Improper Governmental Activities Act (Education Code Sections 87160 through 87164) to establish policies and procedures, and to periodically update those policies and procedures, to implement the act.

B) Pursuant to Education Code Section 87164, subdivision (a), to receive, file and maintain written complaints filed by school employees or applicants for employment alleging actual or attempted acts of reprisal, retaliation, threats, coercion or similar improper acts for having disclosed improper governmental activities or for refusing to obey an illegal order.

C) Pursuant to Education Code Section 87164, subdivision (b), to investigate or cooperate with law enforcement written complaints filed by school employees or applicants for employment alleging actual or attempted acts of reprisal, retaliation, threats, coercion or similar improper acts for having disclosed improper governmental activities or for refusing to obey an illegal order.

D) Pursuant to Education Code Section 87164, subdivision (b), to discipline any employee, officer or administrator, as may be required by law or the district's collective bargaining agreement, who is found to have engaged in actual or attempted acts of reprisal, retaliation, threats, coercion or similar improper acts for having disclosed improper governmental activities or for refusing to obey an illegal order.

E) Pursuant to Education Code Section 87164, subdivision (h), to respond, appear and defend in any civil action, directly or derivatively, when named as a party or otherwise required by the collective bargaining agreement, brought by a person alleging an employee or officer of the district has engaged in actual or attempted acts of reprisal, retaliation, threats, coercion or similar improper acts for having made a protected disclosure.

F) Pursuant to Education Code Section 87164, subdivision (h), to pay damages, directly or derivatively, including attorney's fees, when ordered by the court based upon the liability of the district, or as otherwise defined by the collective bargaining agreement .

G) Pursuant to Education Code Section 87164, subdivision (c), for Community College Districts to appear and participate in hearings and investigations initiated by the State Personnel Board when complaints alleging actual or attempted acts of reprisal, retaliation, threats, coercion or similar acts for having made a protected disclosures have been filed with the Board.

H) Pursuant to Education Code Section 87164, subdivision (d), for Community College Districts to request a hearing before the State Personnel Board when adverse findings of the hearing officer are incorrect.

I) Pursuant to Education Code Section 87164, subdivision (e), for

Community College Districts when, after a hearing, the State Personnel Board determined that a violation has occurred, or if no hearing is requested and the findings of the hearing officer conclude improper activity has occurred, to comply with any ordered relief including, but not limited to, reinstatement, backpay, restoration of lost service credit, and the expungement of any adverse records of the employee or employee applicant who was the subject of the acts of misconduct.

J) Pursuant to Education Code Section 87164, subdivision (f), for Community College Districts, when the State Personnel Board determines that a supervisor, administrator or employer has violated Section 87163, to cause an entry to that effect to be made in the supervisor's, administrator's or employer's official personnel records.

K) Pursuant to Education Code Section 87164, subdivision (c)(2), to reimburse the State Personnel Board for all of the costs associated with its hearings conducted pursuant to subdivision (c)(1).

It is estimated that the Santa Monica Community College District, to the extent improper activities may be reported, will incur approximately $1,000, or more, annually, in staffing and other costs in excess of any funding provided to school districts and the state for the period from July 1, 2001 through June 30, 2002 to implement these new duties mandated by the state for which the school district has not been reimbursed by any federal, state, or local government agency, and for which it cannot otherwise obtain

reimbursement.

The foregoing facts are known to me personally and, if so required, I could testify to the statements made herein. I hereby declare under penalty of perjury that the foregoing is true and correct except where stated upon information and belief and where so stated I declare that I believe them to be true.

EXECUTED this 26 day of May, 2003, at Santa Monica, California

Tom Donner
Executive Vice President
Business and Administration
Santa Monica Community College District

EXHIBIT 2
COPIES OF STATUTES CITED

COLLEGES AND UNIVERSITIES—COMMUNITY COLLEGES—REPORTING IMPROPER GOVERNMENTAL ACTIVITIES

CHAPTER 81

A.B. No. 2034

AN ACT to amend Section 87164 of the Education Code, relating to community colleges.

[Filed with Secretary of State June 30, 2002.]

LEGISLATIVE COUNSEL'S DIGEST

AB 2034, Horton. Community colleges: Reporting by Community College Employees of Improper Governmental Activities Act.

Existing law establishes the California Community Colleges under the administration of the Board of Governors of the California Community Colleges. Existing law authorizes the establishment of community college districts under the administration of community college governing boards, and authorizes these districts to provide instruction at community college campuses throughout the state.

Existing law, known as the California Whistleblower Protection Act, sets forth the circumstances and procedures under which a state employee may report improper governmental activities or make a protected disclosure to the State Auditor, and prohibits retaliation or reprisal against a state employee for these acts. Existing law, known as the Reporting by Community College Employees of Improper Governmental Activities Act, enacts provisions, applicable to community college campuses, that are similar to the California Whistleblower Protection Act, including procedures for the investigation and determination of complaints by the State Personnel Board.

This bill would require the hearings to be conducted in accordance with the statutes governing community colleges and the rules of practice and procedure of the State Personnel Board. The bill would also require that no costs associated with hearings of the State Personnel Board conducted pursuant to a cited provision of the Reporting by Community College Employees of Improper Governmental Activities Act shall be charged to the board of governors. The bill would instead require that all of the costs associated with those hearings shall be charged directly to the community college district that employs the complaining employee, or with whom the complaining applicant for employment has filed his or her employment application.

The people of the State of California do enact as follows:

SECTION 1. Section 87164 of the Education Code is amended to read:

87164. (a) An employee or applicant for employment with a public school employer who files a written complaint with his or her supervisor, a community college administrator, or the public school employer alleging actual or attempted acts of reprisal, retaliation, threats, coercion, or similar improper acts prohibited by Section 87163 for having disclosed improper governmental activities or for refusing to obey an illegal order may also file a copy of the

written complaint with the local law enforcement agency, together with a sworn statement that the contents of the written complaint are true, or are believed by the affiant to be true, under penalty of perjury. The complaint filed with the local law enforcement agency shall be filed within 12 months of the most recent act of reprisal that is the subject of the complaint.

(b) A person who intentionally engages in acts of reprisal, retaliation, threats, coercion, or similar acts against an employee or applicant for employment with a public school employer for having made a protected disclosure is subject to a fine not to exceed ten thousand dollars ($10,000) and imprisonment in the county jail for a period not to exceed one year. An employee, officer, or administrator who intentionally engages in that conduct shall also be subject to discipline by the public school employer. If no adverse action is instituted by the public school employer, and it is determined that there is reasonable cause to believe that an act of reprisal, retaliation, threats, coercion, or similar acts prohibited by Section 87163, the local law enforcement agency may report the nature and details of the activity to the governing board of the community college district.

(c)(1) The State Personnel Board shall initiate a hearing or investigation of a written complaint of reprisal or retaliation as prohibited by Section 87163 within 10 working days of its submission. The executive officer of the State Personnel Board shall complete findings of the hearing or investigation within 60 working days thereafter, and shall provide a copy of the findings to the complaining employee or applicant for employment with a public school employer and to the appropriate supervisors, administrator, or employer. This hearing shall be conducted in accordance with Section 18671.2 of the Government Code, this part, and the rules of practice and procedure of the State Personnel Board. When the allegations contained in a complaint of reprisal or retaliation are the same as, or similar to, those contained in another appeal, the executive officer may consolidate the appeals into the most appropriate format. In these cases, the time limits described in this paragraph shall not apply.

(2) Notwithstanding Section 18671.2 of the Government Code, no costs associated with hearings of the State Personnel Board conducted pursuant to paragraph (1) shall be charged to the board of governors. Instead, all of the costs associated with hearings of the State Personnel Board conducted pursuant to paragraph (1) shall be charged directly to the community college district that employs the complaining employee, or with whom the complaining applicant for employment has filed his or her employment application.

(d) If the findings of the executive officer of the State Personnel Board set forth acts of alleged misconduct by the supervisor, community college administrator, or public school employer, the supervisor, administrator, or employer may request a hearing before the State Personnel Board regarding the findings of the executive officer. The request for hearing and any subsequent determination by the board shall be made in accordance with the board's usual rules governing appeals, hearings, investigations, and disciplinary proceedings.

(e) If, after the hearing, the State Personnel Board determines that a violation of Section 87163 occurred, or if no hearing is requested and the findings of the executive officer conclude that improper activity has occurred, the board may order any appropriate relief, including, but not limited to, reinstatement, back pay, restoration of lost service credit if appropriate, and the expungement of any adverse records of the employee or applicant for employment with a public school employer who was the subject of the alleged acts of misconduct prohibited by Section 87163.

(f) Whenever the State Personnel Board determines that a supervisor, community college administrator, or public school employer has violated Section 87163, it shall cause an entry to that effect to be made in the supervisor's, community college administrator's, or public school employer's official personnel records.

(g) In order for the Governor and the Legislature to determine the need to continue or modify personnel procedures as they relate to the investigations of reprisals or retaliation for the disclosure of information by employees, the State Personnel Board, by June 30 of each year, shall submit a report to the Governor and the Legislature regarding complaints filed, hearings held, and legal actions taken pursuant to this section.

(h) In addition to all other penalties provided by law, a person who intentionally engages in acts of reprisal, retaliation, threats, coercion, or similar acts against an employee or applicant

for employment with a public school employer for having made a protected disclosure shall be liable in an action for damages brought against him or her by the injured party. Punitive damages may be awarded by the court where the acts of the offending party are proven to be malicious. Where liability has been established, the injured party shall also be entitled to reasonable attorney's fees as provided by law. However, an action for damages shall not be available to the injured party unless the injured party has first filed a complaint with the local law enforcement agency. Nothing in this subdivision requires an injured party to file a complaint with the State Personnel Board prior to seeking relief for damages in a court of law.

(i) This section is not intended to prevent a public school employer, school administrator, or supervisor from taking, failing to take, directing others to take, recommending, or approving a personnel action with respect to an employee or applicant for employment with a public school employer if the public school employer, school administrator, or supervisor reasonably believes an action or inaction is justified on the basis of evidence separate and apart from the fact that the person has made a protected disclosure as defined in subdivision (e) of Section 87162.

(j) In any civil action or administrative proceeding, once it has been demonstrated by a preponderance of evidence that an activity protected by this article was a contributing factor in the alleged retaliation against a former, current, or prospective employee, the burden of proof shall be on the supervisor, school administrator, or public school employer to demonstrate by clear and convincing evidence that the alleged action would have occurred for legitimate, independent reasons even if the employee had not engaged in protected disclosures or refused an illegal order. If the supervisor, school administrator, or public school employer fails to meet this burden of proof in an adverse action against the employee in any administrative review, challenge, or adjudication in which retaliation has been demonstrated to be a contributing factor, the employee shall have a complete affirmative defense in the adverse action.

(k) Nothing in this article shall be deemed to diminish the rights, privileges, or remedies of an employee under any other federal or state law or under an employment contract or collective bargaining agreement.

(*l*) If the provisions of this section are in conflict with the provisions of a memorandum of understanding reached pursuant to Chapter 10.7 (commencing with Section 3540) of Division 4 of Title 1 of the Government Code, the memorandum of understanding shall be controlling without further legislative action.

COLLEGES AND UNIVERSITIES—WHISTLEBLOWERS—IMPROPER GOVERNMENT ACTIVITIES

CHAPTER 416

A.B. No. 647

AN ACT to amend Section 87164 of the Education Code, relating to whistleblower protection.

[Filed with Secretary of State October 2, 2001.]

LEGISLATIVE COUNSEL'S DIGEST

AB 647, Horton. Whistleblower protection: Reporting by Community College Employees of Improper Governmental Activities Act.

Existing law, the California Whistleblower Protection Act, sets forth the circumstances and procedures under which a state employee may report improper governmental activities or make a protected disclosure to the State Auditor, and prohibits retaliation or reprisal against a state employee for these acts. Existing law defines any employee of the California State University as a state employee and the California State University as a state agency for some provisions of this act. Existing law authorizes a California State University employee to file a written complaint with his or her supervisor or manager, or any other designated university officer alleging actual or attempted acts of reprisal, retaliation, threats, coercion, or similar improper acts for having made a protected disclosure. It is a misdemeanor for any person to intentionally engage in acts of retaliation, reprisal, threats, coercion, or similar acts against an employee of the California State University for having made a protected disclosure under these provisions.

Existing law establishes the Reporting by Community College Employees of Improper Governmental Activities Act, which enacts provisions similar to the California Whistleblower Protection Act, that are applicable to community college campuses.

This bill would amend the Reporting by Community College Employees of Improper Governmental Activities Act to include procedures for the investigation and determination of complaints by the State Personnel Board that are currently contained in the California Whistleblower Protection Act.

The people of the State of California do enact as follows:

SECTION 1. Section 87164 of the Education Code is amended to read:

87164. (a) An employee or applicant for employment with a public school employer who files a written complaint with his or her supervisor, a community college administrator, or the public school employer alleging actual or attempted acts of reprisal, retaliation, threats, coercion, or similar improper acts prohibited by Section 87163 for having disclosed improper governmental activities or for refusing to obey an illegal order may also file a copy of the written complaint with the local law enforcement agency, together with a sworn statement that the contents of the written complaint are true, or are believed by the affiant to be true, under penalty of perjury. The complaint filed with the local law enforcement agency shall be filed within 12 months of the most recent act of reprisal that is the subject of the complaint.

(b) A person who intentionally engages in acts of reprisal, retaliation, threats, coercion, or similar acts against an employee or applicant for employment with a public school employer for having made a protected disclosure is subject to a fine not to exceed ten thousand dollars ($10,000) and imprisonment in the county jail for a period not to exceed one year. An employee, officer, or administrator who intentionally engages in that conduct shall also be subject to discipline by the public school employer. If no adverse action is instituted by the public school employer, and it is determined that there is reasonable cause to believe that an act of reprisal, retaliation, threats, coercion, or similar acts prohibited by Section 87163, the local law enforcement agency may report the nature and details of the activity to the governing board of the community college district.

(c) The State Personnel Board shall initiate a hearing or investigation of a written complaint of reprisal or retaliation as prohibited by Section 87163 within 10 working days of its submission. The executive officer of the State Personnel Board shall complete findings of the hearing or investigation within 60 working days thereafter and shall provide a copy of the findings to the complaining employee or applicant for employment with a public school employer and to the appropriate supervisors, administrator, or employer. This hearing shall be conducted in accordance with Section 18671.2 of the Government Code. When the allegations contained in a complaint of reprisal or retaliation are the same as, or similar to, those contained in another appeal, the executive officer may consolidate the appeals into the most appropriate format. In these cases, the time limits described in this subdivision shall not apply.

(d) If the findings of the executive officer of the State Personnel Board set forth acts of alleged misconduct by the supervisor, community college administrator, or public school employer, the supervisor, administrator, or employer may request a hearing before the State Personnel Board regarding the findings of the executive officer. The request for hearing and any subsequent determination by the board shall be made in accordance with the board's usual rules governing appeals, hearings, investigations, and disciplinary proceedings.

(e) If, after the hearing, the State Personnel Board determines that a violation of Section 87163 occurred, or if no hearing is requested and the findings of the executive officer conclude that improper activity has occurred, the board may order any appropriate relief, including, but not limited to, reinstatement, backpay, restoration of lost service credit if appropriate, and the expungement of any adverse records of the employee or applicant for employment with a public school employer who was the subject of the alleged acts of misconduct prohibited by Section 87163.

(f) Whenever the State Personnel Board determines that a supervisor, community college administrator, or public school employer has violated Section 87163, it shall cause an entry to that effect to be made in the supervisor's, community college administrator's, or public school employer's official personnel records.

(g) In order for the Governor and the Legislature to determine the need to continue or modify personnel procedures as they relate to the investigations of reprisals or retaliation for the disclosure of information by employees, the State Personnel Board, by June 30 of each year, shall submit a report to the Governor and the Legislature regarding complaints filed, hearings held, and legal actions taken pursuant to this section.

(h) In addition to all other penalties provided by law, a person who intentionally engages in acts of reprisal, retaliation, threats, coercion, or similar acts against an employee or applicant for employment with a public school employer for having made a protected disclosure shall be liable in an action for damages brought against him or her by the injured party. Punitive damages may be awarded by the court where the acts of the offending party are proven to be

malicious. Where liability has been established, the injured party shall also be entitled to reasonable attorney's fees as provided by law. However, an action for damages shall not be available to the injured party unless the injured party has first filed a complaint with the local law enforcement agency. Nothing in this subdivision requires an injured party to file a complaint with the State Personnel Board prior to seeking relief for damages in a court of law.

(i) This section is not intended to prevent a public school employer, school administrator, or supervisor from taking, failing to take, directing others to take, recommending, or approving a personnel action with respect to an employee or applicant for employment with a public school employer if the public school employer, school administrator, or supervisor reasonably believes an action or inaction is justified on the basis of evidence separate and apart from the fact that the person has made a protected disclosure as defined in subdivision (e) of Section 87162.

(j) In any civil action or administrative proceeding, once it has been demonstrated by a preponderance of evidence that an activity protected by this article was a contributing factor in the alleged retaliation against a former, current, or prospective employee, the burden of proof shall be on the supervisor, school administrator, or public school employer to demonstrate by clear and convincing evidence that the alleged action would have occurred for legitimate, independent reasons even if the employee had not engaged in protected disclosures or refused an illegal order. If the supervisor, school administrator, or public school employer fails to meet this burden of proof in an adverse action against the employee in any administrative review, challenge, or adjudication in which retaliation has been demonstrated to be a contributing factor, the employee shall have a complete affirmative defense in the adverse action.

(k) Nothing in this article shall be deemed to diminish the rights, privileges, or remedies of an employee under any other federal or state law or under an employment contract or collective bargaining agreement.

(*l*) If the provisions of this section are in conflict with the provisions of a memorandum of understanding reached pursuant to Chapter 10.7 (commencing with Section 3540) of Division 4 of Title 1 of the Government Code, the memorandum of understanding shall be controlling without further legislative action.

CHAPTER 159

S.B. No. 662

AN ACT to amend Sections 27, 113, 130, 144, 350, 1647.11, 2570.6, 2570.8, 2570.19, 2995, 3059, 3364, 3403, 4059, 4312, 4980.80, 4980.90, 4996.6, 5111, 5536, 6408, 6716, 6730.2, 6756, 7092, 7583.11, 8027, 8773.4, 10167.2, and 21702 of the Business and Professions Code, to amend Sections 1748.10, 1748.11, 1810.21, 2954.4, 2954.5, and 3097 of, and to amend and renumber Section 1834.8 of, the Civil Code, to amend Sections 403.020, 645.1, 674, and 699.510 of the Code of Civil Procedure, to amend Sections 9323, 9331, and 9408 of the Commercial Code, to amend Sections 2200, 6810, 17540.3, 25102, 25103, and 25120 of the Corporations Code, to amend Sections 313, 406, 426, 427, 11700, 17071.46, 17210, 17317, 17610.5, 22660, 22950, 25933, 33126.1, 37252, 37252.2, 37619, 41329.1, 42239, 44114, 45023.1, 48664, 52054, 52270, 52485, 54749, 56045, 56845, 69432.7, 69434.5, 69437.6, 69439, 69613.1, 87164, and 92901 of, and to amend and renumber Sections 45005.25 and 45005.30 of, the Education Code, to amend Sections 1405, 8040, 9118, and 15375 of the Elections Code, to amend Section 17504 of the Family Code, to amend Sections 761.5, 4827, 16024, 16501, and 18586 of the Financial Code, to amend Sections 1506, 2921, and 8276.3 of the Fish and Game Code, to amend Sections 492, 6046, and 75131 of the Food and Agricultural Code, to amend Sections 3543.4, 3562.2, 3583.5, 6254, 6516.6, 6599.2, 7074, 18935, 20028, 20300, 20392, 21006, 21547.7, 30064.1, 31461.3, 31681.55, 31835.02, 38773.6, 55720, 65584, 65585.1, and 75059.1 of the Government Code, to amend Sections 444.21, 1358.11, 11836, 11877.2, 17922, 25358.6.1, 39619.6, 104170, 105112, 111656.5, 111656.13, 114145, 123111, and 124900 of, to amend and renumber Section 104320 of, and to amend and renumber the heading of Article 10.5 (commencing with Section 1899.801) of Chapter 2.2 of Division 2 of, the Health and Safety Code, to amend Sections 789.8, 1215.1, 1871, 1872.83, 10123.135, 10178.3, 10192.11, 10231.2, 10236, 10506.5, 11621.2, 11784, 11786, 11787, and 12698 of the Insurance Code, to amend Sections 90.5, 129, 230.1, 4455, and 4609 of the Labor Code, to amend Section 1048 of the Military and Veterans Code, to amend Sections 272, 417.2, 646.94, and 3058.65 of the Penal Code, to amend Sections 1813 and 16062 of the Probate Code, to amend Sections 10129 and 20209.7 of the Public Contract Code, to amend Sections 5090.51, 14581, 36710, and 42923 of the Public Resources Code, to amend Sections 383.5, 2881.2, 7943, 9608, 9610, and 12702.5 of, and to amend and renumber Section 399.15 of, the Public Utilities Code, to amend Sections 75.11, 75.21, 97.3, 214, 23622.8, 23646, 44006, and 45153 of the Revenue and Taxation Code, to amend Section 1110 of the Unemployment Insurance Code, to amend Section 4000.37 of the Vehicle Code, to amend Sections 1789.5, 4098.1, 5614, 8102, 10082, 14005.28, 14005.35, 14008.6, 14087.32, and 14105.26 of the Welfare and Institutions Code, and to amend Section 511 of the San Gabriel Basin Water Quality Authority Act (Chapter 776 of the Statutes of 1992), Section 1 of Chapter 352 of the Statutes of 2000, Section 1 of Chapter 661 of the Statutes of 2000, Section 2 of Chapter 693 of the Statutes of 2000, Sections 5 and 6 of the Naval Training Center San

SEC. 68. Section 44114 of the Education Code is amended to read:

44114. (a) A public school employee or applicant for employment with a public school employer who files a written complaint with his or her supervisor, a school administrator, or the public school employer alleging actual or attempted acts of reprisal, retaliation, threats, coercion, or similar improper acts prohibited by Section 44113 for having disclosed improper governmental activities or for refusing to obey an illegal order may also file a copy of the written complaint with the local law enforcement agency together with a sworn statement that the contents of the written complaint are true, or are believed by the affiant to be true, under penalty of perjury. The complaint filed with the local law enforcement agency shall be filed within 12 months of the most recent act of reprisal that is the subject of the complaint.

(b) A person who intentionally engages in acts of reprisal, retaliation, threats, coercion, or similar acts against a public school employee or applicant for employment with a public school employer for having made a protected disclosure is subject to a fine not to exceed ten thousand dollars ($10,000) and imprisonment in the county jail for a period not to exceed one year. Any public school employee, officer, or administrator who intentionally engages in that conduct shall also be subject to discipline by the public school employer. If no adverse action is instituted by the public school employer * * * and it is determined that there is reasonable cause to believe that an act of reprisal, retaliation, threats, coercion, or similar acts prohibited by Section 44113 occurred, the local law enforcement agency may report the nature and details of the activity to the governing board of the school district or county board of education, as appropriate.

(c) In addition to all other penalties provided by law, a person who intentionally engages in acts of reprisal, retaliation, threats, coercion, or similar acts against a public school employee or applicant for employment with a public school employer for having made a protected disclosure shall be liable in an action for damages brought against him or her by the injured party. Punitive damages may be awarded by the court where the acts of the offending party are proven to be malicious. Where liability has been established, the injured party shall also be entitled to reasonable attorney's fees as provided by law. However, an action for damages shall not be available to the injured party unless the injured party has first filed a complaint with the local law enforcement agency.

(d) This section is not intended to prevent a public school employer, school administrator, or supervisor from taking, failing to take, directing others to take, recommending, or approving a personnel action with respect to a public school employee or applicant for employment with a public school employer if the public school employer, school administrator, or supervisor reasonably believes the action or inaction is justified on the basis of evidence separate and apart from the fact that the person has made a protected disclosure as defined in subdivision (e) of Section 44112.

(e) In any civil action or administrative proceeding, once it has been demonstrated by a preponderance of evidence that an activity protected by this article was a contributing factor in the alleged retaliation against a former, current, or prospective public school employee, the burden of proof shall be on the supervisor, school administrator, or public school employer to demonstrate by clear and convincing evidence that the alleged action would have occurred for legitimate, independent reasons even if the public school employee had not engaged in protected disclosures or refused an illegal order. If the supervisor, school administrator, or public school employer fails to meet this burden of proof in an adverse action against the public school employee in any administrative review, challenge, or adjudication in which retaliation has been demonstrated to be a contributing factor, the public school employee shall have a complete affirmative defense in the adverse action.

(f) Nothing in this article shall be deemed to diminish the rights, privileges, or remedies of a public school employee under any other federal or state law or under an employment contract or collective bargaining agreement.

(g) If the provisions of this section are in conflict with the provisions of a memorandum of understanding reached pursuant to Chapter 10.7 (commencing with Section 3540) of Division 4 of Title 1 of the Government Code, the memorandum of understanding shall be controlling without further legislative action.

(e) The meetings of the Bipartisan California Commission on Internet Political Practices shall be open and public. The commission members shall receive one hundred dollars ($100) per diem for each day of attendance at a meeting of the commission, not to exceed 10 meetings.

(f) The Bipartisan California Commission on Internet Political Practices shall report its findings and recommendations to the Legislature not later than December 1, 2001. The commission shall cease to exist on January 1, 2002.

SEC. 207. Section 3 of Chapter 975 of the Statutes of 2000 is amended to read:

Sec. 3. The sum of two hundred twenty thousand dollars ($220,000) is hereby appropriated from the General Fund to the Controller for allocation to the Bipartisan California Commission on Internet Political Practices to defray the costs of the commission in conducting the study and preparing the report required by this act.

SEC. 208. Any section of any act enacted by the Legislature during the 2001 calendar year that takes effect on or before January 1, 2002, and that amends, amends and renumbers, adds, repeals and adds, or repeals a section that is amended, amended and renumbered, added, repealed and added, or repealed by this act, shall prevail over this act, whether that act is enacted prior to, or subsequent to, the enactment of this act. The repeal, or repeal and addition, of any article, chapter, part, title, or division of any code by this act shall not become operative if any section of any other act that is enacted by the Legislature during the 2001 calendar year and takes effect on or before January 1, 2002, amends, amends and renumbers, adds, repeals and adds, or repeals any section contained in that article, chapter, part, title, or division.

SCHOOLS AND SCHOOL DISTRICTS—PUBLIC SCHOOL EMPLOYEES—WRITTEN COMPLAINTS

CHAPTER 531

A.B. No. 2472

AN ACT to add Article 5 (commencing with Section 44110) to Chapter 1 of Part 25 of, and to add Article 6 (commencing with Section 87160) to Chapter 1 of Part 51 of, the Education Code, relating to public school employees.

[Filed with Secretary of State September 19, 2000.]

LEGISLATIVE COUNSEL'S DIGEST

AB 2472, Romero. Public school employees: disclosure of improper governmental activities.

Under the California Whistleblower Protection Act, the State Auditor is authorized to conduct an investigative audit upon receiving confirmation that an employee or state agency, as defined, has engaged in an improper governmental activity. The act prohibits an employee from using his or her official authority or influence to intimidate, threaten, coerce, or command any person in order to interfere with that person's right to make a disclosure under the act. The act protects employees who, among other things, make disclosures to anyone of information that may evidence an improper governmental activity, refusal to obey an illegal order, or any condition that may significantly threaten the health or safety of employees or the public if the disclosure is made for the purpose of remedying the condition.

The act also provides that a state employee who files a written complaint with his or her supervisor, manager, or the appointing power alleging actual or attempted acts of reprisal, retaliation, threats, coercion, or similar improper acts because he or she has made a protected disclosure under the act, may also file a copy of the written complaint with the State Personnel Board, as specified. Any person who engages in the above-specified acts is guilty of a misdemeanor and subject to a $10,000 fine, and is also subject to civil liability, as specified, except for any action or inaction that is justified on the basis of evidence separate and apart from the fact that the person has made a protected disclosure.

This bill would enact the Reporting by School Employees of Improper Governmental Activities Act and the Reporting by Community College Employees of Improper Governmental Activities Act which would enact provisions similar to the California Whistleblower Protection Act applicable to employees of any public school employer, as defined, and would add provisions by which a public school employee is authorized to file a written complaint with the local law enforcement agency, as specified, alleging acts or attempted acts of reprisal, retaliation, threats, coercion, or similar improper acts. By expanding the scope of an existing crime, the bill would create a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

The people of the State of California do enact as follows:

SECTION 1. Article 5 (commencing with Section 44110) is added to Chapter 1 of Part 25 of the Education Code, to read:

Article 5. Reporting by School Employees of Improper Governmental Activities

44110. This article shall be known and may be referred to as the Reporting by School Employees of Improper Governmental Activities Act.

44111. It is the intent of the Legislature that school employees and other persons disclose, to the extent not expressly prohibited by law, improper governmental activities.

44112. For the purposes of this article, the following terms have the following meanings:

(a) "Employee" means a public school employee as defined in subdivision (j) of Section 3540.1 of the Government Code.

(b) "Illegal order" means any directive to violate or assist in violating a federal, state, or local law, rule, or regulation or an order to work or cause others to work in conditions outside of their line of duty that would unreasonably threaten the health or safety of employees or the public.

(c) "Improper governmental activity" means an activity by a public school agency or by an employee that is undertaken in the performance of the employee's official duties, whether or not that activity is within the scope of his or her employment, and that meets either of the following descriptions:

(1) The activity violates a state or federal law or regulation, including, but not limited to, corruption, malfeasance, bribery, theft of government property, fraudulent claims, fraud, coercion, conversion, malicious prosecution, misuse of government property, or willful omission to perform duty.

(2) The activity is economically wasteful or involves gross misconduct, incompetency, or inefficiency.

(d) "Person" means any individual, corporation, trust, association, any state or local government, or any agency or instrumentality of any of the foregoing.

(e) "Protected disclosure" means a good faith communication that discloses or demonstrates an intention to disclose information that may evidence either of the following:

(1) An improper governmental activity.

(2) Any condition that may significantly threaten the health or safety of employees or the public if the disclosure or intention to disclose was made for the purpose of remedying that condition.

(f) "Public school employer" has the same meaning as in subdivision (k) of Section 3540.1 of the Government Code.

44113. (a) An employee may not directly or indirectly use or attempt to use the official authority or influence of the employee for the purpose of intimidating, threatening, coercing, commanding, or attempting to intimidate, threaten, coerce, or command any person for the purpose of interfering with the right of that person to disclose to an official agent matters within the scope of this article.

(b) For the purpose of subdivision (a), "use of official authority or influence" includes promising to confer or conferring any benefit; affecting or threatening to affect any reprisal; or taking, directing others to take, recommending, processing, or approving any personnel action, including, but not limited to appointment, promotion, transfer, assignment, performance evaluation, suspension, or other disciplinary action.

(c) For the purpose of subdivision (a), "official agent" includes a school administrator, member of the governing board of a school district or county board of education, county superintendent of schools, or the Superintendent of Public Instruction.

(d) An employee who violates subdivision (a) may be liable in an action for civil damages brought against the employee by the offended party.

(e) Nothing in this section shall be construed to authorize an individual to disclose information otherwise prohibited by or under law.

44114. (a) A public school employee or applicant for employment with a public school employer who files a written complaint with his or her supervisor, a school administrator, or

the public school employer alleging actual or attempted acts of reprisal, retaliation, threats, coercion, or similar improper acts prohibited by Section 44113 for having disclosed improper governmental activities or for refusing to obey an illegal order may also file a copy of the written complaint with the local law enforcement agency together with a sworn statement that the contents of the written complaint are true, or are believed by the affiant to be true, under penalty of perjury. The complaint filed with the local law enforcement agency shall be filed within 12 months of the most recent act of reprisal that is the subject of the complaint.

(b) A person who intentionally engages in acts of reprisal, retaliation, threats, coercion, or similar acts against a public school employee or applicant for employment with a public school employer for having made a protected disclosure is subject to a fine not to exceed ten thousand dollars ($10,000) and imprisonment in the county jail for a period not to exceed one year. Any public school employee, officer, or administrator who intentionally engages in that conduct shall also be subject to discipline by the public school employer. If no adverse action is instituted by the public school employer, and it is determined that there is reasonable cause to believe that an act of reprisal, retaliation, threats, coercion, or similar acts prohibited by Section 44113, the local law enforcement agency may report the nature and details of the activity to the governing board of the school district or county board of education, as appropriate.

(c) In addition to all other penalties provided by law, a person who intentionally engages in acts of reprisal, retaliation, threats, coercion, or similar acts against a public school employee or applicant for employment with a public school employer for having made a protected disclosure shall be liable in an action for damages brought against him or her by the injured party. Punitive damages may be awarded by the court where the acts of the offending party are proven to be malicious. Where liability has been established, the injured party shall also be entitled to reasonable attorney's fees as provided by law. However, an action for damages shall not be available to the injured party unless the injured party has first filed a complaint with the local law enforcement agency.

(d) This section is not intended to prevent a public school employer, school administrator, or supervisor from taking, failing to take, directing others to take, recommending, or approving a personnel action with respect to a public school employee or applicant for employment with a public school employer if the public school employer, school administrator, or supervisor reasonably believes the action or inaction is justified on the basis of evidence separate and apart from the fact that the person has made a protected disclosure as defined in subdivision (e) of Section 44112.

(e) In any civil action or administrative proceeding, once it has been demonstrated by a preponderance of evidence that an activity protected by this article was a contributing factor in the alleged retaliation against a former, current, or prospective public school employee, the burden of proof shall be on the supervisor, school administrator, or public school employer to demonstrate by clear and convincing evidence that the alleged action would have occurred for legitimate, independent reasons even if the public school employee had not engaged in protected disclosures or refused an illegal order. If the supervisor, school administrator, or public school employer fails to meet this burden of proof in an adverse action against the public school employee in any administrative review, challenge, or adjudication in which retaliation has been demonstrated to be a contributing factor, the public school employee shall have a complete affirmative defense in the adverse action.

(f) Nothing in this article shall be deemed to diminish the rights, privileges, or remedies of a public school employee under any other federal or state law or under an employment contract or collective bargaining agreement.

(g) If the provisions of this section are in conflict with the provisions of a memorandum of understanding reached pursuant to Chapter 10.7 (commencing with Section 3540) of Division 4 of Title 1 of the Government Code, the memorandum of understanding shall be controlling without further legislative action.

SEC. 2. Article 6 (commencing with Section 87160) is added to Chapter 1 of Part 51 of the Education Code, to read:

Article 6. Reporting by Community College Employees of Improper Governmental Activities

87160. This article shall be known and may be referred to as the Reporting by Community College Employees of Improper Governmental Activities Act.

87161. It is the intent of the Legislature that community college employees and other persons disclose, to the extent not expressly prohibited by law, improper governmental activities.

87162. For the purposes of this article, the following terms have the following meanings:

(a) "Employee" means a public school employee as defined in subdivision (j) of Section 3540.1 of the Government Code as construed to include community college employees.

(b) "Illegal order" means any directive to violate or assist in violating a federal, state, or local law, rule, or regulation or an order to work or cause others to work in conditions outside of their line of duty that would unreasonably threaten the health or safety of employees or the public.

(c) "Improper governmental activity" means an activity by a community college or by an employee that is undertaken in the performance of the employee's official duties, whether or not that activity is within the scope of his or her employment, and that meets either of the following descriptions:

(1) The activity violates a state or federal law or regulation, including, but not limited to, corruption, malfeasance, bribery, theft of government property, fraudulent claims, fraud, coercion, conversion, malicious prosecution, misuse of government property, or willful omission to perform duty.

(2) The activity is economically wasteful or involves gross misconduct, incompetency, or inefficiency.

(d) "Person" means any individual, corporation, trust, association, any state or local government, or any agency or instrumentality of any of the foregoing.

(e) "Protected disclosure" means a good faith communication that discloses or demonstrates an intention to disclose information that may evidence either of the following:

(1) An improper governmental activity.

(2) Any condition that may significantly threaten the health or safety of employees or the public if the disclosure or intention to disclose was made for the purpose of remedying that condition.

(f) "Public school employer" has the same meaning as in subdivision (k) of Section 3540.1 of the Government Code as construed to include community college districts.

87163. (a) An employee may not directly or indirectly use or attempt to use the official authority or influence of the employee for the purpose of intimidating, threatening, coercing, commanding, or attempting to intimidate, threaten, coerce, or command any person for the purpose of interfering with the right of that person to disclose to an official agent matters within the scope of this article.

(b) For the purpose of subdivision (a), "use of official authority or influence" includes promising to confer or conferring any benefit; affecting or threatening to affect any reprisal; or taking, directing others to take, recommending, processing, or approving any personnel action, including, but not limited to appointment, promotion, transfer, assignment, performance evaluation, suspension, or other disciplinary action.

(c) For the purpose of subdivision (a), "official agent" includes a community college administrator, member of the governing board of a community college district, or the Chancellor of the California Community Colleges.

(d) An employee who violates subdivision (a) may be liable in an action for civil damages brought against the employee by the offended party.

(e) Nothing in this section shall be construed to authorize an individual to disclose information otherwise prohibited by or under law.

87164. (a) An employee or applicant for employment with a public school employer who files a written complaint with his or her supervisor, a community college administrator, or the public school employer alleging actual or attempted acts of reprisal, retaliation, threats, coercion, or similar improper acts prohibited by Section 87163 for having disclosed improper governmental activities or for refusing to obey an illegal order may also file a copy of the written complaint with the local law enforcement agency, together with a sworn statement that the contents of the written complaint are true, or are believed by the affiant to be true, under penalty of perjury. The complaint filed with the local law enforcement agency shall be filed within 12 months of the most recent act of reprisal that is the subject of the complaint.

(b) A person who intentionally engages in acts of reprisal, retaliation, threats, coercion, or similar acts against an employee or applicant for employment with a public school employer for having made a protected disclosure is subject to a fine not to exceed ten thousand dollars ($10,000) and imprisonment in the county jail for a period not to exceed one year. An employee, officer, or administrator who intentionally engages in that conduct shall also be subject to discipline by the public school employer. If no adverse action is instituted by the public school employer, and it is determined that there is reasonable cause to believe that an act of reprisal, retaliation, threats, coercion, or similar acts prohibited by Section 87163, the local law enforcement agency may report the nature and details of the activity to the governing board of the community college district.

(c) In addition to all other penalties provided by law, a person who intentionally engages in acts of reprisal, retaliation, threats, coercion, or similar acts against an employee or applicant for employment with a public school employer for having made a protected disclosure shall be liable in an action for damages brought against him or her by the injured party. Punitive damages may be awarded by the court where the acts of the offending party are proven to be malicious. Where liability has been established, the injured party shall also be entitled to reasonable attorney's fees as provided by law. However, an action for damages shall not be available to the injured party unless the injured party has first filed a complaint with the local law enforcement agency.

(d) This section is not intended to prevent a public school employer, school administrator, or supervisor from taking, failing to take, directing others to take, recommending, or approving a personnel action with respect to an employee or applicant for employment with a public school employer if the public school employer, school administrator, or supervisor reasonably believes an action or inaction is justified on the basis of evidence separate and apart from the fact that the person has made a protected disclosure as defined in subdivision (e) of Section 87162.

(e) In any civil action or administrative proceeding, once it has been demonstrated by a preponderance of evidence that an activity protected by this article was a contributing factor in the alleged retaliation against a former, current, or prospective employee, the burden of proof shall be on the supervisor, school administrator, or public school employer to demonstrate by clear and convincing evidence that the alleged action would have occurred for legitimate, independent reasons even if the employee had not engaged in protected disclosures or refused an illegal order. If the supervisor, school administrator, or public school employer fails to meet this burden of proof in an adverse action against the employee in any administrative review, challenge, or adjudication in which retaliation has been demonstrated to be a contributing factor, the employee shall have a complete affirmative defense in the adverse action.

(f) Nothing in this article shall be deemed to diminish the rights, privileges, or remedies of an employee under any other federal or state law or under an employment contract or collective bargaining agreement.

(g) If the provisions of this section are in conflict with the provisions of a memorandum of understanding reached pursuant to Chapter 10.7 (commencing with Section 3540) of Division 4 of Title 1 of the Government Code, the memorandum of understanding shall be controlling without further legislative action.

SEC. 3. Nothing in this act is intended to supersede or limit the application of the privilege of subdivision (b) of Section 47 of the Civil Code to informants and proceedings conducted pursuant to Article 3 (commencing with Section 8547) of Chapter 6.5 of Division 1

of Title 2 of the Government Code, as confirmed in Braun v. Bureau of State Audits (1998) 67 Cal.App.4th 1382.

SEC. 4. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs that may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.

EXHIBIT 3
COPIES OF CODE SECTIONS CITED

§ 44110. Short title

This article shall be known and may be referred to as the Reporting by School Employees of Improper Governmental Activities Act.

(Added by Stats.2000, c. 531 (A.B.2472), § 1.)

§ 44111. Legislative intent

It is the intent of the Legislature that school employees and other persons disclose, to the extent not expressly prohibited by law, improper governmental activities.

(Added by Stats.2000, c. 531 (A.B.2472), § 1.)

§ 44112. Definitions

For the purposes of this article, the following terms have the following meanings:

(a) "Employee" means a public school employee as defined in subdivision (j) of Section 3540.1 of the Government Code.

(b) "Illegal order" means any directive to violate or assist in violating a federal, state, or local law, rule, or regulation or an order to work or cause others to work in conditions outside of their line of duty that would unreasonably threaten the health or safety of employees or the public.

(c) "Improper governmental activity" means an activity by a public school agency or by an employee that is undertaken in the performance of the employee's official duties, whether or not that activity is within the scope of his or her employment, and that meets either of the following descriptions:

(1) The activity violates a state or federal law or regulation, including, but not limited to, corruption, malfeasance, bribery, theft of government property, fraudulent claims, fraud, coercion, conversion, malicious prosecution, misuse of government property, or willful omission to perform duty.

(2) The activity is economically wasteful or involves gross misconduct, incompetency, or inefficiency.

(d) "Person" means any individual, corporation, trust, association, any state or local government, or any agency or instrumentality of any of the foregoing.

(e) "Protected disclosure" means a good faith communication that discloses or demonstrates an intention to disclose information that may evidence either of the following:

(1) An improper governmental activity.

(2) Any condition that may significantly threaten the health or safety of employees or the public if the disclosure or intention to disclose was made for the purpose of remedying that condition.

(f) "Public school employer" has the same meaning as in subdivision (k) of Section 3540.1 of the Government Code.

(Added by Stats.2000, c. 531 (A.B.2472), § 1.)

§ 44113. Use or attempt to use official authority or influence to interfere with protected disclosures; prohibitions; civil liability

(a) An employee may not directly or indirectly use or attempt to use the official authority or influence of the employee for the purpose of intimidating, threatening, coercing, commanding, or attempting to intimidate, threaten, coerce, or command any person for the purpose of interfering with the right of that person to disclose to an official agent matters within the scope of this article.

(b) For the purpose of subdivision (a), "use of official authority or influence" includes promising to confer or conferring any benefit; affecting or threatening to affect any reprisal; or taking, directing others to take, recommending, processing, or approving any personnel action, including, but not limited to appointment, promotion, transfer, assignment, performance evaluation, suspension, or other disciplinary action.

(c) For the purpose of subdivision (a), "official agent" includes a school administrator, member of the governing board of a school district or county board of education, county superintendent of schools, or the Superintendent of Public Instruction.

(d) An employee who violates subdivision (a) may be liable in an action for civil damages brought against the employee by the offended party.

(e) Nothing in this section shall be construed to authorize an individual to disclose information otherwise prohibited by or under law.

(Added by Stats.2000, c. 531 (A.B.2472), § 1.)

§ 44114. Written complaints; filing with local law enforcement agency; penalties; other rights and remedies

(a) A public school employee or applicant for employment with a public school employer who files a written complaint with his or her supervisor, a school administrator, or the public school employer alleging actual or attempted acts of reprisal, retaliation, threats, coercion, or similar improper acts prohibited by Section 44113 for having disclosed improper governmental activities or for refusing to obey an illegal order may also file a copy of the written complaint with the local law enforcement agency together with a sworn statement that the contents of the written complaint are true, or are believed by the affiant to be true, under penalty of perjury. The complaint filed with the local law enforcement agency shall be filed within 12 months of the most recent act of reprisal that is the subject of the complaint.

(b) A person who intentionally engages in acts of reprisal, retaliation, threats, coercion, or similar acts against a public school employee or applicant for employment with a public school employer for having made a protected disclosure is subject to a fine not to exceed ten thousand dollars ($10,000) and imprisonment in the county jail for a period not to exceed one year. Any public school employee, officer, or administrator who intentionally engages in that conduct shall also be subject to discipline by the public school employer. If no adverse action is instituted by the public school employer * * * and it is determined that there is reasonable cause to believe that an act of reprisal, retaliation, threats, coercion, or similar acts prohibited by Section 44113 occurred, the local law enforcement agency may report the nature and details of the activity to the governing board of the school district or county board of education, as appropriate.

(c) In addition to all other penalties provided by law, a person who intentionally engages in acts of reprisal, retaliation, threats, coercion, or similar acts against a public school employee or applicant for employment with a public school employer for having made a protected disclosure shall be liable in an action for damages brought against him or her by the injured party. Punitive damages may be awarded by the court where the acts of the offending party are proven to be malicious. Where liability has been established, the injured party shall also be entitled to reasonable attorney's fees as provided by law. However, an action for damages shall not be available to the injured party unless the injured party has first filed a complaint with the local law enforcement agency.

(d) This section is not intended to prevent a public school employer, school administrator, or supervisor from taking, failing to take, directing others to take, recommending, or approving a personnel action with respect to a public school employee or applicant for employment with a public school employer if the public school employer, school administrator, or supervisor reasonably believes the action or inaction is justified on the basis of evidence separate and apart from the fact that the person has made a protected disclosure as defined in subdivision (e) of Section 44112.

(e) In any civil action or administrative proceeding, once it has been demonstrated by a preponderance of evidence that an activity protected by this article was a contributing factor in the alleged retaliation against a former, current, or prospective public school employee, the burden of proof shall be on the supervisor, school administrator, or public school employer to demonstrate by clear and convincing evidence that the alleged action would have occurred for legitimate, independent reasons even if the public school employee had not engaged in protected disclosures or refused an illegal order. If the supervisor, school administrator, or public school employer fails to meet this burden of proof in an adverse action against the public school employee in any administrative review, challenge, or adjudication in which retaliation has been demonstrated to be a contributing factor, the public school employee shall have a complete affirmative defense in the adverse action.

(f) Nothing in this article shall be deemed to diminish the rights, privileges, or remedies of a public school employee under any other federal or state law or under an employment contract or collective bargaining agreement.

(g) If the provisions of this section are in conflict with the provisions of a memorandum of understanding reached pursuant to Chapter 10.7 (commencing with Section 3540) of Division 4 of Title 1 of the Government Code, the memorandum of understanding shall be controlling without further legislative action.

(Added by Stats.2000, c. 531 (A.B.2472), § 1. Amended by Stats.2001, c. 159 (S.B.662), § 68.)

§ 87160. Short title

This article shall be known and may be referred to as the Reporting by Community College Employees of Improper Governmental Activities Act.

(Added by Stats.2000, c. 531 (A.B.2472), § 2.)

§ 87161. Legislative intent

It is the intent of the Legislature that community college employees and other persons disclose, to the extent not expressly prohibited by law, improper governmental activities.

(Added by Stats.2000, c. 531 (A.B.2472), § 2.)

§ 87162. Definitions

For the purposes of this article, the following terms have the following meanings:

(a) "Employee" means a public school employee as defined in subdivision (j) of Section 3540.1 of the Government Code as construed to include community college employees.

(b) "Illegal order" means any directive to violate or assist in violating a federal, state, or local law, rule, or regulation or an order to work or cause others to work in conditions outside of their line of duty that would unreasonably threaten the health or safety of employees or the public.

(c) "Improper governmental activity" means an activity by a community college or by an employee that is undertaken in the performance of the employee's official duties, whether or not that activity is within the scope of his or her employment, and that meets either of the following descriptions:

(1) The activity violates a state or federal law or regulation, including, but not limited to, corruption, malfeasance, bribery, theft of government property, fraudulent claims, fraud, coercion, conversion, malicious prosecution, misuse of government property, or willful omission to perform duty.

(2) The activity is economically wasteful or involves gross misconduct, incompetency, or inefficiency.

(d) "Person" means any individual, corporation, trust, association, any state or local government, or any agency or instrumentality of any of the foregoing.

(e) "Protected disclosure" means a good faith communication that discloses or demonstrates an intention to disclose information that may evidence either of the following:

(1) An improper governmental activity.

(2) Any condition that may significantly threaten the health or safety of employees or the public if the disclosure or intention to disclose was made for the purpose of remedying that condition.

(f) "Public school employer" has the same meaning as in subdivision (k) of Section 3540.1 of the Government Code as construed to include community college districts.

(Added by Stats.2000, c. 531 (A.B.2472), § 2.)

§ 87163. Use or attempt to use official authority or influence to interfere with protected disclosures; prohibitions; civil liability

(a) An employee may not directly or indirectly use or attempt to use the official authority or influence of the employee for the purpose of intimidating, threatening, coercing, commanding, or attempting to intimidate, threaten, coerce, or command any person for the purpose of interfering with the right of that person to disclose to an official agent matters within the scope of this article.

(b) For the purpose of subdivision (a), "use of official authority or influence" includes promising to confer or conferring any benefit; affecting or threatening to affect any reprisal; or taking, directing others to take, recommending, processing, or approving any personnel action, including, but not limited to appointment, promotion, transfer, assignment, performance evaluation, suspension, or other disciplinary action.

(c) For the purpose of subdivision (a), "official agent" includes a community college administrator, member of the governing board of a community college district, or the Chancellor of the California Community Colleges.

(d) An employee who violates subdivision (a) may be liable in an action for civil damages brought against the employee by the offended party.

(e) Nothing in this section shall be construed to authorize an individual to disclose information otherwise prohibited by or under law.

(Added by Stats.2000, c. 531 (A.B.2472), § 2.)

§ 87164. Written complaints; filing with local law enforcement agency; penalties; other rights and remedies

(a) An employee or applicant for employment with a public school employer who files a written complaint with his or her supervisor, a community college administrator, or the public school employer alleging actual or attempted acts of reprisal, retaliation, threats, coercion, or similar improper acts prohibited by Section 87163 for having disclosed improper governmental activities or for refusing to obey an illegal order may also file a copy of the written complaint with the local law enforcement agency, together with a sworn statement that the contents of the written complaint are true, or are believed by the affiant to be true, under penalty of perjury. The complaint filed with the local law enforcement agency shall be filed within 12 months of the most recent act of reprisal that is the subject of the complaint.

(b) A person who intentionally engages in acts of reprisal, retaliation, threats, coercion, or similar acts against an employee or applicant for employment with a public school employer for having made a protected disclosure is subject to a fine not to exceed ten thousand dollars ($10,000) and imprisonment in the county jail for a period not to exceed one year. An employee, officer, or administrator who intentionally engages in that conduct shall also be subject to discipline by the public school employer. If no adverse action is instituted by the public school employer, and it is determined that there is reasonable cause to believe that an act of reprisal, retaliation, threats, coercion, or similar acts prohibited by Section 87163, the local law enforcement agency may report the nature and details of the activity to the governing board of the community college district.

(c)(1) The State Personnel Board shall initiate a hearing or investigation of a written complaint of reprisal or retaliation as prohibited by Section 87163 within 10 working days of its submission. The executive officer of the State Personnel Board shall complete findings of the hearing or investigation within 60 working days thereafter, and shall provide a copy of the findings to the complaining employee or applicant for employment with a public school employer and to the appropriate supervisors, administrator, or employer. This hearing shall be conducted in accordance with Section 18671.2 of the Government Code, this part, and the rules of practice and procedure of the State Personnel Board. When the allegations contained in a complaint of reprisal or retaliation are the same as, or similar to, those contained in another appeal, the executive officer may consolidate the appeals into the most appropriate format. In these cases, the time limits described in this paragraph shall not apply.

(2) Notwithstanding Section 18671.2 of the Government Code, no costs associated with hearings of the State Personnel Board conducted pursuant to paragraph (1) shall be charged to the board of governors. Instead, all of the costs associated with hearings of the State Personnel Board conducted pursuant to paragraph (1) shall be charged directly to the community college district that employs the complaining employee, or with whom the complaining applicant for employment has filed his or her employment application.

(d) If the findings of the executive officer of the State Personnel Board set forth acts of alleged misconduct by the supervisor, community college administrator, or public school employer, the supervisor, administrator, or employer may request a hearing before the State Personnel Board regarding the findings of the executive officer. The request for hearing and any subsequent determination by the board shall be made in accordance with the board's usual rules governing appeals, hearings, investigations, and disciplinary proceedings.

(e) If, after the hearing, the State Personnel Board determines that a violation of Section 87163 occurred, or if no hearing is requested and the findings of the executive officer conclude that improper activity has occurred, the board may order any appropriate relief, including, but not limited to, reinstatement, back pay, restoration of lost service credit if appropriate, and the expungement of any adverse records of the employee or applicant for employment with a public school employer who was the subject of the alleged acts of misconduct prohibited by Section 87163.

(f) Whenever the State Personnel Board determines that a supervisor, community college administrator, or public school employer has violated Section 87163, it shall cause an entry to that effect to be made in the supervisor's, community college administrator's, or public school employer's official personnel records.

(g) In order for the Governor and the Legislature to determine the need to continue or modify personnel procedures as they relate to the investigations of reprisals or retaliation for the disclosure of information by employees, the State Personnel Board, by June 30 of each year, shall submit a report to the Governor and the Legislature regarding complaints filed, hearings held, and legal actions taken pursuant to this section.

(h) In addition to all other penalties provided by law, a person who intentionally engages in acts of reprisal, retaliation, threats, coercion, or similar acts against an employee or applicant for employment

with a public school employer for having made a protected disclosure shall be liable in an action for damages brought against him or her by the injured party. Punitive damages may be awarded by the court where the acts of the offending party are proven to be malicious. Where liability has been established, the injured party shall also be entitled to reasonable attorney's fees as provided by law. However, an action for damages shall not be available to the injured party unless the injured party has first filed a complaint with the local law enforcement agency. Nothing in this subdivision requires an injured party to file a complaint with the State Personnel Board prior to seeking relief for damages in a court of law.

(i) This section is not intended to prevent a public school employer, school administrator, or supervisor from taking, failing to take, directing others to take, recommending, or approving a personnel action with respect to an employee or applicant for employment with a public school employer if the public school employer, school administrator, or supervisor reasonably believes an action or inaction is justified on the basis of evidence separate and apart from the fact that the person has made a protected disclosure as defined in subdivision (e) of Section 87162.

(j) In any civil action or administrative proceeding, once it has been demonstrated by a preponderance of evidence that an activity protected by this article was a contributing factor in the alleged retaliation against a former, current, or prospective employee, the burden of proof shall be on the supervisor, school administrator, or public school employer to demonstrate by clear and convincing evidence that the alleged action would have occurred for legitimate, independent reasons even if the employee had not engaged in protected disclosures or refused an illegal order. If the supervisor, school administrator, or public school employer fails to meet this burden of proof in an adverse action against the employee in any administrative review, challenge, or adjudication in which retaliation has been demonstrated to be a contributing factor, the employee shall have a complete affirmative defense in the adverse action.

(k) Nothing in this article shall be deemed to diminish the rights, privileges, or remedies of an employee under any other federal or state law or under an employment contract or collective bargaining agreement.

(*l*) If the provisions of this section are in conflict with the provisions of a memorandum of understanding reached pursuant to Chapter 10.7 (commencing with Section 3540) of Division 4 of Title 1 of the Government Code, the memorandum of understanding shall be controlling without further legislative action.

(Amended by Stats.2002, c. 81 (A.B.2034), § 1.)

EXHIBIT B

STATE OF CALIFORNIA

CALIFORNIA COMMUNITY COLLEGES
CHANCELLOR'S OFFICE
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SACRAMENTO, CA 95814-6511
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RECEIVED

MAR 16 2004

COMMISSION ON
STATE MANDATES

March 11, 2004

Paula Higashi, Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

Re: Test Claim: Reporting Improper Governmental Activities, 02-TC-24

Dear Ms. Higashi:

As an interested state agency, the Chancellor's Office has reviewed the above test claim in light of the following questions which address key issues before the Commission:

- Do the provisions [Ed. Code, §§ 87160, 87161, 87162, 87163 and 87164] impose a new program or higher level of service within an existing program upon local entities within the meaning of section 6, article XIII B of the California Constitution and costs mandated by the state pursuant to section 17514 of the Government Code?
- Does Government Code section 17556 preclude the Commission from finding that any of the test claim provisions impose costs mandated by the state?
- Have funds been appropriated for this program (e.g., state budget) or are there any other sources of funding available? If so, what is the source?

Education Code section 87160
Enacted in 2000 (Stats. 2000, ch. 531, § 2 (AB 2472)), this code section requires the new article (article 6 of chapter 1 of part 51 of division 7 of title 3 of the Education Code) to be referred to as the "Reporting by Community College Employees of Improper Governmental Activities Act" (the Act) and does not, standing alone, impose a new program or higher level of service on community college districts ("districts"). However, this code section is part of the statutory scheme discussed below.

Education Code section 87161
Enacted in 2000 (Stats. 2000, ch. 531, § 2 (AB 2472)), this code section states the legislative intent of the article and does not, standing alone, impose a new program or higher level of service on the districts. However, this legislative intent concerns the statutory scheme discussed below.

Education Code section 87162
Enacted in 2000 (Stats. 2000, ch. 531, § 2 (AB 2472)), this code section contains the operative definitions applicable to article 6 of chapter 1 of Part 51 of division 7 of title 3 of the Education Code, and does not, standing alone, impose a new program or higher level of service on the districts. However, the definitions contained in section 87162 are an integral part of the statutory scheme discussed below, and also confirm that community college districts are specifically covered by the requirements of the article.

Education Code section 87163
Enacted in 2000 (Stats. 2000, ch. 531, § 2 (AB 2472)), this code section sets forth conditions under which the direct or indirect actions of district employees would violate or interfere with the right of a person to disclose matters within the scope of the article to an official agent, and thus incur liability for civil damages. (Ed. Code, § 87163(a), (b) and (d).) Thus this code section, standing alone, does not impose a new program or higher level of service, but it is an integral part of the statutory scheme discussed below.

Education Code section 87164
Overview
The requirements of Education Code section 87164 overlap in part with several "whistleblower" statutes under which districts and their employees were covered prior to the passage of the Act. All of the violations of law defined in Education Code section 87162(c), and by implication, section 87162(b), were previously prohibited by the statutes discussed below.

- The Whistleblower Protection Act enacted in 1999 ("WPA"; Stats. 1999, ch. 156, § 1 (AB 1412); Gov. Code, §§ 9149.20-9149.23), covers district employees in its definition of "employee" (Gov. Code, § 9149.22(b)), protects district employees that report improper governmental activity, as defined,[1] to legislative committees, and allows for civil damages against district employees who violate or interfere with an employee's right to make such disclosures (Gov. Code, § 9149.23(a)). There have been no gaps in the requirements contained in the WPA. Nancy Patton of the Commission has confirmed that no test claims were filed with regard to this statutory enactment.

- The Local Government Disclosure of Information Act enacted in 1986 ("LGDIA"; Stats. 1986, ch. 353, § 7; Gov. Code, §§ 53296-53299) protects district employees or applicants for employment who file complaints with the districts with regard to "evidence regarding gross mismanagement or a significant waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety." (Gov. Code, § 53296(c).) The LGDIA covers districts in its definition of "local agency." (Gov. Code, § 53296(a).) The LGDIA allows for

[1] Government Code section 9149.22(c) provides that: "'Improper governmental activity' means any activity by a governmental agency or by an employee that is undertaken in the performance of the employee's official duties, whether or not that action is within the scope of his or her employment, and that (1) is in violation of any state or federal law or regulation, including, but not limited to, corruption, malfeasance, bribery, theft of government property, fraudulent claims, fraud, coercion, conversion, malicious prosecution, misuse of government property, or willful omission to perform duty, or (2) is economically wasteful, or involves gross misconduct, incompetency, or inefficiency."

civil damages, punitive damages, and attorneys' fees, and also imposes criminal penalties against employees who violate its provisions. (Gov. Code, § 53298.5(a) and (b).) There have been no gaps in the requirements contained in the LGDIA. Nancy Patton of the Commission has confirmed that no test claims were filed with regard to this statutory enactment.

- Labor Code sections 1101, et seq. contain whistleblower statutes ("Labor Code"; Lab. Code, § 1102.5, enacted in 1984 (Stats. 1984, ch. 1083, § 1)) applicable to employees of state and local governmental entities and private-sector employees, and is specifically applicable to employees of the districts (see Lab. Code, § 1106, enacted in 1992 (Stats. 1992, ch. 1230, § 1 (AB 3486))). The Labor Code whistleblower statutes are statutes of general application, laws which, to implement a state policy, do not impose "unique requirements on local governments and . . . apply generally to all residents and entities in the state" and thus do not impose a new program or higher level of service upon the districts. (*County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56-57.) These statutes protect employees that disclose information to a government or law enforcement agency "where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or violation or noncompliance with a state or federal regulation," allow for criminal penalties against employers and individual employees (Lab. Code, § 1103), make employers responsible for the actions of their employees (Lab. Code, § 1104), and allow civil suits for damages against employers (Lab. Code, § 1105). The appellate court has ruled that these statutes also protect government employees that disclose such information within the agency where they are employed, rather than to an outside government or law enforcement agency. (*Gardenhire v. Housing Authority of the City of Los Angeles* (2000) 85 Cal.App.4th 236, 243.) There have been no gaps in the whistleblower requirements contained in the Labor Code.

According to a Senate Judiciary Committee report regarding its August 8, 2000, hearing on AB 2472, the bill implementing the Act, and the Legislative Counsel's Digest in the chaptered legislation, there was legislative intent that the provisions of the California Whistleblower Protection Act, formerly known as the Reporting of Improper Governmental Activities Act (Gov. Code, §§ 8547-8547.12; enacted by Stats. 1993, ch. 12, § 8 (SB 37) [historically derived from former Gov. Code, § 10540, et seq., enacted by Stats. 1981, ch. 1168, and Stats. 1979, ch. 584]) apply to school districts and community college district employees. The California Whistleblower Protection Act applies to state employees, gubernatorial appointees and officeholders, employees of the University of California, and employees of the California State University.

The Test Claim

The District's test claim, in II (A)-(K) (at pp. 21-23) and in the Declaration of Tom Donner (at pp. 2-4), claims state mandated costs as follows:

A) "Pursuant to [the Act] to establish policies and procedures, and to periodically update those policies and procedures, to implement the act." There is no express requirement in the Act for districts to establish policies and procedures or to update the same. Prior to the passage of the Act, districts may have had policies in place pursuant to the LGDIA, which makes reference to the filing of complaints pursuant to "locally adopted administrative procedures" but does not require them. (Gov. Code, § 53297(c).) Indeed, the LGDIA offers an alternate process for filing complaints in situations where there are no local administrative procedures in place. (Gov. Code, § 53297(c).) Thus it does not appear that the Act mandates a new program or higher level of service upon the districts with regard to establishing and updating policies and procedures.

B) "Pursuant to [Ed. Code, § 87164(a)], to receive, file and maintain written complaints filed by school employees or applicants for employment alleging actual or attempted acts of reprisal, retaliation, threats, coercion or similar improper acts for having disclosed improper acts or for having disclosed improper governmental activities or for refusing to obey an illegal order." Prior to the passage of the Act, districts were required to receive, file and maintain written complaints filed by district employees or applicants for employment under the LGDIA. (Gov. Code, § 53297.) In addition, the Labor Code permits employees to disclose violations of Labor Code section 1102.5 to the districts. (*Gardenhire, supra*, 85 Cal.App.4th 236, 243.) As the requirements of the LGDIA and the Labor Code are similar to the requirements of the Act, it appears that, with regard to the requirement to "receive, file and maintain written complaints," the impact upon the districts would be minimal. Thus it does not appear that the Act mandates a new program or higher level of service upon the districts in this regard.

C) "Pursuant to [Ed. Code, § 87164(b)] to investigate, or to cooperate with law enforcement investigations of, written complaints, . . ." The LGDIA, which was in effect prior to the passage of the Act, imposes criminal penalties similar to those contained in the Act. (Gov. Code, § 53298.5(a).) Additionally, the whistleblower provisions in the Labor Code impose criminal penalties (Lab. Code, § 1103), and mention criminal prosecutions regarding the same (Lab. Code, § 1104). The districts lack enforcement jurisdiction with regard to criminal violations of the Act. In the event that a local law enforcement agency chooses to investigate criminal violation of the Act, Government Code section 17556 states:

> "the commission shall not find costs mandated by the state . . . if: . . .
>
> (g) The statute creates a new crime or infraction . . . *but only for the portion of the statute relating directly to the enforcement of the crime or infraction*." (Gov. Code, § 17556(g), emphasis added.)

It appears that cooperation with law enforcement investigations regarding criminal violations of the Act is not considered to be a cost mandated by the state. Education Code section 87164(b) does not require the districts to conduct civil investigations. The only entity expressly required to conduct civil investigations pursuant to the Act is the State Personnel Board (SPB). (Ed. Code, § 87164(c)(1).) Thus it does not appear that the Act mandates a new program or higher level of service upon the districts in this regard.

D) "Pursuant to [Ed. Code, § 87164(b)], to discipline, as may be required by law or the district's collective bargaining agreement, any employee, officer or administrator, who is found to have engaged in actual or attempted acts" in violation of the Act. The Act expressly requires employee discipline. However, districts were under an express duty to discipline employees under the LGDIA prior to the passage of the Act. (Gov. Code, § 53298.5(a).) The disclosure of information pursuant to Labor Code sections 1101 et seq. could potentially result in the imposition of discipline, although there is no express requirement for discipline within that statutory scheme. As the requirements of the LGDIA and the Labor Code are similar to the requirements of the Act, we believe that, with regard to the requirements for employee discipline, the impact upon the districts would be minimal. Thus it does not appear that the Act mandates a new program or higher level of service upon the districts.

E) "Pursuant to [Ed. Code, § 87164(h)], to respond, appear and defend in any civil action, directly or derivatively, when named as a party or otherwise required by the collective bargaining agreement, brought by a person alleging an employee or officer of the district" has violated the Act. Prior to the passage of the Act, districts were subject to defend in civil actions brought against their employees under virtually all of the provisions of the Act through the LGDIA (Gov. Code, § 53298.5(b)), the WPA (Gov. Code, § 9149.23), and the Labor Code (Lab. Code, §§ 1104, 1105). Having to defend in civil actions brought pursuant to the Act does not appear to mandate a new program or higher level of service upon the districts. There is also a question as to whether this claim is ripe for review, as the districts have not indicated that they have been required to defend in civil actions brought pursuant to the Act.

F) "Pursuant to [Ed. Code, § 87164(h)], to pay damages, directly or derivatively, including attorney's fees, when ordered by the court based upon the liability of the district, or as otherwise defined by the collective bargaining agreement." Prior to the passage of the Act, districts were subject to general damages, punitive damages, and attorneys' fees in civil actions under the LGDIA (Gov. Code, § 53298.5(b)), and for civil damages under the WPA (Gov. Code, § 9149.23) and the Labor Code (Lab. Code, § 1105). It does not appear that having to pay court-ordered damages and attorneys' fees under the Act, based upon the liability of the districts in civil actions, mandates a new program or higher level of service upon the districts. There is also a question as to whether this claim is ripe for review, as the districts have not indicated that they have been required to pay damages, directly or derivatively, including attorneys' fees, in civil actions brought pursuant to the Act. With regard to attorneys' fees brought pursuant to the private attorney general statute, the appellate court ruled that, "It was not until the County was ordered to pay and paid those fees that the County could apply for reimbursement under Government Code section 17500 et seq." (*County of Fresno v. Lehman* (1991) 229 Cal.App.3d 340, 346.)

G) "Pursuant to [Ed. Code, § 87164(c)], for [districts] to appear and participate in hearings and investigations initiated by the State Personnel Board when complaints alleging [violations of the Act] have been filed with the State Personnel Board." Prior to 2001 amendments to the Act (Stats. 2001, ch. 416, § 1 (AB 647)), there were no requirements for State Personnel Board ("SPB") hearings and investigations regarding whistleblower complaints, and thus no requirement that districts appear and participate in the same. It appears that the Act mandates a

new program or higher level of service upon the districts with regard to appearing and participating in hearings and investigations initiated by the SPB.

H) "Pursuant to [Ed. Code, § 87164(d), for [districts] to request a hearing before the State Personnel Board when the adverse findings of the hearing officer are incorrect." Prior to 2001 amendments to the Act (Stats. 2001, ch. 416, § 1 (AB 647)), there were no requirements for SPB hearings and the issuance of findings adverse to the districts regarding whistleblower complaints. It appears that the Act mandates a new program or higher level of service upon the districts with regard to their responses to adverse findings issued by the SPB.

I) "Pursuant to [Ed. Code, § 87164(e)], for [districts] . . . to comply with any ordered relief [by the SPB] including, but not limited to, reinstatement, backpay, restoration of lost service credit, and the expungement of any adverse records of the employee or employee applicant who was the subject of the acts of misconduct." Prior to 2001 amendments to the Act (Stats. 2001, ch. 416, § 1 (AB 647)), there were no requirements for SPB hearings and orders thereupon regarding whistleblower complaints, and thus no requirement for districts to comply with the same. It appears that the Act mandates a new program or higher level of service upon the districts with regard to compliance with relief ordered by the SPB.

J) "Pursuant to [Ed. Code, § 87164(f), for [districts], when the State Personnel Board determines that a supervisor, administrator or employer has violated Section 87163, to cause an entry to that effect to be made in the supervisor's, administrator's or employer's official personnel records." Prior to 2001 amendments to the Act (Stats. 2001, ch. 416, § 1 (AB 647)), there was no requirement for SPB hearings and orders thereon regarding whistleblower complaints, and thus no requirement that districts make entries in personnel files regarding the same. It appears that the Act mandates a new program or higher level of service upon the districts with regard to complying with findings of violations of the law by the SPB.

K) "Pursuant to [Ed. Code, § 87164(c)(2)], to reimburse the State Personnel Board for all of the costs associated with its hearings conducted pursuant to subdivision (c)(1)." Prior to 2001 amendments to the Act (Stats. 2001, ch. 416, § 1 (AB 647)), there was no requirement for SPB hearings regarding whistleblower complaints, and thus no requirement that districts bear costs regarding the same. There was legislative intent that the SPB's total hearing costs would fall upon the districts with the passage of the 2001 amendments,[2] although the law in this regard was far from clear. The law was clarified by amendments made in 2002 (Stats. 2002, ch. 81, § 1 (AB 2034)) to make it clear that, notwithstanding the language of Government Code section 18671.2,

[2] This confusion is due to the fact that, as amended by AB 647, Government Code section 87164(c) stated that the SPB hearings were to be "conducted in accordance with Section 18671.2 of the Government Code." Section 18671.2 provides that the SPB can bill the total cost of hearings held with regard to state employees upon the state agency employer. District employees are not state employees, and are employees of the local districts. (Ed. Code, § 70902(b)(4).) It appears that the Legislature, however, intended that the tie-in with 18671.2 would allow the college districts to be billed for the costs of such hearings. The Senate Rules Committee, Office of Senate Floor Analyses, 3rd reading floor analysis of the August 27, 2001, regarding amendments to the bill (which added the reference to section 18671.2) stated an intent that the college districts be billed: "Senate Floor Amendments of 8/27/01 clarify that (1) the existing provisions that allow the State Personnel Board (SPB) to bill state agencies for hearings conducted on whistleblower cases will also apply to community colleges for whistleblower hearings that may be conducted pursuant to this bill. . . ." (*Id.*, at pp. 1-2.)

no costs associated with hearings pursuant to the Act should be charged to the Board of Governors of the California Community Colleges, and that these costs must fall upon the districts. (Gov. Code, § 87164(c)(2).) This clarification codified the legislative intent of the Senate floor amendments of August 27, 2001, made before the passage of the prior version of the law. Thus it appears that the Act mandates a new program or higher level of service upon the districts through the enactment of AB 647 in 2001, and the subsequent clarification contained in AB 2034 in 2002.

There have been no monies allocated to community colleges nor the Chancellor's Office for reporting improper governmental activities.

Sincerely,

FREDERICK E. HARRIS, Assistant Vice Chancellor
College Finance and Facilities Planning

SixTen and Associates
Mandate Reimbursement Services

EXHIBIT C

KEITH B. PETERSEN, MPA, JD, President
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April 2, 2004

Paula Higashi, Executive Director
Commission on State Mandates
U.S. Bank Plaza Building
980 Ninth Street, Suite 300
Sacramento, California 95814

RECEIVED
APR 0 5 2004
COMMISSION ON STATE MANDATES

Re: Test Claim 02-TC-24
San Juan Unified School District and
Santa Monica Community College District
Reporting Improper Governmental Activities

Dear Ms. Higashi:

I have received the comments of the Chancellor's Office of the California Community Colleges ("CCC") dated March 11, 2004[1], to which I now respond on behalf of the test claimants.

A. The Comments of CCC are Incompetent and Should be Excluded

Test claimant objects to the comments of CCC, in total, as being legally incompetent and move that they be excluded from the record. Title 2, California Code of Regulations, Section 1183.02(d) requires that any:

> "...written response, opposition, or recommendations and supporting documentation shall be signed at the end of the document, under penalty of perjury by an authorized representative of the state agency, with the declaration that it is true and complete to the best of the representative's personal knowledge or information or belief."

Furthermore, the test claimant objects to any and all assertions or representations of fact made in the response (such as, "Nancy Patton of the Commission has confirmed that...") since CCC has failed to comply with Title 2, California Code of Regulations, Section 1183.02(c)(1) which requires:

---

[1] Although dated March 11, 2004, the document was e-mailed to my office on March 16, 2004, along with comments for 13 other test claims.

> "If assertions or representations of fact are made (in a response), they must be supported by documentary evidence which shall be submitted with the state agency's response, opposition, or recommendations. All documentary evidence shall be authenticated by declarations under penalty of perjury signed by persons who are authorized and competent to do so and must be based on the declarant's personal knowledge or information or belief."

The comments of CCC do not comply with these essential requirements. Since the Commission cannot use unsworn comments or comments unsupported by declarations, but must make conclusions based upon an analysis of the statutes and facts supported in the record, test claimant requests that the comments and assertions of CCC not be included in the Staff's analysis.

B. <u>The Reporting by Community College Employees of Improper Governmental Activities Act is not a Law of General Application</u>

At page 3 of its comments, CCC refers to Labor Code sections 1101, et seq., and concludes "The Labor Code whistleblower statutes are statutes of general application, laws which, to implement a state policy, do not impose 'unique requirements on local governments and ... apply generally to all residents and entities in the state' and thus do not impose a new program or higher level of service upon the districts." CCC cites <u>County of Los Angeles v. State of California</u> (1987) 43 Cal.3d 46, 56-57 as its authority.

CCC errs because the test must be applied to the test claim legislation, i.e., the "Reporting by Community College Employees of Improper Government Activities Act" (hereinafter "CC-RIGA") (Education Code Sections 87160, et seq.) and not to the Labor Code whistleblower statutes. An analysis of the CC-RIGA will show why it is not a law which applies generally to all residents and entities in the state.

(1) Under CC-RIGA, an "employee" is limited to community college employees (Education Code Section 87162(a)), whereas,

Under the Labor Code whistleblower statutes, "employee" includes, but is not limited to, any individual employed by the state or any subdivision thereof, any county, city, city and county, including any charter city or county, and any school district, community college district, municipal or public corporation, political subdivision, or the University of California." (Labor Code Section 1106)

(2) Under CC-RIGA, the protected reports include reports of "improper governmental

activity," defined as an activity that meets either of the following descriptions: (1) the activity violates a state or federal law or regulation, including, but not limited to, corruption, malfeasance, bribery, theft of government property, fraudulent claims, fraud, coercion, conversion, malicious prosecution, misuse of government property, or willful omission to perform duty, or (2) the activity is economically wasteful or involves gross misconduct, incompetency, or inefficiency (Education Code Section 87162(c)), whereas,

Under the Labor Code whistleblower statutes, the protected reports only include reports of a violation of a state or federal statute, or violation or noncompliance with a state or federal rule or regulation. (Labor Code Section 1102.1(a))

(3) Under CC-RIGA, a "protected disclosure" means a good faith communication that discloses, or demonstrates an intention to disclose, information that may evidence either of the following: (1) an improper governmental activity (see above), or (2) any condition that may significantly threaten the health or safety of employees or the public if the disclosure or intention to disclose was made for the purpose of remedying that condition (Education Code Section 87162(e)), whereas,

Under the Labor Code whistleblower statutes, the protected reports only include reports of a violation of state or federal statute, or violation or noncompliance with a state or federal rule or regulation. (Labor Code Section 1102.1(a))

(4) Under CC-RIGA, an employee may not directly or indirectly use or attempt to use official authority or influence for the purpose of intimidating, threatening, coercing, commanding, or attempting to intimidate, threaten, coerce, or command any person for the purpose of interfering with the right of that person to disclose (Education Code Section 87163(a)), whereas,

Under the Labor Code whistleblower statutes, an employer may not "retaliate." (Labor Code Section 1102.5(d)). The Labor Code does not define "retaliate," but a public employer would not use "official authority or influence."

(5) Under CC-RIGA, a person who violates the Act is not only subject to a fine and imprisonment, he shall also be subject to discipline by the public school employer (Education Code Section 87164(b)), whereas,

Under the Labor Code whistleblower statutes, an employer is only subject to fine and imprisonment. (Labor Code Section 1103) He/she/it is not subject to discipline because he/she/it is not a public school employee.

(6) Under CC-RIGA, the public school employer and employee are subject to proceedings by the State Personnel Board (Education Code Section 87164, subdivisions (c)(d)(e) and (f)),[2] whereas,

Under the Labor Code whistleblower statutes, employers and employees are not subject to proceedings by the State Personnel Board.

(7) Under CC-RIGA, punitive damages may be awarded by the court where the acts of the offending party are proven to be malicious (Education Code Section 87164(h)), whereas,

There is no such provision under the Labor Code whistleblower statutes. Arguably, one could point out that under Civil Code Section 3294, subdivision (a), punitive damages might be awarded upon a showing of malice, but the burden of proof under section 3294(a) is by "clear and convincing evidence." Under CC-RIGA, only a "preponderance of evidence" is required to shift the burden of proof to the supervisor, school administer, or public school employer. (Education Code Section 87164(j))

(8) Under CC-RIGA, the injured party is also entitled to reasonable attorney's fees (Education Code Section 87164(h)), whereas,

There is no such provision under the Labor Code whistleblower statutes.

The above comparison shows clearly that CC-RIGA is not a law which applies equally to all residents and entities in the state.

The decision in _County of Los Angeles v. State of California_ (*supra*) was further relied upon and explained in _City of Sacramento v. State of California_ (1990) 50 Cal.3d 51. (hereinafter "_Sacramento II_") There, the Supreme Court explained its _County of Los Angeles_ decision:

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

[2] At pages 5-6, CCC concurs that these sections contain new programs or higher levels of service. CCC did not consider these additional duties as also making them "unique requirements".

in this respect from private employers.'" (Opinion, at pages 66-67)

The above comparison of CC-RIGA with the Labor Code whistleblower statutes shows that community colleges, in compliance with CC-RIGA, are, in fact, "distinguishable from private employers" when complying with the Labor Code whistleblower statutes.

C. CC-RIGA is a New Program

CCC's "overview" at pages 2-3 provides an extensive review of the Whistleblower Protection Act enacted in 1999, the Local Government Disclosure of Information Act enacted in 1986, and the Labor Code whistleblower statutes as amended in 1984. The comments imply that these pre-existing programs prevent the test claim legislation, enacted in 2000, from being "new" programs.

To make sure that there is no question as to this argument, a district may seek subvention for costs imposed by legislation after January 1, 1975, but reimbursement is limited to costs incurred after July 1, 1980. Government Code Section 17514; *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564, 1581 All of the statutes referenced by CCC are post 1975. They would be subject to reimbursement if alleged and found to be a mandate.

D. Education Code Section 17556(g) Does Not Bar a Finding That the Test Claim Legislation Creates a New Mandate.

Education Code Section 87162, subdivision (b), states, *inter alia*, that a person who intentionally engages in acts of reprisal, retaliation, threats, coercion, or similar acts against an employee is subject to a fine not to exceed ten thousand dollars ($10,000) and imprisonment in the county jail for a period not to exceed one year. CCC concludes that this provision is subject to subdivision (g) of Government Code Section 17556 and does not, therefore, appear to be a new program or higher level of service upon districts in this regard.

Government Code Section 17556, subdivision (g) provides:

> "The commission shall not find costs mandated by the state, as defined in Section 17514, in any claim submitted by a local agency or school district, if, after a hearing, the commission finds that:...
>
> (g) The statute created a new crime or infraction, eliminated a crime or infraction, or changed the penalty for a crime or infraction, but only for that portion of the statute relating directly to the enforcement of the crime or infraction."

Nothing in the test claim, or in the activities alleged therein, claims any reimbursement for that portion of the statute relating directly to the enforcement of the crime or infraction. Therefore, the comment of CCC is without merit.

E. A "Minimum Cost" Argument is Improper

At page 5 of its comments, CCC concurs that the test claim legislation requires employee discipline, but supposes that the impact upon districts would be minimal. CCC concludes that it would therefore not appear to mandate a new program or higher level of service upon the districts.

A "minimum cost" argument is not found in Government Code Section 17556. In addition, the supposition that costs would be minimal is not supported by any acceptable evidence in the record. Finally, the determination of the existence of a mandate requires the determination of total costs involved in the test claim legislation, and not just the costs of any particular component.

F. "Ripe for Review" Arguments are Irrelevant for Test Claim Determinations

Twice, the comments of CCC argue that there is a question as to whether the claim is "ripe for review." The first occasion, at page 5, relates to the requirement to appear and defend; the second, also at page 5, relates to responding to damages. The basis for the argument is that the test claimants have not indicated that they have already been required to appear and defend, or respond to damages. This argument is irrelevant for test claim determinations.

There is no statutory or regulatory requirement that a test claimant must actually have experienced every element of a test claim. This is why the declaration of Tom Donner of Santa Monica Community College District declares:

> "It is estimated that the Santa Monica Community College District, to the extent improper activities may be reported, will incur approximately $1,000, or more, annually, in staffing and other costs in excess of any funding provided to school districts and the state...to implement these new duties mandated by the state for which the school district has not been reimbursed by any federal, state, or local government agency, and for which it cannot otherwise obtain reimbursement." (Declaration of Tom Donner dated May 26, 2003, pages 4-5, emphasis supplied)

A test claimant acts in a representative capacity for every school district or community college district in the state. Any one district may experience a test claim activity one

year, but may not in the next.

CERTIFICATION

I certify by my signature below, under penalty of perjury under the laws of the State of California, that the statements made in this document are true and complete to the best of my own personal knowledge or information or belief.

Sincerely,

Keith B. Petersen

C: Per Mailing List Attached

DECLARATION OF SERVICE

RE: Reporting Improper Governmental Activities 02-TC-24
CLAIMANT: San Juan Unified School District and
Santa Monica Community College District

I declare:

I am employed in the office of SixTen and Associates, which is the appointed representative of the above named claimant(s). I am 18 years of age or older and not a party to the within entitled matter.

On the date indicated below, I served the attached: letter of April 2, 2004 , addressed as follows:

Paula Higashi
Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

AND per mailing list attached

FAX: (916) 445-0278

☒ **U.S. MAIL:** I am familiar with the business practice at SixTen and Associates for the collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at SixTen and Associates is deposited with the United States Postal Service that same day in the ordinary course of business.

☐ **OTHER SERVICE:** I caused such envelope(s) to be delivered to the office of the addressee(s) listed above by:

(Describe)

☐ **FACSIMILE TRANSMISSION:** On the date below from facsimile machine number (858) 514-8645, I personally transmitted to the above-named person(s) to the facsimile number(s) shown above, pursuant to California Rules of Court 2003-2008. A true copy of the above-described document(s) was(were) transmitted by facsimile transmission and the transmission was reported as complete and without error.

☐ A copy of the transmission report issued by the transmitting machine is attached to this proof of service.

☐ **PERSONAL SERVICE:** By causing a true copy of the above-described document(s) to be hand delivered to the office(s) of the addressee(s).

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on 4/2/04 , at San Diego, California.

Diane Bramwell

Original List Date: 6/18/2003
Last Updated: 6/19/2003
List Print Date: 09/09/2003
Claim Number: 02-TC-24
Issue: Reporting Improper Governmental Activities

Mailing Information: Other

Mailing List

TO ALL PARTIES AND INTERESTED PARTIES:

Each commission mailing list is continuously updated as requests are received to include or remove any party or person on the mailing list. A current mailing list is provided with commission correspondence, and a copy of the current mailing list is available upon request at any time. Except as provided otherwise by commission rule, when a party or interested party files any written material with the commission concerning a claim, it shall simultaneously serve a copy of the written material on the parties and interested parties to the claim identified on the mailing list provided by the commission. (Cal. Code Regs., tit. 2, § 1181.2.)

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SixTen & Associates
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Fax: (858) 514-8645

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Education Mandated Cost Network
1121 L Street, Suite 1060
Sacramento, CA 95814

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Fax: (916) 446-2011

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Claimant
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Mandate Resource Services
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Fax: (916) 727-1734

Ms. Sandy Reynolds
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Mr. Michael Havey
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Mr. Gerald Shelton
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Mr. Thomas J. Nussbaum (G-01)
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Fax: (916) 323-8245

Mr. Thomas J. Donner
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Claimant
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Ms. Jill Bowers
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Sacramento, CA 95814

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Fax: (916) 324-5567

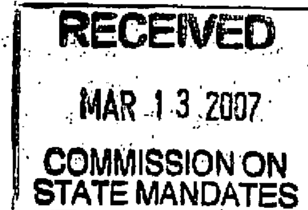
EXHIBIT D

DEPARTMENT OF FINANCE

ARNOLD SCHWARZENEGGER, GOVERNOR

915 L STREET ■ SACRAMENTO CA ■ 95814-3706 ■ WWW.DOF.CA.GOV

March 9, 2007



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

Dear Ms. Higashi:

The Department of Finance has reviewed the test claim submitted June 5, 2003 by the San Juan Unified School District (claimant) asking the Commission to determine whether specified costs incurred under various sections of the Education Code are reimbursable state mandated costs (Claim No. CSM-02-TC-24 "Reporting Improper Governmental Activities").

Before addressing the individual activities specified in the test claim statutes we note that Sections 1102.5-1106 of the Labor Code already protect employees who disclose information of unlawful activity to a government or law enforcement agency, allow for criminal penalties, and hold employers liable. Specifically, Section 1106 of the Labor Code states "For purposes of Sections 1102.5, 1102.6, 1102.7, 1102.8, 1104, and 1105, "employee" includes, but is not limited to, any individual employed by the state or any subdivision thereof, any county, city, city and county, including any charter city or county, and any school district, community college district, municipal or public corporation, political subdivision, or the University of California." In addition, subdivision (f) of Section 1102.5 also includes penalties against an employer that is a corporation or a limited liability company. The pre-existing Labor Code sections are laws of general application, applying to both the private sector, and local and state government. Further:

- Section 1104 of the Labor Code specifically states that "In all prosecutions under this chapter, the employer is responsible for the acts of his managers, officers, agents, and employees." Thus, since the Labor Code is pre-existing law of general application, any activity related to complying with or enforcing the provisions of the test claim statutes, Education Code Sections 44110-44114 and 87154-87164, would not be new to LEAs and community college districts, and thus the state is not obligated to reimburse them.

- The Local Government Disclosure of Information Act enacted in 1986 ((LGDIA); Gov. Code, §§ 53296-53299) protects, from reprisal action, district employees or applicants for employment who file complaints of "gross mismanagement or significant waste of funds, an abuse of authority, or a substantial and specific danger to public health safety" with districts and holds any local officer, manager or supervisor individually liable. Furthermore, the LGDIA states that, "...any local officer, manager, or supervisor who has been found by a court to have violated the provisions of Section 53298 ... shall be individually liable for damages in an action brought against him or her by the injured employee. Section 53298.5(b) places no requirement or liability upon the district for its employee's court

ordered damages and thus Section 53298.5(b) does not impose a reimbursable state mandate.

- The Whistleblower Protection Act enacted in 1999 ((WPA); Gov. Code, §§ 1949.20-1949.23), protects district employees that report improper governmental activity, as defined, to legislative committees, and allows for civil damages against district employees who violate or interfere with an employee's right to make such disclosures. These sections clearly state that while the offending employee may be liable in an action for civil damages, the employer is not obligated to pay its employee's judgments. Any payment by the employer on behalf of the employee would be a voluntary action by the LEA and not a reimbursable state mandate.

- Subdivision (g) of Section 44114 and subdivision (l) of Section 87164 of the Education Code state that if any of the provisions of the Reporting by School Employees of Improper Governmental Activities Act ("Act") are in conflict with provisions of the public school employer's collective bargaining agreement, the terms of the collective bargaining agreement supersede the Act. Since LEAs enter into these collective bargaining agreements voluntarily, any resulting costs incurred by the district for activities which exceed those required by the Education Code would be voluntary and are not reimbursable mandates.

In summary, since the employee protections provided for in the test claim statutes are the same as the laws of general application included in Labor Code Sections 1102.5-1106, the test claim statutes do not establish a new program or impose a higher level of service. Further, these Education Code Sections duplicate prior law establishing the LGDIA and the WPA and do not create new duties for LEAs. Therefore the whole of this test claim is not a reimbursable mandate. However, we will address the individual claim activities below:

Commencing with page 19 of the test claim, the claimant has identified the following new duties, which it asserts are reimbursable state mandates:

1) Pursuant to Education Code Sections 44110 – 44114 and 87154-87164, "to establish policies and procedures, and to periodically update those policies and procedures, to implement the act."

Finance response:

The specific language of Education Code Sections 44110 – 44114 and 87154-87164 does not require school and community college districts to establish or update any policies and procedures to implement the Act. In addition, while Education Code Sections 44110 – 44114 apply specifically to public school employers, none of the requirements is a new requirement for LEAs. Labor Code Sections 1102.5 – 1106 protect employees who disclose information of unlawful activity to a government or law enforcement agency, allow for criminal penalties, and hold employers liable. The Labor Code statutes are laws of general application, applying to both the private sector and local and state government. Thus, since the test claim does not impose a higher level of service and the activities cited are not new to LEAs as they were required by existing law, this is not a reimbursable mandate. Further, none of the activities cited here would be new since the Education Code Sections are consistent with prior law establishing the LGDIA and WPA.

2) Pursuant to Education Code Section 44114, subdivision (a) and Section 87164 (a), "to receive, file and maintain written complaints filed by school employees or applicants for employment alleging actual or attempted acts of reprisal, retaliation, threats, coercion or similar improper acts for having disclosed improper governmental activities or for refusing to obey an illegal order."

Finance response:

The specific language of Education Code Section 44114, subdivision (a) and Section 87164 (a) does not require a local education agency or community college district to complete any of the above claimed activities. The language states that any employee that has filed a complaint with his or her supervisor, a school administrator, or the public school employer, may also file a copy of the complaint with the local law enforcement agency. Therefore, this Section does not impose a new program or higher level of service upon an LEA or community college district and is not a state-reimbursable activity.

3) Pursuant to Education Code Section 44114, subdivision (b) and Section 87164, subdivision (b):
   - "to investigate, or to cooperate with law enforcement investigations of, written complaints filed by school employees..."
   - "to discipline, as may be required by law or the district's collective bargaining agreement, any employee, officer or administrator, who is found to have engaged in actual or attempted acts..."

Finance response:

The specific language of subdivision (b) of Education Code Section 44114 and Section 87164, subdivision (b) does not make any reference to investigating or cooperating with law enforcement, nor does the specific language of the Section place any requirement for discipline upon LEAs or community college districts. The language states that a person who intentionally engages in prohibited acts is subject to local law enforcement penalties of a fine of $10,000 and imprisonment for up to one year. In addition to the penalties enforceable by local law enforcement, the Section states that "Any public school employee, officer, or administrator who intentionally engages in that conduct shall also be subject to discipline by the public school employer." This is not a mandated activity, only an authorization for the LEA and community college districts to discipline the employee. That authority is evidenced by the next sentence of this Section which states, "If no adverse action is instituted by the public school employer...the local law enforcement agency may report the nature and details of the activity to the governing board of the school district or the county board of education..." Further, the Section does not make any reference to the scope or magnitude of any discipline the LEA may choose to implement. It is likely that any discipline would be consistent with the LEA's collective bargaining agreement. Since LEAs enter into these agreements voluntarily, any resulting activities are not reimbursable mandates.

4) Pursuant to Education Code Section 44114, subdivision (c):
   - "to respond, appear, and defend in any civil action..." and
   - "to pay damages, directly or derivatively, including attorney's fees, when ordered by the court..."

Finance response:

Both Labor Code Section 1102.6 and Education Code Section 44114 specifically state that in a civil action or administrative proceeding, once it has been demonstrated that a prohibited activity was an action against an employee, it becomes the employer's burden of proof to demonstrate that the action would have occurred regardless of the employee's participation in protected whistleblower activities. Thus, since the plain language of the test claim statutes does not require LEAs to participate in any civil action against their employee and the pre-existing Labor Code applies to both public and private employers, participating in any civil action is not a new activity, is voluntary for LEAs and is therefore not reimbursable.

Labor Code Section 1105 states that the injured employee may recover damages from his or her employer. Since the Education Code mirrors the pre-existing Labor Code Section and the Labor Code applies to both public and private employers, the test claim statute imposes no new activity or requirements on LEAs and is therefore not reimbursable. Education Code Section 44114 allows the injured employee to recover damages from the individual who participated in prohibited activities. Furthermore, Government Code Sections 53296-53299 under the LGDIA and 1949.20-1949.23 under the WPA, which protect district employees or applicants for employment who report improper governmental activities, allow for civil damages against district employees who violate or interfere with an employee's right to make such disclosures. These sections do not place any requirement upon the LEA itself, but only upon its employee who has violated the law. Therefore, they do not constitute a new program or higher level of service for the district. Any decision the LEA makes to pay the resulting damages for its employee is a voluntary action and is therefore not reimbursable.

Community College Specific Requirements

5) Pursuant to Education Code 87164, subdivision (c)(1), "The State Personnel Board shall initiate a hearing or investigation of a written complaint or reprisal as prohibited by [the Act] within 10 working days of its submission. This hearing will be conducted in accordance with...the rules of practice and procedure of the State Personnel Board."

Finance response:

The specific language of Education Code Section 87164 does not require community college districts to complete any of the above claimed activities. There are no requirements within the statute for community college districts to appear and participate in these hearings. This is not a mandated activity. The decision to appear at these hearings is voluntary. This Section does not impose a new program or higher level of service on Community College districts and is not a state-reimburseable activity.

6) Pursuant to Education Code 87164, subdivision (c)(2), "no costs associated with the hearings of the State Personnel Board...shall be charged to the board of governors. Instead all the costs associated with hearings...shall be charged directly to the community college district."

Finance response:

The specific language of Education Code Section 87164, subdivision (c)(2) requires a reimbursement of costs associated with the hearings of the State Personnel Board. This language does not require community college districts to undertake any new programs or provide a higher level of services. The payment of costs alone is not a state-reimburseable activity.

7) Pursuant to Education Code 87164, subdivision (d), if the findings of the State Personnel Board set forth [violations of the Act] [the community college districts] may request a hearing before the State Personnel Board regarding the findings.

Finance response:

The specific language of Education Code Section 87164, subdivision (d) does not require community college districts to complete any of the above claimed activities. The operative language of the Section only provides community college districts with the option of participating in hearings set forth by the State Personnel Board. This is not a mandated activity. The decision to appear at these hearings is voluntary. This Section does not impose a new program or higher level of service on community college districts and is not a state-reimburseable activity.

8) Pursuant to Education Code 87164, subdivision (e), if the State Personnel Board determines a violation of the Act, the board may order any appropriate relief.

The specific language of Education Code Section 87164, subdivision (e) does not impose any clear duties on community college districts. There is no indication of exactly what relief community college districts will be required to do in these situations. If these determinations only involve payment of monetary costs, these do not constitute a new program or higher level of service and thus is not a state-reimburseable activity.

9) Pursuant to Education Code 87164, subdivision (f), whenever the State Personnel Board determines that there was a violation of the Act, it shall cause an entry to be made in the relevant personnel files.

The specific language of Education Code 87164, subdivision (f) does not impose any clear duty on community college districts. It is unclear what community college districts are required to do when the State Personnel Board "causes" an entry to be made to official personnel records. If this merely is a cost related to the hearings, this Section does not impose a new program or higher level of service on community college districts and therefore is not a state-reimburseable activity.

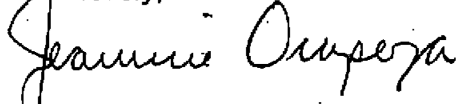
As the result of our review, we have concluded for the above mentioned reasons, that the test claim statutes do not create any reimbursable mandated activities for LEAs or community college districts.

As required by the Commission's regulations, we are including a "Proof of Service" indicating that the parties included on the mailing list which accompanied your June 5, 2003 letter have been provided with copies of this letter via either United States Mail or, in the case of other state agencies, Interagency Mail Service.

As required by the Commission's regulations, we are including a "Proof of Service" indicating that the parties included on the mailing list which accompanied your June 5, 2003 letter have been provided with copies of this letter via either United States Mail or, in the case of other state agencies, Interagency Mail Service.

If you have any questions regarding this letter, please contact Sara Swan, Principal Program Budget Analyst or Thomas Todd, Principal Program Budget Analyst at (916) 445-0328.

Sincerely,



JEANNIE OROPEZA
Program Budget Manager

Attachments

Attachment A

DECLARATION OF THOMAS TODD
DEPARTMENT OF FINANCE
CLAIM NO. 02-TC-24

1. I am currently employed by the State of California, Department of Finance (Finance), am familiar with the duties of Finance, and am authorized to make this declaration on behalf of Finance.

2. We concur that the sections relevant to this claim are accurately quoted in the test claim submitted by claimants and, therefore, we do not restate them in this declaration.

I certify under penalty of perjury that the facts set forth in the foregoing are true and correct of my own knowledge except as to the matters therein stated as information or belief and, as to those matters, I believe them to be true

3-9-07
at Sacramento, CA

Thomas Todd

PROOF OF SERVICE

Test Claim Name: Reporting Improper Governmental Activities
Test Claim Number: 02-TC-24

I, the undersigned, declare as follows:
I am employed in the County of Sacramento, State of California, I am 18 years of age or older and not a party to the within entitled cause; my business address is 915 L Street, 7th Floor, Sacramento, CA 95814.

On March 9, 2007, I served the attached recommendation of the Department of Finance in said cause, by facsimile to the Commission on State Mandates and by placing a true copy thereof: (1) to claimants and nonstate agencies enclosed in a sealed envelope with postage thereon fully prepaid in the United States Mail at Sacramento, California; and (2) to state agencies in the normal pickup location at 915 L Street, 7th Floor, for Interagency Mail Service, addressed as follows:

A-16
Ms. Paula Higashi, Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

B-29
Legislative Analyst's Office
Attention Marianne O'Malley
925 L Street, Suite 1000
Sacramento, CA 95814

Sixten & Associates
Attention: Keith Petersen
5252 Balboa Avenue, Suite 807
San Diego, CA 92117

Mandated Cost Systems, Inc.
Attention: Steve Smith
2275 Watt Avenue, Suite C
Sacramento, CA 95825

E-8
State Board of Education
Attention: Bill Lucia, Executive Director
721 Capitol Mall, Room 532
Sacramento, CA 95814

B-8
State Controller's Office
Division of Accounting & Reporting
Attention: William Ashby
3301 C Street, Room 500
Sacramento, CA 95816

Education Mandated Cost Network
C/O School Services of California
Attention: Dr. Carol Berg, PhD
1121 L Street, Suite 1060
Sacramento, CA 95814

E-8
Department of Education
School Business Services
Attention: Marie Johnson
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Sacramento, CA 95814

San Diego Unified School District
Attention: Arthur Palkowitz
4100 Normal Street, Room 3159
San Diego, CA 92103-2682

California Teachers Association
Attention: Steve DePue
2921 Greenwood Road
Greenwood, CA 95635

Girard & Vinson
Attention: Paul Minney
1676 N. California Blvd., Suite 450
Walnut Creek, CA 95496

San Juan Unified School District
3738 Walnut Ave.
Carmichael, CA 95609-0477

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 at Sacramento, California.

Mui Phung

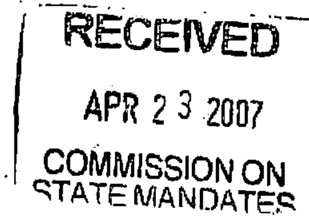
CALIFORNIA STATE PERSONNEL BOARD
801 Capitol Mall • Sacramento, California 95814 • www.spb.ca.gov

EXHIBIT E

Telephone: (916) 653-1403
Facsimile: (916) 653-4256
TDD: (916) 653- 1498

April 20, 2007

Paula Higashi, Executive Officer
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814



RECEIVED
APR 23 2007
COMMISSION ON STATE MANDATES

Re: Notice of Complete Test Claim Filing and Schedule for Comments – *Reporting Improper Governmental Activities*; 02-TC-24; response of the State Personnel Board

Dear Ms. Higashi:

The State Personnel Board (SPB) is in receipt of your correspondence, dated March 22, 2007, wherein the Commission on State Mandates (CSM) requested that the SPB provide the CSM with certain specified information related to whistleblower retaliation complaints filed with the SPB by community college employees, or applicants for community college employment, pursuant to the provisions of Education Code section 87164. In accordance with that request, the following information is provided:

(1) **On a per year basis, beginning in January 1, 2001, the number of cases that the SPB has received under Education Code section 87164, subdivision (c).**

Response:

2001 – 0 complaints were filed with the SPB. (Government Code section 87164 did not authorize community college employees, or applicants for community college employment, to file complaints with the SPB during 2001.)

2002 – Two (2) complaints were filed with the SPB.

2003 – Two (2) complaints were filed with the SPB.

2004 – Three (3) complaints were filed with the SPB.

2005 – One (1) complaint was filed with the SPB.

2006 – Three (3) complaints were filed with the SPB.

2007 – To date, one (1) complaint has been filed with the SPB.

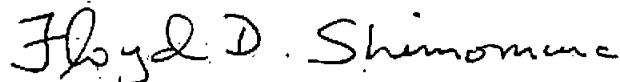
(2) **Beginning in January 1, 2002, the cost charged to community college districts pursuant to Education Code section 87164, subdivision (c)(2).**

Response:

To date, the SPB has charged the community college districts **$4,860.91** for all whistleblower retaliation complaints filed by community college employees, or applicants for community college employment, that it has processed. The three cases from 2006 are, however, still in the hearing process.

Please do not hesitate to contact the SPB if the CSM requires additional information on this matter in the future.

Sincerely,



FLOYD D. SHIMOMURA
Executive Officer

[CSM-cor-042007-bam fds]

EXHIBIT F

Hearing Date: September 27, 2007
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ITEM ____

TEST CLAIM
DRAFT STAFF ANALYSIS

Education Code Sections 44110 - 44114, and 87160 - 87164

Statutes 2000, Chapter 531
Statutes 2001, Chapter 159
Statutes 2001, Chapter 416
Statutes 2002, Chapter 81

Reporting Improper Governmental Activities (02-TC-24)
San Juan Unified School District and Santa Monica Community College District, Claimants

EXECUTIVE SUMMARY

Background

This test claim addresses the procedures used to protect kindergarten through 12th grade (K-12) and community college employees and applicants for employment from employees, officers, or administrators who intentionally engage in acts of reprisal, or coercion against an employee or applicant for employment who has disclosed improper governmental activity of the employer.

In these circumstances, the test claim statutes, allow K-12 and community college employees or applicants for employment to file a complaint with local law enforcement agencies. Supervisors, administrators, or employers that have been found to have engaged in retaliatory or coercive activities are subject to civil and criminal liabilities, and punitive damages. Community college employees and applicants for employment are provided the additional protection of being allowed to file their complaint with the State Personnel Board (SPB), which then must conduct a hearing or investigation to investigate and remedy these complaints.

Claimants contend that the test claim statutes impose new requirements on K-12 school districts and community college districts resulting in increased costs. These new requirements include: (1) establishing policies and procedures; (2) receiving, filing, and maintaining written complaints; (3)investigating or cooperating with law enforcement investigations; (4) disciplining employees, officers, or administrators found to have engaged in retaliatory activities; (5) responding, appearing and defending in any civil action; and (6) paying any court ordered damages. In addition, claimants assert that the test claim statutes impose activities on community college districts associated with an SPB hearing or investigation initiated by a community college employee or applicant for employment. As a result, claimants assert the test claim statutes constitute a reimbursable state-mandated program within the meaning of article XIII B, section of the California Constitution.

The California Community Colleges, Chancellor's Office (Chancellor's Office) asserts that claimants are possibly entitled to reimbursement for activities associated with the SPB hearings and orders made in the course of those hearings, because prior to the enactment of the test claim statutes there was no requirement for an SPB hearing in community college whistleblower cases.

The Department of Finance (Finance) argues that the test claim statutes do not constitute a reimbursable state-mandated program for the following reasons: (1) the language of the test claim statutes do not require the activities claimed; (2) the activities do not constitute a new program or higher level of service, as they were required by existing law; and (3) collective bargaining agreements are entered into voluntarily, and therefore, "any resulting costs incurred by the district for activities which exceed those required by the Education Code would be voluntary and are not reimbursable."

Staff Findings

Staff finds that the plain language of Education Code sections 44110 – 44114 does not mandate any activities upon K-12 school districts. Thus, Education Code sections 44110 – 44114 do not impose any state mandated activities upon K-12 school districts subject to article XIII B, section 6 of the California Constitution.

Staff also finds that under *Department of Finance v. Commission on State Mandates* (*Kern High School Dist.*) (2003) 30 Cal.4th 727, Education Code section 87160 – 87164, as it applies to *employees* of a community college district, does not impose state-mandated activities upon community college districts. It is the community college district's underlying decision during collective bargaining which triggers any requirements Education Code section 87164 may impose with respect to the "whistleblower" cases of a district employee.

However, in regard to *applicants* for employment of community college districts, who are not currently employed by the district, Education Code section 87164, does impose reimbursable state-mandated programs upon community college districts relating to the State Personnel Board hearings required by Education Code section 87164.

Conclusion

Staff concludes that Education Code section 87164, subdivisions (c)(1), (c)(2), and (f), as amended by Statutes 2001, chapter 416, and Statutes 2002, Chapter 81, constitutes a reimbursable state-mandated program on community college districts within the meaning of article XIII B, section 6 of the California Constitution, and Government Code section 17514, for the following specific new activities when a new applicant for employment files a whistleblower complaint with the State Personnel Board:

- Beginning January 1, 2003, fully comply with the rules of practice and procedure of the State Personnel Board. This includes serving the applicant for employment and the SPB with a written response to the applicant's complaint addressing the allegations, and responding to investigations or attending hearings, and producing documents during investigations or hearings (Ed. Code § 87164, subd. (c)(1))
- Beginning January 1, 2003, pay for all costs associated with the State Personnel Board hearing regarding a complaint filed by a new applicant for employment (Ed. Code § 87164, subd. (c)(2))
- Beginning January 1, 2002, make an entry into the official personnel record of a supervisor, community college administrator, or public school employer, who is found by the State Personnel Board to have violated Education Code section 87163 (Ed. Code § 87164, subd. (f)).

Staff further concludes that Education Code sections 44110 – 44114, as added and amended by Statutes 2000, chapter 531, and Statutes 2001, chapter 159 do not impose any state-mandated activities upon K-12 school districts and, thus, are not subject to article XIII B, section 6 of the California Constitution. In addition, Education Code sections 87160 – 87164, as added and amended by Statutes 2000, chapter 531, Statutes 2001, chapter 159, Statutes 2001, chapter 416, and Statutes 2002, Chapter 81, as applicable to community college employees, do not impose any state-mandated activities upon community college districts and, thus, are not subject to article XIII B, section 6 of the California Constitution.

Any other test claim statute and allegation not specifically approved above, do not impose a reimbursable state-mandated program subject to article XIII B, section 6 of the California Constitution.

Recommendation

Staff recommends the Commission adopt this staff analysis and partially approve this test claim.

STAFF ANALYSIS

Claimants

San Juan Unified School District and Santa Monica Community College District

Chronology

06/05/03	Claimants, San Juan Unified School District and Santa Monica Community College District, file test claim with the Commission on State Mandates (Commission)
06/19/03	Commission staff issues completeness letter and requests comments
07/08/03	The California Community Colleges, Chancellor's Office (Chancellor's Office) and the Department of Finance (Finance) request extensions of time for comments
07/08/03	Commission staff grants extension of time for comments to August 18, 2003
09/08/03	The Attorney General, on behalf of Finance, requests an extension of time for comments
09/09/03	Commission staff grants extension of time for comments to October 8, 2003
10/23/03	The Attorney General, on behalf of Finance, requests an extension of time for comments
10/24/03	Commission staff grants extension of time for comments to December 18, 2003
10/31/03	Finance requests an extension of time for comments
11/07/03	Commission staff grants extension of time for comments to February 7, 2004
02/18/04	Finance requests an extension of time for comments
02/18/04	Commission staff grants extension of time for comments to May 18, 2004
03/16/04	The Chancellor's Office files comments to the test claim
04/05/04	Claimants file response to comments by the Chancellor's Office
06/14/04	Finance requests an extension of time for comments
06/14/04	Commission staff grants extension of time for comments to August 9, 2004
09/09/04	Finance requests an extension of time for comments
09/14/04	Commission staff grants extension of time for comments to December 9, 2004
09/24/04	The Attorney General requests to be removed from the test claim mailing list

12/24/04	Finance requests an extension of time for comments
12/28/04	Commission staff grants extension of time for comments to March 9, 2005
03/15/05	Finance requests an extension of time for comments
03/17/05	Commission staff grants extension of time for comments to June 9, 2005
10/03/05	Commission staff grants extension of time for comments to December 1, 2005
02/03/06	Finance requests an extension of time for comments
02/07/06	Commission staff grants extension of time for comments to April 3, 2006
03/13/07	Finance files comments to the test claim
03/22/07	Commission staff issues request for comments from the State Personnel Board by April 23, 2007 and extension of time for comments to May 23, 2007
04/23/07	The State Personnel Board files comments to the test claim
07/24/07	Commission staff issues draft staff analysis

Background

This test claim addresses the procedures used to protect kindergarten through 12th grade (K-12) and community college employees and applicants for employment from employees, officers, or administrators who intentionally engage in acts of reprisal, or coercion against an employee or applicant for employment who has disclosed improper governmental activity of the employer.

Test Claim Statutes

The legislative intent behind the test claim statutes, Education Code sections 44110 – 44114 and 87160 – 87164, as added and amended in 2000, 2001, and 2002, is for K-12 and community college employees[1] and applicants for employment to disclose improper governmental activities. The test claim statutes define "improper governmental activities" as activities by an employee in the performance of the employee's official duties, whether within the scope of the employee's duties or not, that violates state or federal law or regulation, or that is economically wasteful, or involves gross misconduct, incompetency, or inefficiency.[2]

The Legislature enacted Statutes 2000, chapter 531, adding Education Code sections 44110 – 44114 and 87160 – 87164, which adopted and adapted existing "whistleblower protection" laws to apply to school districts. K-12 and community college employees are prohibited from using

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[1] Education Code section 44112, subdivision (a), defines employee as "any person employed by any public school employer except persons elected by popular vote, persons appointed by the Governor of this state, management employees, and confidential employees." Education Code section 87162, subdivision (a) construes this definition to include community college employees.

[2] Education Code sections 44112, subdivisions (c)(1) and (2), and 87162, subdivisions (c)(1) and (2).

official authority to influence, intimidate, threaten, or coerce any person[3] for the purpose of interfering with the right of that person to disclose improper governmental activities.[4] A K-12 or community college employee or applicant for employment that files a written complaint with his/her supervisor, school administrator, or employer alleging acts of reprisal, retaliation, threats, or coercion for refusing to obey an illegal order or for disclosing improper governmental activities, may also file a complaint with local law enforcement within 12 months of the most recent act of reprisal that is the subject of the complaint.[5] A person who intentionally engages in acts of reprisal, retaliation, threats, or coercion is subject to the criminal penalties of a fine up to $10,000 and imprisonment for a period of no more than one year.[6] An employee, officer, or administrator who engages in acts of reprisal, retaliation, threats, or coercion is also subject to discipline by his/her employer.[7]

In addition to criminal and administrative sanctions, a person who engages in acts of reprisal, threats, or coercion, is liable for civil damages in an action brought against him/her.[8] A court may also order punitive damages and reasonable attorney's fees.[9] Statutes 2000, chapter 531, also provides a shift in the burden of proof in any civil action or administrative proceeding brought by an employee or applicant for employment against an employer for violation of the statute. Specifically, once an employee or applicant for employment has demonstrated by a preponderance of the evidence that the employee's disclosure of an employer's improper governmental activity was a contributing factor in the alleged retaliatory actions against the employee or applicant for employment, the employer has the burden of proof to demonstrate by clear and convincing evidence that the alleged retaliatory actions would have occurred for legitimate reasons independent of the employee or applicant for employment's disclosure.[10] In addition, Education Code sections 44114 and 87164 provide that if the provisions of the code sections are in conflict with the terms of a memorandum of understanding (MOU) between the school district and its employees, the terms of the MOU are controlling.[11]

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[3] Education Code sections 44113, subdivision (d), and 87163, subdivision (d), define "person" as "any individual, corporation, trust, association, any state or local government, or any agency or instrumentality of any of the forgoing."

[4] Education Code sections 44113 and 87163.

[5] Education Code sections 44114, subdivision (a) and 87164, subdivision (a), as added by Statutes 2000, chapter 531.

[6] Education Code sections 44114, subdivisions (b), and 87164, subdivisions (b), as added by Statutes 2000, chapter 531.

[7] *Ibid.*

[8] Education Code sections 44114, subdivisions (c), and 87164, subdivisions (c), as added by Statutes 2000, chapter 531.

[9] *Ibid.*

[10] Education Code sections 44114, subdivision (e), and 87164, subdivision (e), as added by Statutes 2000, chapter 531.

[11] Education Code sections 44114, subdivision (g), and 87164, subdivision (g), as added by Statutes 2000, chapter 531.

Statutes 2001, chapter 159, sections 68 and 84, made technical changes to Education Code sections 44114(b) and 87164(b), respectively. After the enactment of Statutes 2001, chapter 159, section 68, no further changes were made to Education Code sections 44110 – 44110.

Statutes 2001, chapter 416, section 1, amended Education Code section 87164 to add the requirement that the State Personnel Board (SPB) initiate an informal hearing or investigation within 10 working days of the submission of a community college employee or applicant for employment's written complaint of reprisal or retaliation. If the SPB's investigation or formal hearing's findings set forth acts of alleged misconduct by the accused supervisor, administrator, or employer, the supervisor, administrator, or employer may request a hearing regarding the SPB's findings.[12] If after the hearing the SPB determines that the alleged misconduct did occur, or no hearing is requested, the board may order any appropriate relief, including, but not limited to, reinstatement, backpay, and expungement of any adverse records of the employee who was subjected to the alleged acts of misconduct.[13] In addition, if the SPB finds that a community college supervisor, administrator, or employer has engaged in misconduct, it shall cause an entry to be made in his/her official personnel record to that effect.[14] Education Code section 87164, subdivision (c) also provides that the hearing shall be conducted in accordance with Government Code section 18671.2, which provides that the SPB shall be reimbursed for all costs associated with the hearing, and that the SPB may charge "the appropriate state agencies for the costs incurred in conducting hearings involving employees of those state agencies."

Education Code section 87164 was amended again by Statutes 2002, chapter 81, section 1, to specify which entity will be responsible for the financial costs of the SPB hearings. Education Code section 87164, subdivision (c)(2) provides that all costs of the SPB hearings shall be charged directly to the community college district that employs the complaining employee or with whom the complaining applicant for employment has filed his or her employment application.[15]

Prior Law

Prior law provides public and private employees and applicants for employment, who disclose violations of statutes and regulations, or gross misconduct by an employer or potential employer, with many of the same protections provided by the test claim statutes.[16] These protections, however, are provided in a piecemeal manner, and therefore, certain protections were available to some types of employees and not to others. For example, Labor Code section 1101 et seq. provides most of the test claim statutes' protections from retaliation for disclosing violations of state or federal statute, rule or regulation, to all employees (public and private) but not applicants for employment. Government Code section 53296 et seq. provides "whistleblower" protection to

[12] Education Code section 87164, subdivision (d), as added by Statutes 2001, chapter 416.

[13] Education Code section 87164, subdivision (e), as added by Statutes 2001, chapter 416.

[14] Education Code section 87164, subdivision (f), as added by Statutes 2001, chapter 416.

[15] Education Code section 87164, subdivision (c)(2), as added by Statutes 2002, chapter 81, section 1.

[16] Labor Code sections 1101 et seq., Government Code section 53296 et seq., Government Code section 8547 et seq., and Government Code section 9149.20 et seq.

both employees and applicants; however, the protection does not include a shift in the burden of proof during civil actions or administrative proceedings.

Claimant's Position

The claimants, San Juan Unified School District and Santa Monica Community College District, contend that the test claim statutes constitute a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and seek reimbursement to implement Education Code sections 44110 – 44114 and 87160 – 87164.

The claimants state that prior to January 1, 1975, there were no state statutes or executive orders in effect which required school districts to establish procedures to protect employees or applicants for employment or to discipline employees, officers, or administrators who intentionally engaged in acts of reprisal, retaliation, threats, or coercion against an employee or applicant for employment who disclosed improper governmental activities. However, after the enactment of the test claim statutes (beginning with Statutes 2000, chapter 531) the claimants were required to establish procedures to protect employees or applicants for employment and to discipline employees, officers, or administrators who intentionally engaged in acts of misconduct.

The claimants assert that meeting the new requirements of Education Code sections 44110 – 44114 and 87160 – 87164 as added and amended by the test claim statutes, required increased costs to implement the following activities:

K-12 School Districts and Community College Districts

- establish policies and procedures to implement Education Code sections 44110 – 44114 and 87160 – 87164, and to periodically update those policies and procedures;
- receive, file and maintain written complaints filed by school employees or applicants for employment alleging actual or attempted acts of reprisal, retaliation, threats, coercion or similar improper acts for having disclosed improper governmental activities or refusing to obey an illegal order (pursuant to Ed. Code, §§ 44114, subd. (a) and 87164, subd. (a));
- investigate or to cooperate with law enforcement investigations of written complaints (pursuant to Ed. Code, §§ 44114, subd. (b) and 87164, subd. (b));
- discipline, as may be required by law or the district's MOU, any employee, officer or administrator who is found to have engaged in actual or attempted acts of reprisal, retaliation, threats, coercion or similar improper acts against an employee or applicant for employment who refused to obey an illegal order or who has disclosed improper governmental activities (pursuant to Ed. Code §§ 44114, subd. (b) and 87164, subd. (b));
- respond, appear, and defend in any civil action, directly or derivatively, when named as a party or otherwise required by the MOU, brought by an employee or applicant for employment alleging improper acts (pursuant to Ed. Code §§ 44114, subd. (c) and 87164, subd. (h)); and
- pay damages, directly or derivatively, including attorney's fees, when ordered by the court based upon the liability of the district, or as otherwise defined by the MOU (pursuant to Ed. Code §§ 44114, subd. (c) and 87164, subd. (h)).

Community College Districts

- appear and participate in hearings and investigations initiated by the SPB (pursuant to Ed. Code § 87164, sub. (c));
- request a hearing before the SPB when the adverse findings of the SPB hearing officer are incorrect (pursuant to Ed. Code § 87164, subd. (d));
- "comply with any ordered relief [by the SPB] including, but not limited to, reinstatement, backpay, restoration of lost service credit, and the expungement of any adverse records of the employee or [applicant for employment] who was the subject of the acts of misconduct"[17] (pursuant to Ed. Code § 87164, subd. (e));
- cause an entry into the supervisor's, administrator's, or employer's official personnel record when the SPB has determined he or she has engaged in acts of misconduct (pursuant to Ed. Code § 87164, subd. (f)); and
- reimburse the SPB for all of the costs associated with its hearings (pursuant to Ed. Code § 87164, subd. (c)(2)).

California Community Colleges, Chancellor's Office Position (Chancellor's Office)

The Chancellor's Office asserts that community college districts are not entitled to reimbursement for the majority of activities that the claimants have associated with Education Code section 87164, as added and amended by the test claim statutes.

The Chancellor's Office argues that establishing policies and procedures to implement the act and periodically updating those policies and procedures; investigating or cooperating with law enforcement investigations of written complaints; and responding, appearing, and defending in civil actions are not mandated by the language of the test claim statutes.

In addition, the Chancellor's Office contends that receiving, filing and maintaining written complaints filed by school employees or applicants for employment; disciplining any employee, officer, or administrator who is found to have engaged in or attempted acts of misconduct; responding, appearing, and defending in civil actions; and paying damages are not new activities as compared to Government Code section 53296 et seq., Labor Code section 1102.5, and other "whistleblower" protection laws.

The Chancellor's Office further asserts that "with regard to the requirements for employee discipline, the impact upon the districts would be minimal."[18] Additionally, in regard to litigation costs, including payment of damages, the Chancellor's Office contends that there is a "question as to whether this claim is ripe for review, as the districts have not indicated that they have been required to defend in civil actions brought pursuant to the Act."[19]

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[17] Exhibit A, Test claim, p. 23.

[18] Exhibit B, California Community Colleges – Chancellor's Office comments, dated March 11, 2004, p. 5.

[19] *Ibid.*

The Chancellor's Office does, however, indicate that the claimants may be entitled to reimbursement for the following activities the claimants have associated with Education Code section 87164, as added and amended by the test claim statutes:

- appearing and participating in hearings and investigations initiated by the SPB when complaints alleging violations of Education Code sections 87160 – 87164 have been filed;
- requesting a hearing before the SPB when the adverse findings of the hearing officer are incorrect;
- complying with any ordered relief by the SPB;
- causing an entry into the violating employees' record when the SPB has determined that the employee has violated Education Code sections 87160 – 87164; and
- reimbursing the SPB for all costs associated with its hearings.

The Chancellor's Office states that Education Code sections 87160 – 87164 appear to mandate a new program or higher level of service upon the claimants in regard to these activities because prior to the enactment of Statutes 2001, Chapter 416, there were no requirements for SPB hearings and orders regarding whistleblower complaints, and therefore no requirement to do the above activities.

Department of Finance's Position

The Department of Finance (Finance) filed comments dated March 9, 2007, disagreeing with the claimants' test claim allegations. Finance asserts that "the whole of this test claim is not a reimbursable mandate."[20] Finance contends that the language of the test claim statutes do not require the activities the claimants have alleged under Education Code sections 44110 – 44114 and 87160 – 87164. Also, Finance argues that the protections provided by Education Code sections 44110 – 44114 and 87160 – 87164 are the same as those provided by pre-existing whistleblower protection laws applicable to the claimants, and therefore, the requirements do not constitute a new program or higher level of service.

Finance acknowledges that Education Code section 87164, subdivision (c)(2) requires all costs associated with an SPB hearing to be charged to the community college district that employs the complaining employee or considered employing the applicant for employment. However, Finance contends that the language of Education Code section 87164, subdivision (c)(2) does not require community college districts to undertake any new programs or provide a higher level of service, and that costs alone do not constitute a reimbursable state mandate.

In addition, Finance notes that collective bargaining agreements (MOUs) are entered into voluntarily and that Education Code sections 44114, subdivision (g), and 87164, subdivision (l), provide that if any of the provisions of Education Code sections 44110 – 44114 and 87160 – 87164 are in conflict with provisions of the school districts' MOU, the terms of the MOU supersede the Education Code sections. Therefore, "any resulting costs incurred by the districts for activities which exceed those required by the Education Code would be voluntary and are not reimbursable."[21]

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[20] Exhibit D, Department of Finance comments, dated March 9, 2007, p. 2.

[21] *Ibid.*

As a result, Finance argues that the test claim statutes do not constitute a reimbursable state mandated program within the meaning of article XIII B, section 6 of the California Constitution.

Discussion

The courts have found that article XIII B, section 6 of the California Constitution[22] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[23] "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."[24] 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.[25] 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.[26]

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.[27] 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

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[22] California Constitution, 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."

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

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

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

[26] *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*).

[27] *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).

legislation.[28] A "higher level of service" occurs when there is "an increase in the actual level or quality of governmental services provided."[29]

Finally, the newly required activity or increased level of service must impose costs mandated by the state.[30]

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.[31] 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."[32]

Issue 1: Do Education Code sections 44110-44114, and 87160-87164 constitute a state-mandated program subject to article XIII B, section 6 of the California Constitution?

In order for a 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 entities. If the statutory language does not mandate or require the claimants to perform a task, then article XIII B, section 6, does not apply.

In addition, the California Supreme Court held in *Kern High School Dist.* that when analyzing state mandate claims, the Commission must look at the underlying program to determine if the claimant's participation in the underlying program is voluntary or legally compelled.[33] The court also held open the possibility that a reimbursable state mandate might be found in circumstances short of legal compulsion; where "'certain and severe … penalties', such as 'double … taxation' and other 'draconian' consequences,'"[34] would result if the local entity did not comply with the program.

<u>Do Education Code Sections 44110 – 44114 Impose State Mandated Activities on K-12 School Districts?</u>

Education Code sections 44110 – 44113 set forth the short title, legislative intent, definitions, and prohibited activities of the code sections. Education Code section 44113 prohibits an

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

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

[30] *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.

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

[32] *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.

[33] *Kern High School Dist., supra*, 30 Cal.4th 727, 743.

[34] *Id.* at p. 751, quoting *City of Sacramento, supra*, 50 Cal.3d at p. 74.

employee from using or attempting to use "official authority or influence"[35] for the purpose of intimidating, threatening, coercing, commanding any person, or attempting to do so, for the purpose of interfering with the right of that person to disclose to an official agent improper governmental activities.

Education Code section 44114, which claimants cite as the code section requiring most of the claimed activities for K-12 school districts, sets forth the procedures used to protect employees and applicants for employment of a K-12 school district, who allege actual or attempted acts of reprisal, retaliation, threats, coercion, or similar improper acts prohibited by Education Code section 44113 for having disclosed improper governmental activities or for refusing to obey an illegal order. Therefore, the discussion of this section will focus on Education Code section 44114. Education Code section 44114 provides:

> (a) A public school employee or applicant for employment with a public school employer who files a written complaint with his or her supervisor, a school administrator, or the public school employer alleging actual or attempted acts of reprisal, retaliation, threats, coercion, or similar improper acts prohibited by Section 44113 for having disclosed improper governmental activities[36] or for refusing to obey an illegal order[37] may also file a copy of the written complaint with the local law enforcement agency together with a sworn statement that the contents of the written complaint are true, or are believed by the affiant to be true, under penalty of perjury. The complaint filed with the local law enforcement agency shall be filed within 12 months of the most recent act of reprisal that is the subject of the complaint.
>
> (b) A person[38] who intentionally engages in acts of reprisal, retaliation, threats, coercion, or similar acts against a public school employee or applicant for employment with a public school employer for having made a protected disclosure is subject to a fine not to exceed ten thousand dollars ($10,000) and imprisonment in the county jail for a period not to exceed one year. Any public school employee, officer, or administrator who intentionally engages in that conduct shall also be subject to discipline by the public school employer. If no

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[35] Education Code section 44113, subdivision (b) defines the use of "official authority or influence" as including promising to confer or conferring any benefit; affecting or threatening to affect any reprisal, or taking personnel action.

[36] Education Code section 44112, subdivision (c)(1) and (c)(2), defines "improper governmental activities" as an activity by a public school agency or employee that violates a state or federal law or regulation, or that is economically wasteful or involves gross misconduct, incompetency, or inefficiency.

[37] Education Code section 44112, subdivision (b), defines "illegal order" as any directive to violate or assist in violating a federal, state, or local law, rule, or regulation, or to work or cause others to work in conditions that would unreasonably threaten the health or safety of employees or the public.

[38] Education Code section 44112, subdivision (d), defines "person" as including any state or local government, or any agency or instrumentality of the state or local government.

adverse action is instituted by the public school employer and it is determined that there is reasonable cause to believe that an act of reprisal, retaliation, threats, coercion, or similar acts prohibited by Section 44113 occurred, the local law enforcement agency may report the nature and details of the activity to the governing board of the school district or county board of education, as appropriate.

(c) In addition to all other penalties provided by law, a person who intentionally engages in acts of reprisal, retaliation, threats, coercion, or similar acts against a public school employee or applicant for employment with a public school employer for having made a protected disclosure shall be liable in an action for damages brought against him or her by the injured party. Punitive damages may be awarded by the court where the acts of the offending party are proven to be malicious. Where liability has been established, the injured party shall also be entitled to reasonable attorney's fees as provided by law. However, an action for damages shall not be available to the injured party unless the injured party has first filed a complaint with the local law enforcement agency.

(d) This section is not intended to prevent a public school employer, school administrator, or supervisor from taking, failing to take, directing others to take, recommending, or approving a personnel action with respect to a public school employee or applicant for employment with a public school employer if the public school employer, school administrator, or supervisor reasonably believes the action or inaction is justified on the basis of evidence separate and apart from the fact that the person has made a protected disclosure as defined in subdivision (e) of Section 44112.

(e) In any civil action or administrative proceeding, once it has been demonstrated by a preponderance of evidence that an activity protected by this article was a contributing factor in the alleged retaliation against a former, current, or prospective public school employee, the burden of proof shall be on the supervisor, school administrator, or public school employer to demonstrate by clear and convincing evidence that the alleged action would have occurred for legitimate, independent reasons even if the public school employee had not engaged in protected disclosures or refused an illegal order. If the supervisor, school administrator, or public school employer fails to meet this burden of proof in an adverse action against the public school employee in any administrative review, challenge, or adjudication in which retaliation has been demonstrated to be a contributing factor, the public school employee shall have a complete affirmative defense in the adverse action.

(f) Nothing in this article shall be deemed to diminish the rights, privileges, or remedies of a public school employee under any other federal or state law or under an employment contract or collective bargaining agreement.

(g) If the provisions of this section are in conflict with the provisions of a memorandum of understanding reached pursuant to Chapter 10.7 (commencing with Section 3540) of Division 4 of Title 1 of the Government Code, the

memorandum of understanding shall be controlling without further legislative action.

For the reasons below, staff finds that the plain language of Education Code section 44114 does not impose any state-mandated activities upon school districts.

Claimants assert that Education Code section 44114, subdivision (a), mandates K-12 school districts to receive, file, and maintain written complaints filed by school employees or applicants for employment. However, the plain language of the code section only confers a right upon employees or applicants for employment. Specifically, the subdivision (a) sets forth the right that complaining employees have to file a complaint with the local law enforcement agency. There is no requirement in Education Code section 44114, subdivision (a) that K-12 school districts engage in any activity.

Claimants also assert that Education Code section 44114, subdivision (b), mandates K-12 school districts to investigate or cooperate with law enforcement investigations of written complaints. In addition, claimants contend that subdivision (b) requires K-12 school districts to discipline an employee in violation of the code sections. The plain language of Education Code section 44114, subdivision (b), however, does not mandate these activities. The plain language of subdivision (b) provides K-12 employers with the option of disciplining an employee in violation of the code sections. Although an employee in violation of subdivision (b) "shall be subject to discipline," a district's discretion to discipline that employee is evidenced by the following language of subdivision (b):

> *If no adverse action is instituted* by the [K-12] employer and it is determined that there is reasonable cause to believe that an act of reprisal, retaliation, threats, coercion, or similar acts prohibited by Section 44113 occurred, the local law enforcement agency may report the nature and details of the activity to the governing board of the school district or county board of education, as appropriate.

The language "if no adverse action is taken …" indicates that there is a possibility that K-12 employers will not discipline an employee in violation of Education Code section 44113, and therefore, disciplinary action against an employee is not mandated by the state.

Claimants argue that Education Code section 44114, subdivision (c) requires K-12 school districts to respond, appear, and defend in civil actions brought by an employee alleging retaliation after disclosing improper governmental activities. Claimants also argue that subdivision (c) requires the payment of damages as ordered by the court in the civil action. The plain language of Education Code section 44114, subdivision (c), however, does not mandate these activities upon public school districts. Rather, subdivision (c) merely describes the liabilities that "a person who intentionally engages in acts of reprisal" faces in a civil action for voluntarily engaging in prohibited activities (i.e. acts of reprisal). In addition, the plain language of the Education Code section 44114, subdivision (c), does not require claimants to dispute a claim, and therefore, does not require claimants to incur litigation costs and potential damages against the claimants. As a result, the plain language of Education Code sections 44114, subdivision (c), does not impose any state-mandated activities upon claimants.

The plain language of Education Code section 44114, subdivision (e), shifts the burden of proof in a civil action or administrative proceeding from an employee or applicant for employment to

the employer when the employee or applicant has demonstrated by a preponderance of evidence that the employee or applicant's whistleblowing was a contributing factor in the employer's retaliatory actions. Staff finds that subdivision (e) does not require public school districts to dispute a claim brought by an employee or applicant for employment, and therefore, K-12 school districts are not required to incur litigation costs. Thus, Education Code section 44114, subdivision (e) does not impose any state-mandated activities upon claimants.

The plain language of Education Code section 44114, subdivision (f), merely limits the affect Education Code sections 44110 – 44114. As a result, subdivision (f) does not impose any state-mandated activities upon claimants.

Moreover, in regard to employees of K-12 school districts, Education Code section 44114, subdivision (g), provides that if a K-12 school district's memorandum of understanding (MOU) contains provisions that conflict with the rights provided in Education Code section 44114, the MOU prevails. Specifically, subdivision (g) states the following:

> If the provisions of this section are in conflict with the provisions of a memorandum of understanding reached pursuant to Chapter 10.7 (commencing with Section 3540) of Division 4 of Title 1 of the Government Code, the memorandum of understanding shall be controlling without further legislative action.

Pursuant to Education Code section 44114, subdivision (g), claimants are not legally required to respond to the rights given to employees[39] by Education Code section 44114. Rather, K-12 school districts and their employees can opt out of the terms of Education Code section 44114 by entering into a MOU and negotiating their own terms for "whistleblower" cases. Thus, in regard to employees, it is not a mandate by the state, but rather claimants' underlying voluntary decision to enter into a MOU that triggers any K-12 school district response to whistleblower cases.

Pursuant to the above discussion, staff finds that the plain language of Education Code sections 44110 – 44114 does not impose any state-mandated activities upon K-12 school districts, and thus, these statutes are not subject to article XIII B section 6 of the California Constitution.

Do Education Code Sections 87160 – 87164 Impose State-Mandated Activities on Community College Districts?

Education Code sections 87160 – 87163 set forth the short title, legislative intent, definitions, and prohibited activities of the code sections. Education Code section 87163 prohibits an employee from using or attempting to use "official authority or influence"[40] for the purpose of intimidating, threatening, coercing, commanding any person, or attempting to do so, for the purpose of interfering with the right of that person to disclose to an official agent improper governmental activities.

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[39] Subdivision (g) of Education Code section 44114 has no effect on the rights given to new applicants for employment under Education code section 44114, because an MOU reached pursuant to Government Code section 3540 et seq. is an agreement between school districts and *employees* of those districts.

[40] Education Code section 87163, subdivision (b) defines the use of "official authority or influence" as including promising to confer or conferring any benefit; affecting or threatening to affect any reprisal, or taking personnel action.

Education Code section 87164, which claimants cite as the code section requiring most of the claimed activities for community college districts, sets forth the procedures used to protect community college employees and applicants for employment, who allege actual or attempted acts of reprisal, retaliation, threats, coercion, or similar improper acts prohibited by Education Code section 87163 for having disclosed improper governmental activities or for refusing to obey an illegal order. Therefore, the discussion of this section will focus on Education Code section 87164. Education Code section 87164 currently provides in relevant part:[41]

> (a) An employee or applicant for employment with a public school employer who files a written complaint with his or her supervisor, a community college administrator, or the public school employer alleging actual or attempted acts of reprisal, retaliation, threats, coercion, or similar improper acts prohibited by Section 87163 for having disclosed improper governmental activities[42] or for refusing to obey an illegal order[43] may also file a copy of the written complaint with the local law enforcement agency, together with a sworn statement that the contents of the written complaint are true, or are believed by the affiant to be true, under penalty of perjury. The complaint filed with the local law enforcement agency shall be filed within 12 months of the most recent act of reprisal that is the subject of the complaint.
>
> (b) A person who intentionally engages in acts of reprisal, retaliation, threats, coercion, or similar acts against an employee or applicant for employment with a public school employer for having made a protected disclosure is subject to a fine not to exceed ten thousand dollars ($10,000) and imprisonment in the county jail for a period not to exceed one year. An employee, officer, or administrator who intentionally engages in that conduct shall also be subject to discipline by the public school employer. If no adverse action is instituted by the public school employer, and it is determined that there is reasonable cause to believe that an act of reprisal, retaliation, threats, coercion, or similar acts prohibited by Section 87163, the local law enforcement agency may report the nature and details of the activity to the governing board of the community college district.
>
> (c) (1) The State Personnel Board shall initiate a hearing or investigation of a written complaint of reprisal or retaliation as prohibited by Section 87163 within 10 working days of its submission. The executive officer of the State Personnel Board shall complete findings of the hearing or investigation within 60 working

[41] Omitted Education Code section 87164, subdivision (g), which provides that the SPB must submit an annual report to the Governor and Legislature regarding complaints filed, hearings held, and legal actions taken, such that the Governor and Legislature may determine the need to continue or modify whistleblower protections.

[42] Education Code section 87162, defines "improper governmental activities" as an activity by a public school agency or employee that violates a state or federal law or regulation, or that is economically wasteful or involves gross misconduct, incompetency, or inefficiency.

[43] Education Code section 87162, defines "illegal order" as any directive to violate or assist in violating a federal, state, or local law, rule, or regulation, or to work or cause others to work in conditions that would unreasonably threaten the health or safety of employees or the public.

days thereafter, and shall provide a copy of the findings to the complaining employee or applicant for employment with a public school employer and to the appropriate supervisors, administrator, or employer. This hearing shall be conducted in accordance with Section 18671.2 of the Government Code,[44] this part, and the rules of practice and procedure of the State Personnel Board. When the allegations contained in a complaint of reprisal or retaliation are the same as, or similar to, those contained in another appeal, the executive officer may consolidate the appeals into the most appropriate format. In these cases, the time limits described in this paragraph shall not apply.

(2) Notwithstanding Section 18671.2 of the Government Code, no costs associated with hearings of the State Personnel Board conducted pursuant to paragraph (1) shall be charged to the board of governors. Instead, all of the costs associated with hearings of the State Personnel Board conducted pursuant to paragraph (1) shall be charged directly to the community college district that employs the complaining employee, or with whom the complaining applicant for employment has filed his or her employment application.

(d) If the findings of the executive officer of the State Personnel Board set forth acts of alleged misconduct by the supervisor, community college administrator, or public school employer, the supervisor, administrator, or employer may request a hearing before the State Personnel Board regarding the findings of the executive officer. The request for hearing and any subsequent determination by the board shall be made in accordance with the board's usual rules governing appeals, hearings, investigations, and disciplinary proceedings.

(e) If, after the hearing, the State Personnel Board determines that a violation of Section 87163 occurred, or if no hearing is requested and the findings of the executive officer conclude that improper activity has occurred, the board may order any appropriate relief, including, but not limited to, reinstatement, back pay, restoration of lost service credit if appropriate, and the expungement of any adverse records of the employee or applicant for employment with a public school employer who was the subject of the alleged acts of misconduct prohibited by Section 87163.

(f) Whenever the State Personnel Board determines that a supervisor, community college administrator, or public school employer has violated Section 87163, it shall cause an entry to that effect to be made in the supervisor's, community college administrator's, or public school employer's official personnel records.

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[44] Government Code section 18671.2 provides that the SPB shall be reimbursed for the entire costs of hearings and may bill the appropriate "state agencies" for the costs incurred in conducting hearings involving employees of those state agencies. Due to the fact that community college districts are not "state agencies," Statutes 2002, chapter 81, added subdivision (c)(2) to clarify that community college districts would be charged the costs associated with the SPB hearings.

(h) In addition to all other penalties provided by law, a person who intentionally engages in acts of reprisal, retaliation, threats, coercion, or similar acts against an employee or applicant for employment with a public school employer for having made a protected disclosure shall be liable in an action for damages brought against him or her by the injured party. Punitive damages may be awarded by the court where the acts of the offending party are proven to be malicious. Where liability has been established, the injured party shall also be entitled to reasonable attorney's fees as provided by law. However, an action for damages shall not be available to the injured party unless the injured party has first filed a complaint with the local law enforcement agency. Nothing in this subdivision requires an injured party to file a complaint with the State Personnel Board prior to seeking relief for damages in a court of law.

(i) This section is not intended to prevent a public school employer, school administrator, or supervisor from taking, failing to take, directing others to take, recommending, or approving a personnel action with respect to an employee or applicant for employment with a public school employer if the public school employer, school administrator, or supervisor reasonably believes an action or inaction is justified on the basis of evidence separate and apart from the fact that the person has made a protected disclosure as defined in subdivision (e) of Section 87162.

(j) In any civil action or administrative proceeding, once it has been demonstrated by a preponderance of evidence that an activity protected by this article was a contributing factor in the alleged retaliation against a former, current, or prospective employee, the burden of proof shall be on the supervisor, school administrator, or public school employer to demonstrate by clear and convincing evidence that the alleged action would have occurred for legitimate, independent reasons even if the employee had not engaged in protected disclosures or refused an illegal order. If the supervisor, school administrator, or public school employer fails to meet this burden of proof in an adverse action against the employee in any administrative review, challenge, or adjudication in which retaliation has been demonstrated to be a contributing factor, the employee shall have a complete affirmative defense in the adverse action.

(k) Nothing in this article shall be deemed to diminish the rights, privileges, or remedies of an employee under any other federal or state law or under an employment contract or collective bargaining agreement.

(l) If the provisions of this section are in conflict with the provisions of a memorandum of understanding reached pursuant to Chapter 10.7 (commencing with Section 3540) of Division 4 of Title 1 of the Government Code, the memorandum of understanding shall be controlling without further legislative action.

Whistleblower Cases of Community College District Employees

In *Kern High School Dist.*,[45] the court found that requirements imposed on a claimant due to the claimant's participation in an underlying voluntary program do not constitute a reimbursable state mandate. Here, subdivision (l) of Education Code section 87164 provides that if a community college district's MOU contains provisions that conflict with the rights provided in Education Code section 87164, the MOU prevails. As a result, claimants are not legally compelled to respond to the rights given to employees[46] by Education Code section 87164. Rather, community college districts and their employees can opt out of the terms of Education Code section 87164 by entering into a MOU and negotiating their own terms in "whistleblower" cases. Thus, in regard to employees of community college districts, it is the community college district's voluntary decision to comply with Education Code section 87164 and any requirements it may impose with respect to the "whistleblower" cases of a district employee.

In addition, community college districts are not "practically" compelled to comply with Education Code section 87164 with respect to district employees. As noted above, the court in *Kern High School Dist.* left open the possibility of practical compulsion in circumstances in which a claimant faced the imposition of certain and severe penalties such as double taxation and other "draconian consequences." Here, there is no evidence in the record to suggest that community college districts will face any certain and severe penalties or "draconian consequences" for not complying with Education Code section 87164 and instead bargaining alternative procedures with employees regarding "whistleblower" cases. Thus, community college districts have not, as a practical matter, been compelled to comply with Education Code section 87164 with respect to the "whistleblower" cases of a community college district employee.

Therefore, under *Kern High School Dist.*, Education Code section 87164, as it applies to employees, does not impose a reimbursable state mandate upon community college districts under article XIII B, section 6 of the California Constitution. As a result, the remaining discussion will focus on Education Code section 87164 only as applicable to new applicants[47] for employment with community college districts.

Whistleblower Cases of Community College District Applicants for Employment

Education Code section 87164, subdivisions (a), (b), (h), (j), and (k) substantively mirror Education Code section 44114, subdivisions (a) – (c), (e), and (f). Thus, like Education Code section 44114, the plain language of Education Code sections 87164, subdivisions (a), (b), (h), (j), and (k) does not impose any state-mandated activities upon community college districts.

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[45] *Kern High School Dist., supra,* 30 Cal.4th 727, 742-743.

[46] Subdivision (l) of Education Code section 87164 has no effect on the rights given to new applicants for employment under Education code section 87164, because an MOU reached pursuant to Government Code section 3540 et seq. is an agreement between school districts and *employees* of those districts.

[47] "New applicant" is distinguished from a current employee with a community college district who is applying for a new position within that same district. These current employee applicants would have an existing MOU in place due to their current employment with the district, and therefore, are also excluded from the following discussion.

However, unlike Education Code section 44114, section 87164 provides community college district applicants for employment with the ability to submit complaints to the SPB, after which the SPB is required to initiate an informal hearing or investigation of the complaint within 10 working days. Education Code section 87164, subdivisions (c) – (f), set forth the procedures and available administrative actions of the SPB hearing or investigation.

Education Code section 87164, subdivision (c), as amended in 2001 (Stats. 2001, ch. 416) and effective January 1, 2002, provided in relevant part:

> The State Personnel Board shall initiate a hearing or investigation of a written complaint of reprisal or retaliation as prohibited by Section 87163 within 10 working days of its submission. The executive officer of the State Personnel Board shall complete findings of the hearing or investigation within 60 working days thereafter and shall provide a copy of the findings to the complaining employee or applicant for employment with a public school employer and to the appropriate supervisors, administrator, or employer. This hearing shall be conducted in accordance with Section 18671.2 of the Government Code.

Claimants contend that Education Code section 87164, subdivision (c) requires claimants to appear and participate in hearings and investigations initiated by the SPB. However, the plain language of subdivision (c) only indicates that the SPB shall initiate a hearing or investigation of a community college applicant for employment's complaint of reprisal. Government Code section 18671.2, which subdivision (c) incorporates by reference, requires that the SPB be reimbursed for the entire cost of the hearing. Thus, the plain language of Education Code section 87164, subdivision (c), does not impose a state-mandate upon community college districts to appear and participate in SPB hearings or investigations.[48]

Education Code section 87164 was amended again in 2002, replacing subdivision (c) with subdivisions (c)(1) and (c)(2). These amendments were effective January 1, 2003. Education Code section 87164, subdivision (c)(1), adds to subdivision (c) the language that the hearing shall be conducted in accordance with "the rules of practice and procedure of the State Personnel Board." The rules of practice and procedure are set forth by California Code of Regulations, title 2, sections 56-57.4, which implement whistleblower laws, including Education Code sections 87160 – 87164. The SPB regulations provide that community college districts are required to cooperate fully with the SPB executive officer or investigator during an investigation or be subject to disciplinary action for impeding the investigation.[49] The regulations provide that investigators shall have authority to administer oaths, subpoena and require the attendance of witnesses and the production of books or papers, and cause witness depositions pursuant to

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[48] Staff notes that effective August 14, 2002, the SPB adopted California Code of Regulations, title 2, sections 56-57.4, to implement whistleblower laws, including Education Code sections 87160 – 87164. However, these regulations have not been pled by claimants. Staff, therefore, makes no independent findings on the regulations.

[49] Exhibit F, California Code of Regulations, title 2, section 56.3 Register 2006, No. 10 (March 10, 2006).

Government Code section 18671.[50] If the SPB initiates an informal hearing, rather than an investigation, each named respondent to the complaint is required to serve on the complaining applicant and file with the SPB a written response to the complaint addressing the allegations contained in the complaint. During the informal hearing the administrative law judge (ALJ) conducting the hearing shall have full authority to question witnesses, inspect documents, visit state facilities in furtherance of the hearing, and otherwise conduct the hearing in a manner and to the degree he or she deems appropriate.[51] As a result, Education Code section 87164, subdivision (c)(1), as added by Statutes 2002, chapter 81, imposes a state-mandate upon community college districts, beginning on January 1, 2003, to fully comply with the rules of practice and procedure of the State Personnel Board. This includes serving the applicant and the SPB with a written response to the complaint addressing the allegations contained therein for hearings, and responding to investigations or attending hearings, and producing documents during investigations or hearings.

Claimants further contend that Education Code section 87164, subdivision (c), as amended in 2001, requires community college districts to reimburse the SPB for all of the costs associated with its hearings. Education Code section 87164, subdivision (c), provides that the hearing shall be conducted in accordance with Government Code section 18671.2, which states that the SPB "may bill appropriate state agencies for the costs incurred in conducting hearings involving *employees* of those state agencies."[52] Construing Education Code section 87164, subdivision (c), in light of the language of Government Code section 18671.2 leads to absurd results due to the fact that community college districts are not state agencies,[53] thus rendering the portion of subdivision (c) that incorporates Government Code section 18671.2 meaningless. Courts have held that "the literal meaning of the words of a statute may be disregarded to avoid absurd results or to give effect to manifest purposes that, in the light of the statute's legislative history, appear from its provisions considered as a whole."[54] The legislative history of Statutes 2001, chapter 416 (Assem. Bill (AB) No. 647) indicates that it was the Legislature's intent to "clarify that…the existing provisions that allow the [SPB] to bill state agencies for hearings conducted on whistleblower cases will also apply to community colleges for whistleblower hearings that may be conducted pursuant to this bill…"[55] Government Code section 18671.2 makes no mention of "applicants for employment," and the remaining language of Education Code section 87164,

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[50] *Ibid.* Staff notes that Government Code section 18678 provides that a failure to appear and testify or to produce books or papers pursuant to a SPB subpoena issued pursuant to SPB regulations constitutes a misdemeanor.

[51] Exhibit F, California Code of Regulations, title 2, section 56.4 Register 2006, No. 10 (March 10, 2006).

[52] Exhibit F, Government Code section 18671.2, subdivision (b). (Emphasis added.)

[53] Education Code sections 70900 – 70902, establishes the postsecondary education system consisting of community college districts and provides that, to the maximum extent permissible, local authority and control in the administration of the California Community Colleges be maintained.

[54] *Silver v. Brown* (1966) 63 Cal.2d 841, 846.

[55] Exhibit F, Senate Rules Committee, Office of Senate Floor Analysis, 3d reading analysis of Assembly Bill 647 (2001-2002 Reg. Sess.) as amended August 27, 2001.

subdivision (c), does not address applicants for employment either. As a result, Education Code section 87164, subdivision (c), requires community college districts to pay for all costs of SPB hearings resulting only from a complaint brought by an *employee* of the community college district. However, as discussed above, under *Kern High School Dist.*, Education Code section 87164, as it applies to employees, does not impose a reimbursable state mandate upon community college districts. The requirements of Education Code section 87164, including the requirement to pay for all costs associated with a SPB hearing initiated by a claim filed by an employee, are only triggered by a community college district's voluntary decision to enter into an MOU with its employees that does not conflict with the terms of Education Code section 87164. Thus, Education Code section 87164, subdivision (c), as amended in 2001, does not impose any state-mandated activities upon community college districts.

In 2002, Education Code section 87164 was amended to add subdivision (c)(2), which specifically provides that, "Notwithstanding Section 18671.2 of the Government Code ... all of the costs associated with hearings of the State Personnel Board ... shall be charged directly to the community college district with whom the complaining applicant for employment has filed his or her employment application." Thus, staff finds that pursuant to the plain language of Education Code section 87164, subdivision (c)(2), effective January 1, 2003, a community college district is required to pay for all costs associated with a SPB hearing as a result of a complaints filed by an applicant for employment with that community college district.

Claimants also contend that Education Code section 87164, subdivision (d) requires community college districts to request a hearing before the SPB when the adverse findings of the hearing officer are incorrect. However, the plain language of subdivision (d) only authorizes a community college district to request a hearing after the SPB has issued its findings from the investigation or informal hearing. As a result, Education Code section 87164, subdivision (d), does not impose any state-mandated activities upon community college districts.

Education Code section 87164, subdivision (e), grants the SPB the authority to order "any appropriate relief" upon a finding that a violation of Education Code section 87163 has occurred and provides examples of "appropriate relief" for an applicant for employment.[56] Thus, the plain language of Education Code section 87164, subdivision (e), does not impose any state-mandated activities upon community college districts.

In 2001, subdivision (f) was added to Education Code section 87164. Effective January 1, 2002, subdivision (f) provides:

> Whenever the State Personnel Board determines that a supervisor, community college administrator, or public school employer has violated Section 87163, it shall cause an entry to that effect to be made in the supervisor's, community college administrator's, or public school employer's official personnel records.

[56] Education Code section 87163 prohibits the use of official authority or influence for the purpose of intimidating, threatening, coercing, commanding, or attempting to said acts for the purpose of interfering with the right a an employee or applicant for employment to disclose improper governmental activities or conditions that may significantly threaten the health or safety of employees or the public.

It is unclear from the language of subdivision (f) how the SPB "shall cause an entry" to be made into the official personnel records kept by a community college district. Courts have held that when an administrative agency is charged with enforcing a particular statute, its interpretation of the statute will be accorded great respect by the courts and will be followed if not clearly erroneous.[57] The SPB regulations provide that in cases where the SPB finds that any community college administrator, supervisor, or public school employer, has engaged in improper retaliatory acts, the SPB shall order the community college district to place a copy of the SPB decision in that individual's official personnel file.[58] Thus, Education Code section 87164, subdivision (f) imposes a state-mandate upon community college districts to make an entry into a community college administrator, supervisor, or public school employer's official personnel file indicating the SPB's finding of misconduct.

As a result, staff finds that Education Code section 87164, subdivisions (a), (b), (d), (e), (h), (j) do not impose any state-mandated activities upon community college districts. However, staff finds that Education Code section 87164, subdivisions (c)(1), (c)(2), and (f), impose the following state-mandated activities upon community college districts when a new applicant for employment files a complaint with the SPB:

- Beginning January 1, 2003, fully comply with the rules of practice and procedure of the State Personnel Board. This includes serving the applicant for employment and the SPB with a written response to the applicant's complaint addressing the allegations, and responding to investigations or attending hearings, and producing documents during investigations or hearings (Ed. Code § 87164, subd. (c)(1))
- Beginning January 1, 2003, pay for all costs associated with the State Personnel Board hearing regarding a complaint filed by a new applicant for employment (Ed. Code § 87164, subd. (c)(2))
- Beginning January 1, 2002, make an entry into the official personnel record of a supervisor, community college administrator, or public school employer, who is found by the State Personnel Board to have violated Education Code section 87163 (Ed. Code § 87164, subd. (f)).

<u>Do the State-Mandated Activities in Education Code Section 87164 Constitute a "Program" Subject to Article XIII B, section 6 of the California Constitution?</u>

In addition to being state-mandated, the test claim statutes and regulation must also constitute a "program" in order to be subject to article XIII B, section 6 of the California Constitution.

The California Supreme Court, in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, defined the word "program" within the meaning of article XIII B, section 6 as 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

[57] *Giles v. Horn, supra*, 100 Cal.App.4th 206, 220.

[58] Exhibit F, California Code of Regulations, title 2, section 56.6, Register 2006, No. 10 (March 10, 2006).

apply to all residents and entities in the state.[59] The court has held that only one of these findings is necessary.[60]

Here, the state-mandated activities identified above impose unique requirements on community college districts that do not apply to all residents and entities in the state, in order to implement a state policy. Education Code section 87161, indicates a state policy that community college employees and applicants for employment disclose improper governmental activities. In order to implement this policy, the test claim statute imposed the identified state-mandated activities, which are unique and do not apply to all residents and entities in the state. Thus, the identified mandated activities constitute a "program" subject to article XIII B, section 6 of the California Constitution.

Do the State-Mandated Activities in Education Code Section 87164 Constitute a New Program or Higher Level of Service?

The courts have held that legislation constitutes a new program or higher level of service within the meaning of article XIII B, section 6 of the California Constitution when the requirements are new in comparison with the pre-existing scheme and the requirements were intended to provide an enhanced service to the public.[61] To make this determination, the requirements must initially be compared with the legal requirements in effect immediately prior to its enactment.[62]

Prior to the enactment of Statutes 2001, chapter 416, there was no requirement for the SPB to initiate a hearing or investigation into allegations of reprisal against an applicant for employment who disclosed improper governmental information, and therefore no requirement for community college districts to comply with the activities required by Education Code section 87164, subdivisions (c)(1), (c)(2) and (f). Therefore, the requirements to fully comply with the rules of practice and procedure of the SPB, to reimburse the SPB for all costs associated with the hearings or investigations, and to make an entry into the official personnel record of a supervisor, community college administrator, or public school employer, who is found by the SPB to have violated Education Code section 87163, are new in comparison to the pre-existing scheme.

In addition, these activities were intended to provide an enhanced level of service to the public. Education Code sections 87160 – 87164 encourage "employees and other persons [to] disclose... improper governmental activities"[63] by, among other things, providing a SPB hearing as a forum to hear complaints of acts of reprisal taken against an applicant for employment for disclosing improper governmental activity. A protected disclosure under the code sections include activities that violate state or federal law, that are economically wasteful or involves gross misconduct, incompetency, or inefficiency, or that may significantly threaten the health or safety of employees or the public.[64] Thus, requiring participation in a SPB hearing and

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[59] *County of Los Angeles, supra*, 43 Cal.3d 46, 56.

[60] *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.Ap.3d 521, 537.

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

[62] *Ibid.*

[63] Education Code section 87161.

[64] Education Code section 87162, subdivisions (c) and (e).

reimbursement of the SPB for all costs associated with the hearing provides an enhanced service to the public by aiding disclosure of illegal, wasteful, or harmful activities.

Therefore, staff finds that Education Code section 87164, subdivisions (c)(1), (c)(2), and (f), constitute a new program or higher level of service, as they relate to new applicants for employment.

Issue 2: Does Education Code section 87164, subdivisions (c)(1), (c)(2) and (f), impose "costs mandated by the state" on community college districts within the meaning of article XIII B, section 6, and Government Code section 17514?

In order for the test claim statute to impose a reimbursable state-mandated program under the California Constitution, the test claim statutes must impose costs mandated by the state.[65] Government Code section 17514 defines "cost mandated by the state" as follows:

> [A]ny increased costs which a local agency or school district is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution.

Santa Monica Community College District, co-claimant, estimated that it "will incur approximately $1,000, or more, annually, in staffing and other costs in excess of any funding provided to school districts and the state for the period from July 1, 2001 through June 30, 2002"[66] to implement all duties alleged by the claimants to be mandated by the state.

In addition, the SPB has provided evidence of amounts charged to community college districts in the SPB comments, dated April 20, 2007. The SPB indicates that during the period between 2002 and 2007, 12 whistleblower complaints were filed with the SPB by community college district employees and/or applicants for employment. The SPB also indicates that as of April 20, 2007, community college districts have been charged $4,860.91 since 2002. This amount includes hearings for both community college employees and applicants for employment.

Thus, staff finds that the record supports the finding of costs mandated by the state and that none of the exceptions in Government Code section 17556 apply to deny this claim. As a result, staff finds that Education Code section 87164, subdivisions (c)(1), (c)(2), and (f) impose costs mandated by the state on community college districts within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514 for the following activities when a new applicant for employment files a complaint with the SPB:

- Beginning January 1, 2003, fully comply with the rules of practice and procedure of the State Personnel Board. This includes serving the applicant for employment and the SPB with a written response to the applicant's complaint addressing the allegations, and responding to investigations or attending hearings, and producing documents during investigations or hearings (Ed. Code § 87164, subd. (c)(1))

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[65] *Lucia Mar*, *supra*, 44 Cal.3d 830, 835; Government Code section 17514.

[66] Exhibit A, Test Claim, Exhibit 1, Declaration of Tom Donner, p. 4.

- Beginning January 1, 2003, pay for all costs associated with the State Personnel Board hearing regarding a complaint filed by a new applicant for employment (Ed. Code § 87164, subd. (c)(2))
- Beginning January 1, 2002, make an entry into the official personnel record of a supervisor, community college administrator, or public school employer, who is found by the State Personnel Board to have violated Education Code section 87163 (Ed. Code § 87164, subd. (f)).

Conclusion

Staff concludes that Education Code section 87164, subdivisions (c)(1), (c)(2), and (f), as amended by Statutes 2001, chapter 416, and Statutes 2002, Chapter 81, constitutes a reimbursable state-mandated program on community college districts within the meaning of article XIII B, section 6 of the California Constitution, and Government Code section 17514, for the following specific new activities when a new applicant for employment files a whistleblower complaint with the State Personnel Board:

- Beginning January 1, 2003, fully comply with the rules of practice and procedure of the State Personnel Board. This includes serving the applicant for employment and the SPB with a written response to the applicant's complaint addressing the allegations, and responding to investigations or attending hearings, and producing documents during investigations or hearings (Ed. Code § 87164, subd. (c)(1))
- Beginning January 1, 2003, pay for all costs associated with the State Personnel Board hearing regarding a complaint filed by a new applicant for employment (Ed. Code § 87164, subd. (c)(2))
- Beginning January 1, 2002, make an entry into the official personnel record of a supervisor, community college administrator, or public school employer, who is found by the State Personnel Board to have violated Education Code section 87163 (Ed. Code § 87164, subd. (f)).

Staff further concludes that Education Code sections 44110 – 44114, as added and amended by Statutes 2000, chapter 531, and Statutes 2001, chapter 159 do not impose any state-mandated activities upon K-12 school districts and, thus, are not subject to article XIII B, section 6 of the California Constitution. In addition, Education Code sections 87160 – 87164, as added and amended by Statutes 2000, chapter 531, Statutes 2001, chapter 159, Statutes 2001, chapter 416, and Statutes 2002, Chapter 81, as applicable to community college employees, do not impose any state-mandated activities upon community college districts and, thus, are not subject to article XIII B, section 6 of the California Constitution.

Any other test claim statute and allegation not specifically approved above, do not impose a reimbursable state-mandated program subject to article XIII B, section 6 of the California Constitution.

Recommendation

Staff recommends the Commission adopt this staff analysis and partially approve this test claim.

C

Effective: [See Text Amendments]

West's Annotated California Codes Currentness
Government Code (Refs & Annos)
Title 2. Government of the State of California
Division 5. Personnel (Refs & Annos)
Part 2. State Civil Service (Refs & Annos)
Chapter 2. Administration (Refs & Annos)
Article 2. Investigations and Hearings (Refs & Annos)

→§ 18678. Disobedience of subpoena

Any person served with a subpena to appear and testify or to produce books or papers issued in the course of any such investigation or hearing who disobeys or neglects to obey such subpena is guilty of a misdemeanor.

CREDIT(S)

(Added by Stats.1945, c. 123, p. 546, § 1.)

HISTORICAL AND STATUTORY NOTES

1995 Main Volume

Derivation: Stats.1937, c. 753, p. 2090, § 42.

LIBRARY REFERENCES

1995 Main Volume

Administrative Law and Procedure 357.
Westlaw Topic No. 15A.
C.J.S. Public Administrative Law and Procedure § 82.

West's Ann. Cal. Gov. Code § 18678, CA GOVT § 18678

Current through Ch. 42 of 2007 Reg.Sess. urgency legislation

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West's Ann.Cal.Gov.Code § 18671.2.

C

Effective: [See Text Amendments]

West's Annotated California Codes Currentness
Government Code (Refs & Annos)
Title 2. Government of the State of California
Division 5. Personnel (Refs & Annos)
Part 2. State Civil Service (Refs & Annos)
Chapter 2. Administration (Refs & Annos)
Article 2. Investigations and Hearings (Refs & Annos)

→ § 18671.2. Costs of hearing office; billings and reimbursements

(a) The total cost to the state of maintaining and operating the hearing office of the board shall be determined by the board, in advance or upon any other basis as it may determine, utilizing information from the state agencies for which services are provided by the hearing office.

(b) The board shall be reimbursed for the entire cost of hearings conducted by the hearing office pursuant to statutes administered by the board, or by interagency agreement. The board may bill the appropriate state agencies for the costs incurred in conducting hearings involving employees of those state agencies, and employees of the California State University pursuant to Sections 89535 to 89542, inclusive, of the Education Code, and may bill the state departments having responsibility for the overall administration of grant-in-aid programs for the costs incurred in conducting hearings involving employees not administering their own merit systems pursuant to Chapter 1 (commencing with Section 19800) of Part 2.5. All costs collected by the board pursuant to this section shall only be used for purposes of maintaining and operating the hearing office of the board.

CREDIT(S)

(Added by Stats.1994, c. 814 (S.B.846), § 1. Amended by Stats.1996, c. 472 (A.B.2528), § 2.)

West's Ann. Cal. Gov. Code § 18671.2, **CA GOVT § 18671.2**

Current through Ch. 10 of 2007 Reg.Sess. urgency legislation

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(b) Under the General Merit System Process, the executive officer shall either (1) present recommended decisions to the board or (2) make decisions subject to appeal to the board.

NOTE: Authority: Section 18701, Government Code. Reference: Section 18675, Government Code.

HISTORY

1. Renumbering and amendment of former section 53 to sections 51.1 and 53 filed 4–26–90; operative 5–26–90 (Register 90, No. 22). For prior history, see Register 87, No. 48.
2. Change without regulatory effect amending subsection (a) filed 9–16–92 pursuant to section 100, title 1, California Code of Regulations (Register 92, No. 39).

§ 53.1. Merit Issue Complaints.

(a) Merit issue complaints are complaints that the State Civil Service Act or board regulation or policy has been violated by a state agency. Merit issue complaints do not include appeals of actions that are specifically provided for elsewhere in law or in board regulations. Each state agency shall establish and publicize to its employees its process for addressing merit issue complaints. That process shall include provisions for informing employees of their right to appeal the state agency's decision on the merit issue complaint to the board. Failure of a state agency to respond to a merit issue complaint within 90 days of the date of complaint shall be deemed a denial of the complaint authority and shall release the appellant to file an appeal directly with the board. An appeal of a merit issue complaint shall be filed within 30 days of the state agency's denial of the complaint.

NOTE: Authority: Section 18701, Government Code. Reference: Section 12940, 18675, 18952, 19701, 19702, 19230, 19231, Government Code.

HISTORY

1. New section filed 4–26–90; operative 5–26–90 (Register 90, No. 22).
2. Change without regulatory effect amending subsection (a) filed 9–16–92 pursuant to section 100, title 1, California Code of Regulations (Register 92, No. 39).

§ 53.2. Reasonable Accommodation Appeals.

Requests for reasonable accommodation are requests from qualified disabled individuals for accommodation to known physical or mental limitations. These requests may be made concerning securing, retaining or advancing in employment in State service. Appointing authorities shall respond to such requests within 20 days of receipt. Appointing authorities shall respond in writing and inform complainants of their right of appeal to the board, within 30 days of receipt of the department's response. Failure to respond to a request within 20 days shall be deemed a denial of the request by the appointing authority and shall release the complainant to file an appeal directly with the board. Such filing shall be done within 30 days of the exhaustion of the 20–day period.

NOTE: Authority: Section 18701, Government Code. Reference: Section 12940, 18675, 18952, 19701, 19702, 19230, 19231, Government Code.

HISTORY

1. New section filed 4–26–90; operative 5–26–90 (Register 90, No. 22).

§ 54. Discrimination Complaint Process.

Any person who believes that he or she has been discriminated against in state employment in violation of part II, chapter 10, article 2 of the Government Code, the Federal Age Discrimination in Employment Act of 1978, or Governor's Executive Order B–54–79, shall have the opportunity to file a complaint with the board. Complaints filed with the board shall follow the provisions of article 4 and the specific provisions of Sections 54.1 and 54.2. All issues arising under these regulations, if not resolved under the process prescribed hereunder or by Sections 53.1 or 53.2, shall be decided by the board, if the complainant so requests.

NOTE: Authority: Section 18701, Government Code. Reference: Section 19700, 19701, 19702, 19702.1, 19702.2, 19702.5, 19703, 19704 and 19705, Government Code.

HISTORY

1. Repealer and section filed 4–26–90; operative 5–26–90 (Register 90, No. 22). For prior history, see Register 87, No. 48.
2. Change without regulatory effect amending section filed 9–16–92 pursuant to section 100, title 1, California Code of Regulations (Register 92, No. 39).

§ 54.2. Discrimination Complaint Standards for Appointing Powers.

Each appointing power discrimination complaint review shall:

(a) Provide for satisfying the complaint with a minimum of formal procedural requirements, by an organizational level closest to the employee concerned. Such provisions shall include the opportunity for the employee to receive counseling on a confidential basis by an employee who is qualified to give counseling in matters pertaining to discrimination.

(b) Assure that no influence will be used to dissuade the employee from airing a complaint, that no complaint will be suppressed, nor will an employee be subject to reprisal for voicing a complaint or participating in the complaint procedure.

(c) Assure that the employee's complaint will receive preferred, timely and full consideration at each level of review, that investigation into the circumstances surrounding the complaint will be performed by qualified and impartial persons, and that the employee will be informed of all rights at each step of the process, including the right of appeal to the board or to file with the appropriate state or federal agency or court having jurisdiction.

NOTE: Authority: Section 18701, Government Code. Reference: Section 18675, Government Code.

HISTORY

1. Renumbering and amendment of former section 547.2 to section 54.2 filed 4–26–90; operative 5–26–90 (Register 90, No. 22). For prior history, see Register 86, No. 28.

§ 55. Hearing Officer.

HISTORY

1. Repealer filed 4–26–90; operative 5–26–90 (Register 90, No. 22).

§ 56. Whistleblower Retaliation Complaint Process.

(a) Any state employee or applicant for state employment, or any employee or applicant for employment with a California Community College, who believes that he or she has been retaliated against in employment for having reported improper governmental activity, as that phrase is defined in Government Code Section 8547.2(b), or Education Code Section 87162(c), or for having refused to obey an illegal order or directive, as defined in Government Code Section 8547.2(e), or Education Code Section 87162(b), may file a complaint and/or appeal with the State Personnel Board in accordance with the provisions set forth in Sections 56.1–56.8. For purposes of complaints filed by community college employees or applicants for community college employment, the local community college district shall be deemed the "appointing power."

(b) For purposes of Sections 56–56.8, the term "Board" is defined as the five–member State Personnel Board, as appointed by the Governor. The term "Executive Officer" is defined as the Executive Officer of the State Personnel Board, as appointed by the Board. The State Personnel Board shall hereinafter be referred to as the SPB.

NOTE: Authority cited: Sections 18701 and 18214, Government Code. Reference: Sections 87162 and 87164, Education Code; and Sections 8547.2, 8547.8 and 19683, Government Code.

HISTORY

1. New section filed 8–14–2002; operative 8–14–2002 pursuant to Government Code section 18214 (Register 2002, No. 33). For prior history see Register 90, No. 22.
2. Amendment of section and NOTE filed 3–8–2006; operative 3–8–2006. Exempt from the Administrative Procedure Act pursuant to section 18211 of the Government Code and submitted to the Office of Administrative Law for filing with the Secretary of State and publication in the California Code of Regulations pursuant to section 18214 of the Government Code (Register 2006, No. 10).

§ 56.1. Requirements for Filing Whistleblower Retaliation Complaint with the State Personnel Board.

An individual desiring to file a complaint of retaliation with the SPB must adhere to the following requirements:

(a) Prior to filing his or her complaint with the SPB, the complainant shall comply with all other filing requirements, if applicable, set forth in Government Code Section 19683.

(b) The complaint shall be filed with and received by the SPB within one year of the most recent alleged act of reprisal. The complaining party shall submit an original complaint and copy of all attachments, and

enough copies of the complaint and attachments for the SPB to serve each entity and person alleged to have engaged in retaliatory conduct and against whom damages and/or disciplinary action is sought.

(c) All complaints shall be in writing.

(d) Each complaint shall clearly identify the protected activity engaged in by the complainant, the specific act(s) of reprisal or retaliation alleged to have occurred, and the names and business address of the individual(s) and entities alleged to have committed the retaliatory act(s). Each complaint shall specify the relief and/or remedies sought against each entity or individual, including any compensatory damages sought.

(e) If adverse action is sought against any individually named respondent, pursuant to the provisions of Government Code Section 19574, the complaint must clearly state the facts constituting the cause or causes for adverse action in such detail as is reasonably necessary to enable the accused employee to prepare a defense thereto.

(f) Each complaint shall include a sworn statement, under penalty of perjury, that the contents of the written complaint are true and correct.

(g) Each complaint shall be limited to a maximum of 15 pages of double-spaced typed or printed text, not including exhibits. Additional pages may be allowed upon a showing of good cause. The complainant shall submit a separate document with the complaint stating the reasons for good cause.

(h) The above procedures do not apply in those cases where an appellant raises retaliation as an affirmative defense when appealing a notice of adverse action, pursuant to Government Code Sections 19575 or 19590, when appealing a notice of rejection during probation, pursuant to Government Code Section 19175, when appealing a notice of medical action, pursuant to Government Code Section 19253.5, when appealing a notice of non-punitive action, pursuant to Government Code Section 19585, or when appealing a notice of career executive assignment termination pursuant to Government Code Section 19889.2. Neither the remedies nor the relief available to a complaining party pursuant to the provisions of Government Code Sections 8547.8 or 19683, shall, however, be available to a party who raises whistleblower retaliation as either an affirmative defense or as a separate cause of action in any other SPB hearing, unless that party has first complied with all filing requirements set forth in Section 56.1.

NOTE: Authority cited: Sections 18701 and 18214, Government Code. Reference: Section 87164, Education Code; Sections 8547.3, 8547.8, 18670, 18671, 18675, 19175, 19253.5, 19572, 19583.5, 19585, 19683 and 19889.2, Government Code; and Section 6129, Penal Code.

HISTORY

1. New section filed 8–14–2002; operative 8–14–2002 pursuant to Government Code section 18214 (Register 2002, No. 33).
2. Amendment of section heading, section and NOTE filed 3–8–2006; operative 3–8–2006. Exempt from the Administrative Procedure Act pursuant to section 18211 of the Government Code and submitted to the Office of Administrative Law for filing with the Secretary of State and publication in the California Code of Regulations pursuant to section 18214 of the Government Code (Register 2006, No. 10).

§ 56.2. Acceptance of Whistleblower Complaint.

(a) Within 10 working days of receipt of the complaint, the SPB shall determine whether it has jurisdiction over the complaint and whether the complainant meets the filing requirements set forth in Section 56.1. The SPB shall also determine whether the complainant has complied with all other requirements for filing a retaliation complaint, as set forth in Government Code Sections 8547–8547.12 and 19683 and/or Education Code Sections 87160–87164.

(b) If the SPB determines that the complaint does not meet all filing requirements, it shall notify the complaining party in writing that the complaint has not been accepted and the reason(s) for that determination. The complaining party may thereafter be permitted to file an amended complaint within 10 working days of service of the notice of non-acceptance of the complaint.

(c) Unless time is extended by the complaining party in writing, the Executive Officer shall, within 10 working days of receipt of the complaint or amended complaint, notify the complaining party of a decision to either:

(1) dismiss the complaint for failure to meet jurisdictional or filing requirements; or

(2) refer the case for investigation in accordance with the provisions of Section 56.3; or

(3) schedule the case for an informal hearing before an administrative law judge, in accordance with the provisions of Section 56.4.

(d) In accordance with the provisions of Penal Code Section 6129, the SPB shall be entitled to defer review of a complaint filed by an employee of the Department of Corrections and Rehabilitation in those cases where the employee has filed a similar complaint with the Office of the Inspector General.

NOTE: Authority cited: Sections 18701 and 18214, Government Code. Reference: Sections 87160–87164, Education Code; Sections 8547–8547.2, 8547.8, 18670, 18671, 18675, 19572, 19574, 19575, 19683 and 19590, Government Code; and Section 6129, Penal Code.

HISTORY

1. New section filed 8–14–2002; operative 8–14–2002 pursuant to Government Code section 18214 (Register 2002, No. 33).
2. Amendment of section heading, section and NOTE filed 3–8–2006; operative 3–8–2006. Exempt from the Administrative Procedure Act pursuant to section 18211 of the Government Code and submitted to the Office of Administrative Law for filing with the Secretary of State and publication in the California Code of Regulations pursuant to section 18214 of the Government Code (Register 2006, No. 10).

§ 56.3. Cases Referred to Investigation.

(a) If the Executive Officer assigns a complaint for investigation, the Executive Officer or the assigned investigator(s) shall conduct the investigation in the manner and to the degree they deem appropriate, and shall have full authority to question witnesses, inspect documents, and visit state facilities in furtherance of their investigations. All state agencies and employees shall cooperate fully with the investigators, or be subject to disciplinary action for impeding the investigation. The investigators, pursuant to the provisions of Government Code Section 18671, shall have authority to administer oaths, subpoena and require the attendance of witnesses and the production of books or papers, and cause the depositions of witnesses residing within or without the state to be taken in the manner prescribed by law for like depositions in civil cases in the superior court of this state under Article 3 (commencing with Section 2016) of Chapter 3 of Title 4 of Part 4 of the Code of Civil Procedure, in order to ensure a fair and expeditious investigation.

(b) The Executive Officer shall issue findings regarding the allegations contained in the complaint and a recommended remedy, if any, based on the investigation, in accordance with the provisions of Section 56.5.

NOTE: Authority cited: Sections 18701 and 18214, Government Code. Reference: Section 87164, Education Code; Sections 8547.8, 18670, 18671, 18675, 19582, 19583.5 and 19683, Government Code; Section 6129, Penal Code; and Section 2016 et seq., Civil Procedure Code.

HISTORY

1. New section filed 8–14–2002; operative 8–14–2002 pursuant to Government Code section 18214 (Register 2002, No. 33).
2. Amendment of section heading, repealer and new section and amendment of NOTE filed 3–8–2006; operative 3–8–2006. Exempt from the Administrative Procedure Act pursuant to section 18211 of the Government Code and submitted to the Office of Administrative Law for filing with the Secretary of State and publication in the California Code of Regulations pursuant to section 18214 of the Government Code (Register 2006, No. 10).

§ 56.4. Cases Referred to Informal Hearing Before an ALJ.

(a) For those complaints assigned to an informal hearing before an administrative law judge, the SPB shall serve notice of the informal hearing on all parties to the complaint a minimum of 30 calendar days prior to the scheduled hearing date. Service on each respondent shall be made at the respondent's business address. The notice shall:

(1) include a complete copy of the complaint with all attachments, and a copy of the statutes and rules governing the informal hearing; and

(2) require each named respondent to serve on the complainant and file with the SPB, at least 10 calendar days prior to the informal hearing, a written response to the complaint, signed under penalty of perjury, specifically addressing the allegations contained in the complaint.

(b) The informal hearing shall be conducted in conformance with those procedures set forth in Government Code Section 11445.10 *et seq.*, and may in the discretion of the administrative law judge, include such supplemental proceedings as ordered by the administrative law judge, and as permitted by Section 11445.10 *et seq.*, to ensure that the case is heard in a fair and expeditious manner. The administrative law judge shall have full authority to question witnesses, inspect documents, visit state facilities in furtherance of the hearing, and otherwise conduct the hearing in the manner and to the degree he or she deems appropriate. The informal hearing and any supplemental proceedings shall be recorded by the administrative law judge. All parties shall, upon request and payment of applicable reproduction costs, be provided with a transcript or a copy of the recording of the informal hearing.

(c) Following the informal hearing and any supplemental proceedings, the administrative law judge shall issue findings for consideration by the Executive Officer regarding the allegations contained in the complaint, together with all recommended relief, if any, proposed to remedy any retaliatory conduct.

(d) The Executive Officer shall have the discretion to adopt the administrative law judge's findings and recommended remedies in their entirety; modify the administrative law judge's findings and recommended remedies; or reject the administrative law judge's findings and recommended remedies, and:

(1) issue independent findings after reviewing the complete record; or

(2) remand the case back to the administrative law judge for further proceedings.

NOTE: Authority cited: Sections 18701 and 18214, Government Code. Reference: Section 87164, Education Code; Sections 8547.8, 11445.10 *et seq.*, 11513, 18670, 18671, 18672, 18675, 19572, 19574, 19575, 19582, 19590, 19592 and 19683, Government Code; and Section 6129, Penal Code.

HISTORY

1. New section filed 8–14–2002; operative 8–14–2002 pursuant to Government Code section 18214 (Register 2002, No. 33).
2. Amendment of section heading, repealer and new section and amendment of NOTE filed 3–8–2006; operative 3–8–2006. Exempt from the Administrative Procedure Act pursuant to section 18211 of the Government Code and submitted to the Office of Administrative Law for filing with the Secretary of State and publication in the California Code of Regulations pursuant to section 18214 of the Government Code (Register 2006, No. 10).

§ 56.5. Findings of the Executive Officer.

(a) The Executive Officer shall issue a Notice of Findings within 60 working days of the date the SPB accepts the complaint pursuant to Section 56.2(c), unless the complaining party agrees, in writing, to extend the period for issuing the findings, or unless the time period is otherwise tolled.

(b) In those cases where the Executive Officer concludes that the allegations of retaliation were not proven by a preponderance of the evidence, the Executive Officer shall issue a Notice of Findings dismissing the complaint. The Notice of Findings shall notify the complainant that his or her administrative remedies have been exhausted and that the complainant may file a civil complaint with the superior court pursuant to Government Code Section 8547.8(c).

(c) In those cases where the Executive Officer concludes that the complainant proved one or more of the allegations of retaliation by a preponderance of the evidence, the Notice of Findings shall identify the allegations deemed substantiated, and the named respondents deemed to have engaged in retaliatory acts toward the complainant. If the Notice of Findings concludes that any individual manager, supervisor, or other employee engaged in improper retaliatory acts, the Notice of Findings shall include the legal causes for disciplinary action under Government Code Section 19572 and the appropriate disciplinary action to be taken against any individual found to have engaged in retaliatory conduct.

(d) The Notice of Findings shall inform any respondent found to have engaged in retaliatory acts of his or her right to request a hearing regarding the Notice of Findings. Any such request shall be filed with the SPB, and served on all other parties within 30 calendar days of the issuance of the Notice of Findings. Upon receipt of a timely request for hearing, the Board shall, at its discretion, schedule a hearing before the Board, or an evidentiary hearing before an administrative law judge, regarding the findings of the Executive Officer. The hearing shall be conducted in accordance with the SPB's rules governing the conduct of evidentiary hearings. If a timely request for hearing is not filed with the SPB, the Notice of Findings shall be deemed the Board's final decision in the case.

NOTE: Authority cited: Sections 18701 and 18214, Government Code. Reference: Section 87164, Education Code; Sections 8547.8, 18670, 18671.1, 18675, 19572, 19574, 19575, 19582, 19590 and 19683, Government Code: and Section 6129, Penal Code.

HISTORY

1. New section filed 8–14–2002; operative 8–14–2002 pursuant to Government Code section 18214 (Register 2002, No. 33).
2. Amendment of section heading, repealer and new section and amendment of NOTE filed 3–8–2006; operative 3–8–2006. Exempt from the Administrative Procedure Act pursuant to section 18211 of the Government Code and submitted to the Office of Administrative Law for filing with the Secretary of State and publication in the California Code of Regulations pursuant to section 18214 of the Government Code (Register 2006, No. 10).

§ 56.6. Disciplinary Action for Proven Retaliatory Acts.

(a) In those cases where the Board issues a final decision that finds that a manager, supervisor, or other state civil service employee has engaged in improper retaliatory acts, the Board shall order the appointing authority to place a copy of the Board's decision in that individual's Official Personnel File within 30 calendar days of the issuance of the Board's order and to also, within that same time period, notify the Office of the State Controller of the disciplinary action taken against the individual. The appointing authority shall also, within 40 calendar days of the issuance of the Board's order, notify the Board that it has complied with the provisions of this subdivision.

(1) In accordance with the provisions of Penal Code Section 6129, subsection (c)(3), any employee of the Department of Corrections and Rehabilitation found to have engaged in retaliatory acts shall be disciplined by, at a minimum, a suspension without pay for 30 calendar days, unless the Board determines that a lesser penalty is warranted. In those instances where the Board determines that a lesser penalty is warranted, the decision shall specify the reasons for that determination.

(b) In those cases where the Board issues a final decision that finds that any community college administrator, supervisor, or public school employer, has engaged in improper retaliatory acts, the Board shall order the appointing authority to place a copy of the Board's decision in that individual's Official Personnel File within 30 calendar days of the issuance of the Board's order and to also, within 40 calendar days of the issuance of the Board's order, notify the Board that it has complied with the provisions of this subdivision.

(c) Any decision, as described in subdivision (a) or (b), shall be deemed a final decision of the Board and the individual against whom the disciplinary action was taken shall not have any further right of appeal to the Board concerning that action, with the exception of a Petition for Rehearing.

(d) For purposes of this Section, the Board's decision is deemed to be final after:

(1) a request for hearing pursuant to Section 56.5(d) has not been timely filed with the Board; or

(2) 30 calendar days has elapsed from the date that the Board has issued a decision adopting or modifying the proposed decision submitted by an administrative law judge after an evidentiary hearing and a Petition for Rehearing concerning that decision has not been filed with the Board; or

(3) a decision has been issued by the Board after a hearing before that body and no Petition for Rehearing concerning that decision has been filed with the Board.

NOTE: Authority cited: Sections 18701 and 18214, Government Code. Reference: Section 87164, Education Code; Sections 8547.8, 18670, 18671, 18675, 18710, 19572, 19574, 19582, 19583.5, 19590, 19592 and 19683, Government Code; and Section 6129, Penal Code.

HISTORY

1. New section filed 8–14–2002; operative 8–14–2002 pursuant to Government Code section 18214 (Register 2002, No. 33).

2. Amendment of section and NOTE filed 3–8–2006; operative 3–8–2006. Exempt from the Administrative Procedure Act pursuant to section 18211 of the Government Code and submitted to the Office of Administrative Law for filing with the Secretary of State and publication in the California Code of Regulations pursuant to section 18214 of the Government Code (Register 2006, No. 10).

§ 56.7. Consolidation with Other Hearings.

(a) The SPB or the assigned administrative law judge shall possess the requisite discretion to direct that separate, reasonably related cases be consolidated into a single hearing. Whenever two or more cases are consolidated, the assigned administrative law judge shall permit the parties a reasonable opportunity to conduct discovery prior to the first scheduled hearing date, if the discovery provisions set forth in Section 57 et seq. are negatively impacted by the consolidation.

(b) In those cases where one or more individually named respondents have been joined in the consolidated hearing, the administrative law judge may, in his or her discretion, make such orders as may appear just in order to prevent any named respondent from being embarrassed, delayed, or put to undue expense, and may order separate hearings or make such other order as the interests of justice may require.

(c) In those cases where an appeal from adverse action, rejection during probationary period, medical action, or non–punitive action is consolidated with a whistleblower retaliation complaint, and the whistleblower retaliation complaint identifies specifically named individuals against whom damages or adverse action is sought pursuant to the provisions of Section 56.1(d) and (e), each individually named respondent shall have the right to participate in the consolidated hearing in such a manner as to reasonably defend him or herself against the allegations contained in the whistleblower retaliation complaint. These rights shall include, but not be limited to:

(1) to be represented by a representative of his or her own choosing during the consolidated hearing;

(2) to present a defense on his or her own behalf concerning the allegations and issues raised in the whistleblower retaliation complaint, separate and apart from any defense presented by the appointing power or any other named respondent;

(3) to conduct pre–hearing discovery concerning allegations and issues raised in the whistleblower retaliation complaint;

(4) to examine and cross examine witnesses concerning allegations and issues raised in the whistleblower retaliation complaint;

(5) to introduce and challenge the introduction of evidence concerning allegations and issues raised in the whistleblower retaliation complaint; and

(6) to present oral and/or written argument to the decision–maker concerning allegations and issues raised in the whistleblower retaliation complaint.

NOTE: Authority cited: Sections 18701 and 18214, Government Code. Reference: Sections 8547.8, 11513, 18670, 18671, 18672, 18675, 19175, 19253.5, 19575, 19582, 19585, 19590 and 19683, Government Code.

HISTORY

1. New section filed 8–14–2002; operative 8–14–2002 pursuant to Government Code section 18214 (Register 2002, No. 33).
2. Amendment of section and NOTE filed 3–8–2006; operative 3–8–2006. Exempt from the Administrative Procedure Act pursuant to section 18211 of the Government Code and submitted to the Office of Administrative Law for filing with the Secretary of State and publication in the California Code of Regulations pursuant to section 18214 of the Government Code (Register 2006, No. 10).

§ 56.8. Evidentiary Hearing Procedures and Representation by the Executive Officer.

(a) The hearing conducted pursuant to Section 56.5(d), shall be conducted in accordance with the SPB's rules of practice and procedure for the conduct of hearings before the Board, or evidentiary hearings before an administrative law judge. Any proposed decision issued by an administrative law judge after an evidentiary hearing shall be subject to review by the Board.

(b) The administrative law judge assigned to conduct the evidentiary hearing shall not be the same administrative law judge who conducted the informal investigative hearing in the case, unless all parties to the action request, in writing, that the same administrative law judge be assigned to conduct the evidentiary hearing.

(c) The discovery procedures set forth in Section 57 *et seq.*, shall be applicable to those evidentiary hearings conducted pursuant to this Section.

(d) The Executive Officer, or his or her designee, shall have the authority, in his or her discretion, to prosecute the complaint and present evidence regarding his or her findings during a hearing before the Board, and/or during an evidentiary hearing before an administrative law judge. The Executive Officer, or his or her designee, shall have the discretion to present the case in the manner he or she deems to be appropriate, including, but not limited to, the issues to be presented, the evidence to be presented, and the witnesses, if any, to be questioned.

(1) The complaining party shall be permitted to be represented by a representative of his or her own choosing during any hearing before either the Board, and/or an administrative law judge, and shall be permitted to raise relevant issues, present relevant evidence, and question witnesses regarding relevant matters during those hearings where witness testimony is permitted.

(2) In those cases where the Executive Officer, or his or her designee prosecutes a case during an evidentiary hearing before an administrative law judge, the case shall be assigned to an administrative law judge from the Office of Administrative Hearings.

NOTE: Authority cited: Sections 18701 and 18214, Government Code. Reference: Section 87164, Education Code; Sections 8547.8, 18670, 18671, 18675, 19572, 19574, 19575, 19590 and 19683, Government Code; and Section 6129, Penal Code.

HISTORY

1. New section filed 8–14–2002; operative 8–14–2002 pursuant to Government Code section 18214 (Register 2002, No. 33).
2. Repealer and new section filed 3–8–2006; operative 3–8–2006. Exempt from the Administrative Procedure Act pursuant to section 18211 of the Government Code and submitted to the Office of Administrative Law for filing with the Secretary of State and publication in the California Code of Regulations pursuant to section 18214 of the Government Code (Register 2006, No. 10).

§ 57.1. Discovery in Evidentiary Hearings Before the Board or a Board Administrative Law Judge.

(a) An employee who is served with a Notice of Adverse Action pursuant to the provisions of Government Code Sections 19574 or 19590 shall be entitled to conduct discovery in accordance with the provisions of Government Code Sections 19574.1 and 19574.2. In those cases where an employee raises an affirmative defense alleging discrimination or retaliation when filing an answer to a Notice of Adverse Action pursuant to the provisions of Government Code Sections 19575 or 19590, or in those cases where an employee raises an affirmative defense of retaliation or discrimination during the course of a hearing before the Board or an administrative law judge regarding an appeal from adverse action, the appointing power or any other named respondent shall be entitled to conduct discovery regarding any such affirmative defense in accordance with the provisions of Sections 57.2–57.4.

(b) Any party to any other type of action scheduled for hearing before the Board and/or a Board administrative law judge, including but not limited to, rejections during probationary period (Government Code Section 19173), discrimination complaints (Government Code Section 19702), appeals from denial of reasonable accommodation (Government Code Section 19702), whistleblower retaliation complaints (Education Code Section 87164, Government Code Sections 8547.8 and 19683), appeals from non–punitive action (Government Code Section 19585), appeals from medical action (Government Code Section 19253.5), appeals from Career Executive Assignment termination (Government Code Section 19889.2), and appeals from constructive medical termination, shall be entitled to conduct discovery in accordance with the provisions of Sections 57.2–57.4.

(c) The discovery provisions set forth in Sections 57.2–57.4 shall not apply to those cases scheduled for hearing or review by the Executive Officer or a Board hearing officer, to informal hearings conducted by Board administrative law judges pursuant to Government Code Section 11445.10 *et seq.*, to those cases assigned to hearing before a Board ad-

ministrative law judge pursuant to the provisions of Section 52(b), to appeals from termination of Limited Term employees pursuant to Section 282, to appeals from termination of a Limited Examination and Appointment Program appointment pursuant to Section 547.57, or to any other appeal or complaint excluded from the formal evidentiary hearing process pursuant to statute or regulation.

(d) The time frames for service of process set forth in Sections 57.2–57.4 shall apply in those circumstances were service is made or attempted by mail, and service shall not be deemed effective on the date of mailing. Instead, service by mail shall be deemed effective only upon such time as the document being served is either actually received by the person or entity being served, or is legally presumed to have been delivered pursuant to the provisions of Code of Civil Procedure Section 1013, whichever date occurs first.

NOTE: Authority cited: Sections 18701 and 18214, Government Code. Reference: Section 87164, Education Code; Sections 8547.8, 11445.10 *et seq.*, 18670, 18671, 18672, 18672.1, 18673, 18675, 19173, 19175, 19253.5, 19574, 19574.1, 19574.2, 19575, 19585, 19590, 19683, 19700–19706 and 19889.2, Government Code; and Section 1013, Code of Civil Procedure.

HISTORY

1. New section filed 8–12–2002; operative 8–12–2002. Submitted to OAL for printing only pursuant to Government Code section 18214 (Register 2002, No. 33).
2. Change without regulatory effect amending section filed 11–26–2002 pursuant to section 100, title 1, California Code of Regulations (Register 2002, No. 48).
3. Amendment of section heading, repealer and new section and amendment of NOTE filed 2–28–2006; operative 2–28–2006. Exempt from the Administrative Procedure Act pursuant to section 18211 of the Government Code and submitted to the Office of Administrative Law for filing with the Secretary of State and publication in the California Code of Regulations pursuant to section 18214 of the Government Code (Register 2006, No. 9).

§ 57.2. Request for Discovery; Statements; Writings; Investigative Reports; Witness List.

(a) Each party to an appeal or complaint listed in Section 57.1(a) or (b) and scheduled for a hearing is entitled to serve a request for discovery on any other named party to the complaint or appeal as allowed by subdivisions (c)–(e), and Government Code Section 18673. All requests for discovery shall be served on the responding party no later than 40 calendar days prior to the initial hearing date, except upon a petition and showing of good cause by the party seeking discovery, and a finding by the administrative law judge, in his or her sole discretion, that such additional or late requests for discovery should be permitted in the furtherance of justice. For purposes of this Section, the term "party" is defined as the person, or appointing power filing the appeal or complaint, any named respondent, and their designated legal representatives.

(b) Each party to the appeal or complaint is entitled to request and receive from any other party to the appeal or complaint the names and home or business addresses of percipient witnesses to the event(s) in question, to the extent known to the other party and of individuals who may be called as witnesses during the course of the hearing, except to the extent that disclosure of the address is prohibited by law. The responding party may, in his or her discretion, provide either the home or business address of the witness, except to the extent that disclosure of the address is prohibited by law.

(c) Each party to the appeal or complaint is entitled to inspect and make a copy of any of the following non–privileged materials in the possession, custody, or control of any other party to the appeal or complaint:

(1) Statements, as that term is defined in Evidence Code Section 225, of witnesses proposed to be called as witnesses during the hearing by the party and of other persons having personal knowledge of the act, omission, event, decision, condition, or policy which are the basis for the appeal. The responding party shall, upon a showing of good cause and subject to the discretion of the administrative law judge, subsequently amend this list if it intends to call additional witnesses not previously disclosed;

(2) All writings, as that term is defined in Evidence Code Section 250, that the responding party proposes to enter into evidence. The responding party shall, upon a showing of good cause and subject to the discretion of the administrative law judge, subsequently provide the requesting party with additional writings that it proposes to enter into evidence;

(3) Any other writing or thing that is relevant to the appeal or complaint; and

(4) Investigative reports made by or on behalf of any party to the appeal or complaint pertaining to the subject matter of the proceeding, to the extent that these reports: (A) contain the names and home or business addresses of witnesses or other persons having personal knowledge of the facts, omissions or events which are the basis for the proceeding, unless disclosure of the address is prohibited by law, or (B) reflect matters perceived by the investigator in the course of his or her investigation, or (C) contain or include by attachment any statement or writing described in (A) to (C), inclusive, or summary thereof.

(d) All parties receiving a request for discovery shall produce the information requested, or shall serve a written response on the requesting party clearly specifying which of those requested matters will not be produced and the basis for the non–production, within 15 calendar days of receipt of the discovery request.

(e) Not less than 10 calendar days prior to the first scheduled hearing date on the merits, each party shall notify the other parties in writing of the identity and current business address of each expert witness to be presented as a witness at the hearing, and a brief narrative statement of the qualifications of such witnesses and the general substance of the testimony which the expert is expected to provide. At the same time, the parties shall also exchange all written reports prepared by each expert witness. The administrative law judge may permit a party to call an expert witness not included on the list upon a showing of good cause.

NOTE: Authority cited: Sections 18701 and 18214, Government Code. Reference: Section 87164, Education Code; Sections 225 and 250, Evidence Code; and Sections 8547.8, 18670, 18671, 18672, 18672.1, 18673, 18675, 19683 and 19700–19706, Government Code.

HISTORY

1. New section filed 8–12–2002; operative 8–12–2002. Submitted to OAL for printing only pursuant to Government Code section 18214 (Register 2002, No. 33).
2. Amendment of section and NOTE filed 2–28–2006; operative 2–28–2006. Exempt from the Administrative Procedure Act pursuant to section 18211 of the Government Code and submitted to the Office of Administrative Law for filing with the Secretary of State and publication in the California Code of Regulations pursuant to section 18214 of the Government Code (Register 2006, No. 9).

§ 57.3. Petition to Compel Discovery.

(a) A party may serve and file with the administrative law judge a petition to compel discovery, naming as responding party any party who has refused or failed to provide discovery as required by Section 57.2. A copy of the petition shall be served on the responding party on the same date the petition is filed with the administrative law judge.

(b) The petition shall state facts showing the responding party failed or refused to comply with Section 57.2, a description of the matters sought to be discovered, the reason or reasons why the matter is discoverable under that Section, that a reasonable and good faith attempt to contact the responding party for an informal resolution of the issue has been made, and the grounds of the responding party's refusal so far as known to the moving party.

(c)(1) The petition shall be served upon the responding party and filed with the administrative law judge within 14 days after the responding party first evidenced his or her failure or refusal to comply with Section 57.2 or within 30 calendar days after the request was made and the party has failed to reply to the request, whichever period is longer. However, no petition may be filed within 20 calendar days of the date set for commencement of the administrative hearing, except upon a petition and a determination by the administrative law judge of good cause. In determining good cause, the administrative law judge shall consider the necessity and reasons for the discovery, the diligence or lack of diligence of the moving party, whether the granting of the petition will delay the commencement of the administrative hearing on the date set, and the possible prejudice of the action to any party.

(2) The responding parties shall have a right to file a written answer to the petition. Any answer shall be filed with the administrative law

judge and served on the petitioner within 10 calendar days of service of the petition.

(3)(A) Unless otherwise stipulated by the parties and as provided by this Section, the administrative law judge shall review the petition and any response filed by the respondent and issue a decision granting or denying the petition within 15 calendar days after the filing of the petition. Nothing in this Section shall preclude the administrative law judge from determining that an evidentiary hearing on the underlying matter shall be conducted prior to the issuance of a decision on the petition. The administrative law judge shall serve a copy of the order upon the parties by mail and/or by facsimile transmission.

(B) Where the matter sought to be discovered is in the possession, custody, or control of the responding party and the responding party asserts that the matter is not a discoverable matter under Section 57.2, or is privileged or otherwise exempt from disclosure, the administrative law judge may order lodged with him or her matters that are provided in Section 915(b) of the Evidence Code and shall examine the matters in accordance with the provisions thereof.

(d) Any party aggrieved by the decision of the administrative law judge concerning a petition to compel the production of evidence or to compel the attendance of a witness may, within 30 calendar days of the service of the decision, file a petition to compel discovery in the superior court for the county in which the administrative hearing will be held or in the county in which the headquarters of the appointing power is located. A party applying for judicial relief from the decision of the Board or the administrative law judge concerning any disputed discovery issue shall give notice to the Board and all other parties to the action. The notice may be either oral at the time of the administrative law judge's decision, or written at the same time application is made for judicial relief.

(e) The administrative law judge may, upon his or her own motion, or upon the motion of one or more parties to the action and upon a showing of good cause, exercise his or her discretion to continue the initial hearing date in order to resolve any contested discovery issues.

NOTE: Authority cited: Sections 18701 and 18214, Government Code. Reference: Section 87164, Education Code; Section 915, Evidence Code; and Sections 8547.8, 18670, 18671, 18672, 18672.1, 18673, 18675, 19683 and 19700–19706, Government Code.

HISTORY

1. New section filed 8–12–2002; operative 8–12–2002. Submitted to OAL for printing only pursuant to Government Code section 18214 (Register 2002, No. 33).
2. Amendment of section and NOTE filed 2–28–2006; operative 2–28–2006. Exempt from the Administrative Procedure Act pursuant to section 18211 of the Government Code and submitted to the Office of Administrative Law for filing with the Secretary of State and publication in the California Code of Regulations pursuant to section 18214 of the Government Code (Register 2006, No. 9).

§ 57.4. Petition to Quash or for Protective Order.

(a) Any party claiming that a request for discovery pursuant to Section 57.2 is improper under that section or is otherwise privileged or exempt from discovery, may object to its terms by serving and filing with the administrative law judge and the party requesting the disputed discovery, a petition to quash or for a protective order. The petition shall state: (1) a description of the matters sought to be discovered; (2) the reason(s) why the matter is not discoverable under Section 57.2, or is otherwise privileged or exempt from discovery; and (3) that a reasonable and good faith attempt has been made to contact the requesting party and resolve the matter informally.

(b)(1) The petition shall be served upon the party seeking discovery and filed with the administrative law judge within 10 calendar days after the moving party was served with the discovery request, or within another time provided by stipulation, whichever period is longer. No petition may be filed after the applicable time period has expired except upon petition and a determination by the administrative law judge of good cause. In determining good cause, the administrative law judge shall consider the necessity and reason(s) for the petition, the diligence or lack of diligence of the petitioning party, whether the granting of the petition will delay commencement of the hearing on the date set, and the possible prejudice of the action to any party.

(2) The party requesting discovery shall have a right to file a written answer to the petition with the administrative law judge and served on the petitioner within 5 calendar days of the service of the petition to quash and/or for a protective order.

(3)(A) Unless otherwise stipulated by the parties and as provided by this section, the administrative law judge shall review the petition and any response and issue a decision granting or denying the petition within 20 calendar days after the filing of the petition.

(B) The administrative law judge shall have the discretion to continue any evidentiary hearing or to conduct the hearing prior to the issuance of a decision on the petition.

(C) Where the matter sought to be discovered is in the possession, custody, or control of the responding party and the responding party asserts that the matter is not a discoverable matter under Section 57.2, or is privileged or otherwise exempt from disclosure, the administrative law judge may order lodged with him or her matters that are provided in Section 915(b) of the Evidence Code and shall examine the matters in accordance with the provisions thereof.

(c) A ruling of the administrative law judge concerning a petition to quash or for a protective order is subject to review in the same manner and to the same extent as the Board's final decision in the proceeding. Any party aggrieved by the decision of the administrative law judge concerning a petition to quash the production of evidence and/or for a protective order may, within 30 calendar days of the service of the decision, file a petition to quash and/or for protective order in the superior court for the county in which the administrative hearing will be held or in the county in which the headquarters of the appointing power is located. A party applying for judicial relief from the decision of the Board or the administrative law judge concerning any disputed discovery issue shall give notice to the Board and all other parties to the action. The notice may be either oral at the time of the administrative law judge's decision, or written at the same time application is made for judicial relief.

NOTE: Authority cited: Sections 18701 and 18214, Government Code. Reference: Section 87164, Education Code; Section 915, Evidence Code; and Sections 8547.8, 18670, 18671, 18672, 18672.1, 18673, 18675, 19683 and 19700–19706, Government Code.

HISTORY

1. New section filed 8–12–2002; operative 8–12–2002. Submitted to OAL for printing only pursuant to Government Code section 18214 (Register 2002, No. 33).
2. Amendment of section and NOTE filed 2–28–2006; operative 2–28–2006. Exempt from the Administrative Procedure Act pursuant to section 18211 of the Government Code and submitted to the Office of Administrative Law for filing with the Secretary of State and publication in the California Code of Regulations pursuant to section 18214 of the Government Code (Register 2006, No. 9).

§ 60. Definition and Purpose.

Mediation refers to a process whereby a neutral third person called a Mediator acts to encourage and facilitate the resolution of a dispute between two or more parties. It is a voluntary, informal and nonadversarial process with the objective of helping the disputing parties reach a mutually acceptable written agreement. In mediation, decision making authority rests with the parties, not the Mediator. The role of the Mediator includes, but is not limited to, assisting the parties in identifying issues, fostering joint problem solving, and exploring resolution alternatives.

The purpose of the State Personnel Board's State Employee Mediation Program (SEMP) is to provide an efficient, inexpensive, non-adversarial alternative to managing or resolving disputes that occur within the workplace, without diminishing the rights of any party to the mediation to subsequently address the issue(s) in a more traditional administrative, judicial, or other forum.

NOTE: Authority cited: Section 18701, Government Code. Reference: Section 11420.20, Government Code.

HISTORY

1. New section filed 4–4–2002; operative 4–4–2002. Submitted to OAL for printing only pursuant to Government Code section 18214 (Register 2002, No. 14). For prior history, see Register 90, No. 22.

§ 60.1. Exclusivity.

The model regulations related to alternative dispute resolution implemented by the Office of Administrative Hearings (1 Cal. Code Regs.,

|SENATE RULES COMMITTEE | AB 647|
|Office of Senate Floor Analyses |
|1020 N Street, Suite 524 |
|(916) 445-6614 Fax: (916) |
|327-4478 |

THIRD READING

Bill No: AB 647
Author: Horton (D)
Amended: 8/27/01 in Senate
Vote: 21

SENATE PUBLIC EMP. & RET. COMMITTEE : 5-0, 7/9/01
AYES: Soto, Haynes, Karnette, Oller, Romero

SENATE APPROPRIATIONS COMMITTEE : 10-0, 8/20/01
AYES: Alpert, Battin, Bowen, Burton, Escutia, Karnette, McPherson, Murray, Perata, Poochigian

ASSEMBLY FLOOR : 77-0, 6/7/01 - See last page for vote

SUBJECT : Reporting by Community College Employees of Improper
Governmental Activities Act

SOURCE : Faculty Association of California Community Colleges
California Teachers Association

DIGEST : This bill expands provisions of the Reporting by Community College Employees of Improper Governmental Activities Act to authorize community college employees to file retaliation complaints with the State Personnel Board.

Senate Floor Amendments of 8/27/01 clarify that (1) the existing provisions that allow the State Personnel Board (SPB) to bill state agencies for hearings conducted on whistleblower cases will also apply to community colleges
CONTINUED

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for whistleblower hearings that may be conducted pursuant to this bill, and (2) whistleblower complainants are not compelled to report incidents to the SPB by this bill before they take their complaints to a court.

ANALYSIS : Existing law, pursuant to Chapter 531, Statutes of 2000, provides the Reporting by Public School Employees of Improper Governmental Activities (Act) and the Reporting by Community College Employees of Improper Governmental Activities Act, which provides protections to public school employees who report improper governmental activities.

This bill:

1. Allows community college employees to file a written complaint of reprisal or retaliation for reporting improper governmental activities with the State Personnel Board (SPB).

2. Requires SPB to initiate a hearing or investigation within 10 days of receiving a written complaint and requires SPB to complete findings within 60 working days.

3. Provides that if the SPB finds acts of alleged misconduct by the supervisor or employer, the supervisor or employer may request a hearing before SPB.

4. Provides that, if after the hearing, SPB determines that a violation of the Act has occurred, or if no hearing is requested and SPB has indicated in its findings that a violation has occurred, SPB may order any appropriate relief, including reinstatement, back pay, restoration of lost service credit, and the expunging of any adverse records of the employee.

5. Provides that when SPB determines that a supervisor or employer has committed a violation of the Act, that information will be entered into their personnel records.

6. Requires SPB to annually submit a report to the Governor and the Legislature regarding complaints filed, hearings held, and legal action taken with regard to the Act.

AB 647
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FISCAL EFFECT : Appropriation: No Fiscal Com.: Yes Local: No

Fiscal Impact (in thousands)

Major Provisions 2001-02 2002-03
2003-04 Fund

SPB investigations -- Unknown, probably less than
$150 -- General

SUPPORT : (Verified 8/28/01)

California Teachers Association (co-source)
Faculty Association of California Community Colleges (co-source)
Johan Klehs, Member, State Board of Equalization
California Federation of Teachers
California Independent Public Employees Legislative Council
California School Employees Association

OPPOSITION : (Verified 8/28/01)

Community College League of California
State Department of Finance

ARGUMENTS IN SUPPORT : According to the author's office:

"Under current law, community college employees are protected from retaliation for disclosing improper governmental activity as long as the employee discloses the improper governmental activity to an official agent. However, an official agent is defined as a community college administrator, member of the governing board of a community college district or the Chancellor of the California Community Colleges."

ARGUMENTS IN OPPOSITION : According to the Community College League of California:

"The League is opposed to altering the responsibility for the investigation and complaints from local law enforcement agencies and employers to the State Personnel Board. The League is opposed to establishing matters of local

community college employees under the auspice of the SPB, and must raise serious governance issues with this proposal. Furthermore, the bill singles out community college employees for this application, and disregards the original law, which dealt with public school and community college employees. If changes to the investigation process are necessary, then the application should be imposed on both school employees and community colleges to fulfill the original intent of AB 2472 (Chapter 531, Statutes of 2000) to ensure consistency of practice for employees of local

education agencies."

ASSEMBLY FLOOR :
AYES: Aanestad, Alquist, Aroner, Ashburn, Bates, Bogh, Briggs, Calderon, Bill Campbell, John Campbell, Canciamilla, Cardenas, Cardoza, Cedillo, Chan, Chavez, Chu, Cohn, Corbett, Correa, Cox, Daucher, Diaz, Dickerson, Dutra, Firebaugh, Florez, Frommer, Goldberg, Harman, Havice, Hollingsworth, Horton, Jackson, Keeley, Kehoe, Kelley, Koretz, La Suer, Leach, Leonard, Leslie, Liu, Longville, Lowenthal, Maddox, Maldonado, Matthews, Migden, Mountjoy, Nakano, Nation, Negrete McLeod, Oropeza, Robert Pacheco, Rod Pacheco, Pavley, Pescetti, Reyes, Richman, Runner, Salinas, Shelley, Simitian, Steinberg, Strickland, Strom-Martin, Thomson, Vargas, Washington, Wayne, Wesson, Wiggins, Wright, Wyland, Wyman, Hertzberg

TSM:cm 8/28/01 Senate Floor Analyses

SUPPORT/OPPOSITION: SEE ABOVE

**** END ****

Collier v. Superior Court (MCA, Inc.)
Cal.App.2.Dist.

GEORGE A. COLLIER, Petitioner,
v.
THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; MCA, INC., et al., Real Parties in Interest.
No. B050670.

Court of Appeal, Second District, Division 4, California.
Mar. 26, 1991.

SUMMARY

The former employee of a record manufacturer brought an action against the manufacturer for wrongful termination in violation of public policy, breach of the covenant of good faith and fair dealing, and breach of an implied contract. Plaintiff alleged that he was terminated in retaliation for checking on, trying to prevent, and reporting to defendant possible illegal conduct (bribery and kickbacks, tax evasion, drug trafficking, money laundering, and violations of the federal antitrust laws) by other employees. Defendant demurred to the cause of action for wrongful termination in violation of public policy, and the trial court sustained the demurrer without leave to amend. Plaintiff petitioned for writ relief. (Superior Court of Los Angeles County, No. NCC 26960B, Stephen E. O'Neil, Judge.)

The Court of Appeal issued a writ of mandate directing the trial court to set aside its order sustaining the demurrer and to issue a new and different order overruling the demurrer. The court held that plaintiff's report served not only the interests of his employer, but also the public interest in deterring crime and the interests of innocent persons (recording artists, state and federal tax authorities, and record retailers) who stood to suffer specific harm from suspected illegal conduct. The court held that retaliation by an employer when an employee seeks to further the well- established public policy against crime in the workplace seriously impairs the public interest, even when the employee is not coerced to participate or restrained from exercising a fundamental right. (Opinion by Epstein, J., with George, Acting P. J., and Goertzen, J., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1) Mandamus and Prohibition § 35--Mandamus--To Courts and Court Officers-- Pleading--Scope of Review of Trial Court's Sustaining of Demurrer.
In a proceeding for a writ of mandate challenging a trial court order sustaining a demurrer without leave to amend, the court must assume the truth of all properly pleaded material allegations of the complaint in evaluating the validity of the trial court's action. The court does not decide whether the petitioner will be able to prove the allegations, nor does it consider the possible difficulty in making such proof; the court considers only whether he has alleged facts showing an entitlement to some relief.

(2) Employer and Employee § 9--Actions for Wrongful Discharge--Public Policy Limits on Right to Discharge At Will.
Although under Lab. Code, § 2922, an employment contract of indefinite duration is generally terminable at the will of either party, an employer's traditional right to discharge an at-will employee is subject to limits imposed by public policy, since otherwise the threat of discharge could be used to coerce employees into committing crimes, concealing wrongdoing, or taking other action harmful to the public weal. Thus, a tort action for wrongful discharge may lie where the termination violates a fundamental public policy. The employer cannot condition employment upon required participation in unlawful conduct by the employee, and a discharge based on an employee's refusal to engage in such conduct may give rise to a tort action for wrongful discharge. A public policy basis for a wrongful discharge action also has been recognized where an employee is discharged after complaining to his or her employer about working conditions or practices that the employee reasonably believes to be unsafe. [Modern status of rule that employer may discharge at-will employee for any reason, note, **12 A.L.R.4th 544.** See also **Cal.Jur.3d (Rev), Employer and Employee, § 63**; 2 **Witkin,** Summary of Cal. Law (9th ed. 1987) Agency, § 169.]

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(3a, 3b) Employer and Employee § 9.2--Actions for Wrongful Discharge-- Pleading--Discharge in Retaliation for Reporting to Employer Crimes of Other Employees.
In an action against a record manufacturer by a former employee alleging that he was terminated in retaliation for reporting to defendant suspected illegal conduct by other employees, the trial court erred in sustaining without leave to amend defendant's demurrer to plaintiff's cause of action for wrongful termination in violation of public policy. The suspected illegal activity involved bribery and kickbacks, tax evasion, drug trafficking, money laundering, and violations of the federal antitrust laws. Plaintiff's report, therefore, served not only the interests of his employer, but also the public interest in deterring crime and the interests of innocent persons (recording artists, state and federal tax authorities, and record retailers) who stood to suffer specific harm from the suspected illegal conduct. Retaliation by an employer when an employee seeks to further the well-established public policy against crime in the workplace seriously impairs the public interest, even when the employee is not coerced to participate or restrained from exercising a fundamental right.

(4) Employer and Employee § 9--Actions for Wrongful Discharge--Public Policy Limits on Right to Discharge At Will--" Whistle-blowing" Statute.
Lab. Code, § 1102.5, subd. (b), which prohibits employer retaliation against an employee who reports a reasonably suspected violation of the law to a government or law enforcement agency, reflects the broad public policy interest in encouraging workplace " whistle-blowers," who may without fear of retaliation report concerns regarding an employer's illegal conduct. This public policy is the modern day equivalent of the long- established duty of the citizenry to bring to public attention the doings of a lawbreaker.

COUNSEL
Michael S. Duberchin for Petitioner.
No appearance for Respondent.
Rosenfeld, Meyer & Susman, Allison Weiner Fechter and Walter S. Weiss for Real Parties in Interest.
EPSTEIN, J.
In this case we conclude that an employee who is terminated in retaliation for reporting to his or her employer reasonably suspected *1120 illegal conduct by other employees that harms the public as well as the employer, has a cause of action for wrongful discharge. [FN1]

FN1 The parties have not raised and we do not consider any issues with respect to application of the exclusive remedy provisions of the workers' compensation act to a cause of action for wrongful discharge. (See Shoemaker v. Myers (1990) 52 Cal.3d 1 [276 Cal.Rptr. 303, 801 P.2d 1054].)

Factual and Procedural Summary

(1) Because this case challenges the sustaining of a demurrer without leave to amend, " we must, under established principles, assume the truth of all properly pleaded material allegations of the complaint in evaluating the validity of the trial court's action." (Tameny v. Atlantic Richfield Co. (1980) 27 Cal.3d 167, 170 [164 Cal.Rptr. 839, 610 P.2d 1330, 9 A.L.R.4th 314].) At this pleading stage, we do not decide whether petitioner will be able to prove the allegations, nor do we consider the possible difficulty in making such proof; we consider only whether he has alleged facts showing an entitlement to some relief. (See Nagy v. Nagy (1989) 210 Cal.App.3d 1262, 1267-1268 [258 Cal.Rptr. 787].)

According to the third amended complaint, petitioner George Collier worked for respondent MCA, Inc., for 10 years, rising to the position of West Coast regional manager. MCA, Inc., is in the business of producing, marketing and selling phonograph records and other recorded products. Appellant's office was located at MCA's Sun Valley distribution center. From that location, MCA shipped phonograph records and other recorded products, at no cost to the recipients, for promotional purposes. These products were known as " cleans" because they were not marked with any notation limiting them to nonsale or promotional purposes only. " Cleans" had a definite monetary value to a recipient who chose to ignore their promotional purpose, since they could be sold in the retail market or returned to MCA for credit, either choice resulting in profit to the recipient, who had received the products without charge.

The complaint further alleges that in early 1984, Collier became suspicious of criminal conduct when he noticed that certain recipients of large quantities of " cleans" did not ordinarily handle that type of product. He therefore required that shipping personnel give him copies of all documentation for shipping " cleans" ordered by certain MCA vice-

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presidents. He also reported his suspicions to higher management on at least three occasions between April 10 and May 30, 1984. On June 8, 1984, Collier was fired, purportedly for failing to perform his job adequately. He claims that this reason was pretextual and that he actually was terminated in retaliation ***1121** for checking on, trying to prevent, and reporting possible illegal conduct to MCA officials.

Collier brought an action against MCA, Inc. In his third amended complaint, the charging pleading, he asserts three causes of action: (1) wrongful termination in violation of public policy; (2) breach of the covenant of good faith and fair dealing; and (3) breach of implied contract. MCA demurred to the first cause of action, arguing that under *Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654 [254 Cal.Rptr. 211, 765 P.2d 373], a plaintiff cannot state a cause of action for wrongful termination based on reporting a fellow employee's illegal conduct to his or her employer. The trial court sustained the demurrer to the first cause of action without leave to amend.

Collier filed a petition for writ of mandate, seeking an order vacating the trial court's ruling sustaining the demurrer without leave to amend. We issued an alternative writ, and now grant the relief sought.

Discussion

(2) Although an employment contract of indefinite duration is generally terminable at the will of either party (Lab. Code, § 2922), for several decades our courts have recognized that an employer's traditional right to discharge an at-will employee is " subject to limits imposed by public policy, since otherwise the threat of discharge could be used to coerce employees into committing crimes, concealing wrongdoing, or taking other action harmful to the public weal." (*Foley v. Interactive Data Corp., supra,* 47 Cal.3d 654, 665.) Thus a tort action for wrongful discharge may lie where the termination violates a fundamental public policy. (*Tameny v. Atlantic Richfield Co., supra,* 27 Cal.3d 167, 176.)

In *Tameny,* the plaintiff alleged that he was terminated for refusing to engage in price fixing in violation of the Sherman Antitrust Act (15 U.S.C. § 1 et seq.) and the Cartwright Act (Bus. & Prof. Code, § 16720 et seq.). The Supreme Court held that " the employer cannot condition employment upon required participation in unlawful conduct by the employee" and that a discharge based on an employee's refusal to engage in such conduct may give rise to a tort action for wrongful discharge. (27 Cal.3d at p. 178.) This holding was premised upon the fundamental public policies embodied in California's penal statutes. (*Id.* at p. 176.)

A public policy basis for a wrongful discharge action also has been recognized where an employee is discharged after complaining to his or her employer about working conditions or practices which the employee reasonably believes to be unsafe. In ***1122***Hentzel v. Singer Co.* (1982) 138 Cal.App.3d 290, 298 [188 Cal.Rptr. 159, 35 A.L.R.4th 1015], the court noted an employer's statutory duty under Labor Code section 6400 et seq. to provide a safe and healthful work environment and to avoid hazardous conditions, and explained: " Achievement of the statutory objective-a safe and healthy working environment for all employees-requires that employees be free to call their employer's attention to such conditions, so that the employer can be made aware of their existence, and given opportunity to correct them if correction is needed. The public policy thus implicated extends beyond the question of fairness to the particular employee; it concerns protection of employees against retaliatory dismissal for conduct which, in light of the statutes, deserves to be encouraged, rather than inhibited."

The California Supreme Court further defined the public policy exception to the at-will employment doctrine in *Foley v. Interactive Data Corp., supra,* 47 Cal.3d 654. In that case, the plaintiff alleged that he was discharged after reporting to his employer that his newly hired supervisor was currently under investigation by the Federal Bureau of Investigation for embezzlement from the supervisor's former employer. The court found this conduct did not implicate any basic public policy: " When the duty of an employee to disclose information to his employer serves only the private interest of the employer, the rationale underlying the *Tameny* cause of action is not implicated." (47 Cal.3d at pp. 670-671, fn. omitted.) The court distinguished earlier case law, explaining: " Past decisions recognizing a tort action for discharge in violation of public policy seek to protect the public, by protecting the employee who refuses to commit a crime (*Tameny, supra,* 27 Cal.3d 167; *Petermann, supra,* 174 Cal.App.2d 184 [344 P.2d 25]), who reports criminal activity to proper authorities (*Garibaldi v. Lucky Food Stores, Inc.* (9th Cir. 1984) 726 F.2d 1367, 1374; *Palmateer v. International Harvester Co., supra,* 421 N.E.2d 876,

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879-880), or who discloses other illegal, unethical, or unsafe practices (*Hentzel v. Singer Co.* (1982) 138 Cal.App.3d 290 [188 Cal.Rptr. 159, 35 A.L.R.4th 1015] [working conditions hazardous to employees]). No equivalent public interest bars the discharge of the present plaintiff." (47 Cal.3d at p. 670.)

(3a) The case before us involves public policy implications not presented in *Foley*. The plaintiff in *Foley* merely reported that another employee was being investigated for possible past criminal conduct at a previous job. His action served only the interest of his employer. The petitioner in this case reported his suspicion that other employees were currently engaged in illegal conduct at the job, specifically conduct which may have violated laws against bribery and kickbacks (Pen. Code, § 641.3); embezzlement (Pen. Code, § 504); tax evasion (Rev. & Tax. Code, § 7152; 26 U.S.C. §§ 7201, 7202); and possibly even drug trafficking and money laundering. It is also ***1123** inferable from the pleading that the suspect conduct amounted to differential pricing, a form of price discrimination that violates federal antitrust laws (15 U.S.C. §§ 1, 13). Petitioner's report served not only the interests of his employer, but also the public interest in deterring crime and, as we next discuss, the interests of innocent persons who stood to suffer specific harm from the suspected illegal conduct. His report, then, was a disclosure of " illegal, unethical or unsafe practices" which has been recognized in California as supporting a tort action for wrongful discharge in violation of public policy. (*Foley v. Interactive Data Corp., supra,* 47 Cal.3d at p. 670.)

It is not just a financial loss to the employer that resulted from the alleged wrongdoing. Petitioner also alleges that MCA recording artists were deprived of royalty payments for the improperly distributed products, and that state and federal tax authorities were deprived of appropriate tax revenues for " cleans" that were improperly sold. In addition, retailers who had to pay for the MCA products that others received without charge allegedly suffered a competitive disadvantage in pricing these same products. The circle of harm resulting from the alleged wrongdoing encompassed far more than the purely private interest of petitioner's employer.

(4) Labor Code section 1102.5, subdivision (b), which prohibits employer retaliation against an employee who reports a reasonably suspected violation of the law to a government or law enforcement agency, reflects the broad public policy interest in encouraging workplace " whistleblowers," who may without fear of retaliation report concerns regarding an employer's illegal conduct. This public policy is the modern day equivalent of the long-established duty of the citizenry to bring to public attention the doings of a lawbreaker. (See Comment, *Protecting the Private Sector at Will Employee Who " Blows the Whistle" : A Cause of Action Based Upon Determinants of Public Policy* (1977) 1977 Wis. L. Rev. 777.) Even though the statute addresses employee reports to public agencies rather than to the employer and thus does not provide direct protection to petitioner in this case, it does evince a strong public interest in encouraging employee reports of illegal activity in the workplace. (See *Verduzco v. General Dynamics, Convair Div.* (S.D.Cal. 1990) 742 F.Supp. 559, 562.)

If public policy were strictly circumscribed by this statute to provide protection from retaliation only where employees report their reasonable suspicions directly to a public agency, a very practical interest in self preservation could deter employees from taking any action regarding reasonably founded suspicions of criminal conduct by coworkers. Under that circumstance, an employee who reports his or her suspicions to the employer would risk termination or other workplace retaliation. If this employee ***1124** makes a report directly to a law enforcement agency, the employee would be protected from termination or other retaliation by the employer under Labor Code section 1102.5, but would face an obvious disruption of his or her relationship with the employer, who would be in the unfortunate position of responding to a public agency without first having had an opportunity to deal internally with the suspected problem. These discouraging options would leave the employee with only one truly safe course: do nothing at all.

The situation is no better for the responsible employer, who would be deprived of information which may be vital to the lawful operation of the workplace unless and until the employee deems the problem serious enough to warrant a report directly to a law enforcement agency. Clearly, the fundamental public interest in a workplace free from illegal practices would not be served by this result.

(3b) Where, as here and in *Tameny,* the alleged misconduct involves violations of the antitrust laws, the public interest in encouraging an employee to

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report the violation is even clearer. Antitrust laws provide for both criminal prosecution and civil liability. (See, e.g., 15 U.S.C. §§ 1, 4, 13a.) In *Blue Shield of Virginia v. McCready* (1982) 457 U.S. 465, 472 [73 L.Ed.2d 149, 156, 102 S.Ct. 2540], the United States Supreme Court noted the broad scope of citizen enforcement of the antitrust laws, quoting with emphasis the language of section 4 of the Clayton Act, which provides a treble-damages remedy to " '[*a*]*ny person* who shall be injured in his business or property *by reason of anything* forbidden in the antitrust laws,' (15 U.S.C. § 15, emphasis added)." The court pointed to the lack of restrictive language in that section, explaining that it " reflects Congress' 'expansive remedial purpose' in enacting § 4: Congress sought to create a private enforcement mechanism that would deter violators and deprive them of the fruits of their illegal actions, and would provide ample compensation to the victims of antitrust violations. '[Citations.] As we have recognized, '[]the statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. ... The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated.' [Citation.]" (457 U.S. at p. 472 [73 L.Ed.2d at p. 156].)

The public nature of the interest at stake in this case becomes apparent under the hypothetical test suggested in the margin of the *Foley* decision. (47 Cal.3d at p. 670, fn. 12) In explaining why there was no public interest in the case before it, the court noted that if an employer and employee expressly agreed that the employee had no obligation to, and should not, inform the employer of any adverse information the employee learned about ***1125** a fellow employee's background, nothing in the state's public policy would render such an agreement void. The court observed: " Because here the employer and employee could have agreed that the employee had no duty to disclose such information, it cannot be said that an employer, in discharging an employee on this basis, violates a fundamental duty imposed on all employers for the protection of the public interest." (47 Cal.3d at p. 671, fn. 12.) This is because the adverse information in *Foley* served only the employer's interest, not the public's interest, and thus there was no public interest at stake in preventing such report.

That is a critical distinction between the facts alleged in *Foley* and those in this case. As we have seen, the burden of suspected misconduct in this case was not confined to the interests of the employer alone. An agreement prohibiting an employee from informing anyone in the employer's organization about reasonably based suspicions of ongoing criminal conduct by coworkers would be a disservice not only to the employer's interests, but also to the interests of the public and would therefore present serious public policy concerns not present in *Foley*. [FN2]

> FN2 We do not address internal policies that an employer might establish designating particular personnel within the organization to receive reports from employees regarding suspected criminal activity. Such arrangements do not prohibit an employee from making a report, but simply regulate the method for reporting.

The *Hentzel* decision, cited with approval in *Foley*, provides a useful illustration. In that case, an employee protested what he considered to be hazardous working conditions caused by other employees smoking in the workplace. He was terminated and brought an action for wrongful discharge, claiming that his termination was in retaliation for his complaints about working conditions. The *Hentzel* court held that on those facts, the employee had a viable cause of action for wrongful termination because the discharge in retaliation for his report implicated the public policy interest in a safe and healthy working environment for employees. Here, the public interest is in a lawful, not criminal, business operation. Attainment of this objective requires that an employee be free to call his or her employer's attention to illegal practices, so that the employer may prevent crimes from being committed by misuse of its products by its employees. (See *Hentzel v. Singer Co., supra,* 138 Cal.App.3d at p. 298.)

We recognize that a contrary result was reached in a decision by the Fourth District in *American Computer Corp. v. Superior Court* (1989) 213 Cal.App.3d 664 [261 Cal.Rptr. 796]. We find that case factually distinguishable, and further observe that one of the principles upon which it was based is no longer tenable in light of a recent decision by the California Supreme Court. ***1126**

In *American Computer*, the employee told his employer that he believed certain individuals were receiving consulting fees without rendering any

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services to the company. The employee was told not to concern himself with the consulting fees, and soon after that he was fired. Emphasizing that the employee had not been ordered to embezzle from the company and was not being punished for reporting criminal activity to law enforcement, the court concluded that no interest other than the employer's was served by the employee's report to his superiors. It therefore held that the employee had not alleged a discharge in violation of public policy within the requirements of *Foley.* (213 Cal.App.3d at p. 668.)

Looking first at the factual distinction, we note that the victim of the wrongdoing reported in *American Computer* was the employer itself, not other members of the public. The wrongdoing alleged in this case, which Collier believed violated federal antitrust laws and California laws prohibiting bribery and kickbacks, affected members of the public including recording artists, record retailers, and tax authorities, as well as the employer.

The court in *American Computer* focused on the absence of the employer's attempt to coerce the employee to engage in criminal conduct and the absence of a direct violation of a statute protecting the employee's rights. (*American Computer Corp. v. Superior Court, supra,* 213 Cal.App.3d at p. 668.) In *Rojo v. Kliger* (1990) 52 Cal.3d 65 [276 Cal.Rptr. 130, 801 P.2d 373], our Supreme Court rejected a similar argument in the context of a wrongful discharge action based on sex discrimination. It had been argued that *Tameny* claims should be limited to situations where the employer coerces an employee to commit an act that violates public policy, or restrains an employee from exercising a fundamental right, privilege or obligation. The court held that the discharge of an employee because of her resistance and objection to sexual harassment contravened a fundamental and substantial public policy. " In light of our conclusion, we reject defendant's argument that *Tameny* claims should be limited to situations where, as a condition of employment, the employer 'coerces' an employee to commit an act that violates public policy, or 'restrains' an employee from exercising a fundamental right, privilege or obligation. The contention is without merit. Although decided in the factual contexts of coercion (*Tameny, supra,* 27 Cal.3d 167) and restraint (*Foley, supra,* 47 Cal.3d 654), neither *Tameny* nor *Foley* excludes wrongful discharge claims based solely on sex discrimination or sexual harassment. To the contrary, the cases strongly imply that an action for wrongful discharge will lie when, as here, the basis of the discharge contravenes a fundamental public policy." (*Rojo v. Kliger, supra,* 52 Cal.3d at p. 91.)

In *Rojo, supra,* the court recognized a " fundamental public interest in a workplace free from the pernicious influence of sexism." So long as such ***1127** sexism exists, " we are *all* demeaned." (52 Cal.3d at p. 90, italics in the original.) The fundamental public interest in a workplace free from crime is no less compelling. The public policy of this state against crime in the workplace is reflected in the Penal Code sections declaring unlawful the acts of embezzlement (Pen. Code, § 504) and commercial bribery (Pen. Code, § 641.3), and in the federal antitrust laws. (See *Tameny v. Atlantic Richfield Co., supra,* 27 Cal.3d at p. 173.) Retaliation by an employer when an employee seeks to further this well-established public policy by responsibly reporting suspicions of illegal conduct to the employer seriously impairs the public interest, even though the employee is not coerced to participate or restrained from exercising a fundamental right. The absence of such coercion and restraint does not defeat a legal action for wrongful termination. (See *Rojo v. Kliger, supra,* 52 Cal.3d at p. 91.)

Disposition

Mandate shall issue directing the respondent court to set aside its order sustaining the demurrer to petitioner's first cause of action, and to issue a new and different order overruling the demurrer to that cause of action.

George, Acting P. J., and Goertzen, J., concurred.
The petition of real parties in interest for review by the Supreme Court was denied June 27, 1991. ***1128**

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Estate of DENIS H. GRISWOLD, Deceased.
NORMA B. DONER-GRISWOLD, Petitioner and Respondent, v. FRANCIS V. SEE, Objector and Appellant.
Cal. 2001.

Estate of DENIS H. GRISWOLD, Deceased.
NORMA B. DONER-GRISWOLD, Petitioner and Respondent,
v.
FRANCIS V. SEE, Objector and Appellant.
No. S087881.

Supreme Court of California
June 21, 2001.

SUMMARY

After an individual died intestate, his wife, as administrator of the estate, filed a petition for final distribution. Based on a 1941 judgment in a bastardy proceeding in Ohio, in which the decedent's biological father had confessed paternity, an heir finder who had obtained an assignment of partial interest in the estate from the decedent's half siblings filed objections. The biological father had died before the decedent, leaving two children from his subsequent marriage. The father had never told his subsequent children about the decedent, but he had paid court-ordered child support for the decedent until he was 18 years old. The probate court denied the heir finder's petition to determine entitlement, finding that he had not demonstrated that the father was the decedent's natural parent pursuant to Prob. Code, § 6453, or that the father had acknowledged the decedent as his child pursuant to Prob. Code, § 6452, which bars a natural parent or a relative of that parent from inheriting through a child born out of wedlock on the basis of the parent/child relationship unless the parent or relative acknowledged the child and contributed to the support or care of the child. (Superior Court of Santa Barbara County, No. B216236, Thomas Pearce Anderle, Judge.) The Court of Appeal, Second Dist., Div. Six, No. B128933, reversed.

The Supreme Court affirmed the judgment of the Court of Appeal. The court held that, since the father had acknowledged the decedent as his child and contributed to his support, the decedent's half siblings were not subject to the restrictions of Prob. Code, § 6452. Although no statutory definition of " acknowledge" appears in Prob. Code, § 6452, the word's common meaning is: to admit to be true or as stated; to confess. Since the decedent's father had confessed paternity in the 1941 bastardy proceeding, he had acknowledged the decedent under the plain terms of the statute. The court also held that the 1941 Ohio judgment established the decedent's biological father as his natural parent for purposes of intestate succession under Prob. Code, § 6453, subd. (b). Since the identical issue was presented both in the Ohio proceeding and in this California proceeding, the Ohio proceeding bound the parties in this proceeding. (Opinion by Baxter, J., with George, C. J., Kennard, Werdegar, and Chin, JJ., concurring. Concurring opinion by Brown, J. (see p. 925).)

HEADNOTES

Classified to California Digest of Official Reports

(1a, 1b, 1c, 1d) Parent and Child § 18--Parentage of Children-- Inheritance Rights--Parent's Acknowledgement of Child Born Out of Wedlock:Descent and Distribution § 3--Persons Who Take--Half Siblings of Decedent.

In a proceeding to determine entitlement to an intestate estate, the trial court erred in finding that the half siblings of the decedent were precluded by Prob. Code, § 6452, from sharing in the intestate estate. Section 6452 bars a natural parent or a relative of that parent from inheriting through a child born out of wedlock unless the parent or relative acknowledged the child and contributed to that child's support or care. The decedent's biological father had paid court-ordered child support for the decedent until he was 18 years old. Although no statutory definition of " acknowledge" appears in § 6452, the word's common meaning is: to admit to be true or as stated; to confess. Since the decedent's father had appeared in a 1941 bastardy proceeding in another state, where he confessed paternity, he had acknowledged the decedent under the plain terms of § 6452. Further, even though the father had not had contact with the decedent and had not told his other children about him, the record disclosed no evidence that he disavowed paternity to anyone with knowledge of the

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circumstances. Neither the language nor the history of § 6452 evinces a clear intent to make inheritance contingent upon the decedent's awareness of the relatives who claim an inheritance right.
[See 12 Witkin, Summary of Cal. Law (9th ed. 1990) Wills and Probate, §§ 153, 153A, 153B.]
(2) Statutes § 29--Construction--Language--Legislative Intent.
In statutory construction cases, a court's fundamental task is to ascertain the intent of the lawmakers so as to effectuate the purpose of the statute. A court begins by examining the statutory language, giving the words their usual and ordinary meaning. If the terms of the statute are unambiguous, the court presumes the lawmakers meant what they said, and the plain meaning of the language governs. If there is ambiguity, however, the court may then look to extrinsic sources, including the ostensible objects to be achieved and the legislative history. In such cases, the court selects the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoids an interpretation that would lead to absurd consequences.

(3) Statutes § 46--Construction--Presumptions--Legislative Intent--Judicial Construction of Certain Language.
When legislation has been judicially construed and a subsequent statute on the same or an analogous subject uses identical or substantially similar language, a court may presume that the Legislature intended the same construction, unless a contrary intent clearly appears.

(4) Statutes § 20--Construction--Judicial Function.
A court may not, under the guise of interpretation, insert qualifying provisions not included in a statute.

(5a, 5b) Parent and Child § 18--Parentage of Children--Inheritance Rights--Determination of Natural Parent of Child Born Out of Wedlock:Descent and Distribution § 3--Persons Who Take--Half Siblings of Decedent.
In a proceeding to determine entitlement to an intestate estate, the trial court erred in finding that the half siblings of the decedent, who had been born out of wedlock, were precluded by Prob. Code, § 6453 (only " natural parent" or relative can inherit through intestate child), from sharing in the intestate estate. Prob. Code, § 6453, subd. (b), provides that a natural parent and child relationship may be established through Fam. Code, § 7630, subd. (c), if a court order declaring paternity was entered during the father's lifetime. The decedent's father had appeared in a 1941 bastardy proceeding in Ohio, where he confessed paternity. If a valid judgment of paternity is rendered in Ohio, it generally is binding on California courts if Ohio had jurisdiction over the parties and the subject matter, and the parties were given reasonable notice and an opportunity to be heard. Since the Ohio bastardy proceeding decided the identical issue presented in this California proceeding, the Ohio proceeding bound the parties in this proceeding. Further, even though the decedent's mother initiated the bastardy proceeding prior to adoption of the Uniform Parentage Act, and all procedural requirements of Fam. Code, § 7630, may not have been followed, that judgment was still binding in this proceeding, since the issue adjudicated was identical to the issue that would have been presented in an action brought pursuant to the Uniform Parentage Act.

(6) Judgments § 86--Res Judicata--Collateral Estoppel--Nature of Prior Proceeding--Criminal Conviction on Guilty Plea.
A trial court in a civil proceeding may not give collateral estoppel effect to a criminal conviction involving the same issues if the conviction resulted from a guilty plea. The issue of the defendant's guilt was not fully litigated in the prior criminal proceeding; rather, the plea bargain may reflect nothing more than a compromise instead of an ultimate determination of his or her guilt. The defendant's due process right to a civil hearing thus outweighs any countervailing need to limit litigation or conserve judicial resources.

(7) Descent and Distribution § 1--Judicial Function.
Succession of estates is purely a matter of statutory regulation, which cannot be changed by the courts.

COUNSEL
Kitchen & Turpin, David C. Turpin; Law Office of Herb Fox and Herb Fox for Objector and Appellant.
Mullen & Henzell and Lawrence T. Sorensen for Petitioner and Respondent.
BAXTER, J.
Section 6452 of the Probate Code (all statutory references are to this code unless otherwise indicated) bars a " natural parent" or a relative of that parent from inheriting through a child born out of wedlock on the basis of the parent and child relationship unless the parent or relative " acknowledged the

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child" and " contributed to the support or the care of the child." In this case, we must determine whether section 6452 precludes the half siblings of a child born out of wedlock from sharing in the child's intestate estate where the record is undisputed that their father appeared in an Ohio court, admitted paternity of the child, and paid court-ordered child support until the child was 18 years old. Although the father and the out-of-wedlock child apparently never met or communicated, and the half siblings did not learn of the child's existence until after both the child and the father died, there is no indication that the father ever denied paternity or knowledge of the out-of-wedlock child to persons who were aware of the circumstances.

Since succession to estates is purely a matter of statutory regulation, our resolution of this issue requires that we ascertain the intent of the lawmakers who enacted section 6452. Application of settled principles of statutory *908 construction compels us to conclude, on this uncontroverted record, that section 6452 does not bar the half siblings from sharing in the decedent's estate.

Factual and Procedural Background

Denis H. Griswold died intestate in 1996, survived by his wife, Norma B. Doner-Griswold. Doner-Griswold petitioned for and received letters of administration and authority to administer Griswold's modest estate, consisting entirely of separate property.

In 1998, Doner-Griswold filed a petition for final distribution, proposing a distribution of estate property, after payment of attorney's fees and costs, to herself as the surviving spouse and sole heir. Francis V. See, a self-described " forensic genealogist" (heir hunter) who had obtained an assignment of partial interest in the Griswold estate from Margaret Loera and Daniel Draves, [FN1] objected to the petition for final distribution and filed a petition to determine entitlement to distribution.

FN1 California permits heirs to assign their interests in an estate, but such assignments are subject to court scrutiny. (See § 11604.)

See and Doner-Griswold stipulated to the following background facts pertinent to See's entitlement petition.

Griswold was born out of wedlock to Betty Jane Morris on July 12, 1941 in Ashland, Ohio. The birth certificate listed his name as Denis Howard Morris and identified John Edward Draves of New London, Ohio as the father. A week after the birth, Morris filed a " bastardy complaint" [FN2] in the juvenile court in Huron County, Ohio and swore under oath that Draves was the child's father. In September of 1941, Draves appeared in the bastardy proceeding and " confessed in Court that the charge of the plaintiff herein is true." The court adjudged Draves to be the " reputed father" of the child, and ordered Draves to pay medical expenses related to Morris's pregnancy as well as $5 per week for child support and maintenance. Draves complied, and for 18 years paid the court-ordered support to the clerk of the Huron County court.

FN2 A " bastardy proceeding" is an archaic term for a paternity suit. (Black's Law Dict. (7th ed. 1999) pp. 146, 1148.)

Morris married Fred Griswold in 1942 and moved to California. She began to refer to her son as " Denis Howard Griswold;" a name he used for the rest of his life. For many years, Griswold believed Fred Griswold was his father. At some point in time, either after his mother and Fred Griswold *909 divorced in 1978 or after his mother died in 1983, Griswold learned that Draves was listed as his father on his birth certificate. So far as is known, Griswold made no attempt to contact Draves or other members of the Draves family.

Meanwhile, at some point after Griswold's birth, Draves married in Ohio and had two children, Margaret and Daniel. Neither Draves nor these two children had any communication with Griswold, and the children did not know of Griswold's existence until after Griswold's death in 1996. Draves died in 1993. His last will and testament, dated July 22, 1991, made no mention of Griswold by name or other reference. Huron County probate documents identified Draves's surviving spouse and two children-Margaret and Daniel-as the only heirs.

Based upon the foregoing facts, the probate court denied See's petition to determine entitlement. In the court's view, See had not demonstrated that Draves was Griswold's " natural parent" or that Draves " acknowledged" Griswold as his child as required by section 6452.

The Court of Appeal disagreed on both points and

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reversed the order of the probate court. We granted Doner-Griswold's petition for review.

Discussion

(1a) Denis H. Griswold died without a will, and his estate consists solely of separate property. Consequently, the intestacy rules codified at sections 6401 and 6402 are implicated. Section 6401, subdivision (c) provides that a surviving spouse's share of intestate separate property is one-half " [w]here the decedent leaves no issue but leaves a parent or parents or their issue or the issue of either of them." (§ 6401, subd. (c)(2)(B).) Section 6402, subdivision (c) provides that the portion of the intestate estate not passing to the surviving spouse under section 6401 passes as follows: " If there is no surviving issue or parent, to the issue of the parents or either of them, the issue taking equally if they are all of the same degree of kinship to the decedent ...."

As noted, Griswold's mother (Betty Jane Morris) and father (John Draves) both predeceased him. Morris had no issue other than Griswold and Griswold himself left no issue. Based on these facts, See contends that Doner-Griswold is entitled to one-half of Griswold's estate and that Draves's issue (See's assignors, Margaret and Daniel) are entitled to the other half pursuant to sections 6401 and 6402.

Because Griswold was born out of wedlock, three additional Probate Code provisions-section 6450, section 6452, and section 6453-must be considered. *910

As relevant here, section 6450 provides that " a relationship of parent and child exists for the purpose of determining intestate succession by, through, or from a person" where " [t]he relationship of parent and child exists between a person and the person's natural parents, regardless of the marital status of the natural parents." (*Id.*, subd. (a).)

Notwithstanding section 6450's general recognition of a parent and child relationship in cases of unmarried natural parents, section 6452 restricts the ability of such parents and their relatives to inherit from a child as follows: " If a child is born out of wedlock, neither a *natural parent* nor a relative of that parent inherits from or through the child on the basis of the parent and child relationship between that parent and the child unless both of the following requirements are satisfied: [¶] (a) The parent or a relative of the parent *acknowledged the child.* [¶] (b) The parent or a relative of the parent contributed to the support or the care of the child." (Italics added.)

Section 6453, in turn, articulates the criteria for determining whether a person is a " natural parent" within the meaning of sections 6450 and 6452. A more detailed discussion of section 6453 appears *post*, at part B.

It is undisputed here that section 6452 governs the determination whether Margaret, Daniel, and See (by assignment) are entitled to inherit from Griswold. It is also uncontroverted that Draves contributed court-ordered child support for 18 years, thus satisfying subdivision (b) of section 6452. At issue, however, is whether the record establishes all the remaining requirements of section 6452 as a matter of law. First, did Draves acknowledge Griswold within the meaning of section 6452, subdivision (a)? Second, did the Ohio judgment of reputed paternity establish Draves as the natural parent of Griswold within the contemplation of sections 6452 and 6453? We address these issues in order.

A. *Acknowledgement*

As indicated, section 6452 precludes a natural parent or a relative of that parent from inheriting through a child born out of wedlock unless the parent or relative " acknowledged the child." (*Id.*, subd. (a).) On review, we must determine whether Draves acknowledged Griswold within the contemplation of the statute by confessing to paternity in court, where the record reflects no other acts of acknowledgement, but no disavowals either.

(2) In statutory construction cases, our fundamental task is to ascertain the intent of the lawmakers so as to effectuate the purpose of the statute. (*Day v. City of Fontana* (2001) 25 Cal.4th 268, 272 [*911105 Cal.Rptr.2d 457, 19 P.3d 1196].) " We begin by examining the statutory language, giving the words their usual and ordinary meaning." (*Ibid.*; *People v. Lawrence* (2000) 24 Cal.4th 219, 230 [99 Cal.Rptr.2d 570, 6 P.3d 228].) If the terms of the statute are unambiguous, we presume the lawmakers meant what they said, and the plain meaning of the language governs. (*Day v. City of Fontana, supra*, 25 Cal.4th at p. 272; *People v. Lawrence, supra*, 24 Cal.4th at pp. 230-231.) If there is ambiguity, however, we may then look to extrinsic sources, including the ostensible objects to be achieved and the legislative

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history. (*Day v. City of Fontana*, *supra*, 25 Cal.4th at p. 272.) In such cases, we " ' " select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences." ' " (*Ibid.*)

(1b) Section 6452 does not define the word " acknowledged." Nor does any other provision of the Probate Code. At the outset, however, we may logically infer that the word refers to conduct other than that described in subdivision (b) of section 6452, i.e., contributing to the child's support or care; otherwise, subdivision (a) of the statute would be surplusage and unnecessary.

Although no statutory definition appears, the common meaning of " acknowledge " is " to admit to be true or as stated; confess." (Webster's New World Dict. (2d ed. 1982) p. 12; see Webster's 3d New Internat. Dict. (1981) p. 17 [" to show by word or act that one has knowledge of and agrees to (a fact or truth) ... [or] concede to be real or true ... [or] admit"].) Were we to ascribe this common meaning to the statutory language, there could be no doubt that section 6452's acknowledgement requirement is met here. As the stipulated record reflects, Griswold's natural mother initiated a bastardy proceeding in the Ohio juvenile court in 1941 in which she alleged that Draves was the child's father. Draves appeared in that proceeding and publicly " confessed" that the allegation was true. There is no evidence indicating that Draves did not confess knowingly and voluntarily, or that he later denied paternity or knowledge of Griswold to those who were aware of the circumstances. [FN3] Although the record establishes that Draves did not speak of Griswold to Margaret and Daniel, there is no evidence suggesting he sought to actively conceal the facts from them or anyone else. Under the plain terms of section 6452, the only sustainable conclusion on this record is that Draves acknowledged Griswold.

> FN3 Huron County court documents indicate that at least two people other than Morris, one of whom appears to have been a relative of Draves, had knowledge of the bastardy proceeding.

Although the facts here do not appear to raise any ambiguity or uncertainty as to the statute's application, we shall, in an abundance of caution, *912 test our conclusion against the general purpose and legislative history of the statute. (See *Day v. City of Fontana*, *supra*, 25 Cal.4th at p. 274; *Powers v. City of Richmond* (1995) 10 Cal.4th 85, 93 [40 Cal.Rptr.2d 839, 893 P.2d 1160].)

The legislative bill proposing enactment of former section 6408.5 of the Probate Code (Stats. 1983, ch. 842, § 55, p. 3084; Stats. 1984, ch. 892, § 42, p. 3001), the first modern statutory forerunner to section 6452, was introduced to effectuate the Tentative Recommendation Relating to Wills and Intestate Succession of the California Law Revision Commission (the Commission). (See 17 Cal. Law Revision Com. Rep. (1984) p. 867, referring to 16 Cal. Law Revision Com. Rep. (1982) p. 2301.) According to the Commission, which had been solicited by the Legislature to study and recommend changes to the then existing Probate Code, the proposed comprehensive legislative package to govern wills, intestate succession, and related matters would " provide rules that are more likely to carry out the intent of the testator or, if a person dies without a will, the intent a decedent without a will is most likely to have had." (16 Cal. Law Revision Com. Rep., *supra*, at p. 2319.) The Commission also advised that the purpose of the legislation was to " make probate more efficient and expeditious." (*Ibid.*) From all that appears, the Legislature shared the Commission's views in enacting the legislative bill of which former section 6408.5 was a part. (See 17 Cal. Law Revision Com. Rep., *supra*, at p. 867.)

Typically, disputes regarding parental acknowledgement of a child born out of wedlock involve factual assertions that are made by persons who are likely to have direct financial interests in the child's estate and that relate to events occurring long before the child's death. Questions of credibility must be resolved without the child in court to corroborate or rebut the claims of those purporting to have witnessed the parent's statements or conduct concerning the child. Recognition that an in-court admission of the parent and child relationship constitutes powerful evidence of an acknowledgement under section 6452 would tend to reduce litigation over such matters and thereby effectuate the legislative objective to " make probate more efficient and expeditious." (16 Cal. Law Revision Com. Rep., *supra*, at p. 2319.)

Additionally, construing the acknowledgement requirement to be met in circumstances such as these

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is neither illogical nor absurd with respect to the intent of an intestate decedent. Put another way, where a parent willingly acknowledged paternity in an action initiated to establish the parent-child relationship and thereafter was never heard to deny such relationship (§ 6452, subd. (a)), and where that parent paid all court-ordered support for that child for 18 years (*id.*, subd. (b)), it cannot be said that the participation *913 of that parent or his relative in the estate of the deceased child is either (1) so illogical that it cannot represent the intent that one without a will is most likely to have had (16 Cal. Law Revision Com. Rep., *supra*, at p. 2319) or (2) " so absurd as to make it manifest that it could not have been intended" by the Legislature (*Estate of De Cigaran* (1907) 150 Cal. 682, 688 [89 P. 833] [construing Civ. Code, former § 1388 as entitling the illegitimate half sister of an illegitimate decedent to inherit her entire intestate separate property to the exclusion of the decedent's surviving husband]).

There is a dearth of case law pertaining to section 6452 or its predecessor statutes, but what little there is supports the foregoing construction. Notably, *Lozano v. Scalier* (1996) 51 Cal.App.4th 843 [59 Cal.Rptr.2d 346] (*Lozano*), the only prior decision directly addressing section 6452's acknowledgement requirement, declined to read the statute as necessitating more than what its plain terms call for.

In *Lozano*, the issue was whether the trial court erred in allowing the plaintiff, who was the natural father of a 10-month-old child, to pursue a wrongful death action arising out of the child's accidental death. The wrongful death statute provided that where the decedent left no spouse or child, such an action may be brought by the persons " who would be entitled to the property of the decedent by intestate succession." (Code Civ. Proc., § 377.60, subd. (a).) Because the child had been born out of wedlock, the plaintiff had no right to succeed to the estate unless he had both " acknowledged the child " and " contributed to the support or the care of the child" as required by section 6452. *Lozano* upheld the trial court's finding of acknowledgement in light of evidence in the record that the plaintiff had signed as " Father" on a medical form five months before the child's birth and had repeatedly told family members and others that he was the child's father. (*Lozano*, *supra*, 51 Cal.App.4th at pp. 845, 848.)

Significantly, *Lozano* rejected arguments that an acknowledgement under Probate Code section 6452 must be (1) a witnessed writing and (2) made after the child was born so that the child is identified. In doing so, *Lozano* initially noted there were no such requirements on the face of the statute. (*Lozano*, *supra*, 51 Cal.App.4th at p. 848.) *Lozano* next looked to the history of the statute and made two observations in declining to read such terms into the statutory language. First, even though the Legislature had previously required a witnessed writing in cases where an illegitimate child sought to inherit from the father's estate, it repealed such requirement in 1975 in an apparent effort to ease the evidentiary proof of the parent-child relationship. (*Ibid.*) Second, other statutes that required a parent-child relationship expressly contained more formal acknowledgement requirements for the assertion of certain other rights or privileges. (See *id.* at p. 849, citing *914 Code Civ. Proc., § 376, subd. (c), Health & Saf. Code, § 102750, & Fam. Code, § 7574.) Had the Legislature wanted to impose more stringent requirements for an acknowledgement under section 6452, *Lozano* reasoned, it certainly had precedent for doing so. (*Lozano*, *supra*, 51 Cal.App.4th at p. 849.)

Apart from Probate Code section 6452, the Legislature had previously imposed an acknowledgement requirement in the context of a statute providing that a father could legitimate a child born out of wedlock for all purposes " by publicly acknowledging it as his own." (See Civ. Code, former § 230.) FN4 Since that statute dealt with an analogous subject and employed a substantially similar phrase, we address the case law construing that legislation below.

FN4 Former section 230 of the Civil Code provided: " The father of an illegitimate child, by publicly acknowledging it as his own, receiving it as such, with the consent of his wife, if he is married, into his family, and otherwise treating it as if it were a legitimate child, thereby adopts it as such; and such child is thereupon deemed for all purposes legitimate from the time of its birth. The foregoing provisions of this Chapter do not apply to such an adoption." (Enacted 1 Cal. Civ. Code (1872) § 230, p. 68, repealed by Stats. 1975, ch. 1244, § 8, p. 3196.)

In 1975, the Legislature enacted California's Uniform Parentage Act, which abolished the concept of legitimacy and replaced it with the concept of parentage. (See *Adoption of Kelsey S.* (1992) 1

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Cal.4th 816, 828-829 [4 Cal.Rptr.2d 615, 823 P.2d 1216].)

In *Blythe v. Ayres* (1892) 96 Cal. 532 [31 P. 915], decided over a century ago, this court determined that the word " acknowledge," as it appeared in former section 230 of the Civil Code, had no technical meaning. (*Blythe v. Ayers*, *supra*, 96 Cal. at p. 577.) We therefore employed the word's common meaning, which was " 'to own or admit the knowledge of.' " (*Ibid.* [relying upon Webster's definition]; see also *Estate of Gird* (1910) 157 Cal. 534, 542 [108 P. 499].) Not only did that definition endure in case law addressing legitimation (*Estate of Wilson* (1958) 164 Cal.App.2d 385, 388-389 [330 P.2d 452]; see *Estate of Gird*, *supra*, 157 Cal. at pp. 542-543), but, as discussed, the word retains virtually the same meaning in general usage today-" to admit to be true or as stated; confess." (Webster's New World Dict., *supra*, at p. 12; see Webster's 3d New Internat. Dict., *supra*, at p. 17.)

Notably, the decisions construing former section 230 of the Civil Code indicate that its public acknowledgement requirement would have been met where a father made a single confession in court to the paternity of a child.

In *Estate of McNamara* (1919) 181 Cal. 82 [183 P. 552, 7 A.L.R. 313], for example, we were emphatic in recognizing that a single unequivocal act could satisfy the acknowledgement requirement for purposes of statutory legitimation. Although the record in that case had contained additional evidence of the father's acknowledgement, we focused our attention on his *915 one act of signing the birth certificate and proclaimed: " A more public acknowledgement than the act of [the decedent] in signing the child's birth certificate describing himself as the father, it would be difficult to imagine." (*Id.* at pp. 97-98.)

Similarly, in *Estate of Gird*, *supra*, 157 Cal. 534, we indicated in dictum that " a public avowal, made in the courts" would constitute a public acknowledgement under former section 230 of the Civil Code. (*Estate of Gird*, *supra*, 157 Cal. at pp. 542-543.)

Finally, in *Wong v. Young* (1947) 80 Cal.App.2d 391 [181 P.2d 741], a man's admission of paternity in a verified pleading, made in an action seeking to have the man declared the father of the child and for child support, was found to have satisfied the public acknowledgement requirement of the legitimation statute. (*Id.* at pp. 393-394.) Such admission was also deemed to constitute an acknowledgement under former Probate Code section 255, which had allowed illegitimate children to inherit from their fathers under an acknowledgement requirement that was even more stringent than that contained in Probate Code section 6452. [FN5] (*Wong v. Young*, *supra*, 80 Cal.App.2d at p. 394; see also *Estate of De Laveaga* (1904) 142 Cal. 158, 168 [75 P. 790] [indicating in dictum that, under a predecessor to Probate Code section 255, father sufficiently acknowledged an illegitimate child in a single witnessed writing declaring the child as his son].) Ultimately, however, legitimation of the child under former section 230 of the Civil Code was not found because two other of the statute's express requirements, i.e., receipt of the child into the father's family and the father's otherwise treating the child as his legitimate child (see *ante*, fn. 4), had not been established. (*Wong v. Young*, *supra*, 80 Cal.App.2d at p. 394.)

FN5 Section 255 of the former Probate Code provided in pertinent part: " 'Every illegitimate child, whether born or conceived but unborn, in the event of his subsequent birth, is an heir of his mother, and also of the person who, in writing, signed in the presence of a competent witness, acknowledges himself to be the father, and inherits his or her estate, in whole or in part, as the case may be, in the same manner as if he had been born in lawful wedlock ....' " (*Estate of Ginochio* (1974) 43 Cal.App.3d 412, 416 [117 Cal.Rptr. 565], italics omitted.)

Although the foregoing authorities did not involve section 6452, their views on parental acknowledgement of out-of-wedlock children were part of the legal landscape when the first modern statutory forerunner to that provision was enacted in 1985. (See former § 6408.5, added by Stats. 1983, ch. 842, § 55, p. 3084, and amended by Stats. 1984, ch. 892, § 42, p. 3001.) (3) Where, as here, legislation has been judicially construed and a subsequent statute on the same or an analogous subject uses identical or substantially similar language, we may presume that the Legislature intended the *916 same construction, unless a contrary intent clearly appears. (*In re Jerry R.* (1994) 29 Cal.App.4th 1432, 1437 [35 Cal.Rptr.2d 155]; see also *People v. Masbruch* (1996) 13 Cal.4th

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1001, 1007 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *Belridge Farms v. Agricultural Labor Relations Bd.* (1978) 21 Cal.3d 551, 557 [147 Cal.Rptr. 165, 580 P.2d 665].) (1c) Since no evidence of a contrary intent clearly appears, we may reasonably infer that the types of acknowledgement formerly deemed sufficient for the legitimation statute (and former § 255, as well) suffice for purposes of intestate succession under section 6452. FN6

FN6 Probate Code section 6452's acknowledgement requirement differs from that found in former section 230 of the Civil Code, in that section 6452 does not require a parent to " publicly" acknowledge a child born out of wedlock. That difference, however, fails to accrue to Doner-Griswold's benefit. If anything, it suggests that the acknowledgement contemplated in section 6452 encompasses a broader spectrum of conduct than that associated with the legitimation statute.

Doner-Griswold disputes whether the acknowledgement required by Probate Code section 6452 may be met by a father's single act of acknowledging a child in court. In her view, the requirement contemplates a situation where the father establishes an ongoing parental relationship with the child or otherwise acknowledges the child's existence to his subsequent wife and children. To support this contention, she relies on three other authorities addressing acknowledgement under former section 230 of the Civil Code: *Blythe v. Ayers, supra,* 96 Cal. 532, *Estate of Wilson, supra,* 164 Cal.App.2d 385, and *Estate of Maxey* (1967) 257 Cal.App.2d 391 [64 Cal.Rptr. 837].

In *Blythe v. Ayres, supra,* 96 Cal. 532, the father never saw his illegitimate child because she resided in another country with her mother. Nevertheless, he " was garrulous upon the subject" of his paternity and " it was his common topic of conversation." (*Id.* at p. 577.) Not only did the father declare the child to be his child, " to all persons, upon all occasions," but at his request the child was named and baptized with his surname. (*Ibid.*) Based on the foregoing, this court remarked that " it could almost be held that he shouted it from the house-tops." (*Ibid.*) Accordingly, we concluded that the father's public acknowledgement under former section 230 of the Civil Code could " hardly be considered debatable." (*Blythe v. Ayres, supra,* 96 Cal. at p. 577.)

In *Estate of Wilson, supra,* 164 Cal.App.2d 385, the evidence showed that the father had acknowledged to his wife that he was the father of a child born to another woman. (*Id.* at p. 389.) Moreover, he had introduced the child as his own on many occasions, including at the funeral of his mother. (*Ibid.*) In light of such evidence, the Court of Appeal upheld the trial court's finding that the father had publicly acknowledged the child within the contemplation of the legitimation statute. *917

In *Estate of Maxey, supra,* 257 Cal.App.2d 391, the Court of Appeal found ample evidence supporting the trial court's determination that the father publicly acknowledged his illegitimate son for purposes of legitimation. The father had, on several occasions, visited the house where the child lived with his mother and asked about the child's school attendance and general welfare. (*Id.* at p. 397.) The father also, in the presence of others, had asked for permission to take the child to his own home for the summer, and, when that request was refused, said that the child was his son and that he should have the child part of the time. (*Ibid.*) In addition, the father had addressed the child as his son in the presence of other persons. (*Ibid.*)

Doner-Griswold correctly points out that the foregoing decisions illustrate the principle that the existence of acknowledgement must be decided on the circumstances of each case. (*Estate of Baird* (1924) 193 Cal. 225, 277 [223 P. 974].) In those decisions, however, the respective fathers had not confessed to paternity in a legal action. Consequently, the courts looked to what other forms of public acknowledgement had been demonstrated by fathers. (See also *Lozano, supra,* 51 Cal.App.4th 843 [examining father's acts both before and after child's birth in ascertaining acknowledgement under § 6452].)

That those decisions recognized the validity of different forms of acknowledgement should not detract from the weightiness of a father's in-court acknowledgement of a child in an action seeking to establish the existence of a parent and child relationship. (See *Estate of Gird, supra,* 157 Cal. at pp. 542-543; *Wong v. Young, supra,* 80 Cal.App.2d at pp. 393-394.) As aptly noted by the Court of Appeal below, such an acknowledgement is a critical one that typically leads to a paternity judgment and a legally enforceable obligation of support. Accordingly, such

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acknowledgements carry as much, if not greater, significance than those made to certain select persons (*Estate of Maxey*, *supra*, 257 Cal.App.2d at p. 397) or " shouted ... from the house-tops " (*Blythe v. Ayres*, *supra*, 96 Cal. at p. 577).

Doner-Griswold's authorities do not persuade us that section 6452 should be read to require that a father have personal contact with his out-of-wedlock child, that he make purchases for the child, that he receive the child into his home and other family, or that he treat the child as he does his other children. First and foremost, the language of section 6452 does not support such requirements. (See *Lozano*, *supra*, 51 Cal.App.4th at p. 848.) (4) We may not, under the guise of interpretation, insert qualifying provisions not included in the statute. (*California Fed. Savings & Loan Assn. v. City of Los Angeles* (1995) 11 Cal.4th 342, 349 [45 Cal.Rptr.2d 279, 902 P.2d 297].)

(1d) Second, even though *Blythe v. Ayres*, *supra*, 96 Cal. 532, *Estate of Wilson*, *supra*, 164 Cal.App.2d 385, and *Estate of Maxey*, *supra*, *918 257 Cal.App.2d 391, variously found such factors significant for purposes of legitimation, their reasoning appeared to flow directly from the express terms of the controlling statute. In contrast to Probate Code section 6452, former section 230 of the Civil Code provided that the legitimation of a child born out of wedlock was dependent upon three distinct conditions: (1) that the father of the child " publicly acknowledg[e] it as his own" ; (2) that he " receiv[e] it as such, with the consent of his wife, if he is married, into his family" ; and (3) that he " otherwise treat[] it as if it were a legitimate child." (*Ante*, fn. 4; see *Estate of De Laveaga*, *supra*, 142 Cal. at pp. 168-169 [indicating that although father acknowledged his illegitimate son in a single witnessed writing, legitimation statute was not satisfied because the father never received the child into his family and did not treat the child as if he were legitimate].) That the legitimation statute contained such explicit requirements, while section 6452 requires only a natural parent's acknowledgement of the child and contribution toward the child's support or care, strongly suggests that the Legislature did not intend for the latter provision to mirror the former in all the particulars identified by Doner-Griswold. (See *Lozano*, *supra*, 51 Cal.App.4th at pp. 848-849; compare with Fam. Code, § 7611, subd. (d) [a man is " presumed" to be the natural father of a child if " [h]e receives the child into his home and openly holds out the child as his natural child"].)

In an attempt to negate the significance of Draves's in-court confession of paternity, Doner-Griswold emphasizes the circumstance that Draves did not tell his two other children of Griswold's existence. The record here, however, stands in sharp contrast to the primary authority she offers on this point. *Estate of Baird*, *supra*, 193 Cal. 225, held there was no public acknowledgement under former section 230 of the Civil Code where the decedent admitted paternity of a child to the child's mother and their mutual acquaintances but actively concealed the child's existence and his relationship to the child's mother from his own mother and sister, with whom he had intimate and affectionate relations. In that case, the decedent not only failed to tell his relatives, family friends, and business associates of the child (193 Cal. at p. 252), but he affirmatively denied paternity to a half brother and to the family coachman (*id.* at p. 277). In addition, the decedent and the child's mother masqueraded under a fictitious name they assumed and gave to the child in order to keep the decedent's mother and siblings in ignorance of the relationship. (*Id.* at pp. 260-261.) In finding that a public acknowledgement had not been established on such facts, *Estate of Baird* stated: " A distinction will be recognized between a mere failure to disclose or publicly acknowledge paternity and a willful misrepresentation in regard to it; in such circumstances there must be no purposeful concealment of the fact of paternity. " (*Id.* at p. 276.) *919

Unlike the situation in *Estate of Baird*, Draves confessed to paternity in a formal legal proceeding. There is no evidence that Draves thereafter disclaimed his relationship to Griswold to people aware of the circumstances (see *ante*, fn. 3), or that he affirmatively denied he was Griswold's father despite his confession of paternity in the Ohio court proceeding. Nor is there any suggestion that Draves engaged in contrivances to prevent the discovery of Griswold's existence. In light of the obvious dissimilarities, Doner-Griswold's reliance on *Estate of Baird* is misplaced.

Estate of Ginochio, *supra*, 43 Cal.App.3d 412, likewise, is inapposite. That case held that a judicial determination of paternity following a vigorously contested hearing did not establish an acknowledgement sufficient to allow an illegitimate child to inherit under section 255 of the former

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Probate Code. (See *ante*, fn. 5.) Although the court noted that the decedent ultimately paid the child support ordered by the court, it emphasized the circumstance that the decedent was declared the child's father *against his will* and at no time did he admit he was the father, or sign any writing acknowledging publicly or privately such fact, or otherwise have contact with the child. (*Estate of Ginochio*, *supra*, 43 Cal.App.3d at pp. 416-417.) Here, by contrast, Draves did not contest paternity, vigorously or otherwise. Instead, Draves stood before the court and openly admitted the parent and child relationship, and the record discloses no evidence that he subsequently disavowed such admission to anyone with knowledge of the circumstances. On this record, section 6452's acknowledgement requirement has been satisfied by a showing of what Draves did and did not do, not by the mere fact that paternity had been judicially declared.

Finally, Doner-Griswold contends that a 1996 amendment of section 6452 evinces the Legislature's unmistakable intent that a decedent's estate may not pass to siblings who had no contact with, or were totally unknown to, the decedent. As we shall explain, that contention proves too much.

Prior to 1996, section 6452 and a predecessor statute, former section 6408, expressly provided that their terms did not apply to " a natural brother or a sister of the child" born out of wedlock. FN7 In construing former section 6408, *Estate of Corcoran* (1992) 7 Cal.App.4th 1099 [9 Cal.Rptr.2d 475] held that a half sibling was a " natural brother or sister" within the meaning of such ***920** exception. That holding effectively allowed a half sibling and the issue of another half sibling to inherit from a decedent's estate where there had been no parental acknowledgement or support of the decedent as ordinarily required. In direct response to *Estate of Corcoran*, the Legislature amended section 6452 by eliminating the exception for natural siblings and their issue. (Stats. 1996, ch. 862, § 15; see Sen. Com. on Judiciary, Analysis of Assem. Bill No. 2751 (1995-1996 Reg. Sess.) as amended June 3, 1996, pp. 17-18 (Assembly Bill No. 2751).) According to legislative documents, the Commission had recommended deletion of the statutory exception because it " creates an undesirable risk that the estate of the deceased out-of-wedlock child will be claimed by siblings with whom the decedent had no contact during lifetime, and of whose existence the decedent was unaware." (Assem. Com. on Judiciary, Analysis of Assem. Bill No. 2751 (1995-1996 Reg. Sess.) as introduced Feb. 22, 1996, p. 6; see also Sen. Com. on Judiciary, Analysis of Assem. Bill No. 2751, *supra*, at pp. 17-18.)

> FN7 Former section 6408, subdivision (d) provided: " If a child is born out of wedlock, neither a parent nor a relative of a parent (except for the issue of the child *or a natural brother or sister of the child or the issue of that brother or sister*) inherits from or through the child on the basis of the relationship of parent and child between that parent and child unless both of the following requirements are satisfied: [¶] (1) The parent or a relative of the parent acknowledged the child. [¶] (2) The parent or a relative of the parent contributed to the support or the care of the child. " (Stats. 1990, ch. 79, § 14, p. 722, italics added.)

This legislative history does not compel Doner-Griswold's construction of section 6452. Reasonably read, the comments of the Commission merely indicate its concern over the " undesirable risk" that unknown siblings could rely on the statutory exception to make claims against estates. Neither the language nor the history of the statute, however, evinces a clear intent to make inheritance contingent upon the decedent's awareness of or contact with such relatives. (See Assem. Com. on Judiciary, Analysis of Assem. Bill No. 2751, *supra*, at p. 6; see also Sen. Com. on Judiciary, Analysis of Assem. Bill No. 2751, *supra*, at pp. 17-18.) Indeed, had the Legislature intended to categorically preclude intestate succession by a natural parent or a relative of that parent who had no contact with or was unknown to the deceased child, it could easily have so stated. Instead, by deleting the statutory exception for natural siblings, thereby subjecting siblings to section 6452's dual requirements of acknowledgement and support, the Legislature acted to prevent sibling inheritance under the type of circumstances presented in *Estate of Corcoran*, *supra*, 7 Cal.App.4th 1099, and to substantially reduce the risk noted by the Commission. FN8 ***921**

> FN8 We observe that, under certain former versions of Ohio law, a father's confession of paternity in an Ohio juvenile court proceeding was not the equivalent of a formal probate court " acknowledgement" that would have allowed an illegitimate

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child to inherit from the father in that state. (See *Estate of Vaughan* (2001) 90 Ohio St.3d 544 [740 N.E.2d 259, 262-263].) Here, however, Doner-Griswold does not dispute that the right of the succession claimants to succeed to Griswold's property is governed by the law of Griswold's domicile, i.e., California law, not the law of the claimants' domicile or the law of the place where Draves's acknowledgement occurred. (Civ. Code, §§ 755, 946; see *Estate of Lund* (1945) 26 Cal.2d 472, 493-496 [159 P.2d 643, 162 A.L.R. 606] [where father died domiciled in California, his out-of-wedlock son could inherit where all the legitimation requirements of former § 230 of the Civ. Code were met, even though the acts of legitimation occurred while the father and son were domiciled in two other states wherein such acts were not legally sufficient].)

B. *Requirement of a Natural Parent and Child Relationship*

(5a) Section 6452 limits the ability of a " natural parent" or " a relative of that parent" to inherit from or through the child " on the basis of the parent and child relationship between that parent and the child."

Probate Code section 6453 restricts the means by which a relationship of a natural parent to a child may be established for purposes of intestate succession. [FN9] (See *Estate of Sanders* (1992) 2 Cal.App.4th 462, 474-475 [3 Cal.Rptr.2d 536].) Under section 6453, subdivision (a), a natural parent and child relationship is established where the relationship is presumed under the Uniform Parentage Act and not rebutted. (Fam. Code, § 7600 et seq.) It is undisputed, however, that none of those presumptions applies in this case.

FN9 Section 6453 provides in full: " For the purpose of determining whether a person is a 'natural parent' as that term is used is this chapter: [¶] (a) A natural parent and child relationship is established where that relationship is presumed and not rebutted pursuant to the Uniform Parentage Act, Part 3 (commencing with Section 7600) of Division 12 of the Family Code. [¶] (b) A natural parent and child relationship may be established pursuant to any other provisions of the Uniform Parentage Act, except that the relationship may not be established by an action under subdivision (c) of Section 7630 of the Family Code unless any of the following conditions exist: [¶] (1) A court order was entered during the father's lifetime declaring paternity. [¶] (2) Paternity is established by clear and convincing evidence that the father has openly held out the child as his own. [¶] (3) It was impossible for the father to hold out the child as his own and paternity is established by clear and convincing evidence."

Alternatively, and as relevant here, under Probate Code section 6453, subdivision (b), a natural parent and child relationship may be established pursuant to section 7630, subdivision (c) of the Family Code, FN10 if a court order was entered during the father's lifetime declaring paternity. [FN11] (§ 6453, subd. (b)(1).)

FN10 Family Code section 7630, subdivision (c) provides in pertinent part: " An action to determine the existence of the father and child relationship with respect to a child who has no presumed father under Section 7611 ... may be brought by the child or personal representative of the child, the Department of Child Support Services, the mother or the personal representative or a parent of the mother if the mother has died or is a minor, a man alleged or alleging himself to be the father, or the personal representative or a parent of the alleged father if the alleged father has died or is a minor. An action under this subdivision shall be consolidated with a proceeding pursuant to Section 7662 if a proceeding has been filed under Chapter 5 (commencing with Section 7660). The parental rights of the alleged natural father shall be determined as set forth in Section 7664."

FN11 See makes no attempt to establish Draves's natural parent status under other provisions of section 6453, subdivision (b).

See contends the question of Draves's paternity was fully and finally adjudicated in the 1941 bastardy proceeding in Ohio. That proceeding, he *922 argues, satisfies both the Uniform Parentage Act and the Probate Code, and should be binding on the parties

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here.

If a valid judgment of paternity is rendered in Ohio, it generally is binding on California courts if Ohio had jurisdiction over the parties and the subject matter, and the parties were given reasonable notice and an opportunity to be heard. (*Ruddock v. Ohls* (1979) 91 Cal.App.3d 271, 276 [154 Cal.Rptr. 87].) California courts generally recognize the importance of a final determination of paternity. (E.g., *Weir v. Ferreira* (1997) 59 Cal.App.4th 1509, 1520 [70 Cal.Rptr.2d 33] (*Weir*); *Guardianship of Claralyn S.* (1983) 148 Cal.App.3d 81, 85 [195 Cal.Rptr. 646]; cf. *Estate of Camp* (1901) 131 Cal. 469, 471 [63 P. 736] [same for adoption determinations].)

Doner-Griswold does not dispute that the parties here are in privity with, or claim inheritance through, those who are bound by the bastardy judgment or are estopped from attacking it. (See *Weir*, *supra*, 59 Cal.App.4th at pp. 1516-1517, 1521.) Instead, she contends See has not shown that the issue adjudicated in the Ohio bastardy proceeding is identical to the issue presented here, that is, whether Draves was the natural parent of Griswold.

Although we have found no California case directly on point, one Ohio decision has recognized that a bastardy judgment rendered in Ohio in 1950 was res judicata of any proceeding that might have been brought under the Uniform Parentage Act. (*Birman v. Sproat* (1988) 47 Ohio App.3d 65 [546 N.E.2d 1354, 1357] [child born out of wedlock had standing to bring will contest based upon a paternity determination in a bastardy proceeding brought during testator's life]; see also Black's Law Dict., *supra*, at pp. 146, 1148 [equating a bastardy proceeding with a paternity suit].) Yet another Ohio decision found that parentage proceedings, which had found a decedent to be the " reputed father" of a child, [FN12] satisfied an Ohio legitimation statute and conferred standing upon the illegitimate child to contest the decedent's will where the father-child relationship was established prior to the decedent's death. (*Beck v. Jolliff* (1984) 22 Ohio App.3d 84 [489 N.E.2d 825, 829]; see also *Estate of Hicks* (1993) 90 Ohio App.3d 483 [629 N.E.2d 1086, 1088-1089] [parentage issue must be determined prior to the father's death to the extent the parent-child relationship is being established under the chapter governing descent and distribution].) While we are not bound to follow these Ohio authorities, they persuade us that the 1941 bastardy proceeding decided the identical issue presented here.

> FN12 The term " reputed father" appears to have reflected the language of the relevant Ohio statute at or about the time of the 1941 bastardy proceeding. (See *State ex rel. Discus v. Van Dorn* (1937) 56 Ohio App. 82 [8 Ohio Op. 393, 10 N.E.2d 14, 16].)

Next, Doner-Griswold argues the Ohio judgment should not be given res judicata effect because the bastardy proceeding was quasi-criminal in nature. ***923** It is her position that Draves's confession may have reflected only a decision to avoid a jury trial instead of an adjudication of the paternity issue on the merits.

To support this argument, Doner-Griswold relies upon *Pease v. Pease* (1988) 201 Cal.App.3d 29 [246 Cal.Rptr. 762] (*Pease*). In that case, a grandfather was sued by his grandchildren and others in a civil action alleging the grandfather's molestation of the grandchildren. When the grandfather cross-complained against his former wife for apportionment of fault, she filed a demurrer contending that the grandfather was collaterally estopped from asserting the negligent character of his acts by virtue of his guilty plea in a criminal proceeding involving the same issues. On appeal, the judgment dismissing the cross-complaint was reversed. (6) The appellate court reasoned that a trial court in a civil proceeding may not give collateral estoppel effect to a criminal conviction involving the same issues if the conviction resulted from a guilty plea. " The issue of appellant's guilt was not fully litigated in the prior criminal proceeding; rather, appellant's plea bargain may reflect nothing more than a compromise instead of an ultimate determination of his guilt. Appellant's due process right to a hearing thus outweighs any countervailing need to limit litigation or conserve judicial resources." (*Id.* at p. 34, fn. omitted.)

(5b) Even assuming, for purposes of argument only, that *Pease*'s reasoning may properly be invoked where the father's admission of paternity occurred in a bastardy proceeding (see *Reams v. State ex rel. Favors* (1936) 53 Ohio App. 19 [6 Ohio Op. 501, 4 N.E.2d 151, 152] [indicating that a bastardy proceeding is more civil than criminal in character]), the circumstances here do not call for its application. Unlike the situation in *Pease*, neither the in-court admission nor the resulting paternity judgment at

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issue is being challenged by the father (Draves). Moreover, neither the father, nor those claiming a right to inherit through him, seek to litigate the paternity issue. Accordingly, the father's due process rights are not at issue and there is no need to determine whether such rights might outweigh any countervailing need to limit litigation or conserve judicial resources. (See *Pease*, *supra*, 201 Cal.App.3d at p. 34.)

Additionally, the record fails to support any claim that Draves's confession merely reflected a compromise. Draves, of course, is no longer living and can offer no explanation as to why he admitted paternity in the bastardy proceeding. Although Doner-Griswold suggests that Draves confessed to avoid the publicity of a jury trial, and not because the paternity charge had merit, that suggestion is purely speculative and finds no evidentiary support in the record. *924

Finally, Doner-Griswold argues that See and Griswold's half siblings do not have standing to seek the requisite paternity determination pursuant to the Uniform Parentage Act under section 7630, subdivision (c) of the Family Code. The question here, however, is whether the judgment in the bastardy proceeding initiated by Griswold's mother forecloses Doner-Griswold's relitigation of the parentage issue.

Although Griswold's mother was not acting pursuant to the Uniform Parentage Act when she filed the bastardy complaint in 1941, neither that legislation nor the Probate Code provision should be construed to ignore the force and effect of the judgment she obtained. That Griswold's mother brought her action to determine paternity long before the adoption of the Uniform Parentage Act, and that all procedural requirements of an action under Family Code section 7630 may not have been followed, should not detract from its binding effect in this probate proceeding where the issue adjudicated was identical with the issue that would have been presented in a Uniform Parentage Act action. (See *Weir*, *supra*, 59 Cal.App.4th at p. 1521.) Moreover, a prior adjudication of paternity does not compromise a state's interests in the accurate and efficient disposition of property at death. (See *Trimble v. Gordon* (1977) 430 U.S. 762, 772 & fn. 14 [97 S.Ct. 1459, 1466, 52 L.Ed.2d 31] [striking down a provision of a state probate act that precluded a category of illegitimate children from participating in their intestate fathers' estates where the parent-child relationship had been established in state court paternity actions prior to the fathers' deaths].)

In sum, we find that the 1941 Ohio judgment was a court order " entered during the father's lifetime declaring paternity" (§ 6453, subd. (b)(1)), and that it establishes Draves as the natural parent of Griswold for purposes of intestate succession under section 6452.

Disposition

(7) " 'Succession to estates is purely a matter of statutory regulation, which cannot be changed by the courts.' " (*Estate of De Cigaran*, *supra*, 150 Cal. at p. 688.) We do not disagree that a natural parent who does no more than openly acknowledge a child in court and pay court-ordered child support may not reflect a particularly worthy predicate for inheritance by that parent's issue, but section 6452 provides in unmistakable language that it shall be so. While the Legislature remains free to reconsider the matter and may choose to change the rules of succession at any time, this court will not do so under the pretense of interpretation.

The judgment of the Court of Appeal is affirmed.

George, C. J., Kennard, J., Werdegar, J., and Chin, J., concurred. *925 **BROWN, J.**

I reluctantly concur. The relevant case law strongly suggests that a father who admits paternity in court with no subsequent disclaimers " acknowledge[s] the child" within the meaning of subdivision (a) of Probate Code section 6452. Moreover, neither the statutory language nor the legislative history supports an alternative interpretation. Accordingly, we must affirm the judgment of the Court of Appeal.

Nonetheless, I believe our holding today contravenes the overarching purpose behind our laws of intestate succession-to carry out " the intent a decedent without a will is most likely to have had." (16 Cal. Law Revision Com. Rep. (1982) p. 2319.) I doubt most children born out of wedlock would have wanted to bequeath a share of their estate to a " father" who never contacted them, never mentioned their existence to his family and friends, and only paid court-ordered child support. I doubt even more that these children would have wanted to bequeath a share of their estate to that father's other offspring. Finally, I have *no* doubt that most, if not all, children

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born out of wedlock would have balked at bequeathing a share of their estate to a " forensic genealogist."

To avoid such a dubious outcome in the future, I believe our laws of intestate succession should allow a parent to inherit from a child born out of wedlock only if the parent has some sort of parental connection to that child. For example, requiring a parent to treat a child born out of wedlock as the parent's own before the parent may inherit from that child would prevent today's outcome. (See, e.g., *Bullock v. Thomas* (Miss. 1995) 659 So.2d 574, 577 [a father must " openly treat" a child born out of wedlock " as his own " in order to inherit from that child].) More importantly, such a requirement would comport with the stated purpose behind our laws of succession because that child likely would have wanted to give a share of his estate to a parent that treated him as the parent's own.

Of course, this court may not remedy this apparent defect in our intestate succession statutes. Only the Legislature may make the appropriate revisions. I urge it to do so here. ***926**

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People v. Knowles
Cal.

THE PEOPLE, Respondent,
v.
DAVID KNOWLES, Appellant. FN*
No. CR. 4992.

Supreme Court of California
Apr. 21, 1950

FN* Reporter's Note: In the superior court this case was entitled *People v. Caryl Chessman and David Knowles.* (Los Angeles Superior Court No. 117963.)

HEADNOTES

(1) Criminal Law § 1333--Appeal--Questions of Law and Fact--Identity.
It is for the trier of facts to weigh the evidence relating to identification of the accused and to resolve the conflicts therein, and the trier's acceptance of an identification not inherently improbable must be upheld if there is substantial evidence to support it, even though the contradictory evidence, if believed, would have induced a contrary result.

(2) Kidnapping § 2--For Purpose of Robbery.
Pen. Code, § 209, applies not only to orthodox kidnapping for ransom or robbery, but also to detention of the victim during the commission of armed robbery. Under that statute one accused of armed robbery who has inflicted bodily harm on the victim, can be charged with a capital offense.

(3) Kidnapping § 2--For Purpose of Robbery.
The 1933 amendment of Pen. Code, § 209, abandoned the requirement of movement of the victim that characterized the offense of kidnapping proscribed by that section before the amendment, and made the act of seizing for ransom, reward, or to commit extortion or robbery a felony.

(4) Kidnapping § 2--For Purpose of Robbery.
Evidence that defendant restrained a store owner and his clerk in the stockroom for about 15 or 20 minutes and inflicted bodily harm on the owner during the detention, while the codefendant rifled the cash register, showed that defendants seized and confined the two victims with intent to hold and detain them, or that they held and detained such individuals to commit robbery, within the meaning of Pen. Code, § 209.

(5) Kidnapping § 2--For Purpose of Robbery.
Pen. Code, § 209, as amended in 1933, is not restricted to acts of seizure and confinement incident to a traditional act of kidnapping, but includes also the seizure and confinement of an individual for the purpose of robbery.

(6) Kidnapping § 2--For Purpose of Robbery.
Subject to the constitutional prohibition of cruel and unusual punishment, the Legislature may define and punish offenses as it see fit, and hence may, as in Pen. Code, § 209, define and punish as kidnapping an offense that other states regard only as armed robbery.

(7) Kidnapping § 2--For Purpose of Robbery.
The statutory definition of the offenses proscribed by Pen. Code. § 209, is not rendered uncertain or ambiguous because some of the prohibited acts are not ordinarily regarded as kidnapping, and the Supreme Court should not impute to the statute a meaning not rationally supported by its wording.

(8) Kidnapping § 2--For Purpose of Robbery.
The will of the Legislature must be determined from the statutes, and since Pen. Code, § 209, clearly prohibits and punishes the offense of kidnapping for the purpose of robbery, there is no basis for supposing that the Legislature did not mean what it said.

(9) Statutes § 112(2)--Construction--Power and Duty of Courts--Adding to Statute.
If the words of a statute are clear, the court should not add to or alter them to accomplish a purpose that does not appear on the face of the statute or from its legislative history.
See 23 **Cal.Jur.** 29; 50 **Am.Jur.** 261.
(10) Kidnapping § 2--For Purpose of Robbery.
Pen. Code, § 209, in providing that every person " who seizes, confines ... or who holds or detains any individual ... to commit extortion or robbery ... is guilty of a felony," sets forth the conditions as

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alternative ones, and only one need be present to constitute the offense.

(11) Kidnapping § 2--For Purpose of Robbery.
Pen. Code, § 209, does not require that kidnapping be premeditated as part of a robbery, or that robbery be premediated as part of a kidnapping.

(12) Kidnapping § 2--For Purpose of Robbery.
Where the seizure and restraint are clearly forcible and the purpose of the seizure is robbery, the offense is kidnapping within the meaning of Pen. Code, § 209.

(13a, 13b) Criminal Law § 144--Former Jeopardy--Identity of Offenses.
Where defendant's convictions of armed robbery and kidnapping for the purpose of robbery were predicated on the commission of a single act, and he committed no act of seizure or confinement other than that necessarily incident to the commission of robbery, he cannot be subjected to punishment for both offenses, but must under Pen. Code, § 654, be punished only once; and since the Legislature prescribed greater punishment for the violation of Pen. Code, § 209, relating to kidnapping for the purpose of robbery, it must be deemed to have considered that the more serious offense, and the convictions thereunder must be the ones affirmed.
See 7 **Cal.Jur.** 959; 15 **Am.Jur.** 53.
(14) Criminal Law § 144--Former Jeopardy--Identity of Offenses.
If only a single act is charged as the basis of multiple convictions, only one conviction can be affirmed, notwithstanding that the offenses are not necessarily included offenses. It is the singleness of the act and not of the offense that is determinative.

SUMMARY

APPEAL from judgments of the Superior Court of Los Angeles County and from an order denying a new trial. Harold B. Landreth, Judge. Judgments affirmed in part and reversed in part. Order affirmed.

Prosecution for armed robbery and for kidnapping for purpose of robbery. Judgments of conviction of kidnapping for purpose of robbery, affirmed; judgments of conviction of armed robbery, reversed.

COUNSEL
Rosalind G. Bates and Aileen M. MacLymont for Appellant.

Fred N. Howser, Attorney General, and Henry A. Dietz, Deputy Attorney General, for Respondent.
TRAYNOR, J.
Defendant and Caryl Chessman were jointly charged by information with two counts of armed robbery, two counts of kidnapping for the purpose of robbery, and one count of grand theft. Defendant waived a jury and was tried separately. The trial court found him guilty on both counts of robbery and both counts of kidnapping, but not guilty on the count of grand theft. It determined that one kidnapping involved bodily harm to the victim and sentenced appellant to life imprisonment without possibility of parole. The sentences on the other offenses were to run concurrently. Defendant appeals from the judgment of conviction and the order denying his motion for a new trial, contending that the evidence is insufficient to establish his guilt and that armed robbery is not punishable as kidnapping under Penal Code, section 209. ***178**

On January 23, 1948, at about 6:30 p.m., defendant and Chessman entered a clothing store in Redondo Beach. There was no one in the store except the owner Melvin Waisler and Joe Lesher, a clerk. Defendant asked to look at overcoats and Lesher showed him several while Chessman sat nearby and Waisler walked around the store. The accused stood in a well-lighted area, and Waisler and Lesher testified that they were able to get a good look at them. Shortly thereafter, defendant and Chessman displayed guns, saying " this is a stick-up, put up your hands." They compelled Waisler and Lesher to enter a stockroom in the rear of the store and face the wall, and then took their wallets. Defendant held them at gunpoint in the stockroom while Chessman took some clothes and attempted to open the cash register. He returned to the stockroom, forced Lesher to come back and open the register for him, and took money therefrom, after which he returned Lesher to the stockroom. Defendant struck Waisler on the head with the barrel of his gun, and then left with Chessman. Waisler and Lesher ran to the front of the store in time to see defendant and Chessman escaping in a gray 1946 Ford coupe. They then notified the police.

About an hour later, two police officers in a radio car observed the gray Ford proceeding in a northerly direction on Vermont Avenue in Los Angeles, about half a block south of Hollywood Boulevard. They pursued the Ford and saw Chessman, who was driving, turn into a service station, circle it and drive

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out. The Ford proceeded south at high speed for about a mile, and when Chessman then attempted a U-turn the officers drove their car into the side of the Ford. Both men ran from the car but were quickly caught. The officers found the stolen clothing and a .45 automatic in the rear of the Ford. Chessman had about $150 on his person and defendant $8.00.

To establish an alibi, defendant produced Miss Ann Stanfield who testified that he visited her at her residence in Hollywood at about 6 p.m. on the evening of the robbery and that he remained there for about 15 or 20 minutes. If her testimony were true, appellant could not have been in Redondo Beach, 23 miles distant, at the time of the robbery. Defendant testified that he met Chessman by appointment at the corner of Vermont Avenue and Sunset Boulevard at about 7 p.m. on the evening of the robbery. He testified that there was a man in the car at the time introduced to him by Chessman as Joe, and that Joe rode with them when the police *179 pursuit began, but got out of the car at the service station and ran into the rest room while Chessman and appellant drove off. Chessman corroborated defendant's story.

The foregoing testimony was contradicted in every material detail by witnesses for the prosecution. Waisler and Lesher positively identified defendant as a participant in the robbery. The officers testified that they had the car in plain view at all times, that there were only two occupants, and that they saw none leave it at the station. The direct conflict in the evidence was resolved by the trial court in favor of the People.

(1) Defendant contends that Waisler's and Lesher's identification of him does not establish his guilt beyond a reasonable doubt, because the identification was not by means of a standard police line-up, and because they made the identification after being informed by the police that the robbers had been caught and after they saw defendant's picture in the newspapers upon his arrest in company with Chessman, " a famous bandit." It is for the trier of facts to weigh the evidence relating to identification and to resolve the conflicts therein. His acceptance of an identification not inherently improbable must be upheld if there is substantial evidence to support it, even though the contradictory evidence, if believed, would have induced a contrary result. (*People v. Waller,* 14 Cal.2d 693, 700 [96 P.2d 344]; *People v. Braun,* 14 Cal.2d 1, 5 [92 P.2d 402]; *People v. Farrington,* 213 Cal. 459, 463 [2 P.2d 814]; *People v. Ash,* 88 Cal.App.2d 819, 825 [199 P.2d 711]; *People v. Alexander,* 78 Cal.App.2d 954, 957 [178 P.2d 813]; *People v. Tanner,* 77 Cal.App.2d 181, 186 [175 P.2d 26]; *People v. Deal,* 42 Cal.App.2d 33, 36 [108 P.2d 103].) Substantial evidence of defendant's guilt leaves his first contention without merit.

(2) Defendant also contends that the crime of which he was convicted is only armed robbery, and that Penal Code section 209 cannot properly be construed as applicable to that crime. In his view, the statute applies only to orthodox kidnapping for ransom or robbery, not to the detention of the victim during the commission of armed robbery. This interpretation of section 209 finds no support in its language or legislative history; it could not be sanctioned without a *pro tanto* repeal by judicial fiat.

Defendant concedes that the language of the statute does not in its ordinary sense support his interpretation. Under that language one accused of armed robbery who has inflicted *180 bodily harm on the victim, can be charged with a capital offense. Reasonable men may regard the statute as unduly harsh and therefore unwise; if they do, they should address their doubts to the Legislature. It is not for the courts to nullify a statute merely because it may be unwise. " We do not pause to consider whether a statute differently conceived and framed would yield results more consonant with fairness and reason. We take this statute as we find it." (Cardozo, J., in *Anderson v. Wilson,* 289 U.S. 20, 27 [53 S.Ct. 417, 77 L.Ed. 1004].)

(3) Before its amendment in 1933, Penal Code, section 209 provided that " Every person who maliciously, forcibly or fraudulently takes or entices away any person with intent to restrain such person and thereby to commit extortion or *robbery,* or exact from the relatives or friends of such person any money or valuable thing" (italics added) shall be punished by imprisonment for life or for a minimum of ten years. The 1933 amendment made the punishment, where the victim suffered bodily harm, death or life imprisonment without possibility of parole. At the same time, however, the Legislature redefined the offense to encompass " Every person who *seizes, confines,* inveigles, entices, decoys, abducts, conceals, kidnaps or carries away any individual by any means whatsoever *with intent to hold or detain, or who holds and detains,* such individual for ransom, reward or to commit extortion or robbery. ..." (Italics added.) The addition by

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amendment of the italicized words is a deliberate abandonment of the requirement of movement of the victim that characterized the offense of kidnapping proscribed by section 209 before the amendment. By that amendment the Legislature " changed the offense theretofore described in section 209 from one which required the asportation of the victim to one in which the act of seizing for ransom, reward or to commit extortion or robbery became a felony." (*People v. Raucho,* 8 Cal.App.2d 655, 663 [47 P.2d 1108].)

(4) The trial court found on substantial evidence that defendant restrained Waisler and Lesher in the stockroom for about fifteen or twenty minutes and inflicted bodily harm on Waisler during the detention, while his confederate Chessman rifled the cash register. That conduct is clearly covered by the words of section 209 given their plain meaning. Webster's New International Dictionary, Unabridged Edition (1943), defines " seize" as " To take possession of by force," and " confine" as " To restrain within limits; to limit; ... to *181 shut up; imprison; to put or keep in restraint ... to keep from going out." Clearly a person is taken possession of by force when he is compelled to enter a room at the point of a gun, as in this case. He is also restrained within limits, shut up, and kept from going out when he is forced to remain in that room for fifteen or twenty minutes. That he is held and detained thereby and that such detention was the purpose of the seizure and confinement is readily apparent. There can be no doubt therefore that defendant and Chessman *seized* and *confined* the two victims with intent to hold and detain them or that they *held and detained* " such individual[s]" (the victims seized and confined) to commit robbery.

(5) Defendant concedes that asportation of the victim is not an essential element of section 209, but he contends that the Legislature intended that the statute apply only to acts of seizure and confinement incident to a " traditional act of kidnapping." The Legislature, however, has broadened the statutory prohibition to include not only the seizure and confinement of an individual in a traditional act of kidnapping (for ransom or reward), but also the seizure and confinement of an individual for the purpose of robbery, a purpose foreign to " traditional kidnapping" as defined by defendant. It is therefore idle to suggest that conduct aptly described by the statute is not punishable thereunder. (*People v. Raucho, supra,* 8 Cal.App.2d 655, 663.)

(6) There is no question that the Legislature has the power to define kidnapping broadly enough to include the offense here committed and to prescribe the punishment specified in section 209. Subject to the constitutional prohibition of cruel and unusual punishment, the Legislature may define and punish offenses as it sees fit. (*People v. Lavine,* 115 Cal.App. 289, 297 [1 P.2d 496], appeal dismissed, *Lavine v. California,* 286 U.S. 528 [52 S.Ct. 500, 76 L.Ed. 1270].) It may define and punish as kidnapping an offense that other states regard only as armed robbery. Section 209 establishes that definition as the law of California. (*People v. Tanner,* 3 Cal.2d 279, 296 [44 P.2d 324].) (7) The statutory definition of the proscribed offenses is not rendered uncertain or ambiguous because some of the prohibited acts are not ordinarily regarded as kidnapping. When the Legislature has made such acts punishable as kidnapping, this court should not impute to the statute a meaning not rationally supported by its wording. " The judgment of the court, if I interpret the reasoning aright, does not *182 rest upon a ruling that Congress would have gone beyond its power if the purpose that it professed was the purpose truly cherished. The judgment of the court rests upon the ruling that another purpose, not professed, may be read beneath the surface, and by the purpose so imputed, the statute is destroyed. Thus the process of psycho-analysis has spread to unaccustomed fields. There is a wise and ancient doctrine that a court will not inquire into the motives of a legislative body." (Cardozo, J., dissenting in *United States v. Constantine,* 296 U.S. 287, 298-299 [56 S.Ct. 223, 80 L.Ed. 233]; *Smith v. Union Oil Co.,* 166 Cal. 217, 224 [135 P. 966]; *City of Eureka v. Diaz,* 89 Cal. 467, 469-470 [26 P. 961]; *Callahan v. City and County of San Francisco,* 68 Cal.App.2d 286, 290 [156 P.2d 479].) (8) The will of the Legislature must be determined from the statutes; intentions cannot be ascribed to it at odds with the intentions articulated in the statutes. Section 209 clearly prohibits and punishes the offense committed by defendant; there is no basis for supposing that the Legislature did not mean what it said.

An insistence upon judicial regard for the words of a statute does not imply that they are like words in a dictionary, to be read with no ranging of the mind. They are no longer at rest in their alphabetical bins. Released, combined in phrases that imperfectly communicate the thoughts of one man to another, they challenge men to give them more than passive reading, to consider well their context, to ponder what may be their consequences. Speculation cuts

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brush with the pertinent question: what purpose did the Legislature seek to express as it strung those words into a statute? The court turns first to the words themselves for the answer. It may also properly rely on extrinsic aids, the history of the statute, the legislative debates, committee reports, statements to the voters on initiative and referendum measures. Primarily, however, the words, in arrangement that superimposes the purpose of the Legislature upon their dictionary meaning, stand in immobilized sentry, reminders that whether their arrangement was wisdom or folly, it was wittingly undertaken and not to be disregarded.

" While courts are no longer confined to the language [of the statute], they are still confined by it. Violence must not be done to the words chosen by the legislature." (Frankfurter, *Some Reflections on the Reading of Statutes,* 47 Columb.L.Rev. 527, 543.) A standard of conduct prescribed by a statute would hardly command acceptance if the statute were ***183** given an interpretation contrary to the interpretation ordinary men subject to the statute would give it. " After all, legislation when not expressed in technical terms is addressed to the common run of men and is therefore to be understood according to the sense of the thing, as the ordinary man has a right to rely on ordinary words addressed to him." (*Addison v. Holly Hill Fruit Products Co.,* 322 U.S. 607, 618 [64 S.Ct. 1215, 88 L.Ed. 1488]; see, also, *McBoyle v. United States,* 283 U.S. 25, 27 [51 S.Ct. 340, 75 L.Ed. 816].) (9) If the words of the statute are clear, the court should not add to or alter them to accomplish a purpose that does not appear on the face of the statute or from its legislative history. (*Matson Nav. Co. v. United States,* 284 U.S. 352, 356 [52 S.Ct. 162, 76 L.Ed. 336]; *State Board of Equalization v. Young's Market Co.,* 299 U.S. 59, 62-64 [57 S.Ct. 77, 81 L.Ed. 38]; *United States v. Johnson,* 221 U.S. 488, 496 [31 S.Ct. 627, 55 L.Ed. 823]; *In re Miller,* 31 Cal.2d 191, 198-199 [187 P.2d 722]; *Caminetti v. Pacific Mut. Life Ins. Co.,* 22 Cal.2d 344, 353-354 [139 P.2d 908]; *Seaboard Acc. Corp. v. Shay,* 214 Cal. 361, 369 [5 P.2d 882]; *People v. Stanley,* 193 Cal. 428, 431 [225 P. 1]; *Mulville v. City of San Diego,* 183 Cal. 734, 739 [192 P. 702]; *Gordon v. City of Los Angeles,* 63 Cal.App.2d 812, 816 [147 P.2d 961]; *People v. One 1941 Buick 8,* 63 Cal.App.2d 661, 667 [147 P.2d 401]; *People v. Pacific Guano Co.,* 55 Cal.App.2d 845, 848-849 [132 P.2d 254]; see, also, *De Sloovere, The Equity and Reason of a Statute,* 21 Cornell L.Quar. 591, 605, *Contextual Interpretation of Statutes,* 5 Fordham L.Rev. 219, 221, 230; *Extrinsic Aids in the Interpretation of Statutes,* 88 Univ. of Penn. L.Rev. 527, 531, 538; Cox, *Learned Hand and the Interpretation of Statutes,* 60 Harv.L.Rev. 370, 374-375; Jones, *Statutory Doubts and Legislative Intention,* 40 Columb.L.Rev. 957, 964, 974, and *Extrinsic Aids in the Interpretation of Federal Statutes,* 25 Wash.U.L.Q. 2, 8, 9.) Certainly the court is not at liberty to seek hidden meanings not suggested by the statute or by the available extrinsic aids. (*In re Miller,* 31 Cal.2d 191, 198-199 [187 P.2d 722], and cases cited therein.)

Defendant's interpretation of the statute rests entirely upon speculation. It finds no support in the statutory language or its contextual implications or in the legislative history of the statute. He relies upon the wave of public indignation at the widespread kidnapping for ransom during the early 1930's as a motivation for the statute. He takes no account of the equally rampant and terrorizing armed ***184** robbery that compelled the attention of state legislatures at the same time. There is no reason to suppose that the latter evil was not in the minds of the authors of the statute, particularly in view of the retention of the " to commit ... robbery" provision. The contention that only orthodox kidnapping for ransom was contemplated by the statute is hardly tenable in view of the broad scope of the federal Lindbergh Law that served as a model for the revision of section 209. The federal statute did not limit its prohibition to kidnapping for the purpose of ransom or reward. It (Act of May 18, 1934, ch. 301, 48 Stat. 781, 18 U.S.C. § 408a) provides a discretionary death penalty for the transportation in interstate commerce of a person " held for ransom or reward *or otherwise.*" (Italics added.) The holding of an officer to prevent the arrest of his captor, although admittedly not within the concept of orthodox kidnapping for ransom or pecuniary benefit, was held punishable under the statute. (*Gooch v. United States,* 297 U.S. 124, 126 [56 S.Ct. 395, 80 L.Ed. 522].)

Since 1901, the Legislature has included robbery as one of the purposes of kidnapping prohibited under section 209. There is no indication that in making the penalty therefor more severe and the concept of the crime so broad that movement of the victim was no longer required, the Legislature intended to apply these provisions only to kidnapping for ransom or reward. " Familiar legal expressions in their familiar legal sense" (*Henry v. United States,* 251 U.S. 393, 395 [40 S.Ct. 185, 64 L.Ed. 322]) used by the

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Legislature indicates the contrary, that the broad coverage was intended.

Given the unequivocal language of the statute, there is no merit to defendant's contention that the Legislature did not intend to change the substantive nature of the existing crime. Certainly that contention finds no support in any of the cases decided under the statute. In *People v. Tanner*, 3 Cal.2d 279 [44 P.2d 324], the defendants forced the victim to go from his driveway to his house at gunpoint and there questioned him about the location of money that they had heard was on the premises. On appeal from their conviction under section 209, they contended that their offense was only armed robbery and that the Legislature did not intend to punish it under a kidnapping statute. The court affirmed the conviction, holding that the Legislature is empowered to define criminal offenses as it sees fit and that the statute clearly indicates an intention to punish standstill kidnapping under its provisions. It is suggested that under the statute there must *185 be movement of the victim, under a preconceived plan for protracted detention to obtain property that would not be available in the course of ordinary armed robbery. Defendant seeks to read into the statute a condition that the victim be moved a substantial distance. The statute itself is a refutation of that contention. Movement of the victim is only one of several methods by which the statutory offense may be committed. The statute provides that " Every person who seizes, confines ... or who holds or detains [any] individual ... to commit extortion or robbery ... is guilty of a felony.". (10) It is contended that the statute cannot properly be read with the omissions indicated, for all that is then left is " cautious legal verbiage" of no significance. The statute, however, sets forth the conditions as alternative ones, and only one need be present. Thus, under a statute providing that the victim be seized or abducted, a defendant who has seized a victim cannot claim exemption from the statute because he has not also abducted him.

(11) There is no condition in the statute that kidnapping be premeditated as part of a robbery or that robbery be premeditated as part of a kidnapping. In *People v. Brown*, 29 Cal.2d 555, 558- 559 [176 P.2d 929], this court rejected an attempt to read into the statute a condition that the robbery be premeditated, where the defendant abducted a woman to commit rape. After raping her, he took her wristwatch. A finding that the victim suffered bodily harm was supported both by the forcible rape and by the fact that the defendant subsequently struck her. The judgment imposing the death penalty was affirmed on the ground that the taking of the wristwatch made the abduction kidnapping to commit robbery, even if the original objective were rape and the intent to rob was only an afterthought. (See, also, *People v. Kristy*, 4 Cal.2d 504 [50 P.2d 798]; *People v. Holt*, 93 Cal.App.2d 473, 476 [209 P.2d 94]; *People v. Melendrez*, 25 Cal.App.2d 490 [77 P.2d 870]; *People v. Johnston*, 140 Cal.App. 729 [35 P.2d 1074].)

Chatwin v. United States, 326 U.S. 455 [66 S.Ct. 233, 90 L.Ed. 198], affords no support for appellant's contention. In that case, a conviction under the Federal Kidnapping Act of a member of a plural marriage sect for the interstate transportation of his 15-year-old " celestial spouse" was reversed on the ground that the record failed to show that the girl was held against her will as required by the act. " But the broadness *186 of the statutory language does not permit us to tear the words out of their context, using the magic of lexigraphy to apply them to unattractive or immoral situations *lacking the involuntariness of seizure and detention which is the very essence of the crime of kidnapping. Thus, if this essential element is missing, the act of participating in illicit relations or contributing to the delinquency of a minor or entering into a celestial marriage, followed by the interstate transportation, does not constitute a crime under the Federal Kidnapping Act.*" (*Chatwin v. United States*, 326 U.S. 455, 464 [66 S.Ct. 233, 90 L.Ed. 198]. Italics added.) There is no intimation that had the restraint been forcible, the transportation would not have been within the broad meaning of the " or otherwise" clause of the federal act. (12) Similarly, in a case likes the present one, where the seizure and restraint are clearly forcible and the purpose of the seizure is robbery, the offense is kidnapping within the meaning of section 209.

(13a) Defendant's convictions for violation of Penal Code, section 209 (kidnapping) and Penal Code, section 211 (robbery) both rest upon the commission of a single act: the taking of personal property in the possession of Waisler and Lesher from their persons and in their immediate possession by force and fear FN*, namely, by seizing and confining them under force of arms. The seizure and confinement were an inseparable part of the robbery. Penal Code section 654 provides: " An act or omission which is made punishable in different ways by different provisions

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of this code may be punished under either of such provisions, but in no case can it be punished under more than one; an acquittal or conviction and sentence under either one bars a prosecution for the same act or omission under any other." If the two offenses committed by the same act are such that the commission of one is necessarily included in the commission of the other, the defendant can be punished only for the commission of one. (*People v. Greer*, 30 Cal.2d 589, 596 [184 P.2d 512]: " Where an offense cannot be committed without necessarily committing another offense, the latter is a necessarily included offense." The use of a minor to transport narcotics (Health & Saf. Code, § 11714) necessarily contributes to the delinquency of that minor (Welf. & Inst. Code, § 702). Section 654 requires *187 that the defendant be punished only for one of those offenses. (*People v. Krupa*, 64 Cal.App.2d 592, 598 [149 P.2d 416].) Similarly the commission of statutory rape necessarily contributes to the delinquency of the minor victim and a defendant cannot be punished for violation of both statutes on the basis of the one act. (*People v. Greer*, 30 Cal.2d 589, 596 [184 P.2d 512].)

FN* Penal Code, section 211: " Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear."

(14) But the applicability of section 654 is not limited to necessarily included offenses. If a course of criminal conduct causes the commission of more than one offense, each of which can be committed without committing any other, the applicability of section 654 will depend upon whether a separate and distinct act can be established as the basis of each conviction, or whether a single act has been so committed that more than one statute has been violated. If only a single act is charged as the basis of the multiple convictions, only one conviction can be affirmed, notwithstanding that the offenses are not necessarily included offenses. It is the singleness of the act and not of the offense that is determinative. A statute providing for the punishment of any person operating a " still" or having a " still" in his possession (Stats. 1927, ch. 277, p. 497) states two distinct offenses: operation and possession. If, however, the only act of possession is that necessarily incident to the operation, only one conviction can be affirmed. (*People v. Clemett*, 208 Cal. 142, 146 [280 P. 681].) An unsuccessful attempt at murder by use of a bomb may form the basis for convictions of attempted murder, assault with intent to kill, or malicious use of explosives. Insofar as only a single act is charged as the basis of the convictions, however, the defendant can be punished only once. (*People v. Kynette*, 15 Cal.2d 731, 762 [104 P.2d 794].) The possession of narcotics is an offense distinct from the transportation thereof, but there can be only one conviction when a single act of transportation is proved and the only act of possession is that incident to the transportation. (*Schroeder v. United States*, 7 F.2d 60, 65.) In *People v. Greer*, 30 Cal.2d 589, 600 [184 P.2d 512], the defendant was charged with the violation of Penal Code, section 261(1), and Penal Code, section 288. Both charges were based upon a single act of sexual intercourse with a girl under 14. It is possible to violate either statute without violating the other, and this court there stated that if the commission of separable and distinct acts were charged, although they might have been committed at relatively the same time, the convictions of both offenses would *188 be upheld. If, as in that case, however, the violation of both statutes is predicated on the commission of a single act of sexual intercourse, Penal Code, section 654, requires that the defendant be punished under only one statute.

The distinction recognized in *People v. Greer, supra*, has permitted the affirmance of multiple convictions in cases in which separate and divisible acts have been proved as the basis of each conviction, even though those acts were closely connected in time and were part of the same criminal venture. In *People v. Slobodion*, 31 Cal.2d 555, 561-563 [191 P.2d 1], this court sustained convictions under Penal Code, sections 288 and 288a, based upon a course of conduct with a young girl where the commission of a separate act as the basis of each offense was proved. (See, also, *People v. Pickens*, 61 Cal.App. 405, 407 [214 P. 1027]; *People v. Ciulla*, 44 Cal.App. 725 [187 P. 49].) In *People v. Ciulla, supra*, the court sustained convictions for kidnapping under Penal Code, section 207, and forcible rape, both offenses having been committed upon the same girl, for the reason that the acts charged were separate and divisible and were connected only by the fact that they were part of a single criminal venture.

(13b) Since defendant's convictions were predicated upon the commission of a single act, he cannot be subjected to punishment for both offenses under the rule of *People v. Greer, supra*. Defendant committed no act of seizure or confinement other than that

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necessarily incident to the commission of robbery. Waisler and Lesher were restrained only while the actual taking of personal property was being accomplished. No separate act not essential to the commission of the robbery was charged or proved. For that reason, there is no inconsistency between this case and those in which this court has affirmed multiple convictions of kidnapping and robbery. In each of those cases, the acts that formed the basis of the kidnapping conviction were separate from those that involved the actual taking of property. In *People v. Brown,* 29 Cal.2d 555 [176 P.2d 929], the defendant forced his victim to drive a considerable distance to the outskirts of the city where they stopped and he raped her. While she was dressing, he took her wristwatch. The abduction or carrying away upon which the kidnapping conviction was based was separable from the robbery and not essential to its commission. In *People v. Dorman,* 28 Cal.2d 846 [172 P.2d 686], the defendants drove their victim about for several hours without attempting robbery, then murdered him and only thereafter took his money. ***189** Again, the act of kidnapping was separable from the commission of robbery. (See, also, *People v. Pickens,* 61 Cal.App. 405, 407 [214 P. 1027].) In *People v. Kristy,* 4 Cal.2d 504 [50 P.2d 798], the defendants robbed their victims and then kidnapped them to accomplish their escape from prison. In *People v. Pearson,* 41 Cal.App.2d 614 [107 P.2d 463] (habeas corpus denied, *In re Pearson,* 30 Cal.2d 871 [186 P.2d 401]), the defendant robbed X and thereafter forced Y and Z to drive him away in an attempt to escape. He was convicted of the robbery of X and the kidnapping of Y and Z. In *People v. Tanner,* 3 Cal.2d 279 [44 P.2d 324], the defendants first took the valuables that formed the basis of the robbery conviction and thereafter confined their victims and tortured them in an unsuccessful attempt to secure information as to the location of other property.

Unlike the defendants in the foregoing cases, Knowles committed no act of kidnapping that was not coincident with the taking of personal property. There was no seizure or confinement that could be separated from the actual robbery as a separate and distinct act. Since he committed only a single, indivisible act, Penal Code, section 654, requires that he be punished only once therefor. In view of the fact that the Legislature prescribed greater punishment for the violation of section 209 it must be deemed to have considered that the more serious offense, and the convictions thereunder must be the ones affirmed. (*People v. Kehoe,* 33 Cal.2d 711, 716 [204 P.2d 321]; *People v. Chapman,* 81 Cal.App.2d 857, 866 [185 P.2d 424]; *People v. Degnen,* 70 Cal.App. 567, 578 [234 P. 129]; *Durrett v. United States,* 107 F.2d 438, 439; *Hewitt v. United States,* 110 F.2d 1, 10-11; *People v. Goggin,* 281 N.Y. 611 [22 N.E.2d 174], aff'g 10 N.Y.S.2d 586, 587; *People v. Heacox,* 231 App.Div. 617 [247 N.Y.S. 464, 466].)

The order denying the motion for a new trial is affirmed. The judgments of conviction of kidnapping for the purpose of robbery are affirmed, and the judgments of conviction of armed robbery are reversed.

Shenk, J., Schauer, J., and Spence, J., concurred.
EDMONDS, J.
By the present decision, " the detention of a victim during the commission of armed robbery" constitutes kidnaping, and although " [d]efendant committed no act of seizure or confinement other than that necessarily incident to the commission of robbery," he may be prosecuted ***190** either for robbery or for kidnaping at the election of the district attorney. As I read section 209 of the Penal Code, it neither compels nor warrants this construction, and it is a startling innovation in criminal law that an act which constitutes robbery is also kidnaping.

Under the law now stated, the crime of kidnaping may merge into the crime of robbery. In its practical operation, where one is convicted of robbery only, he may be imprisoned for a period of from five years to life. If he is convicted only of kidnaping, under certain circumstances he may be confined for life, with the possibility of being released upon parole. But if he is guilty not only of kidnaping but also of robbery, since under section 654 of the Penal Code he cannot be punished for both crimes, his term of imprisonment may be only for the period prescribed for one of them.

Thus one who also robs will receive no greater punishment than the criminal who does nothing more than kidnap a person. This is a clear invitation to the kidnaper. He has nothing to lose if he also takes property from his victim's person or immediate presence by means of force or fear (Penal Code, § 211). Under the present decision, if prosecuted for both kidnaping and robbery, punishment can be imposed only for kidnaping. Otherwise stated, instead of being subject to imprisonment upon two sentences, each of which may be for life with the

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possibility of parole and, in practical effect terms of confinement for years, he can only be given one such sentence, with consequent reduction in the time to be served in prison. The fact that Knowles will be subject to imprisonment for life without the possibility of parole under one of the sentences for kidnaping does not warrant a construction of the applicable statutes to allow a substantial decrease in the amount of punishment in those cases where the victim was kidnaped and robbed but suffered no physical harm.

Under the rule now stated, section 209 of the Penal Code may be applied in connection with section 1159. By the latter statutes, " The jury may find the defendant guilty of any offense, the commission of which is necessarily included in that with which he is charged. ..." As an act of robbery now will also constitute a kidnaping, the jury may find one charged with robbery guilty of kidnaping. As a result, one who ordinarily would be subjected to a sentence for a minimum term of one year may be executed. From now on, many charges of attempted robbery, and every one of robbery, inevitably *191 will be prosecutions for a crime which may be punishable by death.

Unquestionably, the Legislature has the power to make either attempted robbery or robbery a capital offense. But in my opinion, considering both the language and historical background of section 209, it has not done so. A cardinal rule of statutory interpretation is that where " ... a statute is fairly susceptible of two constructions, one leading inevitably to mischief or absurdity and the other consisting of sound sense and wise policy, the former should be rejected and the latter adopted." (People v. Ventura Refining Co., 204 Cal. 286, 292 [268 P. 347, 283 P. 60]; San Joaquin etc. Irr. Co. v. Stevinson, 164 Cal. 221 [128 P. 924].)

As amended in 1933, section 209 provides: " Every person who seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps or carries away any individual by any means whatsoever *with intent to hold or detain, or who holds or detains,* such individual for ransom, reward or to commit extortion or robbery ..." is punishable for kidnaping. [Italics added.] The proper construction of the statute largely turns upon the meaning of the italicized words. The prevailing opinion also stresses the words " seizes" and " confines," although each of them is consistent with the traditional concept of kidnaping, and unlike those italicized does not pertain to conduct invariably present in robbery.

As defined in Webster's New International Dictionary, Unabridged Edition (1943), the word " seize" means: " *Transitive* ... 2.b To take possession of by force; ... 4. To lay hold of suddenly or forcibly; ... 5. To take prisoner; ... *Intransitive* ... 3. To make a snatch or clutch." Synonyms for " seize" are listed as " Catch, grip; apprehend, arrest, take, capture." The same authority defines the word " confine" as " ... *transitive* ... 2. To restrain within limits; to limit; ... to shut up; imprison; to put or keep in restraint ..." Synonyms listed are " Restrain, immure, circumscribe, compass; incarcerate, cage."

The definitions and synonyms demonstrate that the words " seizes" and " confines" are consistent with conduct which, until the present decision, has been understood to amount to kidnaping. Although proof of asportation is not necessary to sustain a conviction, nevertheless much more is required than the mere " detention" almost invariably present in attempted robbery or robbery. Words like " take prisoner," " arrest," *192 " imprison," and " incarcerate" suggest the more purposeful aspect of the control exercised by the wrongdoer over the victim's person which is present in kidnaping.

As to the controversial words of section 209 designated by italics, the first clause of the statute defines the specific intent necessary to establish the crime of kidnaping. Rather than the requirement prior to 1933 that the acts be done " maliciously, forcibly or fraudulently;" the amended statute declares that the acts need only be done " ... with intent to hold or detain." None of the acts listed in the first clause is that of holding or detaining. The conduct described as constituting kidnaping is the act of seizing, confining, inveigling, enticing, decoying, abducting, concealing, kidnaping or carrying away any individual *with intent to hold or detain him.* [Italics added.] Had the Legislature intended the detention of the victim, in and of itself, to constitute kidnaping, that conduct would have been stated as the criminal act denounced, rather than being used to describe the necessary intent.

The first clause, therefore, defines as a crime any one of a series of specified acts done to " ... any individual ..." with the specific intent to hold or detain him. Following this clause is the disjunctive word, " or." This word introduces an alternative

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definition of kidnaping. One " ... who holds or detains, *such individual* for ransom, reward or to commit extortion or robbery ..." [italics added] is also guilty of kidnaping. The phrase " ... who holds or detains" is qualified by the words " ... such individual." The words " such individual" must refer to the antecedent noun, " individual," in the preceding clause. And the word " individual" in the first clause is qualified as one whom a person " ... seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps or carries away. ..."

Applying these plain grammatical principles, it follows that the only type of holding or detaining which may constitute kidnaping under section 209 is the holding or detaining of an individual who has previously been kidnaped in the well understood sense. It is clear that the words " holding" and " detaining" are used in the code section to extend the definition of kidnaping to one who acts as the guard or keeper of the kidnaped victim. The inclusion of the words " ... who aids or abets ..." reflects a superabundance of caution on the part of the Legislature, and also demonstrates an intent to make even one who aids the keeper guilty of kidnaping.

For these reasons, the language used by the Legislature *193 makes it clear that mere detention is not sufficient to constitute kidnaping, excepting where the detention follows a traditional act of kidnaping. Grammatically, the construction which the court has placed upon the statute is not supported by its language. And even if there were sound grammatical authority for the conclusion reached, the individual words of a statute should not be subjected to semantic dissection; the severed members are cold and lifeless without the spirit of the law.

The historical background and development of section 209 also lead to the conclusion that simple detention during an act of robbery does not constitute kidnaping. In analyzing the evolution of the legislation, it is essential to distinguish between the two statutory crimes of kidnaping which exist in California and in most modern jurisdictions. The first, and more historically orthodox form of the offense, is defined in section 207 of the Penal Code. It is, with certain modifications which harmonize its terms with modern political development, the continuation of the crime of kidnaping as it has existed since before the Christian era. (See Lardone, *Kidnaping in Roman Law*, 1 U.Det.L.J. 163-171.) At common law, as under the earlier Jewish law, kidnaping was " the forcible abduction or stealing away of a man, woman or child from ... [his] own country, and sending ... [him] into another." (4 Bl. Comm. [Christian Ed.] 221.) This is substantially the crime defined by section 207 as it was enacted in 1872 and has since remained without material change. (Amended Stats. 1905, p. 653, to add " carries him into another ... county, *or into another part of the same county.*")

The second crime of kidnaping is of comparatively recent origin. Perhaps no modern crime is as deeply and inescapably attached to its historical basis as is kidnaping for pecuniary purposes, and any adequate analysis of the offense necessarily must be based upon thorough understanding and appreciation of that background.

Apparently kidnaping for ransom was unknown at common law. One of the first reported instances of the crime in this country occurred in 1874. (Ross, *The Kidnapped Child* [1876], cited and discussed in 12 N.Y.U.L.Q. Rev. 646, 649-50.) The next kidnaping for the purpose of ransom which attracted great attention was in 1900 when Edward Cudahy was abducted and $25,000 demanded for his release. (*Spreading Evil-The *194 Autobiography of Pat Crowe* [1927], cited and discussed in 12 N.Y.U.L.Q. Rev. 646, 650-51.) In the following year, one of the first of the kidnaping for ransom statutes to be enacted in the United States was adopted in Illinois, which from the outset, made kidnaping " for the purpose of extorting ransom" a capital offense. (Stats. Ill. 1901, p. 145, § 1.) Other jurisdictions enacted similar statutes, but the penalty prescribed was generally no more than life imprisonment, although uniformly well in excess of the penalty under the preexisting crime of " common-law" kidnaping, such as that defined in section 207 of the Penal Code.

In 1901 the California Legislature enacted section 209 of the Penal Code, which read: " Every person who maliciously, forcibly, or fraudulently takes or entices away any person with intent to restrain such person and thereby to commit extortion or robbery, or exact from the relatives or friends of such person any money or valuable thing, is guilty of a felony, and shall be punished therefor by imprisonment in the state's prison for life, or any number of years not less than ten." (Stats. 1901, ch. 83, p. 98.) This section differed from the majority of kidnaping for ransom or extortion statutes by enumerating robbery as an

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additional purpose of the unlawful act. Inasmuch as extortion, as then defined, was " the obtaining of property from another, with his consent" (Pen. Code, § 518 [enacted 1872]), quite evidently the Legislature determined that robbery should be specified as a purpose in order to include the taking of a thing of value from the person of the victim, against his will. (*People v. Fisher,* 30 Cal.App. 135 [157 P. 7] [promissory note and deeds to property]; *People v. Salter,* 59 Cal.App.2d 59 [137 P.2d 840] [combination to office safe].)

Although in the years after the first World War a number of isolated kidnapings for ransom occurred, " it was not until the latter part of 1931 that the public began to be aware of the fact that kidnapings were becoming more numerous; and that the hit-or-miss methods of the lone criminal had given away to the carefully planned activity of the professional." (Fisher & McGuire, *Kidnapping and the So-Called Lindbergh Law,* 12 N.Y.U.L.Q. Rev. 646, 652 [citing Sullivan, The Snatch Racket, 1931].) " Kidnaping appeared to have acquired some of the characteristics of a profitable and skilled profession." (Finley, *The Lindbergh Law,* 28 Georgetown L.Rev. 908, 909.) The Lindbergh kidnaping awakened the American people to the fact that a revolting crime was being generally committed *195 and unless the menace was met fearlessly and with determination, " the very sanction of the criminal law was threatened." (Fisher & McGuire, *Kidnapping, supra.*)

The Federal Kidnaping Act, the so-called Lindbergh Law (18 U.S.C.A. 1201; [June 22, 1932], ch. 271, § 1, 47 Stats. 326), was " drawn in 1932 against a background of organized violence. 75 Cong. Rec. 13282-13304. Kidnaping by that time had become an epidemic in the United States. Ruthless criminal bands utilized every known legal and scientific means to achieve their aims and to protect themselves. Victims were selected from among the wealthy with great care and study. Details of the seizures and detentions were fully and meticulously worked out in advance. Ransom was the usual motive." (*Chatwin v. United States* (1946), 326 U.S. 455, 462-3 [66 S.Ct. 233, 90 L.Ed. 198].)

It was in this nationwide atmosphere of public alarm that, in 1933, the California Legislature amended section 209 of the Penal Code to make kidnaping for ransom, reward, extortion or robbery a capital crime. During the years 1933 to 1935, similar statutes were enacted in almost all of the other states, or the punishment specified by existing statutes defining kidnaping was increased. The effectiveness of this uniform action by the various states, and particularly by the Federal government, is clearly demonstrated by the statistics which show a decrease in kidnaping and a larger percentage of convictions for the commission of this crime. (See Bomar, the Lindbergh Law, 1 Law & Contemp. Prob. 435; Fisher & McGuire, *Kidnapping, supra.*)

California is almost unique in its specification of robbery as one of the purposes for kidnaping. Other than Nevada and Arizona, where the statute is modeled upon the California code section (Nev. Comp. Laws 1931-41, Supp. vol. 2, § 10612.01; Ariz. Code Anno. [1939] vol. 3, § 43-3202), only two states in the United States specify robbery as a purpose for kidnaping. (Ark. Stats. 1947 Anno. vol. 4, § 41-2302; Wyo. Comp. Stats. 1945 Anno. vol. 1, § 9-214.) The vast majority of American jurisdictions list " ransom" or " extortion" as the dominant purpose. [FN1] Five states, however, follow the New *196 York pattern of having a single crime of kidnaping, the only purpose specified being to hold or detain, [FN2] although in New York, Delaware and Maryland the offense, as it is broadly defined, may carry a death penalty.

FN1 18 U.S.C.A. 1201; Colo. Stats. Anno. [1935], ch. 48, § 77 (4); Gen. Stats. Conn. [1949 Rev.] vol. 3, § 8372; Dist. Col. Code [1940], § 22-2101; Fla. Stats. Anno. vol. 22, § 805.02; Ga. Code [1933], § 26-1603; Smith-Hurd Ill. Anno. Stats., ch. 38, § 386; Gen. Stats. Kans. Anno. [1935], ch. 21, art. 5, § 449; Ky. Rev. Stats. 1948, § 435.140; Anno. Laws of Mass. vol. 9, ch. 265, § 26; Mich. Stats. Anno. vol. 25, § 28.581; Mo. Rev. Stats. Anno. vol. 13, § 4414; Rev. Code Mont. [1935] Anno vol. 5, § 10970.1; Rev. Stats. of Neb. [1943] vol. 2, ch. 28, § 417; N Mex. Stats. 1941 Anno., vol. 3, § 41-2503; Gen. Stats. N. C. 1943, vol. 1, § 14-39; 10 Page's Ohio Gen. Code Anno., § 12427; Okla. Stats. Anno. [1937] title 21, § 745; Ore. Comp. Laws Anno., vol. 3, § 23-435; Purdon's Pa. Stats. Anno., tit. 18, § 4723; Gen. Laws R. I. [1938], ch. 606, § 21; Code of S. C., vol. 1, § 1122; S. D. Code [1939] vol. 1, § 13.2701; Williams Tenn. Code, vol. 7, § 10795; Vernon's Texas Pen. Code, vol. 2, art. 1177a; Utah Code Anno. [1943], vol. 5, § 103-33-1(b) (1); Virginia

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Code 1936 Anno., § 4407; Vermont Stats. [1947], § 8259; Remington's Rev. Stats. Wash. vol. 4, § 2410-1; W. Va. Code [1943] Anno., § 5929(3); Wis. Stats. [1943], § 340.56; Rev. Stats. Me., vol. 2, ch. 117, § 14; also Code of Ala. [1940], tit. 14, § 7; Burns Ind. Stats. Anno. vol. 4 [1942 Rep.] 10-2903; Code of Iowa [1946], vol. 2, § 706.3; La. Code of Crim. L. & Proc. [1943], art. 740-44; N.J.S.A., 2:143-1.

FN2 39 McKinney's Cons. Laws of N. Y. [Pen. Code], pt. 2, § 1250; Rev. Laws of N. H. [1942], vol. 2, p. 1827; Minn. Stats. Anno. vol. 40, § 619.34; Rev. Code Del. [1935], § 5174; Anno. Code Md. [1939], vol. 1, art. 27, § 385. Possibly Washington should also be listed here as a result of judicial construction of their statute. *State v. Andre*, [195 Wash. 221] 80 P.2d 553; *State v. Berry*, [200 Wash. 495] 93 P.2d 782, noted and criticized in 38 Columb.L.Rev. 1287; 19 Ore. L.R. 301.

Thus, although the state laws enacted during the Lindbergh era vary greatly in specific phraseology, the great body of them define the crime as kidnaping for ransom or extortion in the American gangland tradition of the early 1930's. The two exceptions to the general rule are found (1) in the New York act which, in effect, makes " common law" kidnaping, such as is defined in section 207 of our Penal Code, a capital offense; and (2) in the California statute, which includes robbery as one of the purposes of the crime.

If simple detention during robbery is kidnaping, the scope and coverage of the California and New York statutes go far beyond any normal conceptions of kidnaping for ransom. The very severity of the punishment, [FN3] and the revolting nature of the crimes which were the driving force behind such modern statutes, make it obvious that detention incidental to robbery is not kidnaping. These kidnaping for ransom statutes are " to be construed in the light of [their] contemporary historical background" (*Finch v. State*, 116 Fla. 437, 442 [156 So. 489]); and " the act must be so construed to avoid the absurdity. *197 The court must restrain the words. The object designed to be reached by the act must limit and control the literal import of the terms and phrases employed. (1 Kent's Com. 462; *Commonwealth v. Kimball*, 24 Pick. [Mass.] 366, 370; *United States v. Fisher*, 2 Cranch [358] 400 [2 L.Ed. 304].)" (*State v. Clark*, 29 N.J.L. 96.)

FN3 In California, although first degree murder is punishable by death or life imprisonment (Pen. Code, § 190), kidnaping for purposes of extortion or robbery may be punished by death or life imprisonment *without possibility of parole*, if the victim suffers bodily harm. (Pen. Code, § 209.)

The courts which construed the exceedingly broad language of the New York statute were among the first to recognize the reasonable limitations which must be placed upon the language used in such legislation. Thus, in *People v. Kuntzsch*, 64 N.Y.S.2d 116, which was a case involving an abduction for union membership purposes during a strike, the court dismissed an indictment for kidnaping, saying: " A literal reading of the statute makes a wilful seizure with intent to confine, against the will of the person seized, a kidnaping. Such a literal construction can be carried to absurd extremes. ... The Court in construing the Statute should keep in mind the penalty imposed for violation of the statute. The crime is most serious." (64 N.Y.S.2d at 118-9; see, also, Black on Interpretation of Laws, 2d Ed. § 46, p. 129.)

The federal courts have also shown a recent tendency to retreat from their former broad construction of the intent required under the Lindbergh Law. That act specifies, " for ransom or reward *or otherwise*." In *Gooch v. United States* (1936), 297 U.S. 124 [56 S.Ct. 395, 80 L.Ed. 522], the " or otherwise" clause was given a broad construction to cover nonmonetary benefits. However, recently, in *Chatwin v. United States* (1946), 326 U.S. 455 [66 S.Ct. 233, 9 L.Ed. 198], the court considered the conviction of an advocate of polygamous " celestial marriages," who was charged with taking a small girl from Utah into Mexico, going through a marriage ceremony with her and then returning to Arizona where they resided as man and wife. The prosecution was under the " or otherwise" clause of the Lindbergh Law. In reversing the conviction, it was said: " The stipulated facts of this case reveal a situation quite different from the general problem to which the framers of the Federal Kidnaping Act addressed themselves. ... Comprehensive language was used to cover every possible variety of kidnaping followed by interstate transportation ... [but] were we to sanction a careless concept of the crime of kidnaping or were we to

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disregard the background and setting of the Act the boundaries of potential liability would be lost in infinity. ... The absurdtiy of such a result, with its attendant likelihood of unfair punishment and blackmail, *198 is sufficient by itself to foreclose that construction." (326 U.S. at pp. 462-465.) In reaching its conclusions concerning the particular crime for which Knowles should be punished, the court attempts to dismiss the Chatwin case by saying there " ... is no intimation that had the restraint been forcible, the transportation would not have been within the broad meaning of the 'or otherwise' clause of the federal act." This, however, does not give proper weight to the broad policy stated by the Supreme Court of the United States in refusing to " ... sanction a careless concept of the crime of kidnapping. ..."

Applying the rule of the Chatwin case, the facts shown in the prosecution of Knowles reveal a situation quite different from the general conduct against which the framers of the statute directed legislation. Clearly, he was a participant in an armed robbery, but only by a strained construction of section 209 may his acts be said to constitute kidnaping for the purpose of robbery. The record includes no evidence showing any plan to control the victims' whereabouts as a method of extorting money from them or their friends. The dominant act was the robbery. It could have been accomplished without requiring the victims to go into the storeroom. That movement was merely incidental to the robbery; it was a movement during the robbery, but *it was not a considered and essential prelude to the robbery.* Unquestionably, the crime Knowles committed was not kidnaping for the purpose of robbery in the sense that the Legislature intended by the enactment and amendment of section 209 of the Penal Code.

This conclusion logically follows the rationale of the cases decided when the statute enacted in 1901 was in effect. In *People v. Fisher* (1916), 30 Cal.App. 135 [157 P. 7], the court prefaced its statement of facts by noting that the record " reads as though it were a tale of medieval brigandage." The defendants seized the victim on the highawy and forced him to write a note to his secretary explaining his absence. They then drove him from Merced to Stockton, where he escaped and they were captured. Wire-tapping equipment, unsigned deeds to all of the victim's real property and a number of blank promissory notes were found in the automobile. This was a clear case of kidnaping for the purpose of robbery, that is, the property was to be obtained from a victim's person without his consent. Moreover, viewing the transaction in its entirety, it was an orthodox kidnaping.

The other cases which were prosecuted under the 1901 act *199 were decided upon similar facts. In *People v. Lombard* (1933), 131 Cal.App. 525 [21 P.2d 955], a conviction of attempt to commit kidnaping for purposes of ransom was sustained upon facts which showed the usual kidnap plan: a hideaway prepared, ransom notes and other preparations for extorting money. And *People v. Wagner* (1933), 133 Cal.App. 775 [24 P.2d 927], according to one of the defendants in the case, was " just a case of one racket playing on another." The court there said that " the object of kidnaping which is made an offense by the statute is not primarily the seizure and restraint of the victim, but the mulcting him or his relatives or friends of money or other property through coercion." (133 Cal.App. at p. 780.)

The first decision in which this court considered the effect of the 1933 amendment to section 209 of the Penal Code is *People v. Tanner* (1935), 3 Cal.2d 279 [44 P.2d 324]. The defendants believed that the victim had a large amount of cash hidden in his house. He was accosted in his car just outside his garage and was forced to reenter the house. For over an hour he was questioned, threatened, and finally tortured as the defendants attempted to find out where the " real money" was hidden. Finally, they became convinced that their information was incorrect and there was no large sum of money in the house. Although the asportation was slight, it was clearly connected with a prearranged plan which called for protracted holding and coercion to obtain from the victim property which would not have been available in the course of an ordinary armed robbery. This was the type of criminal conduct which the Legislature sought to prevent by making kidnaping " for the purpose of robbery" a capital crime.

At least four other prosecutions under the 1933 amendment may be placed within the same category. In one of them, there was a prison break in which the warden and other officials were detained for the purpose of obtaining money and clothing and to assure safe exit from the prison. The seizure and transportation was as much for the purpose of robbery as for purpose of obtaining human shields for the escape. It was all part of an organized plan to

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seize the victims and secure the escape. FN4 (People v. Kristy, 4 Cal.2d 504 [50 P.2d 798].) *200 People v. Grimes, 35 Cal.App.2d 319 [95 P.2d 486], presents an excellent example of orthodox kidnaping for ransom. A farmer's wife was taken from her home after a demand was made for $25,000 under threat that otherwise she would never be seen again. People v. Salter, 59 Cal.App.2d 59 [137 P.2d 840], concerned a situation similar to that shown in *People v. Tanner, supra.* The defendants seized the victim in his driveway and thereafter held him, both in his house and in a car driven about town, while they attempted to obtain from him the combination to his office safe. And the prosecution in People v. Anderson, 87 Cal.App.2d 857 [197 P.2d 839], was based upon the kidnaping for robbery of a used car dealer who was taken on a feigned demonstration ride. All of these decisions, upon their facts, affirmed judgments of conviction for seizing and carrying away a person for a purpose which could not be accomplished at the place where he was attacked.

FN4 The 1939 amendment to the extortion statute which added the language " the obtaining of an official act of a public officer, induced by the wrongful use of force or fear," (Pen. Code, § 518; Am. Stats. 1939, p. 2017), would appear to more aptly bring such prison break kidnapings under the heading of " for the purpose of extortion."

To ascertain the legislative intent in the amendment of section 209, reference properly may be made to Senate Bill No. 1226 and Assembly Bill No. 334 which were enacted in 1933. These bills, identical in text, were entitled " An act to amend section 209 of the Penal Code, relating to the punishment of kidnaping." After the Legislature passed the assembly bill, a report on it was made to the governor by the legislative counsel, who is charged with the duty of advising him, as well as the legislators, upon pending bills and other matters (Gov. Code, §§ 10230-10245; Rule 34 of the Joint Rules of the Senate and Assembly, California Legislature, 1949). The report analyzed the proposed amendment as follows: " This bill enlarges the definition of kidnapping. It makes the doing of the designated act or acts an offense by deleting the existing requirement that the seizure or carrying away must be done maliciously, forcibly or fraudulently, and includes within the definition one who aids or abets."

" The existing penalty for kidnapping, upon conviction, is imprisonment in the state prison for from 10 years to life. This bill specifies ... [greatly increased] penalties."

The legislative counsel's opinion went to the governor while the bills were being considered by him. " The executive is, by the constitution, a component part of the law-making power. In approving a law, he is ... supposed to act ... as a part of the legislative branch of the government." (Fowler v. Peirce, 2 Cal. 165, 172.) And the enactment of legislation requires the concurrent action not only of the two houses of the Legislature, but of the governor. (See: *201 Davies v. City of Los Angeles, 86 Cal. 37, 50 [24 P. 771].) " While engaged in considering bills ... presented to him for approval or disapproval, he is acting in a legislative capacity and not as an executive." (Lukens v. Nye, 156 Cal. 498, 501 [105 P. 593, 20 Ann.Cas. 158, 36 L.R.A.N.S. 244]. See, also, Wright v. United States, 302 U.S. 583 [58 S.Ct. 395, 82 L.Ed. 439]; Edwards v. United States, 286 U.S. 482 [52 S.Ct. 627, 76 L.Ed. 1239].) Presumably, in considering the two bills, the governor relied upon, or at least considered, the opinion of the legislative counsel. As the legislation was presented to him by his advisor, the only purpose of the amendment of section 209 was to omit the requirement that the acts specified by the statute then in effect be done maliciously and to change the penalties for kidnaping.

Since the amendment in 1933, the decisions of this court have consistently recognized the distinct characteristics of kidnaping and robbery. Before the present case, whenever the conviction of one found guilty of both kidnaping and robbery arising out of the same chain of events was upheld, the judgment as to each crime has been affirmed. By these decisions, impliedly at least, it has been held that one can commit robbery without also being guilty of kidnaping; until now the court has not held that the same act may constitute both kidnaping and robbery. The decisions are to the contrary. (In re Pearson, 30 Cal.2d 871 [186 P.2d 401] [kidnaping for the purpose of committing robbery and attempted robbery of one Afornin; see People v. Pearson, 41 Cal.App.2d 614, 617 [107 P.2d 463], for details]; *People v.* Brown, 29 Cal.2d 555 [176 P.2d 929] [kidnaping for the purpose of robbery and robbery of one Mrs. Jacobs]; *People v.* Dorman, 28 Cal.2d 846 [172 P.2d 686] [kidnaping for the purpose of robbery and robbery of one Bigelow]; People v. Britton, 6 Cal.2d 8 [56 P.2d 493]

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[one charge of kidnaping for the purpose of robbery and two charges of robbery]; *People v. Kristy,* 4 Cal.2d 504 [50 P.2d 798] [four counts of kidnaping for the purpose of robbery and four counts of robbery]; *People v. Tanner,* 3 Cal.2d 279 [44 P.2d 324] [two counts of kidnaping and two counts of robbery of one Bodkin and his wife].)

In *People v. Dorman, supra,* the defendant was convicted upon one count for murder, one count for kidnaping for the purpose of robbery, and three counts for robbery. In affirming the judgment, Justice Shenk discussed " ... the undisputed acts of transporting Bigelow to an isolated spot; and *202 robbing him" as sufficient evidence to support each of the convictions.

A later case is *People v. Brown, supra,* in which Justice Traynor spoke for the court in affirming convictions for two counts of robbery and one of kidnaping for the purpose of robbery, where the victim suffered bodily harm. The most recent decision is *In re Pearson, supra,* in which a petition for a writ of habeas corpus was denied one imprisoned following convictions for kidnaping and attempted robbery based upon the same facts At page 878 of the opinion, Justice Schauer stated as to the conviction for kidnaping, " Petitioner is legally imprisoned for life without possibility of parole under a judgment verdict which so fixes his punishment."

By the present decision, the court *sub silentio* has overruled the cases cited. And if since 1933 an act of robbery has also constituted kidnaping, the defendants in those cases were entitled to the same relief now given Knowles.

The majority opinion attempts to distinguish the prior decisions upon the ground that, in each of them, " ... the acts that formed the basis of the kidnaping conviction were separate from those that involved the actual taking of property. ..." If this be true, the present case apparently is the first one in reported California legal history where there were inseparable acts of robbery and kidnaping. Furthermore, assuming that the records upon which convictions for robbery and kidnaping for the purpose of robbery were affirmed by this court showed separable acts constituting these crimes, the decisions in those cases are entirely inconsistent with the conclusions now reached. It cannot be said with any certainty whether the triers of fact placed the judgments of conviction upon evidence of the incidental detention necessary to relieve the victims of their property, or upon testimony concerning the defendants' conduct not directly connected with the robberies. As now stated, every robbery is a kidnaping because of such incidental detention and one is unable to say which act the jury relied upon as the basis for its verdict of guilty of kidnaping. If in the prior cases the juries determined that there was detention incidental to robbery and based the convictions for the kidnapings upon that evidence, then, as here, the judgment of conviction for robbery should have been reversed. This is true because, under the new formula, either the evidence as to detention incidental to robbery or that concerning an independent act unrelated to robbery would support the judgment of conviction for kidnaping. And applying *203 section 654 of the Penal Code as used in the majority opinion, where, as in the present case, the conviction for robbery and for kidnaping for the purpose of robbery are based upon the robbery alone, the conviction of the lesser crime should have been set aside.

To summarize my conclusions, the grammatical construction and language of the statute, the legislative history and development of section 209, and the legislative intent as derived from the history and circumstances surrounding the enactment of the 1933 amendment clearly show that one can commit robbery without also being guilty of kidnaping. Considering particularly the facts shown by the present record, I see no basis whatever for holding that one who moves his victim within the immediate zone of the crime merely to facilitate the robbery, or detains him briefly in order to obtain property from him, is guilty of kidnaping.

Otherwise stated, if there be detention alone, it must follow a traditional act of kidnaping in order to render the one detaining guilty of that crime. It is true that section 209 does not in every case require asportation, although that is an element usually present in kidnaping. But the seizure, confinement, inveigling, enticing, decoying, abducting, concealing, kidnaping or carrying away must be done, as the words themselves demonstrate, to control the victim's whereabouts for the purpose of robbery or extortion. If the defendant's control of the location of the victim's person is purely transitory or incidental, as in the ordinary robbery, the crime is not kidnaping.

I would reverse the judgments of conviction for kidnaping, and affirm the judgments of conviction for robbery.

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Gibson, C. J., concurred.
CARTER, J.,
Dissenting.

I am in full accord with the views expressed in the dissenting opinion of Mr. Justice Edmonds, but feel that something further should be said in regard to the holding in the majority opinion. It is there held that a robbery is also a violation of section 209 of the Penal Code, called " kidnapping." The prosecuting attorney is given the sole and arbitrary power to determine whether a person shall suffer life imprisonment without possibility of parole or even death on the one hand, or, in the case of robbery in the second degree, as little as one year's imprisonment. It all depends on the charge he chooses, at his whim or caprice, *204 to make against the accused. If he charges both robbery and kidnapping and the defendant is convicted of both crimes, he must suffer the greater punishment provided for kidnapping, or, if he wishes, he may charge kidnapping alone and likewise obtain the extreme penalty. However, he may charge robbery alone, and, in case of a conviction, lesser punishment would follow. All these things could occur on the identical set of facts which establish only robbery as will later appear. It is not to be supposed that the Legislature intended to place any such drastic and arbitrary power in the hands of the district attorney. On the contrary, it is clear that it did not intend to embrace the crime of robbery in section 209 of the Penal Code. Every robbery, whether first or second degree, necessarily involves some detention or holding of the victim if we give those words a narrow and restricted meaning. The Legislature has carefully defined robbery and fixed its punishment, deeming that punishment adequate. If it had intended to depart from those provisions, it would have done so directly by amending the robbery statute. It would not have attempted to achieve that result by amending section 209, the kidnap statute. The case falls squarely within *In re Shull*, 23 Cal.2d 745 [146 P.2d 417], where this court held that a statute imposing an additional five-year term of imprisonment where a felony was committed with a deadly weapon was not intended to apply to the felony of assault with a deadly weapon, for the elements in both instances were the same and the punishment for the latter was clearly defined. It is there said: " It is not unreasonable to suppose that the Legislature believed that for felonies in which the use of a gun was not one of the essential factors, such as rape, larceny, and the like, an added penalty should be imposed by reason of the fact that the defendant being armed with such a weapon would probably be more dangerous because of the probability of death or physical injury being inflicted by the weapon. Hence, such a condition would be reasonable grounds for increasing the penalty where felonies are involved which do not include as a necessary element being armed with a pistol. The Legislature has by other acts imposed an increased punishment where the only additional factor, being armed with a deadly weapon, is present. The only difference between a simple assault and one with a deadly weapon is the latter factor. The commission of a simple assault is declared a misdemeanor, and the punishment therefor is a fine of not over $500 or imprisonment in the county jail for six months, or by both. (Pen. Code, §§ 240, *205 241.) When there is added to the assault the use of a deadly weapon the punishment is increased to imprisonment in the state prison not exceeding ten years or in the county jail not exceeding one year or a fine not exceeding $5,000 or by both fine and imprisonment (Pen. Code, § 245), and if section 1168(2)(a) or 3024(2) is applicable and the weapons therein mentioned are used, the *minimum* term is fixed at five years where the perpetrator is not one previously convicted of a felony. Briefly, the Legislature has fixed the punishment for an assault where a deadly weapon is used, a particular crime, and it is not to be supposed that for the same offense without any additional factor existing the added punishment should be imposed. In felonies where a deadly weapon is not a factor in the offense, the additional punishment is imposed by section 3 of the Deadly Weapons Act, because of the additional factor of a deadly weapon being involved."

Applying the foregoing rule to the case at bar, it seems obvious to me that by the amendment to section 209 of the Penal Code the Legislature did not intend to make the punishment for kidnapping applicable to robbery, but such is the holding of the majority in this case.

Appellant's petition for a rehearing was denied May 18, 1950. Gibson, C. J., Edmonds, J., and Carter, J., voted for a rehearing.

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C

THE PEOPLE, Plaintiff and Respondent, v.
DEXTER HOWARD, Defendant and Appellant.
Cal.App.2.Dist.

THE PEOPLE, Plaintiff and Respondent,
v.
DEXTER HOWARD, Defendant and Appellant.
No. B152875.

Court of Appeal, Second District, California.
July 15, 2002.

[Opinion certified for partial publication. [FN*]]

FN* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for partial publication. The portions of this opinion to be deleted from publication are identified as those portions between double brackets, e.g., [[/]].

SUMMARY

Defendant was convicted in a bench trial of receiving stolen property (Pen. Code, § 496, subd. (a)), exhibiting a firearm in the presence of an occupant of a motor vehicle (Pen. Code, § 417.3), and carrying an unregistered loaded firearm (Pen. Code, § 12031, subd. (a)(1)). Defendant had pointed a semiautomatic handgun at a driver who was sitting inside his stalled car on the median of a street. (Superior Court of Los Angeles County, No. BA210792, Judith L. Champagne, Judge.)

The Court of Appeal vacated defendant's conviction of exhibiting a firearm in the presence of an occupant of a motor vehicle (Pen. Code, § 417.3), with directions to enter a new judgment of conviction of brandishing a weapon in the presence of another person (Pen. Code, § 417), and otherwise affirmed the judgment. The court held that there was insufficient evidence to convict defendant of violating Pen. Code, § 417.3, since that statute applies to exhibition of a firearm in the presence of an occupant of a motor vehicle that is " proceeding on a public street or highway," and not to an occupant of a stalled and inoperative vehicle that is stopped in the vicinity of a street or highway. The court further held that reduction of defendant's conviction to the lesser included offense of brandishing a weapon in the presence of another person (Pen. Code, § 417) was appropriate, since every element of that offense was supported by substantial evidence. (Opinion by Perren, J., with Gilbert, P. J., and Coffee, J., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1a, 1b) Weapons § 10--Crimes--Exhibition of Firearm in Presence of Occupant of Motor Vehicle--Application When Occupied Vehicle Is Inoperative.
Defendant's conviction of exhibiting a firearm in the presence of an occupant of a motor vehicle (Pen. Code, § 417.3) was not supported by substantial evidence, where the record showed that defendant had pointed a semiautomatic handgun at a driver who was sitting inside his stalled car on the median of a street. Pen. Code, § 417.3, applies to exhibition of a firearm in the presence of an occupant of a motor vehicle that is " proceeding on a public street or highway," and not to an occupant of a stalled and inoperative vehicle that is stopped in the vicinity of a street or highway. This interpretation is consistent with the purpose of Pen. Code, § 417.3, which is to deter and punish threats to persons inside vehicles, which threats could result in erratic driving endangering the safety of the innocent driving and pedestrian public. Further, reduction of defendant's conviction to the lesser included offense of brandishing a weapon in the presence of another person (Pen. Code, § 417) was appropriate, since every element of that offense was supported by substantial evidence.
[See 2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 5; West's Key Number Digest, Weapons 🔑 4.]
(2) Statutes § 29--Construction--Language--Plain Meaning Rule.
In determining legislative intent behind a statute, a court begins with the actual words of the statute, since they are generally the most reliable indicator of intent. The court's inquiry ends if the words of a statute are clear and unambiguous; the plain meaning of the statute governs and there is no need for judicial construction.

COUNSEL

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Carol S. Boyk, under appointment by the Court of Appeal, for Defendant and Appellant.
Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Deborah J. Chuang and Timothy M. Weiner, Deputy Attorneys General, for Plaintiff and Respondent. *96

PERREN, J.

In a bench trial, Dexter Howard was convicted of receiving stolen property (Pen. Code, § 496, subd. (a)), [FN1] exhibiting a firearm in the presence of an occupant of a motor vehicle (§ 417.3), and carrying an unregistered loaded firearm (§ 12031, subd. (a)(1)). He was sentenced to four years four months in prison, doubled to eight years eight months under the " Three Strikes" law based on his admission of a prior juvenile adjudication for attempted robbery. (§§ 664, 211.) Howard contends that there was insufficient evidence to support the conviction for exhibiting a firearm. [[/]] [FN*]

FN1 All statutory references are to the Penal Code unless otherwise stated.

FN* See footnote, *ante*, page 94.

We conclude that Howard's conviction for exhibiting a firearm is not supported by substantial evidence that his victim was in a motor vehicle " proceeding on a public street or highway." (§ 417.3.) Accordingly, we will vacate the conviction but direct the trial court to enter a judgment for the lesser included offense of brandishing a firearm. (§ 417.) [[/]] [FN*] Otherwise, we affirm.

FN* See footnote, *ante*, page 94.

Facts and Procedural History

Bryan Riley was driving with a passenger when his car stalled and came to a stop in the center median of a street. Howard and several men approached Riley's car and asked him, in a threatening manner, what he was doing in their neighborhood. Howard stood near the driver's side of the car and pointed a semiautomatic handgun at the car and in the general direction of Riley. Riley rolled up the windows and locked his door, but later escaped by running into the street and getting into another car, which drove him to safety.

The police responded, detained Howard near the scene of the crime, and recovered a loaded semiautomatic handgun from a nearby trash can. Howard admitted that he had been carrying the gun and threw it in the trash can immediately before the police arrived. He said he was walking to a friend's house and was carrying the gun because he was nervous. The handgun had been stolen about one year earlier.

Howard waived a jury and was tried by the court. He was acquitted of an additional charge of assault with a semiautomatic firearm. (§ 245, subd. (b).) *97

Discussion

[[/]] [FN*]

Exhibiting Firearm to Occupant of Motor Vehicle Not Supported by Substantial Evidence

(1a) " Every person who, except in self-defense, in the presence of any other person who is an occupant of a motor vehicle proceeding on a public street or highway, draws or exhibits any firearm, whether loaded or unloaded, in a threatening manner against another person in such a way as to cause a reasonable person apprehension or fear of bodily harm is guilty of a felony ...." (§ 417.3.) Howard contends that he did not exhibit his gun in the presence of " an occupant of a motor vehicle *proceeding on a public street or highway.*" (*Ibid.*, italics added.) We agree, and conclude that the Legislature did not intend the phrase " motor vehicle proceeding on a public street or highway" to cover a stalled and inoperative motor vehicle merely because it is in the vicinity of a street or highway.

FN* See footnote, *ante*, page 94.

(2) In determining legislative intent, a court begins with the actual words of the statute because they are generally the most reliable indicator of intent. (*People v. Gardeley* (1996) 14 Cal.4th 605, 621 [59 Cal.Rptr.2d 356, 927 P.2d 713].) Our inquiry ends if the words of a statute are clear and unambiguous. The plain meaning of the statute governs and there is no need for judicial construction. (*Ibid.*; *People v. Torres* (2001) 25 Cal.4th 680, 685 [106 Cal.Rptr.2d 824, 22 P.3d 871].)

(1b) None of the relevant statutory words, singly or in combination, display any ambiguity. The ordinary meaning of the word " proceeding" in this context is

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to be " in movement," and the plain meaning of the phrase " motor vehicle proceeding on a public street or highway" is that the vehicle is moving on a street or highway with its engine running and propelling the vehicle. A stalled and inoperative vehicle stopped on the side of the road is not " proceeding on a public street or highway."

Although there is no authority considering the word " proceeding" in connection with the operation of a motor vehicle, other language used to describe the use of motor vehicles supports our interpretation. The phrase " to drive a vehicle" has been interpreted to require volitional movement of a vehicle. (*Mercer v. Department of Motor Vehicles* (1991) 53 Cal.3d 753, 763 [280 Cal.Rptr. 745, 809 P.2d 404] [drunk driving]; *People v. Lively* (1992) 10 Cal.App.4th 1364, 1368 [13 Cal.Rptr.2d 368] [same].) Similarly, " [a] ***98** person operates a motor vehicle when the person causes the motor vehicle to function in the manner for which the automobile is fitted." (*Cabral v. Los Angeles County Metropolitan Transportation Authority* (1998) 66 Cal.App.4th 907, 913 [78 Cal.Rptr.2d 385].)

The Attorney General cites *Adler v. Department of Motor Vehicles* (1991) 228 Cal.App.3d 252 [279 Cal.Rptr. 28], in support of its argument that a motor vehicle proceeding on a street or highway includes a vehicle which is stalled and inoperative. In *Adler*, after parking and stopping, a driver opened her door and accidentally hit and injured a passing bicyclist. The court concluded that an accident occurring under those circumstances was an automobile accident covered by the financial responsibility law. The court stated that the financial responsibility law applies to any person who " 'drives *or is in actual physical control of a vehicle*' " at the time of an accident. (*Id.* at p. 258, quoting Veh. Code, § 305.)

Contrary to the Attorney General's assertion, *Adler* provides support for a limitation of section 417.3 to the exhibition of a firearm to a person in a motor vehicle actually driving and proceeding down a street. *Adler*, and Vehicle Code section 305 relied on by *Adler*, distinguish between a person who is driving a vehicle and a person who has physical control of a vehicle after it has parked and stopped. Both persons may be " drivers" for insurance purposes but, under section 417.3, it is immaterial whether the occupant of an inoperable vehicle can be characterized as a " driver" or " operator" of the vehicle. A vehicle is not " proceeding on a public street or highway" merely because a driver retains physical control after the vehicle has stalled and stopped.

Similarly, the difference between " operating a motor vehicle" and being an occupant of a " motor vehicle proceeding on a public street or highway" demonstrates that an inoperable vehicle does not qualify under section 417.3. A " 'person may be convicted of operating a motor vehicle without it necessarily being shown that the automobile was actually in motion or even had the engine going ....' " (*Padilla v. Meese* (1986) 184 Cal.App.3d 1022, 1028, fn. 1 [229 Cal.Rptr. 310].) " Operation" includes stopping, parking, and other acts incidental to driving the vehicle. (*Cabral v. Los Angeles County Metropolitan Transportation Authority, supra,* 66 Cal.App.4th at p. 914.)

The phrase " motor vehicle proceeding on a public street or highway," however, must be construed more narrowly. Satisfying section 417.3 requires more than that the vehicle be in " operation" in the broadest sense of that word. Even if a motor vehicle is still " operating" at the time it is stopped and parked, the vehicle is not " proceeding on a public street or highway." ***99**

In addition, our interpretation of the statutory phrase to exclude an inoperative vehicle is consistent with the purpose of section 417.3 to deter and punish " threats to persons *inside* vehicles, which threats may well result in erratic driving endangering the safety of the innocent driving and pedestrian public." (*People v. Lara* (1996) 43 Cal.App.4th 1560, 1565-1566 [51 Cal.Rptr.2d 349], fn. omitted.) Riley's inoperable vehicle could not be driven, erratically or otherwise.

We also reject the Attorney General's claim that Riley's vehicle could have moved if he accidentally released the handbrake or took the car out of gear. First, based on the evidence, Riley's vehicle was fully stopped, inoperative, and incapable of moving in any manner (except, presumably, if pushed). Second, the Attorney General offers no sound reason to construe the statutory phrase " proceeding on a public street or highway" to include brief and inadvertent movement on the side of a street or highway.

It is important to note that, at trial and on appeal, both sides agreed that a violation of section 417.3 requires that the defendant exhibit a firearm *against* the occupant of a motor vehicle proceeding on a street or highway. In so doing, the parties were accepting the

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holding of *People v. Lara, supra,* 43 Cal.App.4th at page 1566. As discussed in *Lara,* section 417.3 could be interpreted to apply when a firearm is exhibited against a person who is not an occupant of a motor vehicle (or is an occupant of a motor vehicle which is not proceeding on a street or highway) as long as the firearm is exhibited " in the presence" of another person who is an occupant of a motor vehicle proceeding on a street or highway. (*Lara,* at p. 1565.) *Lara* rejected this interpretation and concluded that the Legislature intended " to require that the person who is placed in fear by the brandishing actually be the occupant of a vehicle." (*Id.* at pp. 1565-1566.) Since neither Howard nor the Attorney General questions *Lara*'s interpretation of section 417.3, we will not address the issue.

Although Howard's conviction for exhibiting a firearm in the presence of a motor vehicle must be overturned, an appellate court may reduce a conviction to a lesser included offense if the evidence supports the lesser included offense but not the charged offense. (*People v. Martinez* (1999) 20 Cal.4th 225, 241 [83 Cal.Rptr.2d 533, 973 P.2d 512]; *People v. Kelly* (1992) 1 Cal.4th 495, 528 [3 Cal.Rptr.2d 677, 822 P.2d 385]; § 1181, subd. 6.)

We conclude that section 417, brandishing a weapon " in the presence of any other person," is a lesser included offense of section 417.3 because a section 417.3 offense cannot be committed without necessarily committing a section 417 offense. (*People v. Birks* (1998) 19 Cal.4th 108, 117-118 ***100**[77 Cal.Rptr.2d 848, 960 P.2d 1073]; *People v. Brenner* (1992) 5 Cal.App.4th 335, 341 [7 Cal.Rptr.2d 260].) The elements of section 417.3 include all the elements of section 417, plus the additional requirements that the exhibition of the firearm must be made in the presence of an occupant of a motor vehicle proceeding on a street or highway, and must be made in such a way " as to cause a reasonable person apprehension or fear of bodily harm." (§ 417.3.) Here, it is undisputed that substantial evidence supports every element of section 417.3 except that the vehicle is proceeding on a street or highway. Accordingly, it is undisputed that every element of a section 417 offense is supported by substantial evidence.

Therefore, we will vacate the conviction for violation of section 417.3, and direct the trial court to enter a new judgment for violation of section 417.

[[/]] FN*

FN* See footnote, *ante*, page 94.

Disposition

The conviction for violation of section 417.3 is vacated with directions to enter a new judgment for violation of section 417. Otherwise, the judgment is affirmed.

Gilbert, P. J., and Coffee, J., concurred. *101
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JACQUELYN GILES et al., Plaintiffs and Respondents, v. BILL HORN, as County Supervisor, etc., et al., Defendants and Appellants.
Cal.App.4.Dist.

JACQUELYN GILES et al., Plaintiffs and Respondents,
v.
BILL HORN, as County Supervisor, etc., et al., Defendants and Appellants.
Nos. D037419, D037873.

Court of Appeal, Fourth District, Division 1, California.
July 17, 2002.

SUMMARY

An action was brought against a county board of supervisors and other county officers, alleging that defendants' hiring of private contractors to provide certain services under the county's implementation of the state welfare-to-work program (CalWORKS) violated both the county charter and state law. The trial court entered judgment in favor of plaintiffs. It determined that the county failed to make the finding, required by county charter provisions, that the contractors would provide services more economically and efficiently than county civil service employees. The trial court also found that the contracting out of case management functions violated Welf. & Inst. Code, § 10619, which requires the performance of all such functions exclusively through use of merit civil service employees except to the extent permitted by state or federal law in effect on Aug. 21, 1996. (Superior Court of San Diego County, No. GIC733081, J. Richard Haden, Judge.)

The Court of Appeal reversed the judgment and remanded the matter to the trial court to allow plaintiffs' claim that contracting out case management functions under the CalWORKS program is not more economical and efficient to proceed; the court additionally dismissed as moot plaintiffs' claim challenging the validity of the contracts on the basis that the county violated the county charter by failing to perform an economy and efficiency determination prior to contracting, and it reversed the trial court's order awarding plaintiffs their attorney fees. The court held that the county violated county charter provisions by entering into contracts with independent contractors to perform case management functions under the CalWORKS program, without first determining that the functions could be done more economically and efficiently by the contractors than by civil service personnel. The charter provisions clearly required the economy and efficiency determination to be made unless some exception applied, and there was no applicable exception. However, as to the original contracts, which had now expired, plaintiffs' claim that the county violated the county charter by failing to make this determination was moot; and, since the county subsequently made the economy and efficiency determination as to extensions of these contracts, plaintiffs' claim that the contracting out of case management functions was not in fact more economical and efficient could be addressed on remand. The court further held that the contracting out of case management functions did not violate Welf. & Inst. Code, § 10619, since it was permitted under both state and federal law in effect on Aug. 21, 1996. (Opinion by Nares, Acting P. J., with McIntyre and McConnell, JJ., concurring.)

HEADNOTES

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(1) Appellate Review § 145--Scope of Review--Questions of Law and Fact-- Function of Appellate Court--Independent Review.
Under the independent de novo standard of review, the appellate court is not bound by the findings of the trial court; rather, it reviews the facts and law anew.

(2) Appellate Review § 152--Scope of Review--Questions of Law and Fact-- Sufficiency of Evidence--Consideration of Evidence.
Under the substantial evidence standard of review, the appellate court accepts as true all of the evidence most favorable to the respondent, and discards the unfavorable evidence as not having sufficient verity to be accepted by the trier of fact.

(3) Statutes § 29--Construction--Language--Legislative Intent.

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The fundamental rule of statutory construction is that the court should ascertain the intent of the Legislature so as to effectuate the purpose of the law. In determining that intent, the court first examines the words of the statute itself.

(4) Statutes § 30--Construction--Language--Literal Interpretation; Plain Meaning Rule.
Under the plain meaning rule, courts seek to give the words employed by the Legislature their usual and ordinary meaning. If the language of the statute is clear and unambiguous, there is no need for construction.

(5) Statutes § 21--Construction--Legislative Intent.
A court must select the construction of a statute that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences. The legislative purpose will not be sacrificed to a literal construction of any part of the statute.

(6) Statutes § 44--Construction--Aids--Contemporaneous Administrative Construction.
While the ultimate interpretation of a statute is an exercise of the judicial power, when an administrative agency is charged with enforcing a particular statute, its interpretation will be accorded great respect by the court and will be followed if not clearly erroneous. Courts find administrative interpretations of a law to be significant factors in ascertaining statutory meaning and purpose.

(7) Municipalities § 11--Charters--Construction.
The same rules of statutory interpretation that apply to statutory provisions also apply to local charter provisions.

(8) Counties § 14--Contracts--Welfare-to-work Program--Contracting of Case Management Functions.
A county violated county charter provisions by entering into contracts with independent contractors to perform case management functions under the state welfare-to-work program, without first determining that the functions could be done more economically and efficiently by the contractors than by civil service personnel. The charter provisions clearly required the economy and efficiency determination to be made unless some exception applied. State law allows the contracting out of services that cannot be performed adequately, competently, or satisfactorily by civil service personnel, and it also allows such contracting out where time is of the essence. However, local charter provisions supersede conflicting state law as to matters that are within county operation, and the charter provisions at issue required the economy and efficiency determination without recognizing the state exceptions. Further, the language and statutory history of the charter provisions did not support an interpretation under which the economy and efficiency requirement applied only where the tasks could be completely performed by existing civil service personnel.
[See 8 Witkin, Summary of Cal. Law (9th ed. 1988) Constitutional Law, § 799; West's Key Number Digest, Counties 🔑 111(2).]

(9) Appellate Review § 119--Dismissal--Grounds--Mootness.
Appellate courts will decide only actual controversies. Thus, an action that was originally based on a justiciable controversy cannot be maintained on appeal if the questions raised therein have become moot by subsequent acts or events. Such a case will not proceed to formal judgment but will be dismissed.

(10) Appellate Review § 120--Dismissal--Grounds--Mootness--What Constitutes--Where Injunctive Relief Sought.
The rule that an action that has become moot following judgment in the trial court will be dismissed on appeal applies in the situation where injunctive relief is sought and, pending appeal, the act sought to be enjoined has been performed.

(11) Appellate Review § 120--Dismissal--Grounds--Mootness--What Constitutes--Expiration of Contracts at Issue.
An appeal from a judgment of the trial court, determining that a county violated county charter provisions by entering into contracts with independent contractors to perform case management functions under the state welfare-to-work program, without first determining that the functions could be done more economically and efficiently by the contractors than by civil service personnel, was rendered moot by the expiration of the original contracts and by the county chief administrative officer's having made the required economy and efficiency determination as to the contract extensions. An appellate court has discretion to review a matter on the merits, despite mootness, where the issue is

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one of broad public interest that is likely to recur. However, this exception was inapplicable, since the claim that the economy and efficiency determination had not been made as to the original contracts required fact-specific findings that would not necessarily be applicable to other contracts.

(12) Appellate Review § 163--Determination and Disposition of Cause-- Reversal--Where Appeal Moot.
Where an appeal is disposed of on the ground of mootness and without reaching the merits, in order to avoid ambiguity, the preferable procedure is to reverse the judgment with directions to the trial court to dismiss the action for having become moot prior to its final determination on appeal.

(13) Public Aid and Welfare § 2--State and Federal Legislation--Welfare-to-work Program--Contracting of Case Management Functions--State Requirements.
A county, by entering into contracts with independent contractors to perform case management functions under the state welfare-to-work program (CalWORKS), did not violate Welf. & Inst. Code, § 10619, insofar as that statute requires the performance of all such functions exclusively through use of merit civil service employees except to the extent permitted by state law in effect on Aug. 21, 1996. The legislative history of the CalWORKS program indicated that the nature of services contracted out by the county complied with state law as it existed on that date. The state approved the county's CalWORKS plan in 1998, and this was persuasive evidence that the plan was not in violation of § 10619. Further, the state issued an all-county letter in 1997 that prohibited the contracting out of only discretionary functions, and there was no contention that the county had contracted out such functions. The functions contracted out were ministerial, not discretionary.

(14) Public Aid and Welfare § 2--State and Federal Legislation--Welfare-to-work Program--Contracting of Case Management Functions--Federal Requirements.
A county, by entering into contracts with independent contractors to perform case management functions under the state welfare-to-work program, did not violate Welf. & Inst. Code, § 10619, insofar as that statute requires the performance of all such functions exclusively through use of merit civil service employees except to the extent permitted by federal law in effect on Aug. 21, 1996. The federal regulations in effect on that date allowed the contracting out of case management functions, as long as certain requirements were met, and the county's program met those requirements. Policy level determinations and overall program administration were retained by the county. Contractors could make recommendations to county staff regarding determinations of no good cause for failure to participate in the program, but the actual determination was made by county staff. Similarly, contractors could make recommendations regarding sanctions, but only county staff could determine whether to actually impose them.

COUNSEL
John J. Sansone, County Counsel, and Judith A. McDonough, Deputy County Counsel, for Defendants and Appellants.
Chapin Shea McNitt & Carter, Aaron H. Katz and Sarah N. Baker for Maximus, Inc., as Amicus Curiae on behalf of Defendants and Appellants.
Kathleen Bales-Lange, County Counsel (Tulare) and Teresa M. Saucedo, Deputy County Counsel, as Amici Curiae on behalf of Defendants and Appellants.
Tosdal, Levine, Smith & Steiner and Thomas Tosdal for Plaintiff and Respondent Jacquelyn Giles.
Van Bourg, Weinberg, Roger & Rosenfeld and James G. Varga for Plaintiffs and Respondents Ardelia McClure, Amelia Rivera, Sara Sandez, Maria Franco and Mary Harrigan. *211

NARES, Acting P. J.

These consolidated appeals arise from plaintiffs and respondents Jacquelyn Giles, Ardelia McClure, Amelia Rivera, Mary Harrigan, Maria Franco and Sara Sandez's (collectively plaintiffs) suit against defendants and appellants Bill Horn, Greg Cox, Dianne Jacob, Pam Slater and Ron Roberts, in their collective official capacity as the San Diego County Board of Supervisors, and against the San Diego County Welfare Director and Robert Ross, M.D., in his official capacity as Director of the San Diego County Health and Human Services Agency (collectively defendants), alleging that defendants' hiring of private contractors to provide certain services under San Diego County's implementation of California's welfare-to-work program, known as CalWORKS, violated both the San Diego County Charter (County Charter) and state law. The court agreed, ordering the agreements entered into between San Diego County (the County) and the private contractors terminated because (1) the County did not make a finding that the contractors would provide

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services more economically and efficiently than county civil service employees as required by the County Charter; and (2) Welfare and Institutions Code [FN1] section 10619 forbids the County from contracting out to private contractors case management services under the CalWORKS program.

FN1 All further statutory references are to the Welfare and Institutions Code unless otherwise specified.

Defendants contend that the court erred in terminating the contracts because the issue of whether a finding of efficiency and economy is required prior to contracting with non-civil-service employees is now moot because the pertinent contracts have been performed and have expired, and the County made efficiency and economy findings before entering into new contracts with the private contractors. Defendants also assert that they were not required to make an economy and efficiency finding here because (1) the County was hiring individuals to perform services not already performed by civil service employees; (2) time was of the essence and independent contractors could provide the services more swiftly; and (3) the County Charter only required economy and efficiency determinations where the services could be performed by existing civil service personnel. Defendants also contend that the County has authority under both state and federal law to contract out welfare services to private contractors.

We conclude that the County was required, pursuant to the County Charter, to make a determination that it was more economical and efficient to contract out case management services under the CalWORKS program to private contractors than to have those services performed by County civil ***212** service personnel prior to entering into such contracts. However, we reverse as moot the court's ruling that the County violated applicable County Charter provisions in failing to make such a determination, as the relevant contracts have been performed and have expired. We therefore order the court to dismiss that claim. Further, we remand the action for a determination of plaintiffs' claim that the County's contracts with private contractors are in fact not more economical and efficient than having those functions performed by civil service personnel. The present contracts expired on June 30, 2002, and the County is in the process of making or has already made an economy and efficiency determination for contracts with private contractors following that date. Therefore, if the County relies upon the determinations made for the expired contracts in finding any new contracts beginning after June 30, 2002, are more economical and efficient, then plaintiffs may challenge those original findings. However, if new findings of economy and efficiency are or have been performed for contracts after June 30, 2002, plaintiffs' challenge in this litigation would have to be as to the new findings as, since the current contracts have expired, any challenge to the original findings will be moot. We also reverse the court's ruling that the contracts violated state and federal law and reverse the court's award of attorney fees to plaintiffs.

Factual and Procedural Background [FN2]

A. *Federal Welfare Reform*

In 1996, the federal government enacted what is known as the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), 42 United States Code section 602 et seq., which authorized funding to states for welfare-to-work programs. PRWORA replaced two federally funded welfare programs, Aid to Families with Dependent Children (AFDC), which provided monetary assistance to eligible families, and Job Opportunity and Basic Skills (JOBS), which provided employment assistance to adults in families that were receiving AFDC benefits. In California, the JOBS program was known as GAIN.

FN2 The factual background is taken largely from a stipulation of facts entered into between the parties prior to trial. Additional facts are also taken from testimony and exhibits introduced at trial.

B. *California's Implementation of PRWORA*

In 1997, the California Legislature implemented PRWORA by amending section 11200 et seq. and replacing California's AFDC and GAIN programs with the California Work Opportunity and Responsibility to Kids Act (CalWORKS). CalWORKS consists of two welfare services: (1) cash aid to ***213** parents and children and (2) the welfare-to-work program, which seeks to end families' dependence on welfare.

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The CalWORKS program took effect on January 1, 1998. Participants in the welfare-to-work program were to be enrolled beginning in April 1998, with all eligible participants required to be enrolled by December 31 of that year. If a county failed to meet these deadlines, it faced financial penalties and program participants could be penalized because they were to receive only 18 to 24 months of welfare-to-work services regardless of whether such services were available.

Regarding the contracting out of functions under CalWORKS, section 10619 provides: " A public agency shall, in implementing programs affected by the act adding this section to the Welfare and Institutions Code, perform all program functions exclusively through the use of merit civil service employees of the public agency, *except to the extent permitted by provisions of state and federal law governing the affected program that were in effect on August 21, 1996*." (Italics added.)

C. *The County's Implementation of CalWORKS*

Anticipating California's pending adoption of the CalWORKS program, in June 1997 the County sought community input on " maximizing the County's capacity to serve CalWORKS recipients through a combination of County staff and community based organizations." By December 1997, County staff developed a CalWORKS plan, which divided case management functions for CalWORKS participants into six geographical regions within the County. Further, the County plan provided for contracting out CalWORKS case management services in four of the six regions to private contractors: " To maximize competition, privatization and creativity in an incentivised system, the County will procure case management services for four of the six regions with the goal of selecting up to two regional contractors from private for profit agencies and up to two regional contractors from nonprofit agencies. County staff will be responsible for case management in the two remaining regions."

The County contends that it decided to contract out a portion of the case management function of CalWORKS to private contractors because (1) CalWORKS increased both the number of participants and functions of case workers; (2) the County would need to hire up to 320 new caseworkers and acquire additional facilities and equipment; and (3) due to the time limitations of the benefits under the program, the caseloads would decrease significantly after the first two years, leaving a surplus of civil service ***214** workers if the functions were performed by county employees. The County believed that private contractors would be able to hire employees and procure facilities and equipment more quickly than the County, and thus comply with the deadlines of CalWORKS and avoid any delay in implementing CalWORKS services.

In February 1998, the County's chief administrative officer (CAO) sent a letter to the board of supervisors, requesting approval for the issuance of requests for proposals (RFP's). The letter stated the requirements of CalWORKS were expected to increase the number of County welfare recipients who must engage in full-time work activities from approximately 12,000 to 34,000 individuals. The letter also stated that " any selection would depend upon a finding of economy and efficiency per Board Policy A-96." The board of supervisors approved the issuance of the RFP's on the same day. The purchasing and contracting director was authorized to issue the RFP's and " negotiate and award contracts for these services ... subject to the [CAO] making a determination of economy and efficiency." In March 1998, the County issued an addendum to the RFP's, stating that " [i]n accordance with County of San Diego Charter Section 916, award of contracts shall be subject to the [CAO's] determination regarding economy and efficiency."

County Charter, article IX, section 916 (County Charter section 916), as amended in 1986, and as it reads today, provides: " Section 916: Independent Contractors. Nothing in this Article [governing civil service employees] prevents the County from employing an independent contractor when the Board or Purchasing Agent determines that *services can be provided more economically and efficiently by an independent contractor than by persons employed in the Classified Service*." (Italics added.)

County Charter, article VII, section 703.10 (County Charter section 703.10) states: " In cases where the County intends to employ an independent contractor, the [CAO] *shall* first determine that the services can be provided more economically and efficiently by an independent contractor than by persons employed in the Classified Service." (Italics added.)

County Board of Supervisors Policy No. A-96 (Board Policy A-96) provides for the procedure in making an

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economy and efficiency determination. However, Board Policy A-96 also provides certain exceptions to the requirements of County Charter sections 703.10 and 916 that an economy and efficiency determination be performed before the County contracts with private contractors: " Service contracts that meet one or more criteria need not be reviewed by the [CAO] for a determination regarding economy and efficiency. The Department's request to contract, however, will include *215 justification for requesting an exception under the criteria. The justification shall be reviewed for sufficiency by the [CAO] prior to submitting the request to contract to the Board of Supervisors or the Director, Purchasing and Contracting for action. The criteria are: [¶] 1. The service is of a highly specialized or technical nature and is intermittent or irregular. [¶] 2. The service is so urgent, temporary, special and highly technical that the work could not be properly performed by civil service employees. [¶] 3. The work is of a character that it is impossible to have it performed by civil service employees.... [¶] 4. The service depends in part on the use of equipment and material not possessed by the County at the time and place required and the cost to the County of procuring such equipment and material would be disproportionate for the result obtained. [¶] 5. The entire service will be funded by a State or Federal funding source that requires the County to contract out for the service. This includes renewals and extensions of such contracts."

In June 1998, the director of the County Health and Human Services Agency wrote the CAO that " County Counsel has analyzed the services to be provided and concluded that these services fall within the parameters of one or more exceptions specified in Board Policy A-96. Therefore, it is not necessary for you to make a determination of economy and efficiency prior to contracts being awarded." In June 1998, the CAO wrote the board of supervisors, stating: " Contract awards were to be subject to a finding by me of economy and efficiency in accordance with Board Policy A-96 .... [¶] County Counsel has analyzed the services to be provided and concluded that they fall within one or more of the exceptions specified in Board Policy A-96. Therefore, it is not necessary for me to make a determination of economy and efficiency."

Nowhere in the record is there any indication as to what exception or exceptions under Board Policy A-96 county counsel believed applied to relieve the County from making an economy and efficiency determination before contracting out CalWORKS case management functions to private entities. It also is undisputed that prior to contracts being signed with private contractors to perform case management functions under the CalWORKS project, no economy and efficiency determination was made by the CAO pursuant to County Charter sections 703.10 and 916.

In June and July 1998, the County entered into contracts with three entities, Maximus, Inc., Lockheed-Martin and Catholic Charities, for provision of case management functions in four of six administrative regions in San Diego. The remaining two administrative regions were to be served by civil service employees of the County. *216

D. *Nature of CalWORKS Functions Administered by Private Contractors*

CalWORKS replaced the GAIN program, where County civil service employees in the health and human services agency provided work services for welfare recipients. However, no civil service employees were terminated or laid off as a result of the private CalWORKS contracts. Rather, persons previously filling the positions for the County under the GAIN program were either employed by the private contractors or transferred to other county positions.

The CalWORKS program also increased the scope of services for the welfare-to-work program from that previously provided by the County under GAIN and mandated several services not previously provided. Case management workers are required to increase their monitoring of participants' attendance in the welfare-to-work program and record that attendance as well. Caseworkers also provide services beyond those previously provided by the County under the GAIN program, including postemployment services.

In providing case management services for welfare-to-work participants under CalWORKS, private contractors are not authorized to make policy or program decisions. County civil service employees make the initial determination of eligibility for applicants for benefits under CalWORKS. The private contractors are not authorized to impose sanctions for violations of CalWORKS rules. Rather, only county civil service employees impose sanctions. Pursuant to the contracts with the private

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contractors the case management functions are described as: " [T]he coordination of services and activities, beginning with Job Search, and including but not limited to: assessing the participant's employability and need for support services; developing the welfare-to-work plan with the participant; tracking and evaluating the participant's attendance and progress in work activities; identifying and authorizing supportive services; making a determination of cause for failure to participate; referring the participant to community resources for work activities, counseling and assisting in accessing community resources and resolving problems; documenting in the physical and electronic case file, and completing other required documents."

The private contractors conduct the appraisal and assessment of the recipient. The assessment includes the development and execution of the welfare-to-work plan between the County and the welfare recipient.

The private contractors also determine what, if any, supportive services are needed by the CalWORKS participant. Supportive services may include *217 child care, transportation, and ancillary expenses. Private contractors are required to assess social, economic and employment situations, and must have the ability to apply judgment in determining appropriate activities and services for the participant to become self-sufficient. The private contractors make good cause recommendations, such as whether there is good cause for a participant's failure to comply with the requirements of participation. The private contractors develop compliance plans with individual participants.

The County mandates that the contractors use the CalWORKS program guide developed by the County, which provides uniform instructions to all case managers to ensure consistent application and administration of the CalWORKS program. Under their contracts, the private contractors must comply with the criteria for case management set forth in the program guide.

E. *Approval of CalWORKS Plan by State*

The County submitted its implementation plan for the CalWORKS program to the California Department of Social Services (DSS) in January 1998. The plan set forth the County's intention to contract with private entities to provide case management services in four of the six administrative regions of the County. In February 1998, the DSS approved the County's plan.

F. *This Action*

In August 1999, plaintiffs brought this action to enjoin expenditure of public funds to provide CalWORKS case management services through private contractors. The first cause of action sought a declaration that the expenditure of funds was illegal because no economy and efficiency determination was made and because civil service employees could adequately, competently and more efficiently perform the services. The first cause of action further sought a declaration that expenditure of public funds was illegal because " the service cannot be provided more economically and efficiently by the contractors than persons employed in the Classified service." The second cause of action sought a declaration that the County's delegation of certain " discretionary" functions under the CalWORKS program to private contractors was illegal under state and federal law. Plaintiffs thereafter filed an amended complaint that added third and fourth causes of action for writ of mandate to stop the alleged violations of law identified in the first two causes of action.

The action proceeded to a bench trial in June 2000. The court heard testimony, received exhibits and received a lengthy stipulation of facts *218 entered into between the parties. In July 2000, the court issued a tentative statement of decision, which it subsequently revised.

In its tentative statement of decision, the court considered the County Charter provisions requiring a finding of economy and efficiency before hiring independent contractors. The court first found that Board Policy A-96, purporting to create exceptions to the required economy and efficiency requirements, was an unlawful attempt to modify or amend the County Charter, as such action could only be taken through a vote of the electorate. The court also found that there was no basis in law to create an exception to the required economy and efficiency determination based upon an emergency or specialized task to be performed. The court also found that, assuming Board Policy A-96 was proper, the facts of this case did not meet any of the listed exceptions contained therein. The court also found that there was no exception to County Charter sections 703.10 and 916 based upon the fact that " new services" were being provided. The court further found that the case

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management functions under CalWORKS were not " new services," but that they only required more tracking and postemployment job retention services than under the GAIN program. The court also noted that while under the common law such an exception might exist for new services if no civil service employees were displaced, civil service employees were displaced because they were moved to other positions within and outside of the County.

The court found that contracting out case management functions to noncivil-service contractors violated the terms of section 10619 because the contracting out of such functions was barred by both California and federal law as it existed in 1996. In making this finding the court relied upon a 1986 DSS letter sent to counties that described what functions could be contracted out under the prior GAIN program. The court also relied upon federal regulations in place in 1996 that described what welfare-to-work program functions could be contracted out.

After receiving objections from counsel, the court confirmed its statement of decision. The court set oral argument for September 2000. Following oral argument the court found the contracts to be " unlawful" and (1) issued a writ of mandate terminating the contracts entered into with the private contractors and (2) permanently enjoined the county from expending further public funds on contracts with private contractors for the provision of case management services under the CalWORKS program. However, the court stayed enforcement of its order and resulting judgment pending the appeal of this matter.

Subsequent to the judgment being entered, plaintiffs brought a motion for attorney fees, arguing that they were entitled to an award of fees pursuant to *219 Code of Civil Procedure section 1021.5 because the judgment they obtained enforced an important right affecting the public interest, conferred a substantial benefit on the public, and the necessity and financial burden of the litigation made an award of fees appropriate. FN3 In March 2001 the court granted plaintiffs' motion, awarding attorney fees in the amount of $104,878.

> FN3 Code of Civil Procedure section 1021.5 provides in part that: " Upon motion, a court may award attorneys' fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement, or of enforcement by one public entity against another public entity, are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any."

G. *Matters Occurring Postjudgment*

Following the court's entry of judgment and the filing of this appeal, defendants filed a motion requesting judicial notice of certain facts with this court. In the motion, the defendants requested that this court take judicial notice of the fact that in December 2000, when the County extended its contracts with Maximus, Lockheed-Martin and Catholic Charities, the CAO for the County made a finding that contracting out the case management functions for the CalWORKS project to those entities was more economical and efficient than to have those services provided by civil service employees. Defendants further sought judicial notice of the fact that in 2001, the San Diego County Taxpayers Association awarded the County's Health and Human Services Agency the Golden Watchdog award for its CalWORKS welfare-to-work program. In support of the request that this court take judicial notice of the December 2000 economy and efficiency determinations, defendants attached the CAO's findings of economy and efficiency as to the extension of the County's contracts with Maximus, Lockheed-Martin and Catholic Charities.

Plaintiffs did not oppose defendants' request for judicial notice. In September 2001, we granted defendants' request for judicial notice.

Discussion

I. *Standard of Review*

Because the pertinent facts are not in dispute, and we are applying these facts to statutory and local charter provisions, we review the court's legal findings that the County's contracts with independent contractors to provide *220 case management functions under the CalWORKS program violated the County Charter

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and state and federal law under the independent de novo standard of review. (*Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 799 [35 Cal.Rptr.2d 418, 883 P.2d 960].) (1) Under this standard, we are not bound by the findings of the trial court and review the facts and law anew. (*Ibid.*)

However, as to any of the court's findings of fact, we apply the substantial evidence standard. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881 [92 Cal.Rptr. 162, 479 P.2d 362].) (2) Under this standard, " [a]ll of the evidence most favorable to the respondent must be accepted as true, and that unfavorable discarded as not having sufficient verity, to be accepted by the trier of fact." (*Buehler v. Sbardellati* (1995) 34 Cal.App.4th 1527, 1542 [41 Cal.Rptr.2d 104], italics omitted.)

II. *Principles of Statutory Construction*

The applicable canons of statutory construction that guide our analysis in this matter are well established. (3) " The fundamental rule of statutory construction is that the court should ascertain the intent of the Legislature so as to effectuate the purpose of the law. [Citations.]" (*Select Base Materials v. Board of Equal.* (1959) 51 Cal.2d 640, 645 [335 P.2d 672].) In determining that intent, we first examine the words of the statute itself. (*Moyer v. Workmen's Comp. Appeals Bd.* (1973) 10 Cal.3d 222, 230 [110 Cal.Rptr. 144, 514 P.2d 1224].) (4) Under the so-called plain meaning rule, courts seek to give the words employed by the Legislature their usual and ordinary meaning. (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735 [248 Cal.Rptr. 115, 755 P.2d 299].) If the language of the statute is clear and unambiguous, there is no need for construction. (*Ibid.*) (5) " 'We must select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences.' [Citation.]" (*People v. Coronado* (1995) 12 Cal.4th 145, 151 [48 Cal.Rptr.2d 77, 906 P.2d 1232].) The legislative purpose will not be sacrificed to a literal construction of any part of the statute. (*Select Base Materials v. Board of Equal., supra*, 51 Cal.2d at p. 645.)

(6) Additionally, " [w]hile the ultimate interpretation of a statute is an exercise of the judicial power [citation], when an administrative agency is charged with enforcing a particular statute, its interpretation of the statute will be accorded great respect by the courts 'and will be followed if not clearly erroneous.' " (*Judson Steel Corp. v. Workers' Comp. Appeals Bd.* (1978) 22 Cal.3d 658, 668-669 [150 Cal.Rptr. 250, 586 P.2d 564] (*Judson *221 Steel*), quoting *Bodinson Mfg. Co. v. California E. Com.* (1941) 17 Cal.2d 321, 325-326 [109 P.2d 935].) Courts find administrative interpretations of a law to be " significant factors in ascertaining statutory meaning and purpose. [Citations.]" (*Nipper v. California Auto. Assigned Risk Plan* (1977) 19 Cal.3d 35, 45 [136 Cal.Rptr. 854, 560 P.2d 743].)

(7) The same rules of statutory interpretation that apply to statutory provisions also apply to local charter provisions. (*Domar Electric, Inc. v. City of Los Angeles* (1994) 9 Cal.4th 161, 171-172 [36 Cal.Rptr.2d 521, 885 P.2d 934].)

III. *Alleged Violation of County Charter Sections 703.10 and 916*

Defendants first contend that the court erred in finding that the County violated the terms of County Charter sections 916 and 703.10 by failing to perform a determination that the contracts it entered into with private contractors for the provision of case management services under the CalWORKS program were more economical and efficient than having county civil service personnel perform those same functions. Specifically, defendants assert that they were not required to make an economy and efficiency finding here because (1) the County was hiring individuals to perform services not already performed by civil service employees; (2) time was of the essence and independent contractors could provide the services more swiftly; and (3) the County Charter only required economy and efficiency determinations where the services could be performed by existing civil service personnel. FN4

FN4 Defendants do not contend on appeal that the services contracted out under the CalWORKS program fell within any of the purported exceptions to County Charter sections 703.10 and 916 listed in Board Policy A-96.

We conclude that the court did not err in finding that the County violated County Charter sections 916 and 703.10. However, because the contracts sued upon have been fulfilled and have expired, plaintiffs' claim

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that the County violated County Charter provisions has been rendered moot. Accordingly, we reverse the judgment on plaintiffs' claim alleging a violation of County Charter provisions and order the court, on remand, to dismiss that claim as moot. However, because plaintiffs have also pleaded a claim that the contracting out of case management functions is not in fact more economical and efficient than if those services were performed by civil service personnel, we remand this matter to allow that claim to proceed to a determination, as detailed, *post.*

A. *Applicable charter provisions*

As detailed above, County Charter section 703.10 provides that " where the County intends to employ an independent contractor, the [CAO] *shall* *222 first determine that the services can be provided more economically and efficiently by an independent contractor than by persons employed in the Classified Service." (County Charter, § 703.10, italics added.) However, it is undisputed that the County did not make such a determination before it entered into contracts with the independent contractors to perform case management functions under the CalWORKS program. (8) By the clear and unambiguous language of the applicable charter provisions, unless some exception applies, the County violated County Charter sections 703.10 and 916 when it entered into those contracts by neglecting to first determine that the functions to be performed could be done more economically and efficiently than by civil service personnel. We address in order the County's assertions that exceptions applied to relieve them of that duty.

B. *Exception for services not previously provided by the County*

Defendants first assert that the County did not need to perform the economy and efficiency determination because the CalWORKS program required the provision of services not previously performed by civil service personnel. In support of this contention they rely primarily upon the decision in California State Employees' Assn. v. Williams (1970) 7 Cal.App.3d 390 [86 Cal.Rptr. 305] (*Williams*). In *Williams*, the Court of Appeal noted the long-standing rule that the state civil service system did not prohibit the contracting out of services that cannot be performed " 'adequately or competently or satisfactorily' " by civil service personnel. (*Id.* at p. 396.) The issue there was whether the state could hire an independent contractor to perform administrative tasks for the Medi-Cal program, rather than hire additional civil service employees to perform those tasks. (*Id.* at p. 392.) The court concluded that the state constitutional policy protecting the civil service system only applies to existing civil service personnel, not to a situation where the state is delivering a new service. (*Id.* at p. 397.)

Defendants argue that here, as in *Williams*, the County was not subject to the requirements of hiring civil service personnel because the CalWORKS program required expanded and new services never provided by the County in the past. However, defendants ignore one fundamental difference between the situation presented here and that in *Williams*. The court in *Williams* was not presented with a specific charter provision that *required* certain findings to be made before services were contracted out to private contractors. Local charter provisions supersede conflicting state law as to matters that are within county operation. (Dibb v. County of San Diego (1994) 8 Cal.4th 1200, 1216 [36 Cal.Rptr.2d 55, 884 P.2d 1003] (*Dibb*) [" [P]owers and duties legitimately conferred by charter on county officers *supersede* general law"].) Thus, general state law allowing contracting out of services that *223 cannot be performed adequately, competently or satisfactorily by civil service personnel cannot supersede the County Charter provisions that require, on their face, an economy and efficiency determination *anytime* the County desires to contract out services that it is charged with providing. If the County wishes to create an exception to this requirement for certain situations, its recourse is to propose a ballot initiative to amend this Charter mandate and create exceptions for certain situations. As County Charter sections 703.10 and 916 presently read, however, economy and efficiency determinations must be made *anytime* the County wishes to employ an independent contractor, as opposed to someone employed within its civil service ranks. There is nothing in their language exempting economy and efficiency determinations where the services are going to be new and different from those previously performed by civil service personnel.

C. *Exception for situations where time is of the essence*

Defendants next assert that case law provides for an exception to the requirement of hiring civil service personnel where time is of the essence and

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independent contractors can provide the services more swiftly. (See Darley v. Ward (1982) 136 Cal.App.3d 614, 629 [186 Cal.Rptr. 434] (*Darley*); *People ex rel. Dept. of Fish & Game v. Attransco, Inc.* (1996) 50 Cal.App.4th 1926, 1936 [58 Cal.Rptr.2d 661] (*Attransco*).) However, as with the previous contention, defendants ignore the fact that the County Charter economy and efficiency provisions supersede more general state law that allows exceptions to general civil service hiring requirements. (*Dibb, supra,* 8 Cal.4th at p. 1216.) There is nothing in the County Charter that provides for an exception to the economy and efficiency determination where the services need to be provided on a short-term basis.

Moreover, the *Darley* and *Attransco* decisions cited by defendants have no application here. In *Darley,* the county had a charter provision that specifically allowed for the contracting out of " special services." (*Darley, supra,* 136 Cal.App.3d at p. 629.) The court found that the ability to perform the task more swiftly made it a special service within the charter. (*Ibid.*) Here, by contrast, the County Charter does not exempt from economy and efficiency determinations those services that could be performed more swiftly by independent contractors.

Similarly, in *Attransco,* the particular service to be provided, the hiring of a private attorney to represent the Department of Fish and Game, was allowed under a state statute that permitted such contracting out where the " 'services are of such an urgent, temporary, or occasional nature that the delay incumbent in their implementation under civil service would frustrate *224 their very purpose.' " (*Attransco, supra,* 50 Cal.App.4th at p. 1936, quoting Gov. Code, § 19130, subd. (b)(10).) Here, however, County Charter provisions do not provide for an exception to the economy and efficiency determination where " time is of the essence."

D. *Language and statutory history of the County Charter sections*

Finally, defendants contend that the language of County Charter section 916 and a review of its history demonstrate that it was never intended to apply to situations where the services require hiring personnel in addition to those already employed in the civil service system. Specifically, defendants point to the fact that in 1967 County Charter section 78.1 (the predecessor to County Charter § 916) was amended to delete a reference to a required economy and efficiency determination for situations where the person was " to be employed" in the civil service system. Former County Charter section 78.1, as it read before the 1967 amendment, provided that: " Nothing in this Article shall prevent the County or any officer, board, commission or agency of the County from employing an independent contractor to provide services of a professional, scientific or technical nature where the Civil Service Commission has determined that it is impractical to have such service furnished by a person employed *or to be employed* in the classified service and the employment of such independent contractor will not require the removal, suspension, layoff or transfer of any employee in the classified service." (Sen. Conc. Res. No. 1, Stats. 1959 (1959 Reg. Sess.) res. ch. 15, pp. 5377-5378, italics added.)

In 1967, the voters approved an amendment to County Charter section 78.1 that, among other things, eliminated the phrase " or to be employed" from its language: " Nothing in this Article shall prevent the County or any officer, board, commission or agency of the County from employing an independent contractor to provide services to the County where the Civil Service Commission has determined that it is impractical to have such services furnished by a person or persons employed in the classified service and the employment of such independent contractor will not require the removal, suspension, layoff or transfer of any employee in the classified service." (Sen. Conc. Res. No. 3, Stats. 1967 (1967 Reg. Sess.) res. ch. 8, p. 4348.) FN5

FN5 The strikethrough portions represent deletions and the underlined portions represent additions.

The current version of County Charter section 916 (and County Charter § 703.10) provides that the County may employ an independent contractor *225 where it is determined that " services can be provided more economically and efficiently by an independent contractor than *by persons employed in* the Classified Service." (Italics added.) Defendants assert that the deletion of the words " or to be employed" means that the County need not perform an economy and efficiency determination where the services could not be provided by persons already employed in the County's civil service system. This contention is unavailing.

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First, the language of County charter sections 916 and 703.10 does not provide that these sections are inapplicable to situations where the County would need to hire additional civil service personnel to perform the particular function. If the authors of the County Charter had intended such a result, they would have plainly so stated. Rather, a plain reading of County Charter sections 916 and 703.10 reveals that they are intended to apply any time the County is considering hiring an independent contractor, not merely on those occasions where sufficient County employees are already in place to perform the desired function. These sections do not state that they limit the economy and efficiency determination where the services would be performed by individuals " *already* employed in the Classified Service." Rather, a plain reading of the charter provisions indicates that the phrase " employed in the Classified Service" merely refers to the class of individuals as to whom the County must determine whether it is economical and efficient to assign certain functions.

Further, contrary to defendants' assertion, there is nothing in the legislative history of County Charter section 916 that supports their interpretation. Although defendants point to various amendments to County Charter section 916 over the years, they do not rely upon any legislative history for the particular 1967 amendment that deleted the phrase " or to be employed." That legislative history provides no support for defendants' contention.

The ballot pamphlet for the 1967 amendment focused upon the deletion of the requirement that only " professional, scientific or technical" services could be contracted out. (San Diego County Ballot Pamp., Gen. Elec. (Nov. 8, 1966) analysis of Prop. A, p. 2.) FN6 The only reference to the deletion of the words " or to be employed" and the other minor changes in the 1967 amendment is the phrase: " Minor changes for clarity are also proposed in other parts of Section 78.1." (*Ibid.*) Thus, the amendment deleting the phrase " or to be employed" was only to make the text more clear, not to substantially limit the reach of this County Charter provision. It is extremely *226 unlikely that such as a major limitation on the required economy and efficiency finding would be added by use of such a phrase and without any discussion in the ballot pamphlet.

> FN6 We may properly take judicial notice of the statutory history of County Charter section 916 and its predecessor, section 78.1. (See Ketchum v. Moses (2001) 24 Cal.4th 1122, 1135 [104 Cal.Rptr.2d 377, 17 P.3d 735].)

Defendants also assert that other amendments to County Charter section 916 evidence a broadening of the ability to contract out for services that supports their interpretation of County Charter sections 916 and 703.10. It is true that the circumstances under which the County may contract out for services has been broadened over the years through amendments to County Charter section 916. As mentioned, *ante*, in the 1967 amendment, the limitation on contracting out for services only for " professional, scientific or technical" positions was eliminated. Further, in 1969, former County Charter section 78.1's requirement that it be " impractical" to have civil service personnel perform the required tasks was deleted and replaced with the present language requiring that an assessment of economy and efficiency be performed. (Sen. Conc. Res. No. 6, Stats. 1969 (1969 Reg. Sess.) res. ch. 14, pp. 3514-3515.) Further, that amendment eliminated the restriction preventing hiring of independent contractors if it would cause the transfer of an existing civil service employee. (*Ibid.*) In 1976 former County Charter section 78.1 was again amended, removing the requirement that contracting out services would not cause the " removal, suspension, or layoff" of civil service personnel. (County Charter, § 78.1 (Dec. 1, 1976).) In 1986, after section 78.1 was renumbered section 916, this charter provision was amended again to eliminate the civil service commission's role in making the economy and efficiency determination. Under that amendment, it is now the CAO's responsibility to perform that assessment. (County Charter, § 916.)

However, although the situations in which the County could contract out services were expanded, none of the foregoing amendments expressly or impliedly evidenced an intent that the economy and efficiency determination should only be performed where the functions could all be performed by existing civil service personnel. In sum, the language of County Charter sections 703.10 and 916 and the legislative history of County Charter section 916 do not support the County's claim that it was only required to make a finding of economy and efficiency where the tasks could be completely performed by existing civil service personnel. We thus conclude the court did not err in finding that the County violated the terms of County Charter sections 703.10 and 916

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when it originally contracted out case management services for the CalWORKS project.

IV. *Mootness of Charter Violation Claim*

(9) " It is well settled that an appellate court will decide only actual controversies. Consistent therewith, it has been said that an action which *227 originally was based upon a justiciable controversy cannot be maintained on appeal if the questions raised therein have become moot by subsequent acts or events.... [T]he appellate court cannot render opinions ' " ... upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal. " ' [Citations.]" (*Finnie v. Town of Tiburon* (1988) 199 Cal.App.3d 1, 10 [244 Cal.Rptr. 581] (*Finnie*).) As the Court of Appeal stated in *Wilson v. L. A. County Civil Service Com.* (1952) 112 Cal.App.2d 450, 453 [246 P.2d 688], " 'although a case may originally present an existing controversy, if before decision it has, through act of the parties or other cause, occurring after the commencement of the action, lost that essential character, it becomes a moot case or question which will not be considered by the court.' "

(10) This rule has been regularly employed where injunctive relief is sought and, pending appeal, the act sought to be enjoined has been performed. For example, in *Finnie, supra,* 199 Cal.App.3d at page 7, the plaintiff brought an action seeking an injunction preventing a special election from occurring. The trial court denied the plaintiff's application, and the plaintiff appealed. (*Id.* at p. 9.) However, during the pendency of the plaintiff's appeal, the election took place. The Court of Appeal held the plaintiff's action was moot and dismissed the appeal. (*Id.* at pp. 10-11.)

Similarly, in *Jennings v. Strathmore Public etc. Dist.* (1951) 102 Cal.App.2d 548 [227 P.2d 838], the plaintiff sought to enjoin and declare invalid a public utility district contract after the contract had been let and work was well under way. After the trial court dismissed the action as moot (and based upon the plaintiff's lack of standing), the plaintiff appealed. By the time the appeal was heard, the work was fully completed. The Court of Appeal again dismissed the case as moot. (*Id.* at p. 549.)

In *Childress v. L. Dinkelspiel Co., Inc.* (1928) 203 Cal. 262, 263 [263 P. 801], the plaintiff obtained an order enjoining a special meeting to elect an additional corporate director. The appeal was dismissed as moot by virtue of the fact that a subsequent annual board meeting had by then been held, and an entirely new board elected. In *Hidden Harbor v. Amer. Fed. of Musicians* (1955) 134 Cal.App.2d 399, 402 [285 P.2d 691], an appeal from a preliminary injunction against interference with the plaintiff's employment contract was declared moot where the employment agreement was fully performed and had expired. *228

(11) Here it is undisputed that the original contracts, which were the subject of plaintiffs' claim that they violated the County Charter provisions requiring findings of economy and efficiency, have been fully performed and expired in 1999. The County was given the option to extend the contracts each year for three years thereafter. Before the County exercised its option to extend the contracts in 2001, the CAO made findings that the CalWORKS case management functions could be performed more economically and efficiently by Maximus, Lockheed-Martin and Catholic Charities than by civil service workers.

Thus, plaintiffs' claims seeking a writ of mandate and injunction to set aside the contracts and enjoin expenditure of public funds under the contracts are moot to the extent they are based upon a failure by the County to make a finding of economy and efficiency before entering into the original contracts. The contracts have been fully performed and have expired. Plaintiffs' claim that defendants violated the County Charter provisions requiring a finding of economy and efficiency before contracting with non-civil service contractors has lost its essential character and therefore we cannot consider it upon this appeal. (*Wilson v. L. A. County Civil Service Com., supra,* 112 Cal.App.2d at p. 453.)

Plaintiffs attack defendants' request for judicial notice on the basis that the fact of which judicial notice is requested " is subject to dispute and not capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy." However, plaintiffs have waived any such challenge by failing to oppose defendants' request for judicial notice. (Cal. Rules of Court, rule 41(c); *Sharp v.*

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Union Pacific R.R. Co. (1992) 8 Cal.App.4th 357, 361 [9 Cal.Rptr.2d 925].) Moreover, based upon the documents provided to this court, it cannot be disputed that in fact the County CAO *did* make a finding of economy and efficiency as to the CalWORKS contracts in December 2000.

Plaintiffs assert that even if the issue concerning violation of the County Charter has been rendered moot, the court should nevertheless exercise its discretion to review the matter on the merits because it poses an issue of broad public interest that is likely to recur. (See *In re William M.* (1970) 3 Cal.3d 16, 23 [89 Cal.Rptr. 33, 473 P.2d 737].) This argument is unavailing. Plaintiffs' claim concerns whether, on the facts peculiar to the particular contracts at issue here, and the services to be performed, the County was required to make a finding of economy and efficiency. Because plaintiffs' claim is a particularly factual determination that must be resolved on a case-by-case basis, dependent upon the specific facts of a given situation, it is not one on which we would exercise our discretion to address on the merits, despite the fact that it is moot. ***229**

Plaintiffs also argue that the County is merely attempting to avoid the court's order by belatedly conducting an economy and efficiency determination in order to render the decision moot and that it will be encouraged to take the same tack in the future as to other challenges. This argument is also unavailing. First, the County is not *avoiding* the court's order, but *complying* with it. Based upon the court's determination, the County could not have renewed the subject contracts without first conducting an economy and efficiency determination. Cases are often found moot when a party has complied with a court's order before an appeal has been decided. (See *Callie v. Board of Supervisors* (1969) 1 Cal.App.3d 13, 18-19 [81 Cal.Rptr. 440] [appeals moot because county amended ordinances invalidated by the court].) Further, as discussed, *ante*, there is no danger of the County only making such a determination after the fact as this case revolves around facts peculiar to the contracts at issue here. Further, as we discuss, *post*, whether the contracts are in fact more economical and efficient is a subject that is still open to challenge.

(12) " 'Where an appeal is disposed of upon the ground of mootness and without reaching the merits, in order to avoid ambiguity, the preferable procedure is to reverse the judgment with directions to the trial court to dismiss the action for having become moot prior to its final determination on appeal. [Citations.]' [Citations.]" (*County of San Diego v. Brown* (1993) 19 Cal.App.4th 1054, 1090 [23 Cal.Rptr.2d 819].) Therefore, we reverse that portion of the judgment that is based upon the County's failure to make a finding of economy and efficiency and direct the court to dismiss that portion of plaintiffs' claim as moot.

V. *Plaintiffs' Claim That Contracts Are Not in Fact More Economical and Efficient*

In addition to alleging that the County failed to make an economy and efficiency determination prior to contracting out CalWORKS case management functions, plaintiffs' complaint also alleges that the contracts were improper because the contracted-out services " cannot be provided more economically and efficiently by the contractors than persons employed in the Classified Service." However, the court never resolved this claim, perhaps because it may not have been ripe for adjudication at the time this matter originally went to trial and because the court determined that the CalWORKS case management functions could not ever be contracted out under state and federal law. Although the court's order is unclear, a fair reading of its text indicates that the court's determination that the contracts were unlawful, and the grant of a writ of mandate and permanent injunction prohibiting expenditures of public funds under the contracts between the ***230** County and private contractors, was based upon the court's finding that such functions could not be contracted out under state and federal law. A violation of the County Charter would only require an order that the County comply with its provisions and/or enjoining expenditure of public funds until such action was taken.

Now that the County has made a finding, obviously in response to the court's ruling, that contracting out case management functions is more economical and efficient than having those services performed by civil service employees, plaintiffs' claim that the contracts are in fact *not* more economical and efficient is now ripe for adjudication. While such a claim could also be brought in a separate action, because plaintiffs have asserted it in this matter, and in the interests of judicial economy and to give both sides some finality to this matter, we order this action remanded for a determination of plaintiffs' claim that the contracting out of case management functions

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under the CalWORKS program is not more economical and efficient than having those services performed by civil service personnel.[FN7] (See *Burden v. Snowden* (1992) 2 Cal.4th 556, 570 [7 Cal.Rptr.2d 531, 828 P.2d 672] [case remanded with directions to allow further proceedings on issue not resolved by trial court].)

> FN7 We take no position on the merits, procedurally or substantively, of such a claim.

In a letter brief submitted by the County in response to our request, it has indicated that the current contracts between the County and contractors for which it made economy and efficiency determinations expired June 30, 2002. The County asserts that it is in the process of conducting economy and efficiency determinations, or has already done so, for new contracts set to begin July 1, 2002. If the County relies upon the determinations made for the expired contracts in finding any new contracts beginning after June 30, 2002, are more economical and efficient, then plaintiffs may challenge those original findings. However, if new findings of economy and efficiency are performed for contracts set to start after June 30, 2002, plaintiffs' challenge in this litigation would have to be as to the new findings as once the current contracts expired any challenge to the original findings would be moot.

VI. *Alleged Violation of Section 10619*

Defendants assert that the court erred in finding that they were in violation of section 10619 because state and federal law in place in 1996 did allow counties to contract out case management functions for CalWORKS programs. We agree and reverse that portion of the judgment based upon the County's alleged violation of section 10619. *231

A. *Section 10619 and other relevant statutes*

Government Code section 26227 gives counties general statutory authority to appropriate and expend funds on welfare programs and authorizes counties to " contract with ... private agencies or individuals to operate those programs ...."

Further California's statutory scheme for the CalWORKS program directs counties to use all available resources, both public and private, to provide welfare-to-work services: " It is the intent of the Legislature that, in developing the plan required by this chapter, counties shall make an effort not to duplicate planning processes that have already occurred within the county, but rather to build upon, and incorporate where appropriate, existing local plans that provide for a collaborative approach to employment services, economic development, and family and children's services." (§ 10530.)

The Legislature clearly envisioned that counties, in adopting plans to provide CalWORKS services, would be contracting out some of those services to private entities:

" Each county shall develop a plan consistent with state law that describes how the county intends to deliver the full range of activities and services necessary to move CalWORKS recipients from welfare to work. The plan shall be updated as needed. The plan shall describe:

" (a) How the county will collaborate with other public and private agencies to provide for all necessary training, and support services." (§ 10531.)

However, section 10619 specifically limits the contracting out of functions under the CalWORKS program as follows: " A public agency shall, in implementing programs affected by the act adding this section to the Welfare and Institutions Code, perform program functions exclusively through the use of merit civil service employees of the public agency, except to the extent permitted by provisions of state and federal law governing the affected program that were in effect on August 21, 1996."

The question presented here is whether the County violated state or federal law as it existed in 1996 when it contracted out case management services under the CalWORKS program. After reviewing applicable authority and persuasive direction from the DSS, we conclude that the County did not violate either state or federal law by contracting out these functions to private entities. *232

B. *State Law*

1. *Legislative history of CalWORKS*

(13) The legislative history of the state CalWORKS program provides support for the defendants' contention that the nature of services contracted out

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under the County's CalWORKS program complied with state law as it existed in 1996. The Concurrence in Senate Amendments for Assembly Bill No. 1542, the bill for the state CalWORKS program, provides as follows regarding contracting out functions: " Contracting Out and Civil Service: Retains existing law and specifies that the counties *shall remain responsible for performing program functions (e.g. eligibility functions)* through merit civil service employees, and may contract out other services only to the extent allowed under state and federal law as of August 21, 1996." (Legis. Counsel's Dig., Sen. Conc. Amends. to Assem. Bill No. 1542 (1997-1998 Reg. Sess.), italics added.)

In a report on Assembly Bill No. 1542 prepared by the DSS, the DSS describes the functions that may not be contracted out under CalWORKS: " Requires program functions to be performed exclusively by merit civil service employees of the public agency, except as permitted by state and federal law governing the program on 8/21/96. This allows only limited functions to be contracted out. *Discretionary activities, e.g., those relating to determining eligibility or imposing sanctions, cannot be contracted out.*" (Cal. Dept. of Social Services, Major Items of Welfare Reform Contained in Assem. Bill No. 1542 (1997-1998 Reg. Sess.) Aug. 14, 1997, p. 21, col. 3, italics added.)

Thus, the legislative history of CalWORKS envisions that " discretionary" functions such as eligibility and imposition of sanctions cannot be contracted out. The parties stipulated that the County did not contract out eligibility determinations and imposition of sanctions to private contractors. County civil service personnel perform these functions. Further, as we discuss in more detail, *post*, the term " discretionary functions" in the context of contracting out welfare services refers to policy level and administrative functions and ultimate decisions that affect a party's right to aid or to participate in the CalWORKS program, none of which are performed by the private case management workers with whom the County contracted.

2. *The DSS's determination the County was in compliance with applicable law*

Pursuant to the CalWORKS legislation, the DSS was directed to determine whether a county's proposed plan to implement that program complied *233 with state and federal law: " The [DSS] and the counties shall implement the provisions of the CalWORKS program in the following manner: [¶] ... [¶] (b)(2) Within 30 days of receipt of a county plan, the [DSS] shall either certify that the plan includes the description of the elements required by Section 10531 and that the descriptions *are consistent with the requirements of state law and, to the extent applicable, federal law* or notify the county that the plan is not complete or consistent stating the reasons therefor." (§ 10532, subd. (b)(2), italics added.)

As discussed, *ante*, the County submitted its proposed plan to implement the CalWORKS project to the DSS in January 1998. In that plan, the County detailed the fact that it was planning to contract out case management functions to private contractors: " [T]he County will procure case management services for four of the six regions with the goal of selecting up to two regional contractors from private for profit agencies and up to two regional contractors from nonprofit agencies. County staff will be responsible for case management in the two remaining regions."

In February 1998, the DSS approved the County's plan, certifying that it met the requirements of section 10531. As the DSS is charged with determining that a county's proposed plan to implement the CalWORKS is consistent with state and federal law under section 10532, its approval of the County's plan is persuasive evidence that it was not in violation of section 10619. (*Judson Steel, supra,* 22 Cal.3d at pp. 668-669.)

Plaintiffs assert that the DSS did not approve the County's contracting out case management functions, arguing that the plan was submitted in January 1997, but the RFP's for contracting out case management functions and describing the scope of services to be contracted out was not submitted to the board of supervisors until February 1997. However, plaintiffs have their dates wrong. The County submitted its proposed plan to the DSS in January *1998*. Moreover, plaintiffs do not explain why the date the plan was submitted to the state versus the date the RFP's were submitted to the board of supervisors is relevant to this appeal.

Plaintiffs also argue that the DSS's certification " only concerns the scope of activities and services to recipients, not the manner of performing case management," citing section 10531. However, the certification by the DSS, as discussed, is governed not by section 10531, but by section 10532, which requires the DSS to determine that the County's plan complied with state and federal law.

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As the following discussion will show, the DSS's approval of the County contracting out case management functions under the CalWORKS program *234 was not clearly erroneous, and therefore it is entitled to great weight. (*Judson Steel, supra,* 22 Cal.3d at pp. 668-669.)

3. *The DSS's 1997 All County Letter*

Section 10532, subdivision (a) provides that the DSS " shall issue a planning allocation letter and county plan instructions to the counties within 30 days of the enactment of the CalWORKS program." The historical and statutory notes for the CalWORKS legislation (contained in the historical and statutory notes for Ed. Code, § 8208) provide that the DSS " 'may implement the applicable provisions of this act through all county letter or similar instructions from the director.' " (Historical and Statutory Notes, 26 West's Ann. Ed. Code (2002 supp.) foll. § 8208, p. 99.)

In August 1997, the DSS issued a report summarizing the major changes between GAIN and CalWORKS. In that report, the DSS explained as to contracting out services that " [f]ederal and state law on 8/21/96 prohibited the contracting out of discretionary functions, e.g., those related to determining eligibility or imposing sanctions."

In October 1997, the DSS issued an All County Letter (the 1997 All County Letter), providing guidelines or implementation instructions to counties for the CalWORKS welfare-to-work program. With regard to employing civil service or contracting out to private entities, the DSS states that " [a] public agency shall, in implementing programs affected by the act adding this section to the Welfare and Institutions Code, perform *discretionary* program functions exclusively through the use of merit civil service employees of the public agency." (Italics added.)

Thus, the DSS takes the position that as of 1996, both state and federal law prohibited the contracting out of " discretionary" functions in implementing the CalWORKS welfare-to-work program. Further, the DSS identifies " discretionary" functions as such things as " determining eligibility or imposing sanctions." This determination, as well as the DSS's approval of the County's plan and its report discussing the functions that could not be contracted out under CalWORKS, is entitled to great weight. (*Judson Steel, supra,* 22 Cal.3d at pp. 668-669.) Again, the parties stipulated prior to trial that the County has not contracted out these services. They are performed by civil service employees.

Plaintiffs completely ignore the 1997 All County letter and the DSS's August 1997 report. Plaintiffs argue, as the trial court found, that a 1986 DSS All County Letter is applicable and dictates that the County could not *235 contract out case management functions under CalWORKS. That 1986 All County Letter provided guidelines for contracting out functions under the prior GAIN program. It provides that " counties may not contract out for the execution of the participant contract, the determination of eligibility, or actions related to the granting, termination, or modification of aid payments. Specific examples of activities that the county may not contract out include registration, determining deferral status, appraisal (except for the remedial education screening test), cause determinations, conciliation, and imposing money management or sanctions."

However, there is no evidence that this letter issued 10 years prior to the enactment of CalWORKS, and applicable to the GAIN program, reflected the DSS's position on the law for contracting out welfare functions in 1996. Moreover, the functions identified in the 1986 All County Letter either do not exist under CalWORKS or are performed by civil service personnel. There is no " participant contract" under CalWORKS. A county eligibility technician (ET), a civil service employee, determines eligibility. There are no deferrals under the CalWORKS program. " Registration" of beneficiaries is performed by ET's.

While there is an " appraisal" process under CalWORKS performed by the private contractor employees, it consists of functions akin to a " remedial screening test," which could be contracted out according to the 1986 All County Letter. In the appraisal process, the case management worker assesses the beneficiary's education, work history, and supportive service needs. The case management worker assists the beneficiary in completing forms, and reviews and approves self-initiated training and education programs.

Further, when a beneficiary fails to participate in the program without good cause, a case management worker can recommend a sanction to county

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personnel. However, private case management workers are *not* authorized to make the determination to sanction a beneficiary. Only county civil service employees may impose sanctions on a beneficiary. Thus, even if the 1986 All County letter reflected the status of the law on contracting out welfare services as of 1996, the County's CalWORKS project was in compliance with that law.

4. *Case law demonstrates the County was in compliance with state law*

In Ramos v. County of Madera (1971) 4 Cal.3d 685 [94 Cal.Rptr. 421, 484 P.2d 93] (*Ramos*), the California Supreme Court was presented with the *236 issue of what functions performed by county employees were " discretionary" in order to determine if the public entity immunity for discretionary decisions applied to their determinations related to the plaintiffs' eligibility under the prior GAIN program. (*Id.* at p. 692.) The high court held that the county defendant was not immune from liability because it and its employees did not exercise " discretion" when making determinations regarding eligibility for welfare benefits. (*Id.* at p. 694.) Because the Legislature had provided standards of eligibility under GAIN, county employees' exercise of judgment in determining if a recipient met those requirements did not constitute an exercise of discretion. (*Ibid.*) The court determined that it is only actual policy level determinations that amount to an exercise of discretion. (*Id.* at pp. 693-695.) Policy decisions are those such as " 'planning' as opposed to the 'operational' level of decisionmaking." (*Id.* at p. 693.) The county's actions in making eligibility determinations under the guidelines provided by the Legislature amounted to only ministerial acts that were not immune from liability. (*Id.* at p. 695.)

Likewise in our case, the private case management contractors are operating under strict guidelines set forth in the CalWORKS program guide. As discussed, *ante*, policy level decisions such as eligibility and sanctions are made by county employees. The private contractors' case management functions, therefore, even though they may involve some judgment, are considered ministerial, not discretionary.

Plaintiffs attempt to distinguish *Ramos* on the ground that it involved the issue of governmental tort immunity, not what functions might be contracted out to non-civil-service employees under welfare programs such as the CalWORKS program. However, plaintiffs do not attempt to explain why these different legal settings should cause us to ignore the *Ramos* court's holding. *Ramos* is persuasive because the legislative history of the CalWORKS legislation and the 1997 All County Letter both indicate that the Legislature intended that counties could contract out any functions that were not " discretionary." These items also demonstrate that the Legislature intended the term " discretionary" to have the same meaning as applied in the *Ramos* case, i.e., policy and administrative level decisions such as those that effect determinations as to eligibility and loss of benefits. *Ramos* provides additional support for the conclusion that state law in effect in 1996 did not prohibit counties from contracting out nondiscretionary, ministerial functions, even if they involved the exercise of some judgment. In sum, the County did not violate California law when it contracted out case management functions to private entities under the CalWORKS program.

C. *Federal Law*

Former 42 United States Code section 685, repealed with the enactment of the PRWORA in 1996, provided for contracting out of welfare services *237 through private organizations as follows: " The State agency that administers or supervises the administration of the State's plan approved under section 602 of this title shall carry out the programs under this part directly or through arrangements or under contracts with administrative entities ..., with State and local educational agencies, and with other public agencies or *private organizations* ...." (42 U.S.C. § 685(a), italics added.)

The scope of services that could be contracted out to private entities under PRWORA's JOBS program was further refined by federal regulations. Former Social Security Regulations, Aid to Families with Dependent Children, 45 Code of Federal Regulations part 250.10 provided:

" (a) The State agency responsible for the administration or supervision of the State's title IV-A plan is responsible for the *administration* or *supervision* of the JOBS program.

" (b) *Except as provided in paragraph (c)(2), JOBS activities which involve decision-making with regard*

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to individual participants may be performed by an entity other than the State IV-A agency according to the policies, rules, and regulations of the State IV-A agency. In doing so, such entity must not have the authority to review, change, or disapprove any administrative decision of the State IV-A agency, or otherwise substitute its judgment for that of the State IV-A agency as to the application of policies, rules, and regulations promulgated by the State IV-A agency.

" (c) *JOBS activities may be delegated or contracted with the exception of the following*:

" *(1) Overall program administration, including:*

" *(i) Establishment of optional provisions and components of the program;*

" *(ii) Responsibility for program planning, design of program, and determining who should participate;*

" *(iii) Establishment of program participation requirements;*

" *(iv) Development of a definition of good cause for failing to participate; and*

" *(v) The issuance of other policies, rules, and regulations governing the program.*

" *(2) Actions involving individuals, including:* ***238**

" *(i) Determination of exemption status;*

" *(ii) Determination of good cause for failure or refusal to participate;*

" *(iii) Determination and application of sanctions;*

" *(iv) Providing notice of case actions; and*

" *(v) Fair hearings.* " (Italics added.)

The legislative history of the former 45 Code of Federal Regulations part 250.10, found in the Rules and Regulations for the Department of Health and Human Services, Family Support Administration (54 Fed.Reg. 42146 (Oct. 13, 1989)), also discusses what functions could be contracted out under the JOBS program. That regulation provides in part that " [l]ongstanding Federal policy [has interpreted the welfare statutes] to mean that the State IV-A agency must maintain overall responsibility for the design and operation of the program and may not delegate to other than its own officials *functions involving discretion in the overall administration or supervision of the program* [citation]. [¶] However, ... *certain JOBS functions and activities which involve decision-making with regard to individual participants may be performed by entities other than the State IV-A agency, so long as there are specific rules and regulations issued by the State IV-A agency governing their implementation.*" (54 Fed.Reg. 42146, 42154, italics added.) This rule also provides later that, " We believe that the State IV-A agency should have maximum flexibility to administer its programs within the requirements of the Act.... [¶] It is also clear that Congress intended to expand the variety of services available to assist families in achieving self-sufficiency. Many of these services involve decision-making.... [D]elivery of these services must be directed by the IV-A agency, both at the State and local level. However, ... *we believe that States may generally contract out such functions if they wish.* [¶] Therefore, certain JOBS functions and activities which involve decision-making with regard to individual participants may be performed by entities other than the IV-A agency, but only according to policies, rules and regulations of the State IV-A agency. In doing so, such entities must not have the authority to review, change, or otherwise substitute their judgment for that of the IV-A agency. [¶] Accordingly, *if the State IV-A agency develops specific criteria under which the decision-making regarding a participant is carried out by the contractor, then such functions can be performed by the contractor.* Such activities might include assessment, priority determinations, provision of component services, *case management, and conciliation.*" (54 Fed.Reg. 42146, 42154-42155, italics added.)

Thus, the former 45 Code of Federal Regulations part 250.10 and 54 Federal Register 42146 made clear that case management functions could be ***239** contracted out under federal law as it existed in 1996 so long as (1) criteria are provided to the contractors for any decisionmaking functions; (2) the decisionmaking function does not involve certain enumerated actions involving participants; and (3) the contractor is not allowed to make discretionary decisions involving policy level determinations and overall program administration. (14) A review of the case management functions contracted out to private

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contractors under the County's CalWORKS program demonstrates that they meet these federal guidelines.

First, the County did not contract out policy level determinations or overall program administration. Further, the County did not contract out those actions involving individuals barred by former 45 Code of Federal Regulations part 250.10(c)(2)(i)-(v). County employees determine eligibility and therefore " exempt status." Further, while contractors may make recommendations to county staff regarding determinations of " no good cause" for a failure to participate in the CalWORKS program, the actual determination is made by county staff. Further, the contractors' decisionmaking in recommending a course of action on a " no good cause" determination is governed by specific criteria in the CalWORKS Program Guide.

Similarly, while contractors may make recommendations regarding sanctions, they are also based upon criteria set forth in the CalWORKS Program Guide and only county staff may determine whether to impose sanctions. County employees provide notice of all case actions relating to termination or modification of benefits. County employees represent the County at hearings and a state administrative law judge acts as the decision maker.

Plaintiffs contend that the contracted-out functions under the CalWORKS program violated federal law in place in 1996 because they call for the exercise of " administrative discretion," in violation of 45 Code of Federal Regulations part 205.100 (2001). FN8 This argument is unavailing.

FN8 Respondents mistakenly refer to the regulation as 42 Code of Federal Regulations 205.100 (2001) throughout their brief.

Title 45 Code of Federal Regulations part 205.100(a)(1)(i) and (b) (2001) provides in pertinent part:

" (a)(1) State plan requirements. A State plan for financial assistance under title I, IV-A, X, XIV, or XVI (AABD) of the Social Security Act must:

" (i) Provide for the establishment or designation of a single State agency with authority to administer or supervise the administration of the plan. [¶] ... [¶]

*240

" (b) Conditions for implementing the requirements of paragraph (a) of this section. (1) The State agency will not delegate to other than its own officials its authority for exercising *administrative discretion in the administration or supervision of the plan including the issuance of policies, rules, and regulations on program matters*." (Italics added.)

Under the clear language of this regulation, the only " administrative discretion" that cannot be contracted out is that involving administration or supervision of the plan, such as " issuance of policies, rules, and regulations on program matters." (45 C.F.R. § 205.100(b) (2001).) It is undisputed that these functions have not been contracted out. Contrary to Plaintiffs' argument, it is not all discretionary functions that cannot be contracted out, but only a very limited species. Plaintiffs also ignore the legislative history for this rule, contained in 54 Federal Register 42146. Discussing 45 Code of Federal Regulations part 205.100 (2001), it states:

" A principal purpose of the single State agency provision is to assure that there is a central point of responsibility in the State ... with adequate legal authority, to which the Federal Government can look for the carrying out the approved State plan and with which it can deal in all matters related to the grants, and that the State functions not be so fragmented as to preclude effective administration. The single State agency principle does not preclude the purchase of services from other State agencies, nor is it designed to set aside the cooperative relationships that are normal and proper within a State. Purchase of services and working cooperatively with other agencies are, however, different from delegating administrative responsibility for performance of functions required under State and Federal laws to other agencies or individuals. The State may make use of the expertise of other agencies as long as the State IV-A agency does not delegate administrative decision-making authority. [¶] ... [¶]

" ... The State IV-A agency must submit the State JOBS and Supportive Services plan to the Department for approval. It must have sole responsibility for promulgating rules, regulations, and guidelines that govern the operation of the program. It must be responsible for program design decisions, including, but not limited to: (1) optional provisions, such as lowering the age of the youngest child that

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qualifies an individual for an exemption; (2) what optional components will be offered; (3) definition of failure to participate and good cause for failure to participate; and (4) the minimum requirements for conciliation." (54 Fed.Reg. 42146, 42155.)

Thus, 54 Federal Register 42146 also confirms that the only functions that cannot be contracted out are management-level administrative and policy ***241** decisionmaking, not the type of case management functions contracted out under the County's CalWORKS program.

Plaintiffs argue that 54 Federal Register 42146's discussion of case management activities demonstrates that it was not envisioned that such individuals would have as broad a role as the case management functions contracted out under the County's CalWORKS program. Actually, 54 Federal Register 42146 provides just the opposite, leaving it to the states and local agencies to determine the scope of case management functions: " Under the final regulations, a State IV-A agency that chooses to establish a case management system is given flexibility to design its case management services and procedures." (54 Fed.Reg. 42146, 42179.) " [W]e decline to mandate that specific features of case management be adopted or that case managers be required to receive specified training. We leave these matters to the discretion of the States." (*Id.* at p. 42180.)

Plaintiffs also assert that 54 Federal Register 42146 provides that only a state agency, not a private contractor, may approve supportive services, such as child care and transportation. Because such services are approved by private contractors under the County's CalWORKS program, plaintiffs argue the County is in violation of federal law. This argument is also unavailing. Actually, 54 Federal Register 42146 only discusses the fact that the state agency must determine appropriate *criteria* to determine if supportive services are warranted. (See 54 Fed.Reg. 42146, 42220.) Nowhere does it state that the actual decision to approve supportive services for a particular participant must only be done by a state agency employee.

In sum, we conclude that the County's contracting out of case management functions under the CalWORKS program did not violate either state or federal law as it existed in 1996. Therefore, the contracts with the private contractors did not violate the terms of section 10619 and that portion of the judgment in plaintiffs' favor that is based upon a violation of section 10619 must also be reversed..

VII. *Attorney Fees*

Defendants assert that if we reverse the court's judgment in this matter, we must also reverse the court's award to plaintiffs of attorney fees as they are no longer the prevailing party in this matter. They are correct that the attorney fee award cannot stand based upon our disposition of this matter. (See *Merced County Taxpayers' Assn. v. Cardella* (1990) 218 Cal.App.3d 396, 402 [267 Cal.Rptr. 62] [An order awarding attorney fees " falls with a reversal of the judgment on which it is based"].) ***242**

We leave it to the trial court to determine if attorney fees should be awarded to plaintiffs under Code of Civil Procedure 1021.5 [FN9] given that plaintiffs' challenge to the contracts based upon the County Charter is only being reversed based upon the mootness of that claim, and the County voluntarily performed an economy and efficiency determination as to the extended contracts with independent contractors after judgment was entered in plaintiffs' favor. We also leave it to the trial court to determine who, if anyone, is the prevailing party on this appeal.

FN9 See footnote 3, *ante*.

Disposition

The judgment is reversed and the matter is remanded to allow plaintiffs' claim that contracting out case management functions under the CalWORKS program is not more economical and efficient than having these functions be performed by civil service employees proceed to a determination, consistent with this opinion. The court is further ordered to dismiss as moot plaintiffs' claim challenging the validity of the contracts on the basis that the County violated the County Charter by failing to perform an economy and efficiency determination prior to contracting. The order awarding plaintiffs attorney fees is reversed. The parties are to pay their own costs on appeal.

McIntyre, J., and McConnell, J., concurred.

Respondents' petition for review by the Supreme Court was denied October 23, 2002. Moreno, J., was of the opinion that the petition should be granted.

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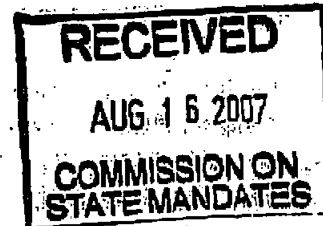
August 14, 2007



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Re: Test Claim 02-TC-24
San Juan Unified School District and
Santa Monica Community College District
Reporting Improper Governmental Activities

Dear Ms. Higashi:

I have received the Commission Draft Staff Analysis (DSA) dated July 25, 2007, to which I respond on behalf of the test claimants.

The ultimate conclusion of the DSA is that the "plain language" of the test claim statutes do not mandate any activity upon K-12 school districts which are subject to reimbursement. AR, 198. No court cases or statutes are cited on the subject matter of the test claim statutes which would prevent reimbursement of the claimed activities, it is merely the Commission staff's interpretation of what the statutory language means. In the case of community colleges, in addition to the "plain language" interpretation, the DSA cites the Kern High School case as the reason not to reimburse the activities, as well as asserting that the collective bargaining process allows the district the discretion to "opt out" of the statutory mandate.

1. The school and community college districts have a duty to respond to complaints filed by employees or applicants for employment.

The DSA correctly states that the "legislative intent behind the test claim statutes . . . is for K-12 and community college employees and applicants for employment to disclose improper governmental activities." AR, 201. Education Code sections 44114 and 87164 create a new legal entitlement and new cause of action for employees and

employment applicants to file a written complaint against a school or community college district alleging retaliation for having disclosed improper governmental activities and to have that complaint administratively and judicially adjudicated. These code sections state the elements of the cause of action and the remedies available. The DSA agrees that the employee or applicant has the "right" to file the complaint. AR, 211. But, the DSA concludes that no action is required by the district thereafter based on the "plain language" of the statute, that the district is not required to dispute the claim. AR, 211. That conclusion is without merit.

The legislative intent of the statute is for employees and applicants to disclose improper governmental activities. The statute establishes the right for employees and applicants to file a written complaint. The statute establishes remedies for the complainant. Therefore, with this establishment of legislative intent and process, there is a corresponding duty by the districts to respond to the complaint. The employee and applicant's right, due process, and remedy require the participation of the district. An objective construction of the "plain language" of the law imposes a duty for the local governmental entity, which as subordinate to the state and subject to state law and the court system, to, as a necessary party, respond to the complaint.

The Commission should decide as a matter of law that the activities listed in the test claim are required in response to the independent and unilateral actions of employees, employment applicants, and law enforcement agencies. There is no discretion. The complaint must have a response according to the due process provided by the test claim statutes.

2. The Kern exception to reimbursement is not applicable to this new program.

The DSA asserts that the Kern case requires that "when analyzing state mandate claims, the Commission must look at the underlying program to determine if the claimant's participation in the underlying program is voluntary or legally compelled." AR, 208. In the Kern case, the "underlying programs" were certain schoolsite committees established before the subsequent mandate to provide public agenda materials and perform other duties for the committees. The court concluded that since the schoolsite committees were a requirement of voluntary programs, then the subsequent public agenda requirements layered on those committees were not reimbursable.

However, in the case of the "whistle-blowing" retaliation complaint process that is the subject of the test claim, there were no previous "underlying" voluntary programs. The DSA stated that prior law provided only "piecemeal" protection to some types of employees and not to others. AR, 203. The Kern fact pattern does not apply to this test claim.

3. The test claim statute does not substitute the collective bargaining process for the legal duty to respond to complaints.

The DSA cites Education Code section 44114, subdivision (g), for the proposition that "claimants are not legally required to respond to the rights given to employees by Education Code section 44114." AR, 212. The DSA asserts that the districts and employees can "opt out of the terms" of Section 44114 by virtue of a collectively bargained agreement. AR, 212. The DSA makes the same conclusions for Section 87164 for the community colleges.

The test claim statutes do not require or allow the district and employees to either "opt" in or "opt" out of Section 44114. The district, contrary to the DSA conclusion, is very much required to "respond to the rights given to employees" by Section 44114 because the districts are required to comply with the law. The DSA reasoning would leave the employees of a district that does not have an MOU on this matter without a remedy because the DSA states that the district can ignore Section 44114.

Education Code section 44114, subdivision (f), states that the test claim statute shall not "diminish the rights, privileges, or remedies of a public school employee under any other federal or state law or under an employment contract or collective bargaining agreement." Without further explanation, the DSA states that subdivision (f) "merely limits the affect [effect?] of Education Code Sections 44110-44114." AR, 212.

However, in combination, subdivisions (f) and (g) prevent Education Code section 44114 from *diminishing* any greater rights provided the complainant by other laws or an agreement established pursuant to the Rodda Act. Thus, Section 44114 becomes the minimum entitlement for the complainant. The employer and employees are not required to collectively bargain a substitute process for Education Code section 44114, nor can the district be relieved from its duty pursuant to Education Code section 44144 by negotiating a substitute process.

CERTIFICATION

I hereby declare, under penalty of perjury under the laws of the State of California, that the statements made in this document true and complete to the best of my own knowledge or information or belief.

Sincerely,

Keith B. Petersen

C: Per Mailing List Updated 4/26/07 Attached

DECLARATION OF SERVICE

Re: Test Claim 02-TC-24 Reporting Improper Governmental Activities
San Juan Unified School District and Santa Monica Community College District

I declare:

I am employed in the office of SixTen and Associates, which is the appointed representative of the above named claimants. I am 18 years of age or older and not a party to the entitled matter. My business address is 3841 North Freeway Blvd, Suite 170, Sacramento, CA 95834.

On the date indicated below, I served the attached letter dated August 14, 2007, to Paula Higashi, Executive Director, Commission on State Mandates, to the Commission mailing list dated 4/26/07 for this test claim, and to:

Paula Higashi, Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

☒ **U.S. MAIL:** I am familiar with the business practice at SixTen and Associates for the collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at SixTen and Associates is deposited with the United States Postal Service that same day in the ordinary course of business.

☐ **OTHER SERVICE:** I caused such envelope(s) to be delivered to the office of the addressee(s) listed above by:

(Describe) ______________

☐ **FACSIMILE TRANSMISSION:** On the date below from facsimile machine number (858) 514-8645, I personally transmitted to the above-named person(s) to the facsimile number(s) shown above, pursuant to California Rules of Court 2003-2008. A true copy of the above-described document(s) was(were) transmitted by facsimile transmission and the transmission was reported as complete and without error.

☐ A copy of the transmission report issued by the transmitting machine is attached to this proof of service.

☐ **PERSONAL SERVICE:** By causing a true copy of the above-described document(s) to be hand delivered to the office(s) of the addressee(s).

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 August 15, 2007, at Sacramento, California.

Jason R. Cale

Original List Date: 8/18/2003
Last Updated: 4/26/2007
List Print Date: 07/19/2007
Claim Number: 02-TC-24
Issue: Reporting Improper Governmental Activities

Mailing Information: Draft Staff Analysis

Mailing List

TO ALL PARTIES AND INTERESTED PARTIES:

Each commission mailing list is continuously updated as requests are received to include or remove any party or person on the mailing list. A current mailing list is provided with commission correspondence, and a copy of the current mailing list is available upon request at any time. Except as provided otherwise by commission rule, when a party or interested party files any written material with the commission concerning a claim, it shall simultaneously serve a copy of the written material on the parties and interested parties to the claim identified on the mailing list provided by the commission. (Cal. Code Regs., tit. 2, § 1181.2.)

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EXHIBIT J

SENATE RULES COMMITTEE	AB 2472
Office of Senate Floor Analyses	
1020 N Street, Suite 524	
(916) 445-6614 Fax: (916) 327-4478	

THIRD READING

Bill No: AB 2472
Author: Romero (D), et al
Amended: 8/25/00 in Senate
Vote: 21

SENATE PUBLIC EMP. & RET. COMMITTEE : 5-0, 6/26/00
AYES: Ortiz, Haynes, Karnette, Lewis, Soto

SENATE JUDICIARY COMMITTEE : 9-0, 8/8/00
AYES: Burton, Escutia, Haynes, Morrow, O'Connell, Peace, Sher, Wright, Schiff

SENATE APPROPRIATIONS COMMITTEE : 13-0, 8/23/00
AYES: Johnston, Alpert, Bowen, Burton, Escutia, Johnson, Karnette, Kelley, Leslie, McPherson, Mountjoy, Perata, Vasconcellos

ASSEMBLY FLOOR : 77-0, 5/31/00 - See last page for vote

SUBJECT : Public school employees: Whistleblower Protection Act

SOURCE : California School Employees Association

DIGEST : This bill establishes the Reporting by Public School Employees of Improper Governmental Activities Act and the Reporting by Community College Employees of Improper Governmental Activities Act, which provide protections to public school employees who report improper governmental activities.

CONTINUED

ANALYSIS : Existing law:

1. Establishes the California Whistleblower Protection Act, which provides protections to state employees who report improper governmental activities.

2. Prohibits a state employee from using his or her authority or influence to interfere with the right of a person to disclose an improper governmental activity to the State Auditor.

3. Prohibits any state or local governmental employee from interfering with the right of any person to disclose an improper governmental activity to an investigating committee of the Legislature.

This bill:

1. Specifies that a public school employee may file a written complaint with the local law enforcement agency, as appropriate, alleging acts or attempted acts of reprisal, retaliation, threats, coercion, or similar improper acts.

2. Specifies that any person who engages in acts of reprisal, retaliation, threats, coercion, or similar acts against a public school employee for having made a protected disclosure is subject to a fine not to exceed $10,000 and imprisonment in the county jail for up to one year.

3. Specifies that any person intentionally engaging in acts of reprisal, retaliation, threats, coercion, or similar acts against a public school employee for having made a protected disclosure may be liable in an action for damages and reasonable attorney's fees.

4. Provides that this provision is not intended to prevent a public school employer from taking a personnel action that the employer believes is justified on the basis or evidence separate and apart from the fact that the employee made a protected disclosure.

5. Provides that if an employee can show that retaliation

for whistleblowing was a contributing factor in an employer retaliating against the employee, the burden of

proof is imposed upon the school employer to prove by clear and convincing evidence that the action would have been brought for legitimate reasons, even if the employee had not engaged in protected disclosures or refused an illegal order.

6. Provides that if an employer fails to meet this burden of proof, the public school employee shall have a complete affirmative defense in the adverse action.

FISCAL EFFECT : Appropriation: No Fiscal Com.: Yes
Local: Yes

SUPPORT : (Verified 8/24/00)

California School Employees Association (source)
American Federation of State, County and Municipal Employees
California Faculty Association
California Federation of Teachers
California Independent Public Employees Legislative Council
California State Employees Association
Service Employees International Union

ASSEMBLY FLOOR
AYES: Aanestad, Ackerman, Alquist, Aroner, Ashburn, Bates, Battin, Bock, Brewer, Briggs, Calderon, Campbell, Cardenas, Cardoza, Cedillo, Corbett, Correa, Cox, Cunneen, Davis, Dickerson, Ducheny, Dutra, Firebaugh, Florez, Floyd, Frusetta, Gallegos, Granlund, Havice, Honda, House, Jackson, Kaloogian, Keeley, Knox, Kuehl, Leach, Lempert, Leonard, Longville, Lowenthal, Machado, Maddox, Maldonado, Margett, Mazzoni, McClintock, Migden, Nakano, Olberg, Oller, Robert Pacheco, Rod Pacheco, Papan, Pescetti, Reyes, Romero, Runner, Scott, Shelley, Steinberg, Strickland, Strom-Martin, Thompson, Thomson, Torlakson, Villaraigosa, Vincent, Washington, Wayne, Wesson, Wiggins, Wildman, Wright, Zettel, Hertzberg

TSM:cm 8/26/00 Senate Floor Analyses

AB 2472
Page 4

SUPPORT/OPPOSITION: SEE ABOVE

**** END ****

Azteca Const., Inc. v. ADR Consulting, Inc.
Cal.App. 3 Dist.,2004.

Court of Appeal, Third District, California.
AZTECA CONSTRUCTION, INC., Plaintiff and Appellant,
v.
ADR CONSULTING, INC., Defendant and Respondent.
No. C045316.

Aug. 25, 2004.
As Modified Sept. 9, 2004.

Background: Construction company filed petition to vacate arbitration award in favor of consulting company, in resolution of contract dispute, alleging that arbitrator's failure to disqualify himself in response to timely demand for such disqualification constituted violation of provisions of California Arbitration Act. The Superior Court, Sacramento County, No. 03CS01085, Loren E. McMaster, J., denied petition, ruling that construction company waived its statutory rights under Act by agreeing to arbitration in conformance with former American Arbitration Association (AAA) construction industry dispute resolution rules, which granted AAA conclusive authority over challenges to arbitrator. Construction company appealed.

Holdings: The Court of Appeal, Butz, J., held that:

(1) parties could not waive Act's provisions pertaining to arbitrator disqualification in favor of AAA rules, and

(2) vacation of award was proper remedy under Act.

Reversed with directions.
West Headnotes
[1] Alternative Dispute Resolution 25T ⚷233

25T Alternative Dispute Resolution
25TII Arbitration
25TII(E) Arbitrators
25Tk228 Nature and Extent of Authority
25Tk233 k. Grounds and Rules of Decision. Most Cited Cases
(Formerly 33k29.1 Arbitration)
Arbitrators are not bound by rules of law, but may base their decisions on broad principles of justice and equity.

[2] Alternative Dispute Resolution 25T ⚷324

25T Alternative Dispute Resolution
25TII Arbitration
25TII(G) Award
25Tk324 k. Consistency and Reasonableness; Lack of Evidence. Most Cited Cases
(Formerly 33k61 Arbitration)

Alternative Dispute Resolution 25T ⚷374(1)

25T Alternative Dispute Resolution
25TII Arbitration
25TII(H) Review, Conclusiveness, and Enforcement of Award
25Tk366 Appeal or Other Proceedings for Review
25Tk374 Scope and Standards of Review
25Tk374(1) k. In General. Most Cited Cases
(Formerly 33k73.7(1) Arbitration)
With narrow exceptions, the courts are not permitted to review the validity of an arbitrator's reasoning or the sufficiency of the evidence to support the award.

[3] Alternative Dispute Resolution 25T ⚷222

25T Alternative Dispute Resolution
25TII Arbitration
25TII(E) Arbitrators
25Tk222 k. Competency. Most Cited Cases
(Formerly 33k26 Arbitration)

Alternative Dispute Resolution 25T ⚷277

25T Alternative Dispute Resolution
25TII Arbitration
25TII(F) Arbitration Proceedings
25Tk274 Waiver of Objections
25Tk277 k. To Arbitrators or Umpire.

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Most Cited Cases
(Formerly 33k46.2 Arbitration)
Construction company and consulting company could not waive California Arbitration Act's provisions pertaining to arbitrator disqualification in favor of former American Arbitration Association (AAA) construction industry dispute resolution rules, which granted AAA conclusive authority over challenges to arbitrator, and thus arbitrator's failure to disqualify himself in response to construction company's timely demand for such disqualification in arbitration to resolve contract dispute constituted violation of Act, as Act's disqualification provisions were enacted primarily for public purpose, and neutrality of arbitrator was of such crucial importance that state legislature could not have intended that its regulation be delegable to unfettered discretion of private business. West's Ann.Cal.Civ.Code § 3513; West's Ann.Cal.C.C.P. §§ 1281.9, 1281.91.
See 6 Witkin, Cal. Procedure (4th ed. 1997) Proceedings Without Trial, § 511; Knight et al., Cal. Practice Guide: Alternative Dispute Resolution (The Rutter Group 2003) ¶ 7:21 et seq. (CAADR Ch. 7-B)

[4] Estoppel 156 52.10(4)

156 Estoppel
156III Equitable Estoppel
156III(A) Nature and Essentials in General
156k52.10 Waiver Distinguished
156k52.10(4) k. Rights Subject to Waiver. Most Cited Cases
A party may waive a statutory right where its public benefit is merely incidental to its primary purpose, but a waiver is unenforceable where it would seriously compromise any public purpose that the statute was intended to serve. West's Ann.Cal.Civ.Code § 3513.
See Cal. Civil Practice (Thomson/West 2003) Business Litigation, § 32:17.

[5] Alternative Dispute Resolution 25T 363(1)

25T Alternative Dispute Resolution
25TII Arbitration
25TII(H) Review, Conclusiveness, and Enforcement of Award
25Tk360 Impeachment or Vacation
25Tk363 Motion to Set Aside or Vacate
25Tk363(1) k. In General. Most Cited Cases
(Formerly 33k76(3) Arbitration)
Vacation of arbitration award in favor of consulting company, in arbitration to resolve contract dispute with construction company, was proper remedy under California Arbitration Act for arbitrator's failure to disqualify himself in response to construction company's timely demand for such disqualification. West's Ann.Cal.C.C.P. §§ 1281.9, 1281.91, 1286.2.

**143 Sheuerman, Martini & Tabari and Alan L. Martini, San Jose, for Plaintiff and Appellant.
Law Offices of George R. Gore and George R. Gore, El Dorado Hills, for Defendant and Respondent.
BUTZ, J.

*1160 This case requires us to resolve a conflict between the rules of the American Arbitration Association (AAA) and the provisions of the California Arbitration Act (the Act) (Code Civ. Proc., § 1280 et seq.) FN1 PERTAINING TO THE DIsqualification of a proposed neutral arbitrator based on pre-arbitration disclosures that might affect his or her impartiality.

FN1. Undesignated statutory references are to the Code of Civil Procedure.

**144 The parties here agreed to private arbitration in accordance with the AAA's then entitled "Construction Industry Dispute Resolution [Rules and] Procedures" (hereafter AAA Rules). Those rules included a provision which stated that where one party objects to the continued service of an arbitrator, the AAA shall decide whether the arbitrator should be disqualified, and that its determination of the issue shall be conclusive.

On the other hand, the Act permits either party uncomfortable with the disclosures of any proposed arbitrator to disqualify him or her within 15 days after receiving the disclosure statement. (§ 1281.91, subd. (b)(1).) If the arbitrator fails to disqualify himself or herself upon timely demand, there is a drastic remedy-vacation of the award. (§ 1286.2, subd. (a)(6)(B).)

In this case, plaintiff Azteca Construction, Inc. (Azteca) demanded disqualification of the proposed arbitrator within 15 days after receiving his disclosure statement. Acting pursuant to its internal rules, the AAA determined that there was no good cause for disqualification, affirmed the appointment of the arbitrator, and the arbitration proceeded to its conclusion.

Azteca filed a petition to vacate the arbitration award for noncompliance with relevant provisions of the

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Act. The trial court ruled that Azteca had waived these provisions by agreeing to AAA arbitration, and more specifically the rule giving the AAA conclusive authority over challenges to the arbitrator's neutrality.

The trial court erred. The provisions for arbitrator disqualification established by the California Legislature may not be waived or superseded by a private contract. The arbitrator's refusal to disqualify himself following Azteca's timely demand rendered the award subject to vacatur. We shall reverse with directions.

This case involves a dispute between Azteca and defendant ADR Consulting, Inc. (ADR Consulting) arising out of a written contract whereby ***1161** ADR Consulting agreed to provide consulting services to Azteca. The contract contained a clause that provided that any dispute arising out of the agreement " shall be resolved through the American Arbitration Association using the [AAA] Rules...." At the time of the events in question, former rule R-20(b) of those rules (Rule R-20(b)) provided that " [u]pon objection of a party to the continued service of a neutral arbitrator, the AAA shall determine whether the arbitrator should be disqualified and shall inform the parties of its decision, which shall be conclusive."

In October 2002, ADR Consulting served a demand on Azteca for arbitration in accordance with the AAA Rules. Because the parties were unable to agree on a neutral arbitrator from the AAA list, the AAA proposed that Attorney Paul W. Taylor arbitrate the dispute. In compliance with section 1281.9,[FN2] Taylor submitted a disclosure statement, which was distributed to both sides on November 12, 2002.

FN2. Section 1281.9, subdivision (a), requires disclosure of " all matters that could cause a person aware of the facts to reasonably entertain a doubt that the proposed neutral arbitrator would be able to be impartial," including specified matters relating to the arbitrator's present arrangements or past relationships with the parties or their attorneys.

**145 Taylor's disclosure statement revealed that he had, within the past five years, served as a neutral arbitrator on matters in which George Gore (ADR Consulting's counsel) had represented one or more parties. Specifically, Taylor recalled only that " these matters have included administrative hearings on behalf of the University of California." Taylor also disclosed that he had a prior relationship with Gore in that in approximately 1985 and for about a year, the same construction company employed both him and Gore. Finally, a conflicts check run by the law firm to which Taylor was " of counsel" reported a case in which Azteca was listed as a potential adverse party to one of its clients; Taylor stated that he had no " personal recollection of any knowledge of this matter," nor had he made inquiry of the attorney at his firm responsible for handling it. (*Ibid.*)

On November 13, 2002, Azteca, through its vice-president, wrote to the AAA formally objecting to Taylor's proposed appointment and requesting his removal as arbitrator, based on his disclosed relationship with Gore. After conducting an investigation, the AAA determined that Taylor should not be disqualified, and notified the parties on November 27, 2002, that it had reaffirmed Taylor's appointment as arbitrator.

An arbitration hearing was conducted and on March 20, 2003, Taylor rendered an interim award, ordering Azteca to pay ADR Consulting $39,140, plus the costs of the arbitration.

***1162** Counsel for Azteca then wrote to Taylor, requesting that he forthwith disqualify himself as arbitrator, reminding him that Azteca had served notice of his disqualification on November 13, 2002. Responding to the letter, the AAA reasserted its authority under its Rule R-20(b) to adjudicate any objection to Taylor's continued service. Taylor issued a final award on April 21, 2003.

Azteca filed a petition to vacate the award, claiming that Taylor was required to disqualify himself upon timely receipt of Azteca's objection under section 1281.91, subdivisions (b)(1) and (d), and the Ethics Standards for Neutral Arbitrators in Contractual Arbitration, adopted by the Judicial Council. (23 pt. 2 West's Cal.Codes, Ann. Rules (2004 supp.), appen., div. VI, former stds. 8(a)(2) [now std. 10(a)(2)] & 10(b) [now std. 12(b)], pp. 604-620 (hereafter Ethics Standards).

The trial court denied the petition. Although it found that Azteca submitted a timely demand for disqualification prior to the arbitration, the court ruled that Azteca had waived the right to disqualify Taylor under the Act by agreeing to arbitration in

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conformance with the AAA Rules. The court indicated that were it to consider the matter of the AAA's refusal to disqualify Taylor de novo, it would conclude that there was nothing in Taylor's disclosure statement that required disqualification.

I. Recent Revisions to the Act and the Present Case

In 2001, the Legislature significantly revised the disclosure requirements and procedures for disqualifying arbitrators pursuant to private or contractual arbitration. (§ 1281.9, as amended by Stats.2001, ch. 362, §§ 4-8.) Section 1281.9, subdivision (a), was amended to require an appointed arbitrator's disclosure of any fact that might reasonably lead a person to *doubt* his or her ability to be impartial.[FN3] The **146 Judicial Council was directed to adopt " ethical standards for all neutral arbitrators effective July 1, 2002" (§ 1281.85) and the Ethics Standards, which now appear in division VI of the Appendix to the California Rules of Court, were made applicable to proposed arbitrators. (§ 1281.9, subd. (a)(2).) Section 1281.91 was also added, clarifying the procedure for party-initiated disqualification of proposed arbitrators. (Stats.2001, ch. 362, § 6.)

FN3. Section 1281.9, subdivision (a)(1), was further amended in 2002 to add disclosure requirements related to prospective employment or compensated service as a neutral arbitrator. (Stats.2002, ch. 1094, § 2.)

Under the Act, proposed neutrals have 10 days from the date of service of their proposed nomination or appointment to make the disclosures *1163 required by law. (§ 1281.9, subd. (b).) The parties then have 15 days to file a notice of disqualification either for failure to comply with disclosure duties (§ 1281.91, subd. (a)), or if full disclosure was made, based on the facts actually disclosed. (§ 1281.91, subd. (b)(1).)

Until Azteca demanded Taylor's removal, the arbitrator selection process here conformed in all aspects to the Act. By letter of November 12, 2002, the AAA selected Taylor as the proposed arbitrator and attached his disclosure statement, in ostensible compliance with section 1281.9.[FN4]

FN4. The letter read in part: " Dear Parties: [¶] In accordance with the California Arbitration Law (C.C.P. Section 1281.9), fully executed Arbitrator Disclosure form submitted by Paul W. Taylor is enclosed for your review. [¶] If you have objections to the appointment of the proposed Arbitrator, it must be factual in nature and/or based upon the Arbitrator's disclosure form, and it must be submitted to the Association in writing within fifteen days from the date of this letter. Absent our receipt of a proper notice of disqualification within the time specified, the appointment of the proposed Arbitrator will be confirmed."

Taylor's statement listed several disclosures reflecting on his neutrality, including a prior working relationship with Gore, the fact that Azteca was a potential adverse party to a client of a law firm with which Taylor was associated, and the fact that Taylor had previously arbitrated cases in which Gore represented one or more parties.

Section 1281.91, subdivision (b)(1), provides that a proposed arbitrator who complies with his or her disclosure obligations under section 1281.9, " *shall be disqualified on the basis of the disclosure statement* " if either party serves a notice of disqualification within 15 days. (Italics added.) This subdivision confers on both parties the unqualified right to remove a proposed arbitrator based on any disclosure required by law which could affect his or her neutrality. (See also Ethics Standards, former std. 10(a)(2) [now std. 12(a)(2)].) There is no good faith or good cause requirement for the exercise of this right, nor is there a limit on the number of proposed neutrals who may be disqualified in this manner. (Knight et al., Cal. Practice Guide: Alternative Dispute Resolution (The Rutter Group 2003) ¶ 7:238, p. 7-49 (Knight).) [FN5] As long as the objection is based on a required disclosure, a party's right to remove the proposed neutral by giving timely notice is absolute.

FN5. Where the arbitrator is appointed by *the court* (see § 1281.6), each party is limited to only one challenge without cause (§ 1281.91, subd. (b)(2)). This was not such a case.

Azteca's November 13, 2002 letter demanding Taylor's removal was based on one of his disclosures and was served within 15 days as required by statute.

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Moreover, the trial court made the unchallenged finding that the letter was a " timely demand for disqualification." Thus, if the provisions of the Act had been followed, Taylor's disqualification should have been automatic.

**147 *1164 However, Taylor did not disqualify himself, nor did the AAA require his removal. Instead, the AAA proceeded to apply its own Rule R-20(b), which gave it the sole right to rule on any objection to the continued service of an arbitrator. Overruling Azteca's demand for removal, the AAA reaffirmed Taylor as arbitrator and the arbitration proceeded to its conclusion. The trial court upheld this procedure because " [w]hatever rights [Azteca] had to challenge the arbitrator under California law, it agreed to waive or alter those rights by agreeing to abide by the AAA rules."

The correctness of the trial court's ruling is a legal issue involving statutory construction and the ascertainment of legislative intent, which we review de novo. (*Spielholz v. Superior Court* (2001) 86 Cal.App.4th 1366, 1371, 104 Cal.Rptr.2d 197.).

II. Did Azteca Waive Its Right to Challenge the Arbitrator Under the Act?

In recent times, there has been a " rapid expansion" of private or contractual arbitration as a mechanism for dispute resolution. (*Aguilar v. Lerner* (2004) 32 Cal.4th 974, 985, 12 Cal.Rptr.3d 287, 88 P.3d 24.) Although " ' [t]he scope of arbitration is ... a matter of agreement between the parties" [citation], and ' " [t]he powers of an arbitrator are limited and circumscribed by the agreement or stipulation of submission" ' " (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 8, 10 Cal.Rptr.2d 183, 832 P.2d 899(*Moncharsh*)), the process has historically been subject to extensive legislative supervision. (*Id.* at pp. 25-28, 10 Cal.Rptr.2d 183, 832 P.2d 899.)

The Act " represents a comprehensive statutory scheme regulating private arbitration in this state. (§ 1280 et seq.)" (*Moncharsh, supra,* 3 Cal.4th at p. 9, 10 Cal.Rptr.2d 183, 832 P.2d 899.)Section 1281 and following provisions that " set forth procedures for the enforcement of agreements to arbitrate (*id.,* §§ 1281.2-1281.95), establish rules for the conduct of arbitration proceedings except as the parties otherwise agree (*id.,* §§ 1282-1284.2), describe the circumstances in which arbitrators' awards may be judicially vacated, corrected, confirmed, and enforced (*id.,* §§ 1285-1288.8), and specify where, when, and how court proceedings relating to arbitration matters shall occur ([Code Civ. Proc.,] §§ 1290-1294.2)." (*Vandenberg v. Superior Court* (1999) 21 Cal.4th 815, 830, 88 Cal.Rptr.2d 366, 982 P.2d 229.)

Over the years, the Legislature has revised and refined the standards for judicial oversight of arbitration awards. " The law has ... evolved from its common law origins and moved towards a more clearly delineated scheme rooted in statute." (*Moncharsh, supra,* 3 Cal.4th at p. 26, 10 Cal.Rptr.2d 183, 832 P.2d 899.)

[1][2] *1165 As the California Supreme Court noted in *Moncharsh,* the Legislature has severely restricted judicial interference in the *merits* of an arbitrator's decision. (*Moncharsh, supra,* 3 Cal.4th at pp. 10-11, 10 Cal.Rptr.2d 183, 832 P.2d 899.) Arbitrators are not bound by rules of law, but may base their decisions on broad principles of justice and equity. (*Id.* at p. 10, 10 Cal.Rptr.2d 183, 832 P.2d 899.) With narrow exceptions, the courts are not permitted to review the validity of an arbitrator's reasoning or the sufficiency of the evidence to support the award. (*Id.* at p. 11, 10 Cal.Rptr.2d 183, 832 P.2d 899; *Crowell v. Downey Community Hospital Foundation* (2002) 95 Cal.App.4th 730, 735-737, 115 Cal.Rptr.2d 810(*Crowell*).)

Precisely because arbitrators wield such mighty and largely unchecked power, the Legislature has taken an increasingly more active role in protecting the fairness of the process. **148(*Moncharsh, supra,* 3 Cal.4th at pp. 12-13, 10 Cal.Rptr.2d 183, 832 P.2d 899.) In 1994, section 1281.9 was added, enumerating required disclosures for proposed arbitrators. (Stats.1994, ch. 1202, § 1.) While awards have traditionally been subject to vacatur if procured by fraud, corruption or misconduct of the arbitrator or if the arbitrator exceeded his or her powers (§ 1286.2, subd. (a)(1), (2), (3) & (4)), in 1997, the Legislature added as a ground for annulment of an award that the arbitrator " *was subject to disqualification upon grounds specified in Section 1281.9* but *failed upon receipt of timely demand to disqualify himself or herself* as required by that provision." (*Crowell, supra,* 95 Cal.App.4th at p. 737, 115 Cal.Rptr.2d 810, quoting former § 1286.2, subd. (f), as amended by Stats.1997, ch. 445, § 4, italics added.) FN6

FN6. This provision now appears in section

> 1286.2, subdivision (a)(6)(B). (Stats.2001, ch. 362, § 7 [Sen. Bill No. 475].)

The 2001 legislation arose out of a perceived lack of rigorous ethical standards in the private arbitration industry.[FN7] Co-sponsored by the Governor and the Judicial Council, the bill sought to provide " basic measures of consumer protection with respect to private arbitration, such as minimum ethical standards and remedies for the arbitrator's failure to comply with existing disclosure requirements." (Bill Analysis, *supra*, p. 1.) Recent developments thus evince an unmistakable legislative intent to oversee and enforce ethical standards for private arbitrators.

> FN7. According to an Assembly Committee analysis prior to the 2001 enactment of Senate Bill No. 475, " the growing use of private arbitrators-including the imposition of mandatory pre-dispute binding arbitration contracts in consumer and employment disputes-has given rise to a largely unregulated private justice industry. While lawyers who act as arbitrators under the judicial arbitration program are required to comply with the Judicial Code of Ethics, arbitrators who act under private contractual arrangements are, surprising to many, currently not required to do so.... Because these obligations do not attach to private arbitrators, parties in private arbitrations are not assured of the same ethical standards as they are entitled to in the judicial system." (Assemb. Com. on Judiciary, Analysis of Sen. Bill No. 475 (2001-2002 Reg. Sess.), Hearing on Private Arbitration: New Ethical Standards, Synopsis, p. 5, as amended Aug. 20, 2001 [<http://www.leginfo.ca.gov>] (hereafter Bill Analysis).)

[3] ***1166** ADR Consulting acknowledges that Taylor was subject to the *disclosure* provisions of the Act, but contends that when it comes to the mechanism for disqualification, the trial court properly ruled that Rule R-20(b), took precedence over the statutory scheme, based on freedom of contract principles. ADR Consulting argues that the trial court properly gave effect to the parties' voluntary contractual limitation on their statutory disqualification rights, citing the basic maxim in Civil Code section 3513, that a party is free to waive a statutory provision intended for his benefit.

[4] The full text of Civil Code section 3513 provides: " Anyone may waive the advantage of a law intended solely for his benefit. *But a law established for a public reason cannot be contravened by a private agreement.*" (Italics added.) As our state Supreme Court pointed out, a literal construction of this statute would be unreasonable, for " it is difficult to conceive of a statutory right enacted *solely* for the benefit of private individuals that does not also have an incidental public benefit." (*Bickel v. City of Piedmont* (1997) 16 Cal.4th 1040, 1049, fn. 4, 68 Cal.Rptr.2d 758, 946 P.2d 427. Therefore, a party may waive a statutory right where its " ' public benefit ... is merely incidental to [its] primary purpose,' " but a waiver is unenforceable where it would " ' seriously compromise ****149** any public purpose that [the statute was] intended to serve.' " *DeBerard Properties, Ltd. v. Lim* (1999) 20 Cal.4th 659, 668-669, 85 Cal.Rptr.2d 292, 976 P.2d 843, quoting *Bickel*, at pp. 1049-1050, 68 Cal.Rptr.2d 758, 946 P.2d 427.) Stated another way, Civil Code section 3513 prohibits a waiver of statutory rights where the " public benefit [of the statute] is one of its primary purposes." (*DeBerard*, at p. 669, 85 Cal.Rptr.2d 292, 976 P.2d 843.)

Courts have applied this principle, either expressly or by implication, to annul or restrict contractual arbitration provisions that run afoul of statutory rights that benefit the public. For example, in *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 99 Cal.Rptr.2d 745, 6 P.3d 669(*Armendariz*), the California Supreme Court held that an arbitration agreement could not be used as a vehicle to waive statutory rights created by the California Fair Employment and Housing Act (FEHA). (*Armendariz*, at p. 101, 99 Cal.Rptr.2d 745, 6 P.3d 669.) Thus, while it was not unlawful *per se* for the parties to agree to arbitrate FEHA claims, the rules of that arbitration must be judicially scrutinized to ensure that the employee is effectively able to vindicate his or her statutory rights in the arbitral forum. (*Id.* at pp. 102-103, 99 Cal.Rptr.2d 745, 6 P.3d 669.) Relying on Civil Code section 3513, as well as Civil Code section 1668(*id.* at p. 100, 99 Cal.Rptr.2d 745, 6 P.3d 669), the high court invalidated or limited certain provisions of an agreement to arbitrate FEHA claims. (*Id.* at pp. 103-113, 99 Cal.Rptr.2d 745, 6 P.3d 669.)

In *Crowell, supra*, 95 Cal.App.4th 730, 115 Cal.Rptr.2d 810, the court voided a provision in an arbitration agreement that purported to expand

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judicial review of the arbitrator's findings of fact and conclusions of law beyond that provided by the Act. *1167 The court found that the clause was inconsistent with the statutory scheme designed to ensure finality of the arbitrator's decision. (*Id.* at pp. 735-739, 115 Cal.Rptr.2d 810.)

And in *Alternative Systems, Inc. v. Carey* (1998) 67 Cal.App.4th 1034, 79 Cal.Rptr.2d 567, a case with a fact pattern closest to that here, the court was confronted with an attorney-client fee agreement, which provided that all fee disputes were to be arbitrated by the AAA in accordance with its rules and procedures. (*Id.* at p. 1038, 79 Cal.Rptr.2d 567.) The AAA's method of dispute resolution conflicted with the client's rights under the Mandatory Fee Arbitration (MFA) statutes (Bus. & Prof.Code, § 6200 et seq.) Citing Civil Code section 3513, *Carey* held that MFA, which was enacted for the public benefit, preempted the AAA arbitration clause in the contract. (*Carey*, at pp. 1042-1044, 79 Cal.Rptr.2d 567.)

It is our view that Rule R-20(b) must yield to the disqualification scheme set forth in sections 1281.9 and 1281.91, for a number of reasons. First, there is no doubt that these statutes were enacted primarily for a public purpose. As we have seen, the Legislature has gone out of its way, particularly in recent years, to regulate in the area of arbitrator neutrality by revising the procedures relating to the disqualification of private arbitrators and by adding, as a penalty for noncompliance, judicial vacation of the arbitration award. The statement of purpose set forth in the Ethics Standards, formulated under statutory mandate, recites: " These standards are adopted under the authority of Code of Civil Procedure section 1281.85 and *establish the minimum standards of conduct for neutral arbitrators who are subject to these standards.* They are intended to guide the conduct of arbitrators, **150 to inform and *protect participants in arbitration,* and to *promote public confidence in the arbitration process.*" (Ethics Standards, std. 1(a), at p. 604, italics added.)

Second, there is a " ' fundamental distinction between contractual rights, which are created, defined, and subject to modification by the same private parties participating in arbitration, and statutory rights, which are created, defined, and subject to modification only by [the Legislature] and the courts....' " (*Armendariz, supra,* 24 Cal.4th at p. 101, 99 Cal.Rptr.2d 745, 6 P.3d 669, quoting *Cole v. Burns Intern. Security Services* (D.C.Cir.1997) 105 F.3d 1465, 1476.) While the parties may be free to contract among themselves for alternative methods of dispute resolution, such contracts would be valueless without the state's blessing. Because it imbues private arbitration with legal vitality by sanctioning judicial enforcement of awards, the state retains ultimate control over the " structural aspect[s] of the arbitration" process. (*Trabuco Highlands Community Assn. v. Head* (2002) 96 Cal.App.4th 1183, 1190, 117 Cal.Rptr.2d 842.) The critical subject of arbitrator neutrality is a structural aspect of the arbitration and falls within the Legislature's supreme authority.

*1168 Finally, the neutrality of the arbitrator is of such crucial importance that the Legislature cannot have intended that its regulation be delegable to the unfettered discretion of a private business. The California Supreme Court has termed the requirement of a neutral arbitrator " essential to ensuring the integrity of the arbitration process." (*Armendariz, supra,* 24 Cal.4th at p. 103, 99 Cal.Rptr.2d 745, 6 P.3d 669, citing *Graham v. Scissor-Tail, Inc.* (1981) 28 Cal.3d 807, 825, 171 Cal.Rptr. 604, 623 P.2d 165.) " Participants who agree to *binding* arbitration are giving up constitutional rights to a jury trial and appeal. [Statutory] [d]uties of disclosure and disqualification are designed to ensure an arbitrator's impartiality." (Knight, *supra,* ¶ 7:13, p. 7-7.) As the Court of Appeal stated in *Britz, Inc. v. Alfa-Laval Food & Dairy Co.* (1995) 34 Cal.App.4th 1085, 40 Cal.Rptr.2d 700(*Britz*): " [E]ven though state and federal policy favors private arbitration and the AAA is certainly a respected forum for such arbitration, the AAA nevertheless is a business enterprise ' in competition not only with other private arbitration services but with the courts in providing-in the case of private services, selling-an attractive form of dispute settlement. It may set its standards as high or as low as it thinks its customers want.' " (*Id.* at p. 1102, 40 Cal.Rptr.2d 700, quoting *Merit Ins. Co. v. Leatherby Ins. Co.* (7th Cir.1983) 714 F.2d 673, 681.) Only by adherence to the Act's prophylactic remedies can the parties have confidence that neutrality has not taken a back seat to expediency.FN8

FN8. In *Britz, supra,* 34 Cal.App.4th 1085, 40 Cal.Rptr.2d 700, a party moved to disqualify the arbitrator for cause in the midst of the proceeding after learning of a potential conflict of interest. (*Id.* at p. 1096,

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> 40 Cal.Rptr.2d 700.) The AAA denied the motion, acting under the AAA Commercial Arbitration Rules, former " rule [R-]19," a rule very similar to Rule R-20(b) (of the AAA Construction Rules), giving the organization " conclusive" authority to rule on objections to the arbitrator. (*Britz*, at pp. 1098-1099, 40 Cal.Rptr.2d 700.) *Britz* held that " a trial court considering a petition to confirm or vacate an arbitration award is required to determine, de novo, whether the circumstances disclose a reasonable impression of arbitrator bias, when that issue is properly raised by a party to the arbitration." (*Id.* at p. 1102, 40 Cal.Rptr.2d 700.)
>
> *Britz* did not involve the issue we face, i.e., the applicability of statutes requiring a proposed arbitrator to disqualify himself upon demand of one party. However, *Britz* is consistent with our conclusion that parties cannot contractually override provisions of the Act designed to protect the fairness of the arbitration process.

**151 We conclude Azteca could not, by agreeing to submit to arbitration before the AAA, waive its statutory rights to disqualify an arbitrator under the methods set forth by the Act. In resolving Azteca's objection to the proposed arbitrator, the AAA was required to follow section 1281.9*and*section 1281.91.

III. Application of the Act to Taylor's Disqualification

[5] Under section 1281.91, Taylor should have been disqualified before the arbitration began since, as discussed in part I, *ante*, Azteca properly exercised its right to remove him within 15 days of service of his disclosure statement.

*1169 Moreover, as Azteca argued below, there was a second reason why Taylor should have stepped down. Section 1281.9, subdivision (a)(2), requires proposed arbitrators to make all disclosures required by the Ethics Standards. In November 2002, former standard 10(b) provided in relevant part: " [W]ithin [10 calendar days of service of notice of the proposed nomination or appointment], a proposed arbitrator must disclose whether or not he or she will entertain offers of employment or new professional relationships in any capacity other than as a lawyer, expert witness, or consultant from a party, a lawyer in the arbitration, or a lawyer or law firm that is currently associated in the private practice of law with a lawyer in the arbitration while that arbitration is pending, including offers to serve as a dispute resolution neutral in another case. *A party may disqualify the arbitrator based on this disclosure by serving a notice of disqualification in the manner and within the time specified in Code of Civil Procedure section 1281.91 [, subdivision] (b).*" (Ethics Standards, former std. 10(b) [now std. 12(b)], italics added.)

Mirroring the language of this standard, Taylor wrote in his disclosure statement that he reserved the right to entertain offers of employment or new professional relationships with a party or lawyer for a party in this case while the arbitration was pending. Thus, Azteca's timely demand triggered Taylor's automatic disqualification under former Ethics Standards, standard 10(b) [now standard 12(b)].

Section 1286.2 provides that the court " *shall* vacate the award if the court determines any of the following: [¶] ... [¶] (6) An arbitrator making the award ... (B) was subject to disqualification upon grounds specified in Section 1281.91*but failed upon receipt of a timely demand to disqualify himself or herself as required by that provision.*" (Italics added.) Since, as we have concluded, Taylor's pre-arbitration disqualification was mandatory, the award to ADR Consulting must be vacated.

We need not express an opinion on the correctness of the AAA's refusal to remove Taylor if viewed as a ruling upon a challenge for cause. Under the circumstances here, Azteca had no independent burden to demonstrate that a reasonable person would doubt Taylor's capacity to be impartial. (Compare §§ 1281.91 subd. (d), 170.1, subd. (a)(6)(C); *Betz v. Pankow* (1993) 16 Cal.App.4th 919, 926, 20 Cal.Rptr.2d 834.) The Legislature has already determined that any of the matters required to be disclosed by section 1281.9, subdivision (a), necessarily satisfies that standard. (See **152*International Alliance of Theatrical Stage Employees, etc. v. Laughon* (2004) 118 Cal.App.4th 1380, 1386-1387, 14 Cal.Rptr.3d 341.) Azteca's demand for disqualification of a proposed neutral arbitrator therefore had the same practical effect as a timely peremptory challenge to a superior court judge under section *1170 170.6-disqualification is automatic, the disqualified judge loses jurisdiction

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over the case and any subsequent orders or judgments made by him or her are void. (*Lawrence v. Superior Court* (1988) 206 Cal.App.3d 611, 615-616, 253 Cal.Rptr. 748; *Brown v. Swickard* (1985) 163 Cal.App.3d 820, 824, 209 Cal.Rptr. 844.)

The order denying Azteca's petition to vacate the arbitration award is reversed with directions to enter a new order granting the petition. Azteca shall recover its costs on appeal. (Cal. Rules of Court, rule 27(a).)

We concur: BLEASE, Acting P.J., MORRISON, J.
Cal.App. 3 Dist.,2004.
Azteca Const., Inc. v. ADR Consulting, Inc.
121 Cal.App.4th 1156, 18 Cal.Rptr.3d 142, 04 Cal. Daily Op. Serv. 7910, 2004 Daily Journal D.A.R. 11,299, 2004 Daily Journal D.A.R. 10,648

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EXHIBIT L

Date of Hearing: May 16, 2001

ASSEMBLY COMMITTEE ON APPROPRIATIONS
Carole Migden, Chairwoman

AB 647 (Horton) - As Amended: May 3, 2001

Policy Committee:
P.E.R.&S.S.Vote:7-0

Urgency: No State Mandated Local Program:
Yes Reimbursable: No

SUMMARY

This bill expands the California Whistleblower Protection Act to include employees of the California Community Colleges (CCC), and authorizes employees of the CCC and the California State University (CSU) to file retaliation complaints under the Whistleblower Act with the Public Employment Relations Board (PERB). Specifically, this bill:

1)Includes CCC employees within the definition of "employee" and the CCC within the definition of "state agency" under the Whistleblower Act.

2)Authorizes a CCC employee to file a complaint with the PERB alleging acts of retaliation for having made a protected disclosure under Whistleblower Act.

3)Prescribes procedures for the PERB to conduct investigations and hold hearings on retaliation complaints. Authorizes the PERB to order relief, including but not limited to reinstatement, backpay, restoration of service credit and the expungement of adverse records, upon finding that a violation has occurred.

4)Establishes criminal and civil liability for a person who retaliates against a CCC or CSU employee for making a protected disclosure under the Whistleblower Act, including a fine not to exceed $10,000, imprisonment in the county jail for up to one year, punitive damages and attorney's fees.

FISCAL EFFECT

1)Annual General Fund costs of $314,000 to the Bureau of State Audits (BSA) to investigate CCC employee complaints under the Whistleblower Act.

2)Annual General Fund costs to the PERB of $250,000 to investigate retaliation complaints under the Whistleblower Act.

3)Minor nonreimbursable local law enforcement costs for criminal investigations under the Whistleblower Act.

COMMENTS

1)The California Whistleblower Protection Act . The Whistleblower Act, administered by the BSA, protects state employees who report improper governmental activities. The Act authorizes the BSA, upon receiving information that an employee or state agency (including the University of California (UC) and CSU) has engaged in an improper governmental activity, to conduct an investigative audit of the matter. If the BSA determines that there is reasonable cause to believe that an employee or state agency has engaged in an improper governmental activity, the BSA must report the activity to the head of the employing agency, or the appropriate appointing authority. The BSA also may report this information to the Attorney General, the policy committees of the Senate and Assembly having jurisdiction over the subject involved, and to any other authority the BSA deems appropriate. The BSA does not have enforcement power.

2)New Role for PERB . The PERB was established to resolve unfair practice charges and representation disputes under the Educational Employee Relations Act (governing K-14 school employees) the Higher Education Employee Relation Act (UC, CSU and Hastings College of Law employees) and the Ralph Dills Act (state employees). (Legislation enacted last year, SB 739 (Solis), also places local government labor relations under PERB jurisdiction.) The types of unfair labor practices subject to PERB jurisdiction include refusing to negotiate in good faith, disciplining or threatening employees for participating in union activities, and unilaterally changing the terms and conditions of employment without bargaining.

The reason this bill extends to CCC and CSU employees the right to file a retaliation complaint under the Whistleblower

Act with the PERB is that the sponsor was under the impression

that UC employees have the right to do so, which is not the case. Thus, this bill would require PERB to branch out from its traditional role in labor relations and investigate reprisals against CCC and CSU employees for making allegations of illegal acts, such as corruption, bribery, theft, or fraud, misuse or abuse of state property, that are protected under the Whistleblower Act.

3) Prior Legislation . AB 2472 (Romero), Chapter 531 of 2000, established whistleblower protections for CCC and public school employees, authorizing these employees to file complaints alleging improper governmental activities with the county offices of education, the State Department of Education, or the Chancellor of the CCC. The sponsor, the Faculty Association of California Community Colleges (FACCC), believes that the these agencies have a conflict of interest in investigating whistleblower complaints, and that authority should be transferred to the BSA and the PERB.

However, this committee amended AB 2472 last year to delete the authority for school district and CCC employees to file Whistleblower complaints with the BSA, on the grounds it would be too expensive. Before reversing this decision, it may be more appropriate to review and identify deficiencies in the process established by AB 2472 - which has been in effect less than six months.

4) Bill Needs Appropriation . The Legislature's Joint Rule 37.4(b) requires any bill requiring action by the BSA to contain an appropriation to cover the BSA's cost. If the committee decides to pass this bill off the suspense file, the bill should be amended to include the appropriation needed to fund the Whistleblower investigations that would be required under the bill.

Analysis Prepared by : Stephen Shea / APPR. / (916) 319-2081