

COMMISSION ON STATE MANDATES

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September 14, 2007

Mr. Keith Petersen
SixTen and Associates
3841 North Freeway Blvd., Suite 170
Sacramento, CA 95834

And Interested Parties and Affected State Agencies (See enclosed mailing list)

Re: Final Staff Analysis/Proposed Statement of Decision and Hearing Date
Reporting Improper Governmental Activities, 02-TC-24
Education Code Section 44110
Statutes 2000, Chapter 531, Statutes 2001, Chapter 159,
Statutes 2001, Chapter 416, Statutes 2002, Chapter 81
San Juan Unified School District and Santa Monica Community
College District, Claimants

Dear Mr. Petersen:

The final staff analysis and proposed Statement of Decision for this test claim are complete and enclosed for your review.

Hearing

The test claim and proposed Statement of Decision are set for hearing on **Thursday, September 27, 2007, at 9:30 a.m.** in Room 126, State Capitol, Sacramento, CA. Please let us know in advance if you or a representative of your agency will testify at the hearing, or if other witnesses will appear.

Special Accommodations

For any special accommodations such as a sign language interpreter, an assistive listening device, materials in an alternative format, or any other accommodations, please contact the Commission Office at least five to seven *working* days prior to the meeting.

Please contact Kenny Louie at (916) 323-3562 with any questions regarding the above.

Sincerely,

A handwritten signature in dark ink, appearing to read "Paula Higashi".

PAULA HIGASHI
Executive Director

Enclosures

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 employees¹ 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

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 foregoing."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

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

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.

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

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.

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 Constitution²⁵ 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

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.

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 activities⁴⁰ or for refusing to obey an illegal order⁴¹ 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 person⁴² 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.

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

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 activities⁵³ or for refusing to obey an illegal order⁵⁴ 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.

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:

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)).

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.

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.

ITEM 12
TEST CLAIM
PROPOSED STATEMENT OF DECISION

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

The sole issue before the Commission on State Mandates (Commission) is whether the Proposed Statement of Decision accurately reflects any decision made by the Commission at the September 27, 2007 hearing on the above named test claim.¹

Recommendation

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

If the Commission's vote on item 11 modifies the staff analysis, staff recommends that the motion to adopt the Proposed Statement of Decision reflect those changes, which will be made before issuing the final Statement of Decision. Alternatively, if the changes are significant, staff recommends that adoption of a proposed Statement of Decision be continued to the December 6, 2007 Commission hearing.

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

BEFORE THE
COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

IN RE TEST CLAIM:

Education Code Sections 44110 - 44114, and
87160 – 87164;

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

Filed on June 5, 2003,

By San Juan Unified School District and Santa
Monica Community College District,
Claimants.

Case No.: 02-TC-24

Reporting Improper Governmental Activities

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

(Proposed for Adoption on September 27, 2007)

PROPOSED STATEMENT OF DECISION

The Commission on State Mandates (“Commission”) heard and decided this test claim during a regularly scheduled hearing on September 27, 2007. [Witness list will be included in the final Statement of Decision.]

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

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

Summary of Findings

This test claim was filed on June 5, 2003, by San Juan Unified School District and Santa Monica Community College District regarding statutes that address 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. The test claim statutes are Education Code sections 44110 – 44114 and 87160 – 87164.

If a K-12 or community college employee or applicant for employment is subject to acts of reprisal for disclosing improper governmental activities, the test claim statutes allow the employee or applicant for employment to file a complaint with local law enforcement agencies. People 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.

The Commission 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, the Commission finds that Education Code section 87164 imposes the following reimbursable state-mandated activities upon community college districts relating to the State Personnel Board hearings required by Education Code section 87164:

- 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)).

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 employees² 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

² 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.

duties or not, that violates state or federal law or regulation, or that is economically wasteful, or involves gross misconduct, incompetency, or inefficiency.³

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 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.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 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.⁸

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.⁹ A court may also order punitive damages and reasonable attorney’s fees.¹⁰ The test claim statutes define

³ Education Code sections 44112, subdivisions (c)(1) and (2), and 87162, subdivisions (c)(1) and (2).

⁴ 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.

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 *Ibid.*

⁹ Education Code sections 44114, subdivisions (c), and 87164, subdivisions (c), as added by Statutes 2000, chapter 531.

¹⁰ *Ibid.*

“person” to include “any state or local government, or any agency or instrumentality of any of the foregoing.”¹¹ 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 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.¹² 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.¹³

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.¹⁴ 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

¹¹ Education Code sections 44113, subdivision (d), and 87163, subdivision (d).

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

¹³ Education Code sections 44114, subdivision (g), and 87164, subdivision (g), as added by Statutes 2000, chapter 531.

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

misconduct.¹⁵ 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.¹⁶ 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 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.¹⁷

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.¹⁸ 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)¹⁹ and private employees,²⁰ 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.

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

¹⁶ Education Code section 87164, subdivision (f), as added by Statutes 2001, chapter 416.

¹⁷ Education Code section 87164, subdivision (c)(2), as added by Statutes 2002, chapter 81, section 1.

¹⁸ 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.

¹⁹ Labor Code section 1106, provides that “‘employee’ includes, but is not limited to, any individual employed by ... any school district, community college district... .”

²⁰ *Collier v. Superior Court* (1991) 228 Cal.App.3d 1117.

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 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”²¹ (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)).

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.”²² 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.”²³

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;

²¹ Test Claim (Exhibit A to Item 11, Commission September 27, 2007 Hearing, p. 125.)

²² California Community Colleges – Chancellor’s Office Comments, dated March 11, 2004 (Exhibit B to Item 11, Commission September 27, 2007 Hearing, p. 169.)

²³ *Ibid.*

- 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 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."²⁴ 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."²⁵

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.

²⁴ Department of Finance Comments, dated March 9, 2007 (Exhibit D to Item 11, Commission September 27, 2007 Hearing, p. 186.)

²⁵ *Ibid.*

Commission Findings

The courts have found that article XIII B, section 6 of the California Constitution²⁶ recognizes the state constitutional restrictions on the powers of local government to tax and spend.²⁷ “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.”²⁸ 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.²⁹ 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.³⁰

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.³¹ 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.³² A “higher level of service” occurs when there is “an increase in the actual level or quality of governmental services provided.”³³

²⁶ 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.”

²⁷ *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727, 735.

²⁸ *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81.

²⁹ *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 174.

³⁰ *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*).

³¹ *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).

³² *San Diego Unified School Dist.*, *supra*, 33 Cal.4th 859, 878; *Lucia Mar*, *supra*, 44 Cal.3d 830, 835.

³³ *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.³⁴

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 6.³⁵ 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.”³⁶

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.³⁷

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.³⁸

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,”³⁹ would result if the local entity did not comply with the program.

³⁴ *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.

³⁵ *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331-334; Government Code sections 17551, 17552.

³⁶ *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.

³⁷ *Estate of Griswold*, (2001) 25 Cal.4th 904, 910-911.

³⁸ *People v. Knowles* (1950) 35 Cal.2d 175, 183.

³⁹ *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”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.

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 activities⁴¹ or for refusing to obey an illegal order⁴² 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 person⁴³ 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

⁴⁰ 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.

⁴¹ 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.

⁴² 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.

⁴³ 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”⁴⁴ 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.⁴⁵ [Citations omitted.]

For the reasons below, the Commission 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.

⁴⁴ *Kern High School Dist.*, *supra*, 30 Cal.4th 727, 743 and 751.

⁴⁵ Claimant Response to Draft Staff Analysis, dated August 14, 2007 (Exhibit I to Item 11, Commission September 27, 2007 Hearing, 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."⁴⁶ Instead, the interpretation of a statute ends with the words of the statute.⁴⁷ 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.⁴⁸ 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 2472,⁴⁹ that requires public school districts to engage in these activities. Thus, as a matter of law, the rules of

⁴⁶ *People v. Howard* (2002) 100 Cal.App.4th 94, 97.

⁴⁷ *Ibid.*

⁴⁸ *People v. Knowles, supra*, 35 Cal.2d 183.

⁴⁹ 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.”⁵⁰ 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,”⁵¹ 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, the Commission 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”⁵² for the purpose of intimidating, threatening, coercing, commanding any person, or attempting to do so, for the purpose of

⁵⁰ *San Diego Unified School Dist.*, *supra*, 33 Cal.4th 859, 880.

⁵¹ *Kern High School Dist.*, *supra*, at p. 751.

⁵² 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:⁵³

(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 activities⁵⁴ or for refusing to obey an illegal order⁵⁵ 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.

⁵³ 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.

⁵⁴ 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.

⁵⁵ 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,⁵⁶ this part, and the rules of practice and procedure of the State Personnel Board.⁵⁷ 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.⁵⁸

(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

⁵⁶ 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.

⁵⁷ "...this part, and the rules of practice and procedure of the State Personnel Board," added by Statutes 2002, chapter 81.

⁵⁸ 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.⁵⁹ 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.⁶⁰ 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.⁶¹ In addition,

⁵⁹ 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.

⁶⁰ *Kern High School Dist.*, *supra*, 30 Cal.4th 727, 743.

⁶¹ *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.”⁶² 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, the Commission 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

⁶² *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.⁶³ 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 18671.⁶⁴ 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.⁶⁵ 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*.”⁶⁶ 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.

⁶³ California Code of Regulations, title 2, section 56.3 Register 2006, No. 10 (March 10, 2006).

⁶⁴ *Ibid.* 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.

⁶⁵ California Code of Regulations, title 2, section 56.4 Register 2006, No. 10 (March 10, 2006).

⁶⁶ Government Code section 18671.2, subdivision (b). (Emphasis added.)

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

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, the Commission 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.⁶⁷ 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.⁶⁸ 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, the Commission 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

⁶⁷ *Giles v. Horn* (2002) 100 Cal.App.4th 206, 220.

⁶⁸ California Code of Regulations, title 2, section 56.6, Register 2006, No. 10 (March 10, 2006).

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)).

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. The Commission 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

⁶⁹ *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, the Commission 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, the Commission 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, the Commission 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)).

⁷⁰ Assembly Committee on Appropriations, Analysis of Assembly Bill 647 (2001-2002 Reg. Sess.) as amended May 3, 2001. 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.

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, the Commission 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, the Commission 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, the Commission 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

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

⁷⁷ Test Claim, Exhibit 1, Declaration of Tom Donner (Exhibit A to Item 11, Commission September 27, 2007 Hearing, p. 139.)

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)).

CONCLUSION

The Commission 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)).

The Commission 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.

Commission on State Mandates

Original List Date: 6/18/2003
Last Updated: 4/26/2007
List Print Date: 09/14/2007
Claim Number: 02-TC-24
Issue: Reporting Improper Governmental Activities

Mailing Information: Final 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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