

**COMMISSION ON STATE MANDATES**

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December 12, 2013

Ms. Evelyn Tseng  
City of Newport Beach  
100 Civic Center Drive  
Newport Beach, CA 92660

Mr. Allan Burdick  
7525 Myrtle Vista Avenue  
Sacramento, CA 95831

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

RE: **Adopted Statement of Decision and Parameters and Guidelines**  
*Peace Officer Procedural Bill of Rights II, 03-TC-18*  
Government Code Sections 3304, 3306.5, 3309 and 3312  
Statutes 1976, Chapter 465; Statutes 1998, Chapter 786;  
Statutes 2000, Chapter 209; and Statutes 2002, Chapter 170  
City of Newport Beach, Claimant

Dear Ms. Tseng and Mr. Burdick:

On December 6, 2013, the Commission on State Mandates adopted the statement of decision and parameters and guidelines on the above-entitled matter.

Please contact Heidi Palchik at (916) 323-3562 if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Heather Halsey".

Heather Halsey  
Executive Director

BEFORE THE  
COMMISSION ON STATE MANDATES  
STATE OF CALIFORNIA

IN RE PARAMETERS AND GUIDELINES  
FOR:

Government Code Sections 3304, 3306.5,  
3309 and 3312

Statutes 1976, Chapter 465; Statutes 1998,  
Chapter 786; Statutes 2000, Chapter 209; and  
Statutes 2002, Chapter 170

Period of reimbursement begins July 1, 2002,  
or later for specified activities added by  
subsequent statutes.

Case No.: 03-TC-18

*Peace Officer Procedural Bill of Rights II*

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

*(Adopted December 6, 2013)*

*(Served December 12, 2013)*

**STATEMENT OF DECISION**

The Commission on State Mandates (Commission) adopted this statement of decision and parameters and guidelines during a regularly scheduled hearing on December 6, 2013. Allan Burdick appeared on behalf of the claimant, and Michael Byrne and Kathy Lynch appeared on behalf of the Department of Finance. The law applicable to the Commission's determination of a reimbursable state-mandated program is article XIII B, section 6 of the California Constitution, Government Code sections 17500 et seq., and related case law.

The Commission adopted the proposed statement of decision and parameters and guidelines by a vote of 7-0.

**I. Summary of the Mandate**

The *Peace Officers Procedural Bill of Rights II (POBOR II)*, 03-TC-18 test claim addresses amendments associated with the Peace Officers Procedural Bill of Rights Act (POBOR) (Gov. Code, § 3300 et seq.). POBOR provides a series of rights and procedural safeguards to peace officers employed by local agencies, school districts, and special districts that are subject to investigation or discipline.

On December 1, 2011, the Commission adopted a statement of decision for the test claim finding that Government Code sections 3304, 3306.5, 3309 and 3312, as amended by the test claim statutes, impose a reimbursable state-mandated program on cities, counties, cities and counties, and special police protection districts named in Government Code section 53060.7,<sup>1</sup> within the

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<sup>1</sup> Government Code section 53060.7 identifies Bear Valley Community Services District, the Broadmoor Police Protection District, the Kensington Police Protection and Community Services

meaning of article XIII B, section 6 of the California Constitution, and Government Code section 17514 for the following activities:

1. Provide a chief of police that is dismissed with a written notice and the reason or reasons for the dismissal when the charges supporting the dismissal *do not* damage the chief of police's ability to find other employment and trigger existing notice requirements under the due process clause of the United States and California Constitutions. (Gov. Code, § 3304(c) (Stats. 1998, ch. 786).)
2. Within one year of discovery of any misconduct, provide notice to the peace officer being investigated that he or she may face disciplinary action after the investigation is completed. (Gov. Code, § 3304(d) (Stats. 1998, ch. 786).)
3. After the investigation and any predisciplinary response or procedure utilized by the employer, notify the peace officer in writing that the employer has decided to impose discipline on the officer. (Gov. Code, § 3304(f) (Stats. 1998, ch. 786)):
  - a. Dismissal, demotion, suspension, salary reduction or written reprimand received by probationary and at-will employees whose liberty interest *are not* affected (i.e., the charges supporting a dismissal do not harm the employee's reputation or ability to find future employment);
  - b. Transfer of permanent, probationary and at-will employees for purposes of punishment;
  - c. Denial of promotion for permanent, probationary, and at-will employees for reasons other than merit; and
  - d. Other actions against permanent, probationary, and at-will employees that result in disadvantage, harm, loss or hardship and impact the career opportunities of the employee.

Conducting investigations is not reimbursable.

4. Provide notice in order to take any of the following disciplinary actions for wearing a pin or displaying any other item containing the American flag (Gov. Code, § 3312 (Stats. 2002, ch. 170)):
  - a. Dismissal of a probationary or at-will officer when the charges supporting the dismissal *do not* damage the officer's ability to find other employment;
  - b. Demotion, suspension, salary reduction, or written reprimand of a probationary or at-will officer;
  - c. Transfer for purposes of punishment of a permanent, probationary, or at-will officer;
  - d. Denial of promotion to a permanent, probationary, or at-will officer; and

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District, the Lake Shastina Community Services District, and the Stallion Springs Community Services District.

- e. Other actions against permanent, probationary, or at-will officer that result in disadvantage, harm, loss, or hardship and impact the career opportunities of the officer.

The notice must include: (1) a statement that the officer's pin or other item violates an existing rule, regulation, policy, or local agency agreement or contract regarding the wearing of a pin, or the displaying of any other item, containing the American flag; (2) a citation to the specific rule, regulation, policy, or local agency agreement or contract that the pin or other item violates; and (3) a statement that the officer may file an appeal against the employer challenging the alleged violation pursuant to the applicable grievance or appeal procedures adopted by the department or public agency that otherwise comply with existing law.

- 5. Perform the following activities upon receipt of a request by an officer to inspect his or her personnel files (Gov. Code, § 3306.5):

Counties

- a. Permit a peace officer to inspect letters of reference and records relating to the investigation of a possible criminal offense if they are used or have been used to determine that officer's qualifications for employment, promotion, additional compensation, or termination or other disciplinary action. (Gov. Code, § 3306.5(a) (Stats. 2000, ch. 209).)
- b. Make the personnel file or copy thereof available within a reasonable period of time after a request therefor by the officer. (Gov. Code, § 3306.5(b) (Stats. 2000, ch. 209).)
- c. Make an officer's written request to correct or delete a portion of the officer's personnel file, which the officer believes to be mistakenly or unlawfully placed in the file, part of the officer's personnel file. (Gov. Code, § 3306.5(c) (Stats. 2000, ch. 209).)
- d. Within 30 days of receiving an officer's request to correct or delete a portion of his or her personnel file pursuant to Government Code section 3306.5(c), grant the request and make the requested changes or notify the officer of the decision to refuse the request. (Gov. Code, § 3306.5(d) (Stats. 2000, ch. 209).)
- e. If the employer refuses to grant the request, in whole or in part, state in writing the reasons for refusing the request, and make the written statement part of the requesting officer's personnel file. (Gov. Code, § 3306.5(d) (Stats. 2000, ch. 209).)

Cities and Special Police Protection Districts Named in Government Code Section 53060.7

- a. Permit a peace officer to inspect personnel files at reasonable times and intervals, and during usual business hours, upon request by the officer. The personnel files that an officer may inspect are limited to those that are used or have been used to determine that officer's qualifications for employment, promotion, additional

compensation, or termination or other disciplinary action. (Gov. Code, § 3306.5(a) (Stats. 2000, ch. 209).)

- b. Make the file or copy thereof available within a reasonable period of time after a request therefor by the officer. (Gov. Code, § 3306.5(b) (Stats. 2000, ch. 209).)
  - c. Make an officer's written request to correct or delete a portion of the officer's personnel file, which the officer believes to be mistakenly or unlawfully placed in the file, part of the officer's personnel file. (Gov. Code, § 3306.5(c) (Stats. 2000, ch. 209).)
  - d. Within 30 days of receiving an officer's request to correct or delete a portion of his or her personnel file pursuant to Government Code section 3306.5(c), grant the request and make the requested changes or notify the officer of the decision to refuse the request. (Gov. Code, § 3306.5(d) (Stats. 2000, ch. 209).)
  - e. If the employer refuses to grant the request, in whole or in part, state in writing the reasons for refusing the request, and make the written statement part of the requesting officer's personnel file. (Gov. Code, § 3306.5(d) (Stats. 2000, ch. 209).)
6. Notify an officer, either orally or in writing, that a search of the officer's employer assigned locker or storage space will be conducted, if during the course of an investigation into officer misconduct an employer determines it is necessary to conduct a search of the officer's employer assigned locker or storage space. (Gov. Code, § 3309 (Stats. 1976, ch. 465).)

## **II. Procedural History**

On December 1, 2011, the Commission adopted a statement of decision for the test claim. On January 5, 2012, the City of Newport Beach, hereafter claimant, submitted proposed parameters and guidelines to the Commission. On February 17, 2012, the State Controller's Office (SCO) filed comments on the proposed parameters and guidelines. On April 12, 2013, a draft staff analysis and proposed parameters and guidelines were issued with a comment period ending on May 3, 2013. On April 26, 2013, the SCO filed comments on the draft staff analysis and proposed parameters and guidelines. On May 3, 2013 the Department of Finance (Finance) filed comments on the draft staff analysis and proposed parameters and guidelines stating that they had no concern with the reimbursable activities as they appear to be consistent with the test claim statement of decision.

On May 8, 2013, the proposed parameters and guidelines and statement of decision were issued with a notice setting the matter for hearing at the May 24, 2013 meeting. On May 9, 2013, claimant requested an extension of time to file comments to September 23, 2013 and postponement of hearing, citing the complexity of the test claim, efforts to develop a reasonable reimbursement methodology (RRM), and changes in key staffing and representation for the claimant. On May 13, 2013, a notice approving the claimant's request was issued extending the deadline to file comments to September 23, 2013, and tentatively scheduling the matter for hearing on January 24, 2014. The notice also requested comments on potential consolidation with the *Peace Officers Procedural Bill of Rights I (POBOR I)* parameters and guidelines. On June 12, 2013, the SCO submitted comments on the potential consolidation with the *POBOR I*

parameters and guidelines. On June 14, 2013, Finance submitted comments on the potential consolidation with the *POBOR I* parameters and guidelines. On August 12, 2013, the claimant requested an informal conference. An informal conference was held on September 26, 2013, three days after comments were due on the draft proposed parameters and guidelines. On October 2, 2013, a notice was issued setting the *POBOR II* parameters and guidelines for hearing on December 6, 2013, as neither comments nor a proposal for an RRM were received by the September 23, 2013 deadline. The October 2 notice also set an October 23, 2013 deadline for filing substantive comments on the previously issued proposed parameters and guidelines and statement of decision. On October 22, 2013, Finance submitted a letter indicating that they had no additional comments. On November 4, 2013, the claimant submitted late comments.

### **III. Commission Findings**

The Commission reviewed the claimants' proposed parameters and guidelines, the adopted statement of decision on the test claim and the comments received. Non-substantive, technical changes for purposes of clarification, consistency, and conformity to the statement of decision and statutory language have been made. In addition, substantive changes have been made as described below.

#### A. Reimbursable Activities

##### 1) Providing Notices

The test claim statement of decision approves reimbursement for the following activities to provide notice to an officer subject to discipline:

1. Provide a chief of police that is dismissed with a written notice and the reason or reasons for the dismissal when the charges supporting the dismissal *do not* damage the chief of police's ability to find other employment and trigger existing notice requirements under the due process clause of the United States and California Constitutions. (Gov. Code, § 3304(c) (Stats. 1998, ch. 786).)
2. Within one year of discovery of any misconduct, provide notice to the peace officer being investigated that he or she may face disciplinary action after the investigation is completed. (Gov. Code, § 3304(d) (Stats. 1998, ch. 786).)
3. After the investigation and any predisciplinary response or procedure utilized by the employer, notify the peace officer in writing that the employer has decided to impose discipline on the officer. (Gov. Code, § 3304(f) (Stats. 1998, ch. 786)):
  - a. Dismissal, demotion, suspension, salary reduction or written reprimand received by probationary and at-will employees whose liberty interest *are not* affected (i.e., the charges supporting a dismissal do not harm the employee's reputation or ability to find future employment);
  - b. Transfer of permanent, probationary and at-will employees for purposes of punishment;
  - c. Denial of promotion for permanent, probationary, and at-will employees for reasons other than merit; and

- d. Other actions against permanent, probationary, and at-will employees that result in disadvantage, harm, loss or hardship and impact the career opportunities of the employee.

Conducting investigations is not reimbursable.

- 4. Provide notice in order to take any of the following disciplinary actions for wearing a pin or displaying any other item containing the American flag (Gov. Code, § 3312 (Stats. 2002, ch. 170)):
  - a. Dismissal of a probationary or at-will officer when the charges supporting the dismissal *do not* damage the officer's ability to find other employment;
  - b. Demotion, suspension, salary reduction, or written reprimand of a probationary or at-will officer;
  - c. Transfer for purposes of punishment of a permanent, probationary, or at-will officer;
  - d. Denial of promotion to a permanent, probationary, or at-will officer; and
  - e. Other actions against permanent, probationary, or at-will officer that result in disadvantage, harm, loss, or hardship and impact the career opportunities of the officer.

The notice must include: (1) a statement that the officer's pin or other item violates an existing rule, regulation, policy, or local agency agreement or contract regarding the wearing of a pin, or the displaying of any other item, containing the American flag; (2) a citation to the specific rule, regulation, policy, or local agency agreement or contract that the pin or other item violates; and (3) a statement that the officer may file an appeal against the employer challenging the alleged violation pursuant to the applicable grievance or appeal procedures adopted by the department or public agency that otherwise comply with existing law.

The claimant requests that additional words be included to clarify the steps involved in providing these notices, and suggests "draft, review, edit, approve, serve and file." The Commission approves this clarifying language with the exception of "serve and file." Draft, review, edit and approve clarify the steps involved in the preparation of a written notice. However, serving and filing are not required by the plain language of the statute, which only requires that a written notice be *given* to the officer. Furthermore, there is no evidence in the record that it is reasonably necessary to "serve and file" the written notice to implement the mandated activities. Activities to "serve and file" are not included in the parameters and guidelines for this activity and minor edits have been made for grammatical clarity in the parameters and guidelines.

## 2) Inspection of Personnel Files

The test claim statement of decision approved the following activities:

Perform the following activities upon receipt of a request by an officer to inspect his or her personnel files (Gov. Code, § 3306.5):

- a. Permit a peace officer to inspect letters of reference and records relating to the investigation of a possible criminal offense if they are used or have been used to

determine that officer's qualifications for employment, promotion, additional compensation, or termination or other disciplinary action. (Gov. Code, § 3306.5(a) (Stats. 2000, ch. 209).)

- b. Make the personnel file or copy thereof available within a reasonable period of time after a request therefor by the officer. (Gov. Code, § 3306.5(b) (Stats. 2000, ch. 209).)

The claimant's proposed parameters and guidelines also requests reimbursement for: (1) scheduling appointments to inspect personnel file; (2) monitoring the officer while he or she reviews the personnel file; and (3) paying the officer's salary during the time it takes to inspect the personnel file while away from his or her normal duties. These additional activities are denied.

Government Code section 3306.5(b) requires the local agency to "make the file or copy thereof available within a reasonable period of time after a request by the officer." The plain language of the statute, however, does not require the local agency to make an appointment or monitor the viewing of the personnel file. Although a local agency may find it necessary to schedule an appointment and to monitor an officer reviewing his or her personnel file, claimant has put no evidence in the record to support a finding that these additional duties are reasonably necessary to implement the mandated activities.

Government Code section 17557(a) and section 1183.1(a)(4) of the Commission's regulations authorize the Commission to include the "most reasonable methods of complying with the mandate" in the parameters and guidelines. The "most reasonable methods of complying with the mandate" are "those methods not specified in statute or executive order that are necessary to carry out the mandated program." A finding that an activity is necessary to carry out the mandated program must be supported by evidence in the record, submitted by either oral or written testimony provided under oath or affirmation by a person who has personal knowledge, information, or belief about the assertions made.<sup>2</sup> Out-of-court statements that are *not* made under oath or affirmation, however, are hearsay. Hearsay evidence may be used to supplement or explain, although it shall not be sufficient to support a finding unless admissible over objection in civil actions.<sup>3</sup> With hearsay evidence, the witness is not under oath, there is no opportunity to cross-examine the witness, and the witness cannot be observed at the hearing.<sup>4</sup>

Here, the request for reimbursement for these additional duties has been made by way of a letter filed by the Revenue Manager for the claimant. The contents of the letter were not made under oath or affirmation by a witness who has personal knowledge, information, or belief about how the POBOR program works. A person with personal knowledge, information, or belief about the POBOR program could be a peace officer, personnel officer, or an internal affairs investigator required to comply with the program. Moreover, there has been no evidence filed to show that making appointments and monitoring the viewing of the personnel file are the most reasonable

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<sup>2</sup> Government Code section 17559; California Code of Regulations, title 2, sections 1183.14, 1187.5.

<sup>3</sup> California Code of Regulations, title 2, section 1187.5.

<sup>4</sup> *People v. Cudjo* (1993) 6 Cal.4th 585.



methods of complying with the mandate to "make the personnel file or copy thereof available" to the officer within a reasonable period of time following the request. Thus, the assertions in the letter are considered hearsay and are insufficient, by themselves; to support a finding that the activities requested are eligible for reimbursement. Therefore, these additional activities are considered beyond the scope of the mandate to make the personnel file available, and are not included in the parameters and guidelines. The claimant also requests reimbursement to pay the officer while the officer inspects his or her personnel file. The Commission denied this request in the statement of decision on the test claim as follows:

Although, as argued by the claimant, an employer may have to pay officers that inspect personnel records while on duty, this section does not require that an officer inspect his or her file while on duty. The activity imposed by section 3306.5(a) is for an employer to permit an officer to inspect the officer's personnel files. The provision that the officer shall be permitted to do so "with no loss of compensation" does not impose an activity on employers.<sup>5</sup>

The statement of decision on the test claim is a final, binding decision of the Commission, and the parameters and guidelines must be consistent with that decision.<sup>6</sup>

Therefore, claimant's proposed additional activities are denied. The parameters and guidelines include the following language clarifying that these activities are not eligible for reimbursement:

*This activity does not include scheduling appointment to inspect personnel file, monitoring the officer while he or she reviews information, or paying the officer for time away from normal duty.*

In addition, the reimbursable activities performed by *counties* upon receipt of a request by an officer to inspect his or her personnel files (Gov. Code § 3306.5) have been modified for consistency with the test claim statement of decision to clarify that the activities are reimbursable only when performed in connection to the inspection of letters of reference and records relating to the investigation of a possible criminal offense if they are used or have been used to determine that officer's qualifications for employment, promotion, additional compensation, or termination or other disciplinary action. Under prior law, county peace officers already had the right to inspect the file for purposes of the employee's performance or relating to a grievance. Inspection of the file for these reasons does not impose a new program or higher level of service. However, there was no prior right provided to county peace officers to inspect letters of reference and records relating to the investigation of a possible criminal offense if they are used or have been used to determine that officer's qualifications for employment, promotion, additional compensation, or termination or other disciplinary action. The statement of decision on the test claim found the following:

From 1974 until the 2000 enactment of section 3306.5, Government Code section 31011 gave *county* employees, including peace officers, the right to inspect personnel files kept and maintained by the employer relating to the employee's

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<sup>5</sup> Exhibit A, Test Claim Statement of Decision adopted December 1, 2011, p.27.

<sup>6</sup> *California School Boards Association v. State of California* (2009) 171 Cal.App.4th 1183, 1200-1201.

performance as an employee or relating to a grievance concerning the employee. Inspection was required to be allowed at reasonable intervals during the regular business hours of the employer.<sup>7</sup> Excluded from the right to inspect are letters of reference and records relating to the investigation of a possible criminal offense. In addition, the Legislature provided county employees the opportunity to respond in writing, or orally in a personal interview, to any information about which he or she disagrees. This response would then become part of the employee's personnel record.<sup>8</sup> Thus, permitting an officer to inspect his or her personnel files, excluding letters of reference and records relating to the investigation of a possible criminal offense does not constitute new programs or higher levels of service as applied to county employers.<sup>9</sup>

Therefore, language has been added to indicate that activities 5(b) through 5(c) for counties are reimbursable only when performed in connection to a peace officer's "*inspection of letters of reference and records relating to the investigation of a possible criminal offense if they are used or have been used to determine that officer's qualifications for employment, promotion, additional compensation, or termination or other disciplinary action.*"

Finally, Government Code section 3306.5(c) and (d) state the following:

(c) If, after examination of the officer's personnel file, the officer believes that any portion of the material is mistakenly or unlawfully placed in the file, the officer may request, in writing, that the mistaken or unlawful portion be corrected or deleted. Any request made pursuant to this subdivision shall include a statement by the officer describing the corrections or deletions from the personnel file requested and the reasons supporting those corrections or deletions. A statement submitted pursuant to this subdivision shall become part of the personnel file of the officer.

(d) Within 30 calendar days of receipt of a request made pursuant to subdivision (c), the employer shall either grant the officer's request or notify the officer of the decision to refuse to grant the request. If the employer refuses to grant the request, in whole or in part, the employer shall state in writing the reasons for refusing the request, and that written statement shall become part of the personnel file of the officer.

The test claim statement of decision approved reimbursement for the activities in subdivisions (c) and (d) for counties, cities, and special districts as follows:

- Make an officer's written request to correct or delete a portion of the officer's personnel file, which the officer believes to be mistakenly or unlawfully placed in the file, part of the officer's personnel file. (Gov. Code, § 3306.5(c) (Stats. 2000, ch. 209).)

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<sup>7</sup> Government Code section 31011 (Stats. 1974, ch. 315).

<sup>8</sup> *Ibid.*

<sup>9</sup> Exhibit A, Test Claim Statement of Decision adopted December 1, 2011, p.28.

- Within 30 days of receiving an officer’s request to correct or delete a portion of his or her personnel file pursuant to Government Code section 3306.5(c), grant the request or notify the officer of the decision to refuse the request. (Gov. Code, § 3306.5(d) (Stats. 2000, ch. 209).)

Although the conclusion in the test claim statement of decision does not clearly state that an employer’s denial of the request to correct or delete a portion of the personnel file shall be in writing, as required by the statute, page 26 of the decision<sup>10</sup> acknowledges that “[i]f the request is denied, the employer must explain the denial in writing.”

The claimant’s proposed parameters and guidelines state the activities a little differently as follows:

- File in an officer’s personnel file a copy of the officer’s written request to correct or delete a portion of the officer’s personnel file, which the officer believes to be mistakenly or unlawfully placed in the file. (Gov. Code, § 3306.5(c) (Stats. 2000, ch. 209).)
- Within 30 days of receiving an officer’s request to correct or delete a portion of his or her personnel file pursuant to Government Code section 3306.5(c), grant the request and make the requested changes or notify the officer of the decision to refuse the request. This includes review officer’s written request for correction(s), make changes as requested if request is granted and respond to officer’s request for correction(s). (Gov. Code, § 3306.5(d) (Stats. 2000, ch. 209).)

The Commission has revised the language proposed by the claimant to conform to the language in section 3306.5(d) and to acknowledge that the plain language of the statute requires review of the officer’s request, and that the written statement requires drafting, reviewing, editing, and approving the statement before placing it in the officer’s personnel file. The parameters and guidelines identify the activities mandated by Government Code section 3306.5(c) and (d) for counties, cities, and special districts as follows:

- File in an officer’s personnel file a copy of the officer’s written request to correct or delete a portion of the officer’s personnel file, which the officer believes to be mistakenly or unlawfully placed in the file. (Gov. Code, § 3306.5(c), Stats. 2000, ch. 209.)
- Within 30 calendar days of receipt of an officer’s request to correct or delete a portion of his or her personnel file pursuant to Government Code 3306.5(c), review the request and either:
  - i) Grant the request and make the requested changes to the personnel file; or
  - ii) Notify the officer of the decision to refuse the request. If the employer refuses to grant the request, in whole or in part, the employer shall state in writing the reasons for refusing the request, and that written statement shall become part of the personnel file of the officer. This activity includes drafting, reviewing, editing, and approving

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<sup>10</sup> Exhibit A, Test Claim Statement of Decision adopted December 1, 2011, p.26.

the written statement, and filing the written statement in the officer's personnel file. (Gov. Code, § 3306.5(d) (Stats. 2000, ch. 209).)<sup>11</sup>

**B. Boilerplate Language Regarding Training**

The claimant's proposed parameters and guidelines include boilerplate language in section V, authorizing eligible claimants to receive reimbursement for the direct costs of training. Training is not required by the plain language of the statutes, and there is no evidence in the record that training is reasonably necessary to comply with the mandated activities. Although training was approved in the parameters and guidelines for *POBOR I* on the ground that the test claim legislation for the right to an appeal lacked specificity and hundreds of court cases had been issued, the activities here (to provide notices and access to officer personnel files) do not create the same complexity. Thus, the direct cost of training has been deleted from the parameters and guidelines and is not eligible for reimbursement.

**IV. Conclusion**

The Commission adopts this statement of decision and the attached parameters and guidelines.

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<sup>11</sup> In comments dated April 26, 2013, the SCO recommended that the language for Government Code section 3306.5(d) be the same for counties, cities, and special districts.

BEFORE THE  
COMMISSION ON STATE MANDATES  
STATE OF CALIFORNIA

**IN RE PARAMETERS AND GUIDELINES  
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3309 and 3312

Statutes 1976, Chapter 465; Statutes 1998,  
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Period of reimbursement begins July 1, 2002,  
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Case No.: 03-TC-18

*Peace Officer Procedural Bill of Rights II*

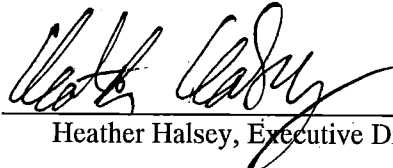
STATEMENT OF DECISION  
PURSUANT TO GOVERNMENT  
CODE SECTION 17500 ET SEQ.;  
CALIFORNIA CODE OF  
REGULATIONS, TITLE 2, DIVISION  
2, CHAPTER 2.5, ARTICLE 7.

*(Adopted December 6, 2013)*

*(Served December 12, 2013)*

**PARAMETERS AND GUIDELINES**

The Commission on State Mandates adopted the attached parameters and guidelines on December 6, 2013.



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Heather Halsey, Executive Director

## **PARAMETERS AND GUIDELINES**

Government Code Sections 3304, 3306.5, 3309 and 3312  
Statutes 1976, Chapter 465; Statutes 1998, Chapter 786;  
Statutes 2000, Chapter 209; and Statutes 2002, Chapter 170

### *Peace Officers Procedural Bill of Rights II*

03-TC-18

Period of reimbursement begins July 1, 2002,  
or later for specified activities added by subsequent statutes.

#### **I. SUMMARY OF THE MANDATE**

On December 1, 2011, the Commission on State Mandates (Commission) adopted the test claim statement of decision finding that the test claim statutes impose a partially reimbursable state-mandated program upon local agencies within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514. Specifically, the Commission found that specified notices required to be provided to an officer in order to take disciplinary action, activities regarding providing access to officer personnel files, and the notice requirements to search an officer's locker imposed an incremental higher level of service above what was required under prior law.

#### **II. ELIGIBLE CLAIMANTS**

Any city, county, city and county, or special police protection district named in Government Code section 53060.7 that incurs increased costs as a result of this reimbursable state-mandated program is eligible to claim reimbursement of those costs.

#### **III. PERIOD OF REIMBURSEMENT**

Government Code section 17557(e), states that a test claim shall be submitted on or before June 30 following a given fiscal year to establish eligibility for that fiscal year. The City of Newport Beach filed the test claim on September 26, 2003, establishing eligibility for reimbursement on or after July 1, 2002. Therefore, costs incurred pursuant to Government Code sections 3304, 3306.5, and 3309 are reimbursable on or after July 1, 2002. However, because Government Code section 3312 was effective January 1 2003, costs incurred pursuant to Government Code section 3312 are reimbursable on or after January 1, 2003.

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

1. Actual costs for one fiscal year shall be included in each claim.
2. Pursuant to Government Code section 17561(d)(1)(A), all claims for reimbursement of initial fiscal year costs shall be submitted to the State Controller within 120 days of the issuance date for the claiming instructions.
3. Pursuant to Government Code section 17560(a), a local agency may, by February 15 following the fiscal year in which costs were incurred, file an annual reimbursement claim that details the costs actually incurred for that fiscal year.

4. If revised claiming instructions are issued by the Controller pursuant to Government Code section 17558(c), between November 15 and February 15, a local agency filing an annual reimbursement claim shall have 120 days following the issuance date of the revised claiming instructions to file a claim. (Government Code section 17560(b).)
5. If the total costs for a given fiscal year do not exceed \$1,000, no reimbursement shall be allowed except as otherwise allowed by Government Code section 17564.
6. There shall be no reimbursement for any period in which the Legislature has suspended the operation of a mandate pursuant to state law.

#### **IV. REIMBURSABLE ACTIVITIES**

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

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

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

Claimants may use time studies to support salary and benefit costs when an activity is task-repetitive. Activities that require varying levels of effort are not appropriate for time studies. Time study usage is subject to the review and audit conducted by the State Controller's Office.

For each eligible claimant, the following activities are reimbursable:

1. Draft, review, edit, and approve a written notice and give it to a chief of police that is dismissed when the charges supporting the dismissal *do not* damage the chief of police's ability to find other employment and trigger existing notice requirements under the due process clause of the United States and California Constitutions. Written notice must be accompanied by the reason or reasons for the dismissal. (Gov. Code, § 3304(c), Stats. 1998, ch. 786.)
2. Within one year of discovery of any misconduct, draft, review, edit, and approve a written notice and give it to the peace officer being investigated, stating that he or she may face disciplinary action after the investigation is completed. (Gov. Code, § 3304(d), Stats. 1998, ch. 786.)

3. After the investigation and any predisciplinary response or procedure utilized by the employer, draft, review, edit, and approve a written notice that the employer has decided to impose discipline on the officer and give it to the peace officer. (Gov. Code, § 3304(f), Stats. 1998, ch. 786):
  - a. Dismissal, demotion, suspension, salary reduction or written reprimand received by probationary and at-will employees whose liberty interest *are not* affected (i.e., the charges supporting a dismissal do not harm the employee's reputation or ability to find future employment);
  - b. Transfer of permanent, probationary and at-will employees for purposes of punishment;
  - c. Denial of promotion for permanent, probationary, and at-will employees for reasons other than merit; and
  - d. Other actions against permanent, probationary, and at-will employees that result in disadvantage, harm, loss or hardship and impact the career opportunities of the employee.

*Conducting investigations and the filing and service of the written notice are not reimbursable activities.*

4. On or after January 1, 2003, draft, review, edit, and approve a notice in order to take any of the following disciplinary actions for wearing a pin or displaying any other item containing the American flag (Gov. Code, § 3312 (Stats. 2002, ch. 170)):
  - a. Dismissal of a probationary or at-will officer when the charges supporting the dismissal *do not* damage the officer's ability to find other employment;
  - b. Demotion, suspension, salary reduction, or written reprimand of a probationary or at-will officer;
  - c. Transfer for purposes of punishment of a permanent, probationary, or at-will officer;
  - d. Denial of promotion to a permanent, probationary, or at-will officer; and
  - e. Other actions against permanent, probationary, or at-will officer that result in disadvantage, harm, loss, or hardship and impact the career opportunities of the officer.

The notice must include: (1) a statement that the officer's pin or other item violates an existing rule, regulation, policy, or local agency agreement or contract regarding the wearing of a pin, or the displaying of any other item, containing the American flag; (2) a citation to the specific rule, regulation, policy, or local agency agreement or contract that the pin or other item violates; and (3) a statement that the officer may file an appeal against the employer challenging the alleged violation pursuant to the applicable grievance or appeal procedures adopted by the department or public agency that otherwise comply with existing law.

5. Perform the following activities upon receipt of a request by an officer to inspect his or her personnel file (Gov. Code, § 3306.5):



## **Counties**

Permit a peace officer to inspect letters of reference and records relating to the investigation of a possible criminal offense if they are used or have been used to determine that officer's qualifications for employment, promotion, additional compensation, or termination or other disciplinary action. (Gov. Code, § 3306.5(a) (Stats. 2000, ch. 209).) Under these circumstances, the following activities are eligible for reimbursement:

- a. Make the personnel file or copy thereof available within a reasonable period of time after a request therefor by the officer. (Gov. Code, § 3306.5(b), Stats. 2000, ch. 209.)

*This activity does not include scheduling an appointment to inspect personnel file, monitoring the officer while he or she reviews information, or paying the officer for time away from normal duty.*

- b. File in an officer's personnel file a copy of the officer's written request to correct or delete a portion of the officer's personnel file, which the officer believes to be mistakenly or unlawfully placed in the file. (Gov. Code, § 3306.5(c), Stats. 2000, ch. 209.)
- c. Within 30 calendar days of receiving an officer's request to correct or delete a portion of his or her personnel file pursuant to Government Code section 3306.5(c), review the request and either:
  - i. Grant the request and make the requested changes to the personnel file; or
  - ii. Notify the officer of the decision to refuse the request. If the employer refuses to grant the request, in whole or in part, the employer shall state in writing the reasons for refusing the request, and that written statement shall become part of the personnel file of the officer. This activity includes drafting, reviewing, editing, and approving the written statement, and filing the written statement in the officer's personnel file. (Gov. Code, § 3306.5(d), Stats. 2000, ch. 209.)

## **Cities and Special Police Protection Districts Named in Government Code Section 53060.7**

- a. Permit a peace officer to inspect personnel files at reasonable times and intervals, and during usual business hours, upon request by the officer. The personnel files that an officer may inspect are limited to those that are used or have been used to determine that officer's qualifications for employment, promotion, additional compensation, or termination or other disciplinary action. (Gov. Code, § 3306.5(a), Stats. 2000, ch. 209.)

- b. Make the personnel file or copy thereof available within a reasonable period of time after a request therefor by the officer. (Gov. Code, § 3306.5(b), Stats. 2000, ch. 209.)

*This activity does not include scheduling an appointment to inspect personnel file, monitoring the officer while he or she reviews information, or paying the officer for time away from normal duty.*

- c. File in an officer's personnel file a copy of the officer's written request to correct or delete a portion of the officer's personnel file, which the officer believes to be

mistakenly or unlawfully placed in the file. (Gov. Code, § 3306.5(c), Stats. 2000, ch. 209.)

- d. Within 30 calendar days of receiving an officer's request to correct or delete a portion of his or her personnel file pursuant to Government Code section 3306.5(c), review the request and either:
  - i) Grant the request and make the requested changes to the personnel file; or
  - ii) Notify the officer of the decision to refuse the request. If the employer refuses to grant the request, in whole or in part, the employer shall state in writing the reasons for refusing the request, and that written statement shall become part of the personnel file of the officer. This activity includes drafting, reviewing, editing, and approving the written statement, and filing the written statement in the officer's personnel file. (Gov. Code, § 3306.5(d) (Stats. 2000, ch. 209).)
6. Notify an officer, either orally or in writing, that a search of the officer's employer assigned locker or storage space will be conducted, if during the course of an investigation into officer misconduct an employer determines it is necessary to conduct a search of the officer's employer assigned locker or storage space. For written notices this also includes drafting, reviewing, editing, and approving the notice. (Gov. Code, § 3309, Stats. 1976, ch. 465.)

## **V. CLAIM PREPARATION AND SUBMISSION**

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

### **A. Direct Cost Reporting**

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

#### **1. Salaries and Benefits**

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

#### **2. Materials and Supplies**

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

#### **3. Contracted Services**

Report the name of the contractor and services performed to implement the reimbursable activities. Attach a copy of the contract to the claim. If the contractor

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

#### 4. Fixed Assets and Equipment

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

#### 5. Travel

Report the name of the employee traveling for the purpose of the reimbursable activities. Include the date of travel, destination, the specific reimbursable activity requiring travel, and related travel expenses reimbursed to the employee in compliance with the rules of the local jurisdiction. Report employee travel time according to the rules of cost element A.1., Salaries and Benefits, for each applicable reimbursable activity.

### B. Indirect Cost Rates

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

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

If the claimant chooses to prepare an ICRP, both the direct costs (as defined and described in 2 CFR Part 225, Appendix A and B (OMB Circular A-87 Attachments A and B) and the indirect costs shall exclude capital expenditures and unallowable costs (as defined and described in 2 CFR Part 225, Appendix A and B (OMB Circular A-87 Attachments A and B).

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

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

1. The allocation of allowable indirect costs (as defined and described in OMB Circular A-87 Attachments A and B) shall be accomplished by: (1) classifying a department's total costs for the base period as either direct or indirect; and (2) dividing the total

allowable indirect costs (net of applicable credits) by an equitable distribution base. The result of this process is an indirect cost rate which is used to distribute indirect costs to mandates. The rate should be expressed as a percentage which the total amount of allowable indirect costs bears to the base selected; or

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

## **VI. RECORD RETENTION**

Pursuant to Government Code section 17558.5(a), a reimbursement claim for actual costs filed by a local agency or school district pursuant to this chapter<sup>1</sup> is subject to the initiation of an audit by the Controller no later than three years after the date that the actual reimbursement claim is filed or last amended, whichever is later. However, if no funds are appropriated or no payment is made to a claimant for the program for the fiscal year for which the claim is filed, the time for the Controller to initiate an audit shall commence to run from the date of initial payment of the claim. In any case, an audit shall be completed not later than two years after the date that the audit is commenced. All documents used to support the reimbursable activities, as described in section IV, must be retained during the period subject to audit. If an audit has been initiated by the Controller during the period subject to audit, the retention period is extended until the ultimate resolution of any audit findings.

## **VII. OFFSETTING REVENUES AND REIMBURSEMENTS**

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

## **VIII. STATE CONTROLLER'S CLAIMING INSTRUCTIONS**

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

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

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<sup>1</sup> This refers to Title 2, division 4, part 7, chapter 4 of the Government Code

## **IX. REMEDIES BEFORE THE COMMISSION**

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

In addition, requests may be made to amend parameters and guidelines pursuant to Government Code section 17557(d), and California Code of Regulations, title 2, section 1183.2.

## **X. LEGAL AND FACTUAL BASIS FOR THE PARAMETERS AND GUIDELINES**

The statements of decision adopted for the test claim and parameters and guidelines are legally binding on all parties and provide the legal and factual basis for the parameters and guidelines. The support for the legal and factual findings is found in the administrative record for the test claim. The administrative record is on file with the Commission.

**DECLARATION OF SERVICE BY EMAIL**

I, the undersigned, declare as follows:

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

On December 12, 2013, I served the:

**Adopted Statement of Decision and Parameters and Guidelines**

*Peace Officer Procedural Bill of Rights II, 03-TC-18*  
Government Code Sections 3304, 3306.5, 3309 and 3312  
Statutes 1976, Chapter 465; Statutes 1998, Chapter 786;  
Statutes 2000, Chapter 209; and Statutes 2002, Chapter 170  
City of Newport Beach, Claimant

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

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on December 12, 2013 at Sacramento, California.



---

Heidi J. Palchik  
Commission on State Mandates  
980 Ninth Street, Suite 300  
Sacramento, CA 95814  
(916) 323-3562

# COMMISSION ON STATE MANDATES

## Mailing List

**Last Updated:** 12/9/13

**Claim Number:** 03-TC-18

**Matter:** Peace Officers Procedural Bill of Rights (POBOR) II

**Claimant(s):** City of Newport Beach

### TO ALL PARTIES, INTERESTED PARTIES, AND INTERESTED PERSONS:

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

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