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RECEIVED
April 09, 2015
Commission on State Mandates

April 9, 2015

Heather Halsey, Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

Dear Ms. Halsey:

RE: CSM 05-4425-I-10
Foothill-De Anza Community College District
Collective Bargaining
Fiscal Years: 1999-00, 2000-01, and 2001-02
Incorrect Reduction Claim

I have received the Commission Draft Proposed Decision (DPD) dated April 3, 2015, for the above-referenced incorrect reduction claim, to which I respond on behalf of the District.

PART A. STATUTE OF LIMITATIONS APPLICABLE TO AUDITS OF ANNUAL REIMBURSEMENT CLAIMS

The District asserted in its incorrect reduction claim filed September 19, 2005, that the first two years of the three claim years audited, fiscal years 1999-00 and 2000-01, were beyond the statute of limitations to complete the audit when the Controller issued the audit report on July 2, 2004 and the revised report dated October 9, 2012. The Commission concludes that the original audit was both timely initiated and timely completed.

Chronology of Annual Claim Action Dates

January 5, 2001	FY 1999-00 annual claim filed by the District
December 21, 2001	FY 2000-01 annual claim filed by the District
March 12, 2003	Audit entrance conference conducted
December 31, 2003	2-year statute to audit expires
July 2, 2004	Original final audit report issued
October 9, 2012	Revised audit report issued

Based on the annual claim filing dates, these two fiscal years are subject to the statute of limitations language established by Statutes of 1995, Chapter 945, Section 13, operative July 1, 1996:

> (a) A reimbursement claim for actual costs filed by a local agency or school district pursuant to this chapter is subject to audit by the Controller no later than two years after the end of the calendar year in which the reimbursement claim is filed or last amended. However, if no funds are appropriated for the program for the fiscal year for which the claim is made, the time for the Controller to initiate an audit shall commence to run from the date of initial payment of the claim.

1. Audit Initiation

The District's FY 1999-00 annual claim was submitted to the Controller on January 5, 2001. The District's FY 2000-01 annual claim was submitted to the Controller on December 21, 2001. According to the 1995 version of Government Code Section 17558.5 these two annual claims are subject to audit no later than December 31, 2003. The Commission determined on March 27, 2015, (CSM 09-4425-I-17 and CSM 10-4425-I-18, Sierra Joint Community College District, Collective Bargaining) that for purposes of measuring the statute of limitations, the audit commences no later than the date the entrance conference letter was sent. The entrance conference letter is not on the record here. However, since the entrance conference occurred prior to January 1, 2004, the District concurs that the original audit of the FY 1999-00 and FY 2000-01 annual claims was *commenced* before the expiration of the statute of limitations to commence an audit.

2. Audit Completion

It is uncontested here that an audit is complete only when the final audit report is issued. The District asserts that the first two years of the three claim years audited, fiscal years 1999-00 and 2000-01, were beyond the statute of limitations to *complete* the original audit when the Controller issued its audit report on July 2, 2004.

The Commission (DPD, 19) concludes that the 1995 version of Section 17558.5 "does not require the completion of an audit before the end of the calendar year; initiating an audit before the expiration of that period is sufficient." The Commission (DPD, 21) instead relies upon common law remedies:

> The only reading of these facts and of section 17558.5 that could bar the subject audits would be to hold that section 17558.5 requires an audit to be *completed* within two years of filing, in which case the final audit report issued September 17, 2004 would be barred. This is the interpretation urged by the claimant, but this reading of the code is not supported by the plain language of the statute, as

> explained above. At the time the costs were incurred in this case, section 17558.5 did not expressly fix the time during which an audit must be completed. Nevertheless, the Controller was still required under common law to complete the audit within a reasonable period of time. Under appropriate circumstances, the defense of laches may operate to bar a claim by a public agency if there is evidence of unreasonable delay by the agency and resulting prejudice to the claimant.[84] However, here the audit report was issued July 2, 2004, approximately sixteen and one-half months after the initiation date. Thus, there is no evidence of an unreasonable delay in the completion of the audit.

Footnote 84 references the *Cedar-Sinai Medical Center* decision, for the proposal that claimants should or could rely upon the defense of laches. This is a misapplication of a decision in a civil matter with equity jurisdiction. The citation does not indicate whether the relevant state agency completed the audit within its three-year statute of limitations, or whether it was so required to do so. However, the Commission is a state agency with a specific statute of limitations to apply and need not rely on laches, therefore this is not an "appropriate circumstance," even if the Commission had such common law jurisdiction.

The Commission seems to be asserting that the Controller was required under common law to complete the audit within a reasonable period of time without regard to the positive law of the legislature's statute of limitations. Reliance on the reasonableness of the actual length of the audit period process would mean in practice that the determination of a reasonable audit completion date would become a question of fact for every audit, which is contrary to the concept of a *statute* of limitations. What objective standards are available for the determination or a reasonable period of time to complete an audit?

The Commission's reliance on the equitable concept of laches is troublesome. Cases in law are governed by statutes of limitations, which are laws that determine how long a person has to file a lawsuit before the right to sue expires. Laches is the equitable equivalent of statutes of limitations. However, unlike statutes of limitations, laches leaves it up to the adjudicator to determine, based on the unique facts of the case, whether a plaintiff has waited too long to seek relief. Here there is no issue as to whether the District has been tardy in seeking relief. The incorrect reduction claim, the statutory form of relief from an audit, was timely-filed according to the statute.

Laches is a defense to a proceeding in which a plaintiff seeks equitable relief. Cases in equity are distinguished from cases at law by the type of remedy, or judicial relief, sought by the plaintiff. Generally, law cases involve a problem that can be solved by the payment of monetary damages. Equity cases involve remedies directed by the court against a party. An incorrect reduction claim is explicitly a matter of money due to the claimant. The District is not seeking an injunction, where the court orders a party to do or not to do something; declaratory relief, where the court declares the rights of the two parties to a

controversy; or an accounting, where the court orders a detailed written statement of money owed, paid, and held.

The Commission has not indicated that it has jurisdiction for equitable remedies. Therefore a Commission finding that there is no evidence of an unreasonable delay in the completion of the audit is without jurisdiction or consequence and simply irrelevant. Or, if the Commission is suggesting that claimant resort to the courts for an equitable remedy on the issue of statute of limitations, that is contrary to fact that the Government Code establishes primary jurisdiction to the Commission for audit disputes, that is, the incorrect reduction claim process.

The adjudication of the audit completion date should end with the 1995 version of Section 17558.5. There is no objective basis or evidence in the record to conclude that the period of time allowed to *complete* an audit is contingent on the notice provision as to when the audit can *commence*. The cases cited by the Commission speak to the issue of *commencing* an audit and the extension of that time by future changes to the statute of limitations. These are not relevant to the issue of the *completion* of the audit. The Commission cites no cases contradicting the practical and inevitable requirement that completion is measured by the date of the audit report.

If, as the Commission asserts, the 1995 version establishes no statutory time limit to complete a timely commenced audit, Section 17558.5 becomes absurd. Once timely commenced, audits could remain unfinished for years either by intent or neglect and the audit findings revised at any time. Thus, the claimant's document retention requirements would become open-ended and eventually punitive. Statutes of limitations are not intended to be open-ended; they are intended to be finite, that is, a period of time measured from an unalterable event, and in the case of the 1995 version of the code, it is the filing date of the annual claim.

3. Revised Audit

The Commission (DPD, 23), relying upon the 2004 version of section 17558.5, concludes that the revised audit report issued October 9, 2012, was not completed within the deadline required by section 17558.5. The District concurs that the revised report was completed too late, but instead relies upon the 1995 version of section 17558.5, as discussed above.

The Commission (DPD, 23) also concludes the findings in the revised audit report may be considered to the extent that it narrows the issues in dispute or makes concessions to the claimant. The District also agrees that the Commission can take official notice of the revised audit findings and incorporate them in the findings for this incorrect reduction claim. As a ministerial matter, the revised audit report process appears to be reasonable

method to implement the changes required as a matter of law by the *Clovis* case. "Revising" the audit report allows the Controller to utilize existing administrative mechanisms to make changes to the audit findings irrespective of statute of limitations issue.

4. Clovis II Decision

Notwithstanding, the District is on notice of the March 24, 2015, judgment denying the petition for writ in the *Clovis II* case. The Sacramento Superior Court appears to agree with the Commission that the 1995 version of section 17558.5 does not require the audit to be completed within two years from the date the annual claim was filed. The Superior Court concluded that time was not unlimited to complete the audit, but that common law requires the Controller to "diligently prosecute" the audit and that the revised audit reports indicate that diligence. This court decision makes timely completion of these audits (generally involving fiscal years before FY 2001-02) always a question of fact. However, the revised Clovis Unified audit reports were issued after the 2004 amendment of section 17558.5. The Commission has concluded in other statements of decision that, as a matter of law, for audits issued after 2004 there is a statutory two-year time period to complete audits. So, to reconcile the court decision and previous Commission decisions, the "due diligence" represented by the revised audits is actually void since the revised audits are past statute.

The time for appeal of *Clovis II* has not concluded and the District continues its dispute of this issue as a matter of future standing.

PART B. DISALLOWANCE OF STAFF TIME

The original audit report concluded that the District claimed "unallowable" employee salaries and benefits in the amount of $207,533 for the three fiscal years audited. The revised report reduced this amount to $42,045, of which the Commission concludes $35,755 should be reinstated since the audit report failed to meet the burden of going forward. The District concurs that the revised audit modifies the previously filed incorrect reduction claim and that the Controller did not meet the burden of going forward with evidence sufficient to sustain $35,755 of the remaining adjustments. However, the Commission endorses the adjustment to the productive hourly rates for the part-time teachers in the amount of $6,250, in the original and revised audit reports.

The District calculated the productive hourly rate for claimed staff using the 21% benefit rate option provided for by the parameters and guidelines. The parameters and guidelines state:

H. Supporting Data for Claims–Report Format for Submission of Claim

3. Salary and Employee's Benefits: Show the classification of the employees involved, amount of time spent, and their hourly rate. The worksheet used to compute the hourly salary rate must be submitted with your claim. Benefits are reimbursable. Actual benefit percent must be itemized. If no itemization is submitted, 21 percent must be used for computation of claim costs. Identify the classification of employees committed to functions required under the Winton Act and those required by Chapter 961, Statutes of 1975.

The Commission (DPD, 29) construes this language as follows:

> . . . The two provisions together suggest that the 21 percent rate should generally provide an incentive for the claimant to provide an itemization of costs that supports a higher rate, and that the 21 percent rate is intended to be punitive.
>
> However, the language does not suggest that a claimant has discretion whether to claim the 21 percent rate: it requires the claimant to itemize, and states that "21 percent *must be used*" if an itemization is not "submitted". Therefore it would be reasonable to interpret the provision to hold that if the claimant does not submit the itemization, the 21 percent rate is required, even if another rate can be independently developed or verified. The difficulty with that interpretation is that, as the Controller has pointed out, it might permit a claimant to receive reimbursement in excess of its actual costs, to the extent actual benefit percent can be verified through evidence in the record. And, it appears to conflict with the earlier sentence, which is strongly worded to require a benefit percent to be itemized.

There is no support for the Commission conclusion that productive hourly rates must be itemized or that the 21% rate is a punitive default. If the 21% default is acceptable for filing the annual claim, similar to the 7% default rate for college indirect cost rates, then itemization is not absolutely required.

The claiming instructions have consistently presented itemization and the 21% rate as two acceptable methods for filing a claim. The Controller's claiming instructions, updated April 2000, which are a part of the record for this incorrect reduction claim, state (page 7 of 11):

7. Reimbursement Limitations

A. Fringe Benefits

The actual fringe benefit costs may be claimed if supported by an itemized list of

> the costs, such as for: Retirement, social security, health and dental insurance, workers' compensation, etc. If no itemization is submitted, twenty one percent of direct salary may be used for computing the fringe benefit costs. Emphasis added.

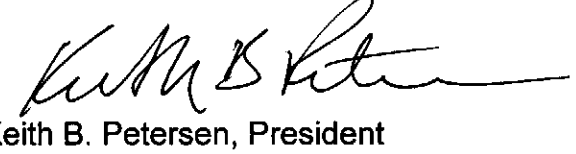
The Collective Bargaining claim is an historic anachronism in that it is the only currently reimbursed mandate program that allows use of the 21% rate. The 21% rate was created through the rulemaking authority of the Commission. Using the 21% rate has been perceived as a convenience for claim preparation, to avoid calculating individual rates for the numerous staff claimed, rather than a punitive measure. Based on my personal experience on mandate reimbursement issues since 1989, the general perception is that the 21% rate is generally representative of the statewide average of total individual district benefits costs divided by total district salary cost. Individual benefit rates for classified staff are usually a bit higher because of their lower hourly salary compared to most certificated staff. The 21% rate mitigates these differences.

Further, as a matter of law, correct use of the 21% rate cannot ever be excessive because it is a uniform cost allowance adopted by the Commission. In order for the 21% default to continue to be representative, it has to be used for all staff claimed. It is inappropriate for the Controller to only select and adjust classes of employees for whom the itemized rate would result in a rate less than 21% and allow the other claimed staff to be limited to the 21%. The $6,290 is a result of "cherry-picking" the productive hourly rates and should be disallowed by the Commission.

CERTIFICATION

By my signature below, I hereby declare, under penalty of perjury under the laws of the State of California, that the information in this submission is true and complete to the best of my own knowledge or information or belief, and that any attached documents are true and correct copies of documents received from or sent by the District or state agency which originated the document.

Executed on April 9, 2015, at Sacramento, California, by



Keith B. Petersen, President
SixTen & Associates

Service by Commission Electronic Drop Box

DECLARATION OF SERVICE BY EMAIL

I, the undersigned, declare as follows:

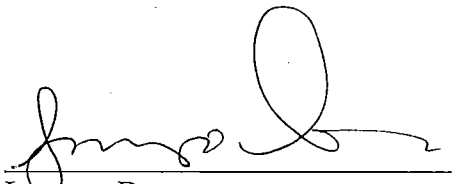
I am a resident of the County of Sacramento and I am over the age of 18 years, and not a party to the within action. My place of employment is 980 Ninth Street, Suite 300, Sacramento, California 95814.

On April 10, 2015, I served the:

Claimant Comments
Collective Bargaining and Collective Bargaining Agreement Disclosure, 05-4425-I-10
Government Code Sections 3540-3549.9
Statutes 1975, Chapter 961 ; Statutes 1991, Chapter 1213
Fiscal Years 1999-2000 through 2001-2002
Foothill-De Anza Community College District, 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 April 10, 2015 at Sacramento, California.



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COMMISSION ON STATE MANDATES

Mailing List

Last Updated: 4/2/15

Claim Number: 05-4425-I-10

Matter: Collective Bargaining

Claimant: Foothill-De Anza Community College District

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, § 1181.3.)

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