Hearing Date: May 27, 2004
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ITEM 9
TEST CLAIM
FINAL STAFF ANALYSIS

Education Code Sections 44660-44665
(Former Ed. Code, §§ 13485-13490)

Statutes 1975, Chapter 1216; Statutes 1983, Chapter 498; Statutes 1986, Chapter 393; Statutes 1995, Chapter 392; Statutes 1999, Chapter 4

The Stull Act (98-TC-25)

Denair Unified School District, Claimant

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Exhibit I

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The Stull Act (98-TC-25)

Denair Unified School District, Claimant

EXECUTIVE SUMMARY

Background

This test claim addresses the Stull Act. The Stull Act was originally enacted in 1971 to establish a uniform system of evaluation and assessment of the performance of "certificated personnel" within each school district. (Former Ed. Code, §§ 13485-13490.) In 1976, the Legislature renumbered the provisions of the Stull Act to Education Code sections 44660 to 44665.

The test claim legislation, enacted between 1975 and 1999, amended the Stull Act. The claimant alleges that the amendments constitute a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution. For the reasons provided in the analysis, staff finds that the test claim legislation constitutes a partial reimbursable state-mandated program.

Staff notes that the draft staff analysis was issued on March 19, 2004 with a request to the parties for additional briefing on the following two issues:

1. Are there any sources of state or federal funds appropriated to school districts that can be applied to the activities identified in the draft staff analysis as reimbursable state-mandated activities for the evaluation of certificated personnel under the Stull Act?
2. Are the state-mandated activities identified in the draft staff analysis reimbursable under article XIII B, section 6 of the California Constitution for the evaluation of certificated personnel employed in local, discretionary educational programs? (See Exhibit I.)

To date, no comments on the draft staff analysis or on the request for additional briefing have been received. Based on the *Department of Finance v. Commission on State Mandates* case, however, staff has limited the reimbursable activities to the evaluations of certificated personnel that perform the requirements of educational programs mandated by state or federal law. Since the parties did not file comments in response to the request for additional briefing, staff recommends that the determination of the certificated employees performing mandated functions for which schools districts are eligible to receive reimbursement be addressed during the parameters and guidelines phase.

Conclusion

Staff concludes that Education Code section 44662, as amended by Statutes 1999, chapter 4, and Education Code section 44664, as amended by Statutes 1983, chapter 498, mandate a new program or higher level of service for school districts within the meaning of article XIII B, section 6 of the California Constitution, and impose costs mandated by the state pursuant to Government Code section 17514 for the following activities only:

- Evaluate and assess the performance of certificated instructional employees that perform the requirements of educational programs mandated by state or federal law as it reasonably relates to the instructional techniques and strategies used by the employee and the employee's adherence to curricular objectives (Ed. Code, § 44662, subd. (b), as amended by Stats. 1983, ch. 498).

  Reimbursement for this activity is limited to the review of the employee's instructional techniques and strategies and adherence to curricular objectives, and to include in the written evaluation of the certificated instructional employees the assessment of these factors during the following evaluation periods:

  - once each year for probationary certificated employees;
  - every other year for permanent certificated employees; and
  - beginning January 1, 2004, every five years for certificated employees with permanent status who have been employed at least ten years with the school district, are highly qualified (as defined in 20 U.S.C. § 7801), and whose previous evaluation rated the employee as meeting or exceeding standards, if the evaluator and certificated employee being evaluated agree.

- Evaluate and assess the performance of certificated instructional employees that teach reading, writing, mathematics, history/social science, and science in grades 2 to 11 as it reasonably relates to the progress of pupils towards the state adopted academic content standards as measured by state adopted assessment tests (Ed. Code, § 44662, subd. (b), as amended by Stats. 1999, ch. 4).

  Reimbursement for this activity is limited to the review of the results of the STAR test as it reasonably relates to the performance of those certificated employees that teach reading, writing, mathematics, history/social science, and science in grades 2 to 11, and to include in the written evaluation of those certificated employees the assessment of the employee's performance based on the STAR results for the pupils they teach during the evaluation periods specified in Education Code section 44664, and described below:

  - once each year for probationary certificated employees;
  - every other year for permanent certificated employees; and
  - beginning January 1, 2004, every five years for certificated employees with permanent status who have been employed at least ten years with the school district, are highly qualified (as defined in 20 U.S.C. § 7801), and whose previous evaluation rated the employee as meeting or exceeding standards, if the evaluator and certificated employee being evaluated agree.

- Assess and evaluate permanent certificated, instructional and non-instructional, employees that perform the requirements of educational programs mandated by state or federal law and receive an unsatisfactory evaluation in the years in which the permanent certificated employee would not have otherwise been evaluated pursuant to Education Code section 44664 (i.e., every other year). The additional evaluations shall last until the employee achieves a positive evaluation, or is separated from the school district. (Ed. Code, § 44664, as amended by Stats. 1983, ch. 498). This additional evaluation and assessment of the permanent certificated employee requires the school district to perform the following activities:
    - evaluate and assess the certificated employee performance as it reasonably relates to the following criteria: (1) the progress of pupils toward the standards established by the school district of expected pupil achievement at each grade level in each area of study, and, if applicable, the state adopted content standards as measured by state adopted criterion referenced assessments; (2) the instructional techniques and strategies used by the employee; (3) the employee's adherence to curricular objectives; (4) the establishment and maintenance of a suitable learning environment, within the scope of the employee's responsibilities; and, if applicable, (5) the fulfillment of other job responsibilities established by the school district for certificated non-instructional personnel (Ed. Code, § 44662, subds. (b) and (c));
    - the evaluation and assessment shall be reduced to writing. (Ed. Code, § 44663, subd. (a).) The evaluation shall include recommendations, if necessary, as to areas of improvement in the performance of the employee. If the employee is not performing his or her duties in a satisfactory manner according to the standards prescribed by the governing board, the school district shall notify the employee in writing of that fact and describe the unsatisfactory performance (Ed. Code, § 44664, subd. (b));
    - transmit a copy of the written evaluation to the certificated employee (Ed. Code, § 44663, subd. (a));
    - attach any written reaction or response to the evaluation by the certificated employee to the employee's personnel file (Ed. Code, § 44663, subd. (a)); and
    - conduct a meeting with the certificated employee to discuss the evaluation (Ed. Code, § 44553, subd. (a)).

Staff further finds that the activities listed above do not constitute reimbursable state-mandated programs with respect to certificated personnel employed in local, discretionary educational programs.

Finally, staff finds that all other statutes in the test claim not mentioned above are not reimbursable state-mandated programs within the meaning of article XIII B, section 6 and Government Code section 17514.

Recommendation

Staff recommends that the Commission adopt the staff analysis that partially approves the test claim for the activities listed above.

STAFF ANALYSIS

Claimant

Denair Unified School District

Chronology

07/07/99	Claimant files test claim
07/07/99	Test claim deemed complete
08/10/99	Commission receives request for extension of time to file comments by the Department of Finance
08/12/99	Department of Finance's request for extension of time granted until October 6, 1999
01/23/01	Letter issued to Department of Finance regarding the status of comments
03/08/01	Department of Finance files comments on test claim
05/31/02	Claimant files rebuttal
07/03/02	Letter issued to claimant's representative advising claimant that analysis will be limited to school districts, and not county offices of education, since no county office of education has made an appearance as a claimant, nor filed a declaration alleging mandated costs pursuant to Government Code section 17564
09/09/03	Spector, Middleton, Young & Minney withdraw as claimant's representative
01/05/04	Claimant files a request to amend test claim to add the Schools Mandate Group, a joint powers authority, as a co-claimant and to designate the Schools Mandate Group as the lead claimant
01/08/04	Claimant's request to amend test claim is denied
02/11/04	Letter issued to Department of Education requesting comments on the test claim
03/19/04	Draft staff analysis and request for additional briefing issued
05/06/04	Final staff analysis issued

Background

This test claim addresses the Stull Act. The Stull Act was originally enacted in 1971 to establish a uniform system of evaluation and assessment of the performance of "certificated personnel" within each school district. (Former Ed. Code, §§ 13485-13490.)[1] The Stull Act required the governing board of each school district to develop and adopt specific guidelines to evaluate and assess certificated personnel[2], and to avail itself of the advice of certificated instructional personnel before developing and adopting the guidelines.[3] The evaluation and assessment of the certificated personnel was required to be reduced to writing and a copy transmitted to the employee no later than sixty days before the end of the school year.[4] The employee then had the right to initiate a written response to the evaluation, which became a permanent part of the employee's personnel file.[5] The school district was also required to hold a meeting with the employee to discuss the evaluation.[6]

Former Education Code section 13489 required that the evaluation and assessment be continuous. For probationary employees, the evaluation had to occur once each school year. For permanent employees, the evaluation was required every other year. Former section 13489 also required that the evaluation include recommendations, if necessary, for areas of improvement in the performance of the employee. If the employee was not performing his or her duties in a satisfactory manner according to the standards, the "employing authority"[7] was required to notify the employee in writing, describe the unsatisfactory performance, and confer with the employee making specific recommendations as to areas of improvement and endeavor to assist in the improvement.

In 1976, the Legislature renumbered the provisions of the Stull Act. The Stull Act can now be found in Education Code sections 44660-44665.[8]

The test claim legislation, enacted between 1975 and 1999, amended the Stull Act. The claimant alleges that the amendments constitute a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution.[9]

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[1] Statutes 1971, chapter 361.

[2] Former Education Code section 13487.

[3] Former Education Code section 13486.

[4] Former Education Code section 13488.

[5] *Ibid.*

[6] *Ibid.*

[7] Former Education Code section 13490 defined "employing authority" as "the superintendent of the school district in which the employee is employed, or his designee, or in the case of a district which has no superintendent, a school principal or other person designated by the governing board."

[8] Statutes 1976, chapter 1010.

[9] In 1999, the Legislature added Education Code section 44661.5 to the Stull Act. (Stats. 1999, ch. 279.) Education Code section 44661.5 authorizes a school district to include objective

Staff notes that the claimant, a school district, alleges that compliance with the Stull Act is new as to county offices of education and, thus, counties are entitled to reimbursement for all activities under the Stull Act. [10]

To date, no county office of education has appeared in this action as a claimant, nor filed a declaration alleging mandated costs exceeding $1000, as expressly required by Government Code section 17564 and section 1183 of the Commission's regulations.

Therefore, the test claim has not been perfected as to county offices of education. The findings in this analysis, therefore, are limited to school districts.

Claimant's Position

The claimant contends that the test claim legislation constitutes a reimbursable state-mandated program for the following "new" activities:

- Rewrite standards for employee assessment to reflect expected student "achievement" (as opposed to the prior requirement of expected student "progress") and to expand the standards to reflect expected student achievement at each "grade level." (Stats. 1975, ch. 1216.)
- Develop job responsibilities for certificated non-instructional personnel, including but not limited to, supervisory and administrative personnel. (Stats. 1975, ch. 1216.)
- Assess and evaluate non-instructional personnel. (Stats. 1975, ch. 1216; Stats. 1995, ch. 392.)
- Receive and review responses from certificated non-instructional personnel regarding the employee's evaluation. (Stats. 1986, ch. 393.)
- Conduct a meeting between the certificated non-instructional employee and the evaluator to discuss the evaluation and assessment. (Stats. 1986, ch. 393.)
- Conduct additional evaluations of certificated employees who receive an unsatisfactory evaluation. (Stats. 1983, ch. 498.)
- Review the results of a certificated instructional employee's participation in the Peer Assistance and Review Program for Teachers as part of the assessment and evaluation. (Stats. 1999, ch. 4.)
- Assess and evaluate the performance of certificated instructional personnel as it relates to the instructional techniques and strategies used and the employee's adherence to curricular objectives. (Stats. 1983, ch. 498.)

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standards from the National Board for Professional Teaching Standards or any objective standards from the California Standards for the Teaching Profession when developing evaluation and assessment guidelines. The claimant did not include Education Code section 44661.5 in this test claim.

[10] Exhibit A, Test Claim, pages 7-9.

- Assess and evaluate certificated instructional personnel as it relates to the progress of pupils towards the state adopted academic content standards, if applicable, as measured by state adopted criterion referenced assessments. (Stats. 1999, ch. 4.)
- Assess and evaluate certificated personnel employed by county superintendents of education. (Stats. 1975, ch. 1216.)[11]

Department of Finance's Position

The Department of Finance filed comments on March 6, 2001, contending that most of the activities requested by the claimant do not constitute reimbursable state-mandated activities. The Department of Finance states, however, that the following activities "may" be reimbursable:

- Assess and evaluate the performance of certificated instructional personnel as it relates to the progress of students toward the attainment of state academic standards, as measured by state-adopted assessments.
- Modification of assessment and evaluation methods to determine whether instructional staff is adhering to the curricular objectives and instructional techniques and strategies associated with the updated state academic standards.
- Assess and evaluate permanent certificated staff that has received an unsatisfactory evaluation at least once each year, until the employee receives a satisfactory evaluation, or is separated from the school district.
- Implementation of the Stull Act by county offices of education.[12]

Discussion

The courts have found that article XIII B, section 6 of the California Constitution[13] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[14] "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."[15] 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

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[11] Exhibit A, Test Claim.

[12] Exhibit B.

[13] Article XIII B, section 6 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 such local government for the costs of such program or increased level of service, except that the Legislature may, but need not, provide such subvention of funds for the following mandates: (a) Legislative mandates requested by the local agency affected; (b) Legislation defining a new crime or changing an existing definition of a crime; or (c) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975."

[14] *Department of Finance v. Commission on State Mandates* (2003) 30 Cal.4th 727, 735.

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

task.[16] In addition, the required activity or task must be new, constituting a "new program," or it must create a "higher level of service" over the previously required level of service.[17]

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.[18] 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.[19] Finally, the newly required activity or increased level of service must impose costs mandated by the state.[20]

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.[21] 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."[22]

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

Certain statutes in the test claim legislation do not require school districts to perform activities and, thus, are not subject to article XIII B, section 6.

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[16] *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 174. In *Department of Finance v. Commission on State Mandates*, *supra*, 30 Cal.4th at page 742, the court agreed that "activities undertaken at the option or discretion of a local government entity (that is, actions undertaken without any legal compulsion or threat of penalty for nonparticipation) do not trigger a state mandate and hence do not require reimbursement of funds - even if the local entity is obligated to incur costs as a result of its discretionary decision to participate in a particular program or practice." The court left open the question of whether non-legal compulsion could result in a reimbursable state mandate, such as in a case where failure to participate in a program results in severe penalties or "draconian" consequences. (*Id.*, at p. 754.)

[17] *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, 835-836.

[18] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; *Lucia Mar, supra,* 44 Cal.3d 830, 835.

[19] *Lucia Mar, supra*, 44 Cal.3d 830, 835.

[20] *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; Government Code sections 17514 and 17556.

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

[22] *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817; *County of Sonoma, supra,* 84 Cal.App.4th 1265, 1280.

In order for a statute to be subject to article XIII B, section 6 of the California Constitution, the statutory language must require local agencies or school districts to perform an activity or task. If the statutory language does not mandate local agencies or school districts to perform a task, then compliance with the test claim statute is within the discretion of the local entity and a reimbursable state-mandated program does not exist.

Here, there are two test claim statutes, Education Code section 44664, subdivision (b) (as amended by Stats. 1983, ch, 498 and Stats. 1999, ch. 4) and Education Code section 44662, subdivision (d) (as amended by Stats. 1999, ch. 4) that do not require school districts to perform activities and, thus, are not subject to article XIII B, section 6 of the California Constitution.

Education Code section 44664, subdivision (b), as amended by Statutes 1983, chapter 498. In 1983, the Legislature amended Education Code section 44664 by adding subdivision (b). Subdivision (b) authorizes a school district to require a certificated employee that receives an unsatisfactory evaluation to participate in a program to improve the employee's performance. Education Code section 44664, subdivision (b), stated the following:

> Any evaluation performed pursuant to this article which contains an unsatisfactory rating of an employee's performance in the area of teaching methods or instruction *may* include the requirement that the certificated employee shall, as determined by the employing authority, participate in a program designed to improve appropriate areas of the employee's performance and to further pupil achievement and the instructional objectives of the employing authority. (Emphasis added.)

The plain language of the statute authorizes, but does not mandate, a school district to require its certificated employees to participate in a program designed to improve performance if the employee receives an unsatisfactory evaluation. Thus, staff finds that Education Code section 44664, subdivision (b), as amended by Statutes 1983, chapter 498, does not mandate school districts to perform an activity and, thus, it is not subject to article XIII B, section 6 of the California Constitution.

Education Code section 44662, subdivision (d), and Education Code section 44664, subdivision (b), as amended by Statutes 1999, chapter 4. In 1999, the Legislature amended Education Code section 44664, subdivision (b), by adding the following underlined sentence:

> Any evaluation performed pursuant to this article which contains an unsatisfactory rating of an employee's performance in the area of teaching methods or instruction may include the requirement that the certificated employee shall, as determined by the employing authority, participate in a program designed to improve appropriate areas of the employee's performance and to further pupil achievement and the instructional objectives of the employing authority. If a district participates in the Peer Assistance and Review Program for Teachers established pursuant to Article 4.5 (commencing with Section 44500), any certificated employee who receives an unsatisfactory rating on an evaluation performed pursuant to this section shall participate in the Peer Assistance and Review Program for Teachers.

The 1999 test claim legislation also amended Education Code section 44662 by adding subdivision (d), which states:

> Results of an employee's participation in the Peer Assistance and Review Program for Teachers established by Article 4.5 (commencing with Section 44500) shall be made available as part of the evaluation conducted pursuant to this section.

The claimant requests reimbursement to "receive and review, for purposes of a certificated employee's assessment and evaluation, if applicable, the results of an employee's participation in the Peer Assistance and Review Program for Teachers established by Article 4.5 (commencing with section 44500.)"[23]

The Department of Finance contends that reviewing the results of the Peer Assistance and Review Program, as part of the Stull Act evaluation of the employee's performance, is not a reimbursable state-mandated activity because participation in the Peer Assistance and Review Program is voluntary.[24]

In response to the Department of Finance, the claimant states the following:

> The legislative intent behind the amendments to the Stull Act was to ensure that school districts adopt objective, uniform evaluation and assessment guidelines that effectively assess certificated employee performance. To meet this desired goal, school districts that participate in the Peer Assistance and Review Program must include an employee's results of participation in the employee's evaluation. If this information was not considered by the district, inconsistent, incomplete, and inaccurate evaluations and assessments would occur – a result contrary to the Legislature's stated intent. Therefore, the claimant contends that the activities associated with the receipt and review of an employee's participation in the Peer Assistance and Review Program impose reimbursable state-mandated activities upon school districts.[25]

For the reasons described below, staff finds that the receipt and review of the results of an employee's participation in the Peer Assistance and Review Program is not a state-mandated activity and, therefore, the 1999 amendments to Education Code sections 44662 and 44664 are not subject to article XIII B, section 6 of the California Constitution.

In *Department of Finance v. Commission on State Mandates*[26], the Supreme Court reviewed test claim legislation that required school site councils to post a notice and an agenda of their meetings. The court determined that school districts were not legally compelled to establish eight of the nine school site councils and, thus, school districts were not mandated by the state to comply with the notice and agenda requirements for these school site councils.[27] The court reviewed the ballot materials for article XIII B, which provided that "a state mandate comprises something that a local government entity is required or forced to do."[28] The ballot summary by

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[23] Exhibit A, Test Claim, page 7.

[24] Exhibit B.

[25] Exhibit C, Claimant Rebuttal, page 7.

[26] *Department of Finance, supra*, 20 Cal.4th 727.

[27] *Id.* at page 731.

the Legislative Analyst further defined "state mandates" as "requirements imposed on local governments by legislation or executive orders."[29]

The court also reviewed and affirmed the holding of the *City of Merced* case.[30, 31] The court stated the following:

> In *City of Merced*, the city was under no legal compulsion to resort to eminent domain-but when it elected to employ that means of acquiring property, its obligation to compensate for lost business goodwill was not a reimbursable state mandate, because the city was not required to employ eminent domain in the first place. Here as well, if a school district elects to participate in or continue participation in any underlying *voluntary* education-related funded program, the district's obligation to comply with the notice and agenda requirements related to that program does not constitute a reimbursable state mandate. (Emphasis in original.)[32]

Thus, the Supreme Court held as follows:

> [W]e reject claimants' assertion that they have been legally compelled to incur notice and agenda costs, and hence are entitled to reimbursement from the state, based merely upon the circumstance that notice and agenda provisions are mandatory elements of education-related programs in which claimants have participated, *without regard to whether claimant's participation in the underlying program is voluntary or compelled.* [Emphasis added.][33]

The Supreme Court left undecided whether a reimbursable state mandate "might be found in circumstances short of legal compulsion—for example, if the state were to impose a substantial penalty (independent of the program funds at issue) upon any local entity that declined to participate in a given program."[34]

The decision of the California Supreme Court in *Department of Finance* is relevant and its reasoning applies in this case. The Supreme Court explained that "the proper focus under a legal compulsion inquiry is upon the nature of the claimants' participation in the underlying programs themselves."[35] Thus, based on the Supreme Court's decision, the Commission is required to determine if the underlying program (in this case, participation in the Peer Assistance and Review Program) is a voluntary decision at the local level or is legally compelled by the state.

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[28] *Id.* at page 737.

[29] *Ibid.*

[30] *Id.* at page 743.

[31] *City of Merced v. State of California* (1984) 153 Cal.App.3d 777.

[32] *Ibid.*

[33] *Id.* at page 731.

[34] *Ibid.*

[35] *Id.* at page 743.

The Peer Assistance and Review Program and the amendment to the Stull Act to reflect the Peer Assistance and Review Program were sponsored by Governor Davis and were enacted by the Legislature during the 1999 special legislative session on education. As expressly provided in the legislation, the intent of the Legislature, in part, was to coordinate the Peer Assistance and Review Program with the evaluations of certificated employees under the Stull Act. Section 1 of the 1999 test claim legislation states the following:

> It is the intent of the Legislature to establish a teacher peer assistance and review system as a critical feedback mechanism that allows exemplary teachers to assist veteran teachers in need of development in subject matter knowledge or teaching strategies, or both.
>
> It is further the intent of the Legislature that a school district that operates a program pursuant to Article 4.5 (commencing with Section 44500) of Chapter 3 of Part 25 of the Education Code coordinate its employment policies and procedures for that program with its activities for professional staff development, the Beginning Teacher Support and Assessment Program, and the biennial evaluations of certificated employees required pursuant to Section 44664 [of the Stull Act].

The plain language of Education Code section 44500, subdivision (a), authorizes, but does not require, school districts to participate in the Peer Assistance and Review Program. That section states in pertinent part that "[t]he governing board of a school district and the exclusive representative of the certificated employees in the school district *may* develop and implement a program authorized by this article that meets local conditions and conforms with the principles set forth in subdivision (b)." (Emphasis added.) If a school district implements the program, the program must assist a teacher to improve his or her teaching skills and knowledge, and provide that the final evaluation of a teacher's participation in the program be made available for placement in the personnel file of the teacher receiving assistance. (Ed. Code, § 44500, subd. (b).) Furthermore, school districts that participate in the Peer Assistance and Review Program receive state funding pursuant to Education Code sections 44505 and 44506.

Therefore, staff finds that school districts are not legally compelled to participate in the Peer Assistance and Review Program and, thus, not legally compelled to receive and review the results of the program as part of the Stull Act evaluation.

Staff further finds that school districts are not practically compelled to participate in the Peer Assistance and Review Program and review the results as part of the Stull Act evaluation. In *Department of Finance*, the California Supreme Court, when considering the practical compulsion argument raised by the school districts, reviewed its earlier decision in *City of Sacramento v. State of California* (1990) 50 Cal.3d 51.[36] The *City of Sacramento* case involved test claim legislation that extended mandatory coverage under the state's unemployment insurance law to include state and local governments and nonprofit corporations. The state legislation was enacted to conform to a 1976 amendment to the Federal Unemployment Tax Act, which required for the first time that a "certified" state plan include unemployment coverage of employees of public agencies. States that did not comply with the federal amendment faced a

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[36] *Department of Finance, supra*, 30 Cal.4th at pages 749-751.

loss of a federal tax credit and an administrative subsidy.[37] The local agencies, knowing that federally mandated costs are not eligible for state subvention, argued against a federal mandate. The local agencies contended that article XIII B, section 9 requires clear legal compulsion not present in the Federal Unemployment Tax Act.[38] The state, on the other hand, contended that California's failure to comply with the federal "carrot and stick" scheme was so substantial that the state had no realistic "discretion" to refuse. Thus, the state contended that the test claim statute merely implemented a federal mandate and that article XIII B, section 9 does not require strict legal compulsion to apply.[39]

The Supreme Court in *City of Sacramento* concluded that although local agencies were not strictly compelled to comply with the test claim legislation, the legislation constituted a federal mandate. The Supreme Court concluded that because the financial consequences to the state and its residents for failing to participate in the federal plan were so onerous and punitive, and the consequences amounted to "certain and severe federal penalties" including "double taxation" and other "draconian" measures, the state was mandated by federal law to participate in the plan.[40]

The Supreme Court applied the same analysis in the *Department of Finance* case and found that the practical compulsion finding for a state mandate requires a showing of "certain and severe penalties" such as "double taxation" and other "draconian" consequences. The Court stated the following:

> Even assuming, for purposes of analysis only, that our construction of the term "federal mandate" in *City of Sacramento* [citation omitted], applies equally in the context of article XIII B, section 6, for reasons set below we conclude that, contrary to the situation we described in that case, claimants here have not faced "certain and severe ... penalties" such as "double ... taxation" and other "draconian" consequences . . .[41]

Although there are statutory consequences for not participating in the Peer Assistance and Review Program, staff finds, as explained below, that the consequences do not constitute the type of draconian penalties described in the *Department of Finance* case.

Pursuant to Education Code section 44504, subdivision (b), school districts that do not participate in the Peer Assistance and Review Program are not eligible to receive state funding for specified programs. Education Code section 44504, subdivision (b), states the following:

> A school district that does not elect to participate in the program authorized under this article by July 1, 2001, is not eligible for any apportionment, allocation, or other funding from an appropriation for the program authorized pursuant to this article or for any apportionments, allocations, or other funding from funding for local assistance appropriated pursuant to the Budget Act Item 6110-231-0001,

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[37] *City of Sacramento, supra*, 50 Cal.3d at pages 57-58.

[38] *Id.* at page 71.

[39] *Ibid.*

[40] *Id.* at pages 73-76.

[41] *Department of Finance, supra*, 30 Cal.4th at page 751.

funding appropriated for the Administrator Training and Evaluation Program set forth in Article 3 (commencing with Section 44681) of Chapter 3.1 of Part 25, from an appropriation for the Instructional Time and Staff Development Reform Program as set forth in Article 7.5 (commencing with Section 44579) of Chapter 3, or from an appropriation for school development plans as set forth in Article 1 (commencing with Section 44670.1) of Chapter 3.1 and the Superintendent of Public Instruction shall not apportion, allocate, or otherwise provide any funds to the district pursuant to those programs.

The funding appropriated under the programs specified in Education Code section 44504, subdivision (b), are not state-mandated programs. Most are categorical programs undertaken at the discretion of the school district in order to receive grant funds. For example, the funding appropriated pursuant to the Budget Act Item 6110-231-0001 is local assistance funding to school districts "for the purpose of the Proposition 98 educational programs specified in subdivision (b) of Section 12.40 of this act." (Stats. 1999, ch. 50, State Budget Act.) The education programs specified in subdivision (b) of Section 12.40 of the 1999 State Budget Act include the Tenth Grade Counseling Program, the Reader Service for Blind Teacher Program, and the Home to School Transportation Program. (A full list of the educational programs identified in section 12.40 of the 1999 State Budget Act is provided in the footnote below.)[42]

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[42] Section 12.40 of the 1999 State Budget Act identifies the following programs: Item 6110-108-0001 – Tenth Grade Counseling (Ed. Code, § 48431.7); Item 6110-110-0001 – Reader Service for Blind Teachers (Ed. Code, §§ 45371, 44925); Item 6110-111-0001 – Home to School Transportation and Small District Transportation (Ed. Code, § 41850, 42290); Item 6110-116-0001 – School Improvement Program (Ed. Code, § 52000 et seq.); Item 6110-118-0001 – State Vocational Education (in lieu of funds otherwise appropriated pursuant to Business and Professions Code section 19632); Item 6110-119-0001 – Educational Services for Foster Youth (Ed. Code, § 42920 et seq.); Item 6110-120-0001 – Pupil Dropout Prevention Programs (Ed. Code, §§ 52890, 52900, 54720, 58550); Item 6110-122-0001 – Specialized Secondary Programs (Ed. Code, § 58800 et seq.); Item 6110-124-0001 – Gifted and Talented Pupil Program (Ed. Code, § 52200 et seq.); Item 6110-126-0001 – Miller-Unruh Basic Reading Act of 1965 (Ed. Code, § 54100 et seq.); Item 6110-127-0001 – Opportunity Classes and Programs (Ed. Code, § 48643 et seq.); Item 6110-128-0001 – Economic Impact Aid (Ed. Code, §§ 54020, 54031, 54033, 54040); Item 6110-131-0001 – American Indian Early Childhood Education Program (Ed. Code, § 52060 et seq.); Item 6110-146-0001 – Demonstration Programs in Intensive Instruction (Ed. Code, § 58600 et seq.); Item 6110-151-0001 – California Indian Education Centers (Ed. Code, § 33380); Item 6110-163-0001 – The Early Intervention for School Success Program (Ed. Code, § 54685 et seq.); Item 6110-167-0001 – Agricultural Vocational Education Incentive Program (Ed. Code, § 52460 et seq.); Item 6110-180-0001 – grant money pursuant to the federal Technology Literacy Challenge Grant Program; Item 6110-181-0001 – Educational Technology Programs (Ed. Code, § 51870 et seq.); Item 6110-193-0001 – Administrator Training and Evaluation Program, School Development Plans and Resource Consortia, Bilingual Teacher Training Program; Item 6110-197-0001 – Instructional Support-Improving School Effectiveness – Intersegmental Programs; Item 6110-203-0001 – Child Nutrition Programs (Ed. Code, §§ 41311, 49536, 49501, 49550, 49552, 49559); Item 6110-204-

The same is true for the other programs identified in Education Code section 44504, subdivision (b), all of which are voluntary: i.e., the Administrator Training and Evaluation Program, the Instructional Time and Staff Development Reform Program, and the School Development Plans Program.

Accordingly, staff finds that the 1999 amendment to Education Code sections 44662, subdivision (d), and 44664, subdivision (b), does not impose a mandate on school districts to receive and review the results of the Peer Assistance and Review Program as part of the Stull Act evaluation and, thus, these sections are not subject to article XIII B, section 6 of the California Constitution.

The remaining requirements imposed by the test claim legislation constitute a state-mandated program only for those certificated employees that perform the duties mandated by state and federal law.

The remaining test claim legislation requires school districts, in their evaluation of certificated personnel, to perform the following activities:

- assess and evaluate the performance of non-instructional certificated personnel (former Ed. Code, §§ 13485, 13487, as amended by Stats. 1975, ch. 1216; Ed. Code, § 44663, as amended by Stats. 1986, ch. 393);
- establish standards of expected student achievement at each grade level in each area of study to be included in a district's evaluation and assessment guidelines (former Ed. Code, § 13487, as repealed and reenacted by Stats. 1975, ch, 1216);
- evaluate and assess the performance of instructional certificated employees as it reasonably relates to the instructional techniques and strategies used by certificated employees, the certificated employee's adherence to curricular objectives, and the progress of pupils towards the state adopted academic content standards (Ed. Code, § 44662, subd. (b), as amended by Stats. 1983, ch. 498 and Stats. 1999, ch. 4); and
- assess and evaluate certificated personnel that receive an unsatisfactory evaluation once each year until the employee achieves a positive evaluation, or is separated from the school district (Ed. Code, § 44664, as amended by Stats. 1983, ch. 498).

Pursuant to the Supreme Court's decision in the *Department of Finance* case, staff finds that the evaluation and assessment activities required by the test claim legislation constitute state-mandated activities only for those certificated employees that perform the duties mandated by state or federal law. The activities associated with evaluating and assessing certificated personnel employed in local, discretionary educational programs do not constitute state-mandated activities and, thus, are not subject to article XIII B, section 6 of the California Constitution.

In *Department of Finance, supra*, the Court found, on page 731 of the decision, that:

> [*W*]*e reject claimants' assertion that they have been legally compelled to incur* notice and agenda *costs,* and hence are entitled to reimbursement from the state,

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0001 – 7th and 8th Grad Math Academies; and Item 6110-209-0001 – Teacher Dismissal Apportionments (Ed. Code, § 44944).

based merely upon the circumstance that notice and agenda provisions are mandatory elements of education-related program in which claimants have participated, *without regard to whether claimant's participation in the underlying program is voluntary or compelled.* [Emphasis added.]

In the present case, the California Constitution gives the Legislature plenary authority over education by requiring the Legislature to encourage by all suitable means the promotion of education and to provide for a system of common schools.[43] A system of common schools means one system, which prescribes the courses of study and educational progression from grade to grade. [44] Schools are required to meet the minimum standards and guidelines regarding course instruction and educational progression established by the Legislature.[45]

Given this background, the Legislature has historically mandated specified educational programs that school districts are required to follow. For example, Education Code section 48200 provides that each person between the ages of six and 18 years is subject to compulsory full-time education. School districts are required to adopt a course of study for grades 1 to 6 that shall include English, Mathematics, Social Sciences, Science, Visual and Performing Arts, Health, and Physical Education.[46] School districts are required to offer the following courses for grades 7 to 12: English, Social Sciences, Foreign Language, Physical Education, Science, Mathematics, Visual and Performing Arts, Career Technical Education; and Driver Education.[47] Education Code section 51225.3 describes the state-mandated courses of instruction required for high school graduation. In addition, in the appropriate elementary and secondary grade levels, the required course of study shall include instruction in personal and public safety and accident prevention (Ed. Code, § 51202), instruction about the nature and effects of alcohol, narcotics, and restricted dangerous drugs (Ed. Code, § 51203), and, in grades 7 and 8, instruction on parenting skills and education (Ed. Code, 51220.5). Finally, Education Code section 44805 states that "every teacher in the public schools shall enforce the course of study . . . prescribed for schools."

In addition, federal law requires school districts to provide a free and appropriate education to all handicapped children.[48]

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[43] California Constitution, article IX, sections 1, 5; *Hayes v. Commission on State Mandates* (1992) 11 Cal. App.4th 1564, 1579, fn. 5.

[44] *Wilson v. State Board of Education* (1999) 75 Cal.App.4th 1123, 1135-1136. In *Wilson*, the court determined that charter schools fall within the system of common schools because their educational programs are required to meet the same state standards, including minimum duration of instruction applicable to all public schools, measurement of student progress by the same assessments required of all public school students, and students are taught by teachers meeting the same minimum requirements as all other public school teachers. (*Id.* at p. 1138.)

[45] *Burton v. Pasadena City Board of Education* (1977) 71 Cal.App.3d 52, 58.

[46] Education Code section 51210.

[47] Education Code section 51220.

[48] *Hayes, supra*, 11 Cal.App.4th at page 1592.

Thus, school districts are required to employ certificated personnel to fulfill the requirements of the state and federal mandated educational programs. Accordingly, pursuant to the *Department of Finance* case, school districts are mandated by the state to perform the test claim requirements to evaluate and assess the certificated personnel performing the mandated functions.

Moreover, staff finds that the test claim requirements to evaluate and assess the certificated personnel performing mandated functions constitutes a program subject to article XIII B, section 6 of the California Constitution. The California Supreme Court, in the case of *County of Los Angeles* v. *State of California*[49], defined the word "program" within the meaning of article XIII B, section 6 as a program that carries out the governmental function of providing a service to the public, or laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state. Only one of these findings is necessary to trigger the applicability of article XIII B, section 6.[50]

Legislative intent of the test claim legislation is provided in Education Code section 44660 as follows:

> It is the intent of the Legislature that governing boards establish a uniform system of evaluation and assessment of the performance of all certificated personnel within each school district of the state, including schools conducted or maintained by county superintendents of education. The system shall involve the development and adoption by each school district of objective evaluation and assessment guidelines, which may, at the discretion of the governing board, be uniform throughout the district, or for compelling reasons, be individually developed for territories or schools within the district, provided that all certificated personnel of the district shall be subject to a system of evaluation and assessment adopted pursuant to this article.[51]

Staff finds that objectively evaluating the performance of certificated personnel performing mandated functions within a school district carries out the governmental function of providing a service to the public. Public education is a governmental function within the meaning of article XIII B, section 6. The California Supreme Court in *Lucia Mar* stated that "the contributions called for [in the test claim legislation] are used to fund a 'program' . . . for the education of handicapped children is clearly a governmental function providing a service to the public."[52] Additionally, the court in the *Long Beach Unified School District* case held that "although numerous private schools exist, education in our society is considered to be a peculiarly

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[49] *County of Los Angeles, supra,* 43 Cal.3d at page 56.

[50] *Carmel Valley Fire Protection Dist., supra,* 190 Cal.App.3d at page 537.

[51] As originally enacted, former Education Code section 13485 stated the legislative intent as follows: "It is the intent of the Legislature to establish a uniform system of evaluation and assessment of the performance of certificated personnel within each school district of the state. The system shall involve the development and adoption by each school district of objective evaluation and assessment guidelines."

[52] *Lucia Mar, supra,* 44 Cal.3d at page 835.

governmental function."[53] In addition, the test claim legislation imposes unique requirements on school districts.

However, the activities associated with evaluating and assessing certificated personnel employed in local, discretionary educational programs do not constitute state-mandated activities and, thus, are not subject to article XIII B, section 6 of the California Constitution. Pursuant to existing law, school districts are encouraged to develop their own local programs that best fit the needs and interests of the pupils. Unless the Legislature expressly imposes statutory requirements on school districts, school districts have discretionary control with their educational programs.[54]

For example, the Supreme Court in the *Department of Finance* case found that eight of the nine educational programs were voluntary and not mandated by the state. These include the following programs: School Improvement Program (Ed. Code, § 52010 et seq.); American Indian Early Childhood Education Program (Ed. Code, § 52060 et seq.); School-Based Coordinated Categorical Program (Ed. Code, § 52850 et seq.); Compensatory Education Programs (Ed. Code, § 54420 et seq.); Migrant Education Program (Ed. Code, § 54440 et seq.); Motivation and Maintenance Program (Ed. Code, § 54720 et seq.); Parental Involvement Program (Ed. Code, § 11500 et seq.); and Federal Indian Education Program (25 U.S.C, § 2604).[55]

Staff finds that school districts are free to discontinue their participation in these underlying voluntary programs and free to discontinue employing certificated personnel funded by these programs. Accordingly, the test claim requirements to evaluate and assess certificated personnel funded or employed in local discretionary programs are not mandated by the state and not subject to article XIII B, section 6 of the California Constitution.[56]

Since the parties did not file comments in response to the request for additional briefing on this issue, staff recommends that the determination of the certificated employees performing mandated functions for which schools districts are eligible to receive reimbursement be addressed during the parameters and guidelines phase.

Issue 2: Does the test claim legislation impose a new program or higher level of service within the meaning of article XIII B, section 6 of the California Constitution?

The California Supreme Court and the courts of appeal have held that article XIII B, section 6 was not intended to entitle local agencies and school districts for all costs resulting from legislative enactments, but only those costs mandated by a new program or higher level of

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[53] *Long Beach Unified School District, supra*, 225 Cal.App.3d at page 172.

[54] California Constitution, article IX, section 14; Education Code sections 35160, 35160.1, 51002.

[55] *Department of Finance, supra*, 30 Cal.4th at page 745.

[56] The court did not conclude whether school districts were legally compelled to participate in the Bilingual-Bicultural Education program (Ed. Code, § 52160 et seq.) since the case was denied on other grounds. (*Department of Finance, supra*, 30 Cal.4th at p. 746-747.)

service imposed on them by the state.[57] Generally, to determine if the program is new or imposes a higher level of service, the analysis must compare the test claim legislation with the legal requirements in effect immediately before the enactment of the test claim legislation.[58]

As indicated above, the Stull Act was enacted in 1971. The test claim legislation, enacted from 1975 to 1999, amended the Stull Act. The issue is whether the amendments constitute a new program or higher level of service within the meaning of article XIII B, section 6 of the California Constitution.

Develop job responsibilities for certificated non-instructional personnel, and assess and evaluate the performance of certificated non-instructional personnel (Former Ed. Code, §§ 13485, 13487, as amended by Stats. 1975, ch. 1216; Ed. Code, § 44663, as amended by Stats. 1986, ch. 393).

The claimant is requesting reimbursement for the following activities relating to certificated non-instructional employees:

- Establish and define job responsibilities for certificated non-instructional personnel, including, but not limited to, supervisory and administrative personnel.
- Evaluate and assess the performance of certificated non-instructional personnel as it reasonably relates to the fulfillment of the established job responsibilities.
- Prepare and draft a written evaluation of the certificated non-instructional employee. The evaluation shall include recommendations, if necessary, as to areas of improvement.
- Receive and review from a certificated non-instructional employee written responses regarding the evaluation.
- Prepare and hold a meeting between the certificated non-instructional employee and the evaluator to discuss the evaluation and assessment.[59]

As originally enacted in 1971, the Stull Act stated in former Education Code section 13485 the following:

> It is the intent of the Legislature to establish a uniform system of evaluation and assessment of the performance of certificated personnel within each school district of the state. The system shall involve the development and adoption by each school district of objective evaluation and assessment guidelines.

Former Education Code section 13486 stated the following:

> In the development and adoption of these guidelines and procedures, the governing board shall avail itself of the advice of the certificated instructional personnel in the district's organization of certificated personnel.

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[57] *Lucia Mar Unified School Dist., supra*, 44 Cal.3d at page 834; *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1816.

[58] *Lucia Mar Unified School Dist., supra*, 44 Cal.3d at page 835.

[59] Exhibit A, Test Claim, page 6.

Former Education Code section 13487 required school districts to develop and adopt specific evaluation and assessment guidelines for certificated personnel. Former section 13487 stated the following:

> The governing board of each school district shall develop and adopt specific evaluation and assessment guidelines which shall include but shall not necessarily be limited in content to the following elements:
>
> (a) The establishment of standards of expected student progress in each area of study and of techniques for the assessment of that progress.
>
> (b) Assessment of certificated personnel as it relates to the established standards.
>
> (c) Assessment of other duties normally required to be performed by certificated employees as an adjunct to their regular assignments.
>
> (d) The establishment of procedures and techniques for ascertaining that the certificated employee is maintaining proper control and is preserving a suitable learning environment.

Former Education Code section 13488 required that the evaluation and assessment be reduced to writing, that an opportunity to respond be given to the certificated employee, and that a meeting be held between the certificated employee and the evaluator to discuss the evaluation. Former section 13488 stated the following:

> Evaluation and assessment made pursuant to this article shall be reduced to writing and a copy thereof shall be transmitted to the certificated employee not later than 60 days before the end of each school year in which the evaluation takes place. The certificated employee shall have the right to initiate a written reaction or response to the evaluation. Such response shall become a permanent attachment to the employee's personnel file. Before the end of the school year, a meeting shall be held between the certificated personnel and the evaluator to discuss the evaluation.

And, former Education Code section 13489 required that the evaluation and assessment be performed on a continuing basis, and that the evaluation include necessary recommendations as to areas of improvement. Former Education Code section 13489, as enacted in 1971, stated the following:

> Evaluation and assessment of the performance of each certificated employee shall be made on a continuing basis, at least once each school year for probationary personnel, and at least every other year for personnel with permanent status. The evaluation shall include recommendations, if necessary, as to areas of improvement in the performance of the employee. In the event an employee is not performing his duties in a satisfactory manner according to the standards prescribed by the governing board, the employing authority shall notify the employee in writing of such fact and describe such unsatisfactory performance. The employing authority shall thereafter confer with the employee making specific recommendations as to areas of improvement in the employee's performance and endeavor to assist him in such performance.

In addition, section 42 of the 1971 statute provided a specific exemption for certificated employees of community colleges if a related bill was enacted. Section 42 stated the following:

> Article 5 (commencing with Section 13401) and Article 5.5 (commencing with Section 13485) of Chapter 2 of Division 10 of the Education Code shall not apply to certificated employees in community colleges if Senate Bill No. 696 or Assembly Bill No. 3032 is enacted at the 1971 Regular Session of the Legislature.

According to the history, Senate Bill 696 was enacted as Statutes 1971, chapter 1654. Thus, certificated employees of community colleges were not required to comply with the Stull Act.

In 1972, former Education Code section 13485 was amended to specifically exclude from the requirements of the Stull Act certificated personnel employed on an hourly basis in adult education classes.[60]

In 1973, former Education Code section 13489 was amended to exclude hourly and temporary certificated employees and substitute teachers, at the discretion of the governing board, from the requirement to evaluate and assess on a continuing basis.[61]

Thus, under prior law, school districts were required to perform the following activities as they related to "certificated personnel:"

- Develop and adopt specific evaluation and assessment guidelines for the performance of "certificated personnel."
- Evaluate and assess "certificated personnel" as it relates to the established standards.
- Prepare and draft a written evaluation of the "certificated employee." The evaluation shall include recommendations, if necessary, as to areas of improvement.
- Receive and review from a "certificated employee" written responses regarding the evaluation.
- Prepare and hold a meeting between the "certificated employee" and the evaluator to discuss the evaluation and assessment.

The test claim legislation, in 1975 (Stats. 1975, ch. 1216), amended the Stull Act by adding language relating to certificated "non-instructional" employees. As amended, former Education Code section 13485 stated in relevant part the following (with the amended language underlined):

> It is the intent of the Legislature that governing boards establish a uniform system of evaluation and assessment of the performance of <u>all</u> certificated personnel within each school district of the state . . . .

Former Education Code section 13487 was also repealed and reenacted by Statutes 1975, chapter 1216, as follows (amendments relevant to this issue are underlined):

> (a) The governing board of each school district shall establish standards of expected student achievement at each grade level in each area of study.

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[60] Statutes 1972, chapter 535.

[61] Statutes 1972, chapter 1973.

(b) The governing board of each school district shall evaluate and assess certificated employee competency as it reasonably relates to (1) the progress of students toward the established standards, (2) the performance of those noninstructional duties and responsibilities, including supervisory and advisory duties, as may be prescribed by the board, and (3) the establishment and maintenance of a suitable learning environment within the scope of the employee's responsibilities.

(c) The governing board of each school district shall establish and define job responsibilities for those certificated noninstructional personnel, including, but not limited to, supervisory and administrative personnel, whose responsibilities cannot be evaluated appropriately under the provisions of subdivision (b), and shall evaluate and assess the competency of such noninstructional employees as it reasonably relates to the fulfillment of those responsibilities. ...

The 1975 test claim legislation did not amend the requirements in former Education Code sections 13488 or 13489 to prepare written evaluations of certificated employees, receive responses to those evaluations, and conduct a meeting with the certificated employee to discuss the evaluation.

Additionally, in 1986, the test claim legislation (Stats. 1986, ch. 393) amended Education Code section 44663 (which derived from former Ed. Code, § 13488) by adding subdivision (b) to provide that the evaluation and assessment of certificated non-instructional employees shall be reduced to writing before June 30 of the year that the evaluation is made, that an opportunity to respond be given to the certificated non-instructional employee, and that a meeting be held between the certificated non-instructional employee and the evaluator to discuss the evaluation before July 30. Education Code section 44663, subdivision (b), as added by the test claim legislation, states the following:

> In the case of a certificated noninstructional employee, who is employed on a 12-month basis, the evaluation and assessment made pursuant to this article shall be reduced to writing and a copy thereof shall be transmitted to the certificated employee no later than June 30 of the year in which the evaluation and assessment is made. A certificated noninstructional employee, who is employed on a 12-month basis shall have the right to initiate a written reaction or response to the evaluation. This response shall become a permanent attachment to the employee's personnel file. Before July 30 of the year in which the evaluation and assessment take place, a meeting shall be held between the certificated employee and the evaluator to discuss the evaluation and assessment.

The claimant contends that the Stull Act, as originally enacted in 1971, required the assessment and evaluation of teachers, or certificated instructional employees, only. The claimant argues that when the Stull Act was amended in 1975 and 1986, it added the requirement for schools districts to develop job responsibilities to assess and evaluate the performance of non-instructional personnel. The claimant contends that under the rules of statutory construction, an amendment indicates the legislative intent to change the law. The claimant contends that this

amendment imposed additional activities on school districts to develop job responsibilities and evaluate certificated non-instructional employees, which constitute a higher level of service.[62]

The Department of Finance argues that school districts have always had the requirement to assess and evaluate non-instructional personnel because the original legislation enacted in 1971 refers to all certificated personnel. The Department of Finance contends that the subsequent amendments that specifically list certificated non-instructional personnel, were clarifying edits and not new requirements.[63]

The Stull Act was an existing program when the test claim legislation was enacted. Thus, the issue is whether the 1975 and 1986 amendments to the Stull Act mandated an increased, or higher level of service to develop job responsibilities and to evaluate and assess certificated non-instructional employees. In 1987, the California Supreme Court in *County of Los Angeles v. State of California* expressly stated that the term "higher level of service" must be read in conjunction with the phrase "new program." Both are directed at *state-mandated increases in the services* provided by local agencies.[64]

In 1990, the Second District Court of Appeal decided the *Long Beach Unified School District* case, which challenged a test claim filed with the Board of Control on executive orders issued by the Department of Education to alleviate racial and ethnic segregation in schools.[65] The court determined that the executive orders did not constitute a "new program" since schools had an existing constitutional obligation to alleviate racial segregation.[66] However, the court found that the executive orders constituted a "higher level of service" because the requirements imposed by the state went beyond constitutional and case law requirements. The court stated in relevant part the following:

> The phrase "higher level of service" is not defined in article XIII B or in the ballot materials. [Citation omitted.] A mere increase in the cost of providing a service which is the result of a requirement mandated by the state is not tantamount to a higher level of service. [Citation omitted.] However, a review of the Executive Order and guidelines shows that a higher level of service is mandated because the requirements go beyond constitutional and case law requirements. . . .While these steps fit within the "reasonably feasible" description of [case law], the point is that these steps are no longer merely being suggested as options which the local school district may wish to consider but are *required acts*. *These requirements constitute a higher level of service*. We are supported in our conclusion by the report of the Board to the Legislature regarding its decision that the Claim is reimbursable: "Only those costs that are above and beyond the regular level of service for like pupils in the district are reimbursable."[67, 68]

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[62] Exhibit C.

[63] Exhibit B.

[64] *County of Los Angeles, supra*, 43 Cal.3d at page 56.

[65] *Long Beach Unified School District, supra,* 225 Cal.App.4th 155.

[66] *Id.* at page 173.

[67] *Ibid.*, emphasis added.

Thus, in order for the 1975 and 1986 amendments to the Stull Act, relating to certificated non-instructional personnel, to impose a new program or higher level of service, the Commission must find that the state is imposing new required acts or activities on school districts beyond those already required by law.

For the reasons described below, staff finds that school districts have been required to develop job responsibilities for certificated non-instructional employees, evaluate and assess certificated non-instructional employees, draft written evaluations of certificated non-instructional employees, receive and review written responses to the evaluation from certificated non-instructional employees, and conduct meetings regarding the evaluation with certificated non-instructional employees under the Stull Act since 1971, before the enactment of the test claim legislation.

Claimant argues that the statutory amendments to the Stull Act, by themselves, reflect the legislative intent to change the law. However, the intent to change the law may not always be presumed by an amendment, as suggested by the claimant. The court has recognized that changes in statutory language can be intended to clarify the law, rather than change it.

> We assume the Legislature amends a statute for a purpose, but that purpose need not necessarily be to change the law. [Citation.] Our consideration of the surrounding circumstances can indicate that the Legislature made ... changes in statutory language in an effort only to clarify a statute's true meaning. [Citations omitted.][69]

Thus, to determine whether the Stull Act, as originally enacted in 1971, applied to all certificated employees of a school district, instructional and non-instructional employees alike, the Commission must apply the rules of statutory construction. Under the rules of statutory construction, the first step is to look at the statute's words and give them their plain and ordinary meaning. Where the words of the statute are not ambiguous, they must be applied as written and may not be altered in any way. Moreover, the intent must be gathered with reference to the whole system of law of which it is a part so that all may be harmonized and have effect.[70]

As indicated by the plain language of former Education Code sections 13485,13487, 13488, and 13489, school districts were required under prior law to develop evaluation and assessment guidelines for the evaluation of "certificated" employees, evaluate and assess "certificated" employees on a continuing basis, draft written evaluations of "certificated" employees, receive and review written response to the evaluation from "certificated" employees, and conduct meetings regarding the evaluation with "certificated" employees. The plain language of these statutes does not distinguish between instructional employees (teachers) and non-instructional employees (principals, administrators), or specifically exclude certificated non-instructional

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[68] See also, *County of Los Angeles v. Commission on State Mandates* (2003) 110 Cal.App.4th 1176, 1193-1194, where the Second District Court of Appeal followed the earlier rulings and held that in the case of an existing program, reimbursement is required only when the state is divesting itself of its responsibility to provide fiscal support for a program, or is forcing a new program on a locality for which it is ill-equipped to allocate funding.

[69] *Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 243.

[70] *People v. Thomas* (1992) 4 Cal.4th 206, 210.

employees. When read in context with the whole system of law of which these statutes are a part, the requirements of the Stull Act originally applied to *all* certificated employees under prior law.

As enacted, the Stull Act was placed in Chapter 2 of Division 10 of the 1971 Education Code, a chapter addressing " Certificated Employees." Certificated employees are those employees directly involved in the educational process and include both instructional and non-instructional employees such as teachers, administrators, supervisors, and principals.[71] Certificated employees must be properly credentialed for the specific position they hold.[72] A "certificated person" was defined in former Education Code section 12908 as "a person who holds one or more documents such as a certificate, a credential, or a life diploma, which singly or in combination license the holder to engage in the school service designated in the document or documents." The definition of "certificated person" governs the construction of Division 10 of the former Education Code and is not limited to instructional employees.[73]

Thus, the plain language of former Education Code sections 13485,13487, 13488, and 13489 read within the context of Chapter 2 of Division 10 of the 1971 Education Code, a division that governs both instructional and non-instructional certificated employees, required school districts to develop evaluation and assessment guidelines and to evaluate both instructional and non-instructional certificated employees based on the guidelines on a continuing basis.

In addition, former Education Code section 13486, as enacted in 1971, expressly required school districts to avail themselves "of the advice of the *certificated instructional personnel* in the district's organization of certificated personnel" when developing and adopting the evaluation guidelines. (Emphasis added.) Former Education Code sections 13485,13487, 13488, and 13489, enacted at the same time, did not limit the evaluation and assessment requirements to "certificated instructional personnel" only. Rather, "certificated employees" were required to be evaluated. Thus, had the Legislature intended to require school districts to evaluate and assess only teachers, as argued by claimant, they would have limited the requirements of former Education Code sections 13485,13487, 13488, 13489 to "certificated instructional personnel." Under the rules of statutory construction, the Commission is prohibited from altering the plain language of a statute, or writing into a statute, by implication, express requirements that the Legislature itself has not seen fit to place in the statute.[74]

Moreover, under prior law, the Legislature expressly excluded certain types of certificated employees from the requirements of the Stull Act, and never expressly excluded non-instructional employees. When the Stull Act was originally enacted in 1971, the Legislature excluded employees of community colleges from the requirements.[75] In 1972, the Legislature revisited the Stull Act and expressly excluded certificated personnel employed on an hourly basis

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[71] Former Education Code section 13187 et seq. of the 1971 Education Code.

[72] Former Education Code section 13251 et seq. of the 1971 Education Code.

[73] Former Education Code 12901 of the 1971 Education Code.

[74] *Whitcomb v. California Employment Commission* (1944) 24 Cal.2d 753, 757; *In re Rudy L.* (1994) 29 Cal.App.4th 1007, 1011.

[75] Section 42 of Statutes 1971, chapter 361.

in adult education classes.[76] In 1973, school districts were authorized to exclude hourly and temporary certificated employees, and substitute teachers from the evaluation requirement.[77] Under the rules of statutory construction, where exceptions to a general rule are specified by statute, other exceptions are not to be implied or presumed, absent a discernible and contrary legislative intent.[78] Thus, it cannot be implied from the plain language of the legislation that the Legislature intended to exclude certificated non-instructional employees from the requirements of the Stull Act.

The conclusion that the Stull Act applied to non-instructional employees under prior law is further supported by case law. In 1977, the First District Court of Appeal considered *Grant v. Adams*.[79] The *Grant* case involved a school district employee who was a certified teacher with credentials as an administrator who had been serving as a principal (a non-instructional employee) of an elementary school from 1973 through 1974. In May 1974, the employee was reassigned and demoted to a teaching position for the 1974-1975 school year.[80] The employee made the argument that the Stull Act, when coupled with other statutory provisions, created a property interest in his position as a principal and required that an evaluation be conducted before termination of an administrative assignment. The court disagreed with the employee's argument, holding that the Stull Act evaluation was not a precondition to reassignment or dismissal.[81] When analyzing the issue, the court made the following findings:

> In 1971, the Legislature passed the so-called "Stull Act," Education Code sections 13485-13490. Among other things the Stull Act required that all school districts establish evaluation procedures for certificated personnel. (Ed. Code, § 13485.) *The state board of education developed guidelines for evaluation of* ***administrators*** *and teachers pursuant to the Stull Act. Respondents [school district] adopted those guidelines without relevant change in June 1972.* The guidelines called for evaluation of personnel on permanent status at least once every two years. Appellant was given no evaluation pursuant to the guidelines. (Emphasis added.)[82]

In 1979, the California Supreme Court decided *Miller v. Chico Unified School District Board of Education*, a case with similar facts.[83] In the *Miller* case, the employee was a principal of a junior high school from 1958 until 1976, when he was reassigned to a teaching position. In 1973, the school board adopted procedures to formally evaluate administrators pursuant to the

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[76] Statutes 1972, chapter 535.

[77] Statutes 1973, chapter 220.

[78] *People v. Galambos* (2002) 104 Cal.App.4th 1147.

[79] *Grant v. Adams* (1977) 69 Cal.App.3d 127.

[80] *Id.* at page 130.

[81] *Id.* at pages 134-135.

[82] *Id.* at page 143, footnote 3.

[83] *Miller v. Chico Unified School District Board of Education* (1979) 24 Cal.3d 703.

Stull Act.[84] The employee received a Stull Act evaluation in 1973, 1974, and 1975.[85] In 1976, the school board requested the employee's cooperation in his fourth annual Stull evaluation report, but the employee refused on advice of counsel.[86] The employee sought reinstatement to his position as a principal on the ground that the school board failed to comply with the Stull Act.[87] The court denied the employee's request and made the following findings:

> The record indicates, however, that the school board substantially complied with the Stull Act's mandate that the board fix performance guidelines for its certificated personnel, evaluate plaintiff in light of such guidelines, inform plaintiff of the results of any evaluation, and suggest to plaintiff ways to improve his performance.
>
> The school board's guidelines provide for annual evaluations of supervisory personnel; accordingly, the board evaluated plaintiff in 1973, 1974, and 1975. Although plaintiff received generally satisfactory evaluations in 1973 and 1974, the board's evaluation report in 1974 contains suggestions for specific areas of improvement. . . .
>
> Plaintiff's final Stull Act evaluation in June 1975 plainly notified plaintiff "in writing" of any unsatisfactory conduct on his part, and in addition provided a forum for plaintiff's supervisors to make "specific recommendations as to areas of improvement in the employee's performance and endeavor to assist him in such performance." [Former Ed. Code, § 13489.) . . . .
>
> The court is surely obligated to understand the purpose of ... [the Stull Act] and to apply those sections to the relevant facts.[88]

Finally, the legislative history of the 1986 test claim legislation supports the conclusion that the specific language added to the Stull Act was not intended to impose new required acts on school districts. As stated above, the test claim legislation (Stats. 1986, ch. 393) amended Education Code section 44663 by adding subdivision (b) to provide that the evaluation and assessment of certificated non-instructional employees shall be reduced to writing before June 30 of the year that the evaluation is made, that an opportunity to respond be given to the certificated non-instructional employee, and that a meeting be held between the certificated non-instructional employee and the evaluator to discuss the evaluation before July 30. The legislative history of Statutes 1986, chapter 393 (Assem. Bill No. 3878) indicates that the purpose of the bill was to extend for 45 days the *current* requirement for the evaluation of certificated non-instructional employees.[89] The analysis of Assembly Bill 3878 by the Assembly Education Committee, dated

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[84] *Id.* at page 707.

[85] *Id.* at pages 708-710, 717.

[86] *Id.* at page 709.

[87] *Id.* at page 716.

[88] *Id.* at pages 717-718.

[89] Letter from San Diego Unified School District to the Honorable Teresa Hughes, Chairperson of the Assembly Education Committee, on Assembly Bill 3878, April 4, 1986; Assembly

April 7, 1986, states the following:

> Current statute requires evaluations of noninstructional certificated employees on 12 month contracts to be conducted within 30 days before the last school day. This apparently is a problem for San Diego [Unified School District] because all evaluations are jammed in at the end of the school year. They feel it would make more sense to allow extra time to evaluate those on 12 month contracts and spread the process out over a longer period of time.[90]

The April 24, 1986 analysis of Assembly Bill 3878 by the Legislative Analyst states the following:

> Our review indicates that this bill does not mandate any new duties on school district governing boards, but simply extends the date by which evaluations of certain certificated employees must be completed.[91]

Based on the foregoing authorities, staff finds that school districts were required under prior law to perform the following activities:

- Develop and adopt specific evaluation and assessment guidelines for the performance of certificated non-instructional personnel.
- Evaluate and assess certificated non-instructional personnel as it relates to the established standards.
- Prepare and draft a written evaluation of the certificated non-instructional employee. The evaluation shall include recommendations, if necessary, as to areas of improvement.
- Receive and review from a certificated non-instructional employee written responses regarding the evaluation.
- Prepare and hold a meeting between the certificated non-instructional employee and the evaluator to discuss the evaluation and assessment.

Staff further finds that the language added to former Education Code section 13487 by the 1975 test claim legislation to "establish and define job responsibilities" for certificated non-instructional personnel falls within the preexisting duty to develop and adopt objective

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Education Committee, Republican Analysis on Assembly Bill 3878, April 7, 1986; Department of Finance, Enrolled Bill Report on Assembly Bill 3878, April 21, 1986; Legislative Analyst, Analysis of Assembly Bill 3878, April 24, 1986; Assembly Education Committee, Republican Analysis on Assembly Bill 3878, April 26, 1986; Senate Committee on Education, Staff Analysis on Assembly Bill 3878, May 28, 1986; Legislative Analyst, Analysis of Assembly Bill 3878, June 18, 1986. (Exhibit I.)

[90] *Id.* at page 301.

[91] *Id.* at page 306.

evaluation and assessment guidelines for all certificated employees, does not mandate any new required acts, and, thus, does not constitute a new program or higher level of service.[92]

Accordingly, staff finds that the 1975 and 1986 amendments to former Education Code sections 13485 and 13487 and Education Code section 44663 as they relate to certificated non-instructional employees do not constitute a new program or higher level of service.[93]

Establish standards of expected pupil achievement at each grade level in each area of study (Former Ed. Code, § 13487, as repealed and reenacted by Stats. 1975, ch. 1216).

The claimant is requesting reimbursement to establish standards of expected pupil achievement at each grade level in each area of study.

Former Education Code section 13487, as originally enacted in 1971, required school districts to develop and adopt specific evaluation and assessment guidelines for certificated personnel. Former section 13487 stated in relevant part the following:

> The governing board of each school district shall develop and adopt specific evaluation and assessment guidelines which shall include but shall not necessarily be limited in content to the following elements:
>
> (a) The establishment of standards of expected student progress in each area of study and of techniques for the assessment of that progress.

The test claim legislation, in Statutes 1975, chapter 1216, repealed and reenacted former Education Code section 13487. As reenacted, the statute provided the following (amendments relevant to this issue are reflected with strikeout and underline):

> (a) The governing board of each school district shall establish standards of expected student ~~progress~~ achievement at each grade level in each area of study.

The claimant contends that the 1975 test claim legislation imposed a new program or higher level of service on school districts to rewrite standards for employee assessment to reflect expected student "achievement" (as opposed expected student "progress") and to expand the

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[92] *Long Beach Unified School District, supra*, 225 Cal.App.4th at page 173.

[93] Staff notes that the analysis by the Legislative Analyst on Senate Bill 777, which was enacted as Statutes 1975, chapter 1216, concludes that "there would also be undetermined increased local costs due to the addition of ... non-instructional certificated employees in evaluation and assessment requirements." (See, Exhibit I, pp. 292-294.) The courts have determined, however, that legislative findings are not relevant to the issue of whether a reimbursable state-mandated program exists:

> [T]he statutory scheme [in Government Code section 17500 et seq.] contemplates that the Commission, as a quasi-judicial body, has the sole and exclusive authority to adjudicate whether a state mandate exists. Thus, any legislative findings are irrelevant to the issue of whether a state mandate exists . . . ." (*City of San Jose, supra*, 45 Cal.App.4th at pp. 1817-1818, quoting *County of Los Angeles v. Commission on State Mandates* (1995) 32 Cal.App.4th 805, 819, and *Kinlaw v. State of California, supra*, 54 Cal.3d at p. 333.)

standards to reflect expected student achievement at each "grade level."[94] The claimant further states the following:

> Prior law only required that the standards of expected student achievement be established to show student progress. Under prior law, these standards may have tracked student progress over time. For example, a school district may have established reading standards for pupils upon graduating from eighth grade. Under the test claim legislation, school districts no longer have the ability to determine over what period standards of expected student achievement will be established: The standards must be established by each grade level. The new standards outlined in the test claim legislation align more closely with the state's new content standards . . ."[95]

The Department of Finance contends that the 1975 amendment to former Education Code section 13487 does not constitute a new program or higher level of service. The Department states the following:

> Finance notes that in practice, school district standards required by Chapter 361/71 would have had to have been differentiated by grade in order to provide a measure of "expected student progress." Finance also notes that changing the term "expected student progress" to the term "expected student achievement" is a wording change that would not require additional work on the part of school districts. These changes did not require additional work on the part of school districts, and therefore, are not reimbursable.[96,97]

In order for the 1975 reenactment of former Education Code section 13487 to constitute a new program or higher level of service, the Commission must find that the state is imposing new required acts or activities on school districts beyond those already required by law.[98] For the reasons below, staff finds that the 1975 reenactment of former Education Code section 13487 does not constitute a new program or higher level of service.

On its face, the activities imposed by the 1975 reenactment of former Education Code section 13487 do not appear different than the activities required by the original 1971 version of former Education Code section 13487. Both versions require that standards for evaluation be established so that certificated personnel are evaluated based on student progress. As originally enacted in 1971, "[t]he governing board of each school district shall develop and adopt specific

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[94] Exhibit A, Test Claim, page 4.

[95] Exhibit C, page 2.

[96] Exhibit B, page 1.

[97] The Department of Finance's factual assertion is not supported by "documentary evidence ... authenticated by declarations under penalty of perjury signed by persons who are authorized and competent to do so," as required by the Commission's regulations. (Cal. Code Regs., tit. 2, § 1183.02, subd. (c)(1).)

[98] *County of Los Angeles, supra*, 43 Cal.3d at page 56; *Long Beach Unified School Dist., supra*, 225 Cal.App.4th at page 173; and *County of Los Angeles, supra*, 110 Cal.App.4th at pages 1193-1194.

evaluation and assessment guidelines which shall include ... the establishment of standards of *expected student progress* in each area of study ... [and the] ... assessment of certificated personnel competence as it relates to the established standards." (Emphasis added.) As reenacted in 1975, "[t]he governing board of each school district shall establish standards of expected student achievement at each grade level in each area of study ... and evaluate and assess certificated employee competency as it reasonably relates to ... *the progress of students toward the established standards*." (Emphasis added.)

In addition, the legislative history of the test claim statute, Statutes 1975, chapter 1216 (Sen. Bill No. 777), does not reveal an intention by the Legislature to impose new required acts. Legislative history simply indicates that the language was "modified."[99]

Moreover, claimant's argument, that the test claim statute imposes a higher level of service because, under prior law, school districts "may" have only tracked student progress over time (for example, by establishing "reading standards for pupils upon graduating from eighth grade"), is not persuasive. Under the claimant's interpretation, the performance of a first grade teacher could be evaluated and assessed based on reading standards for eighth grade students; students that the teacher did *not* teach. The Stull Act, as originally enacted, required the school district to evaluate and assess the performance of all certificated employees based on the progress of their pupils. In addition, the claimant's factual assertion is not supported by "documentary evidence ... authenticated by declarations under penalty of perjury signed by persons who are authorized and competent to do so," as required by the Commission's regulations.[100]

Finally, assuming for the sake of argument only, that school districts were required to establish new standards of expected student achievement due to the 1975 test claim statute, that activity would have occurred outside the reimbursement period for this claim. The reimbursement period for this test claim, if approved by the Commission, begins July 1, 1998. The test claim statute was enacted in 1975, 23 years earlier than the reimbursement period. There is no requirement in the test claim statute that establishing the standards is an ongoing activity.

Therefore, based on the evidence in the record, staff finds that former Education Code section 13487 as reenacted by Statutes 1975, chapter 1216, does not impose a new program or higher level of service on school districts.

Evaluate and assess the performance of certificated instructional employees (Ed. Code, § 44662, subd. (b), as amended by Stats. 1983, ch. 498 and Stats. 1999, ch. 4).

The claimant requests reimbursement to evaluate and assess the performance of certificated instructional employees as it reasonably relates to the following:

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[99] Senate Committee on Education, Staff Analysis on Senate Bill 777, as amended on May 7, 1975; Assembly Education Committee, Analysis of Senate Bill 777, as amended on August 12, 1975; Ways and Means Staff Analysis on Senate Bill 777, as amended on August 19, 1975; Legislative Analyst, Analysis of Senate Bill 777, as amended on August 19, 1975, dated August 22, 1975; Assembly Third Reading of Senate Bill 777, as amended on August 19, 1975. (Exhibit I.)

[100] Cal. Code Regs., tit. 2, § 1183.02, subd. (c)(1).

- the instructional techniques and strategies used by the certificated employee (Stats. 1983, ch. 498);
- the certificated employee's adherence to curricular objectives (Stats 1983, ch. 498); and
- the progress of pupils towards the state adopted academic content standards as measured by state adopted criterion referenced assessments (Stats. 1999, ch. 4).[101]

The Department of Finance agrees that these activities constitute reimbursable state-mandated activities under article XIII B, section 6.[102]

For the reasons described below, staff finds that evaluating and assessing the performance of certificated instructional employees that perform the requirements of educational programs mandated by state or federal law based on these factors constitutes a new program or higher level of service.

The instructional techniques and strategies used by the employee, and the employee's adherence to curricular objectives. In 1983, the test claim legislation amended Education Code section 44662, subdivision (b), to require the school district to evaluate and assess certificated employee competency as it reasonably relates to "the instructional techniques and strategies used by the employee," and "the employee's adherence to curricular objectives." (Stats. 1983, ch. 498.)

Before the 1983 test claim legislation was enacted, the Stull Act required school districts to establish an objective and uniform system of evaluation and assessment of the performance of certificated personnel.[103] When developing these guidelines, school districts were required to receive advice from certificated instructional personnel. The court interpreted this provision to require districts to meet and confer, and engage in collective bargaining, with representatives of certificated employee organizations before adopting the evaluation guidelines.[104] Thus, certificated instructional employees were evaluated based on the guidelines developed through collective bargaining, and on the following criteria required by the state:

- the progress of students toward the established standards of expected student achievement at each grade level in each area of study; and
- the establishment and maintenance of a suitable learning environment within the scope of the employee's responsibilities.[105]

Under prior law, the evaluation had to be reduced to writing and a copy of the evaluation given to the employee. An evaluation meeting had to be held between the certificated employee and the evaluator to discuss the evaluation and assessment.[106]

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[101] Exhibit A, Test Claim, page 6.

[102] Exhibit B.

[103] Former Education Code sections 13485 and 13487.

[104] *Certificated Employees Council of the Monterey Peninsula Unified School District v. Monterey Peninsula Unified School District* (1974) 42 Cal.App.3d 328, 334.

[105] Former Education Code section 13487, subdivision (b), as amended by Statutes 1975, chapter 1216.

The 1983 test claim statute still requires school districts to reduce the evaluation to writing, to transmit a copy to the employee, and to conduct a meeting with the employee to discuss the evaluation and assessment.[107] These activities are not new. However, the 1983 test claim statute amended the evaluation requirements by adding two new evaluation factors: the instructional techniques and strategies used by the employee, and the employee's adherence to curricular objectives. Thus, school districts are now required by the state to evaluate and assess the competency of certificated instructional employees as it reasonably relates to:

- the progress of students toward the established standards of expected student achievement at each grade level in each area of study;
- the instructional techniques and strategies used by the employee;
- the employee's adherence to curricular objectives; and
- the establishment and maintenance of a suitable learning environment, within the scope of the employee's responsibilities.

School districts may have been evaluating teachers on their instructional techniques and adherence to curricular objectives before the enactment of the test claim statute based on the evaluation guidelines developed through the collective bargaining process. But, the state did not previously require the evaluation in these two areas. Government Code section 17565 states that "if a ... school district, at its option, has been incurring costs which are subsequently mandated by the state, the state shall reimburse the ... school district for those costs after the operative date of the mandate."

Accordingly, staff finds that Education Code section 44662, subdivision (b), as amended by Statutes 1983, chapter 498, imposes a new required act and, thus, a new program or higher level of service on school districts to evaluate and assess the performance of certificated instructional employees that perform the requirements of educational programs mandated by state or federal law as it reasonably relates to the instructional techniques and strategies used by the employee and the employee's adherence to curricular objectives.

Reimbursement for this activity is limited to the review of the employee's instructional techniques and strategies and adherence to curricular objectives, and to include in the written evaluation of the certificated instructional employees the assessment of these factors during the following evaluation periods:

- once each year for probationary certificated employees;
- every other year for permanent certificated employees; and
- beginning January 1, 2004, every five years for certificated employees with permanent status who have been employed at least ten years with the school district, are highly

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[106] Former Education Code sections 13485-13490, as originally enacted by Statutes 1971, chapter 361.

[107] Education Code sections 44662, 44663, 44664.

qualified (as defined in 20 U.S.C. § 7801)[108], and whose previous evaluation rated the employee as meeting or exceeding standards, if the evaluator and certificated employee being evaluated agree.[109]

State adopted academic content standards as measured by state adopted assessment tests. In 1999, the test claim legislation (Stats. 1999, ch. 4) amended Education Code 44662, subdivision (b)(1), by adding the following underlined language:

> The governing board of each school district shall evaluate and assess certificated employee competency as it reasonably relates to:
>
> The progress of pupils toward the standards established pursuant to subdivision (a) [standards of expected pupil achievement at each grade level in each area of study] and, if applicable, the state adopted academic content standards as measured by state adopted criterion referenced assessments.

Before the 1999 test claim legislation, school districts were required to evaluate and assess certificated employees based on the progress of pupils. The progress of pupils was measured by standards, adopted by *local school districts*, of expected student achievement at each grade level in each area of study. The evaluation had to be reduced to writing and a copy of the evaluation given to the employee. An evaluation meeting had to be held between the certificated employee and the evaluator to discuss the evaluation and assessment.[110]

The 1999 test claim legislation still requires school districts to evaluate and assess certificated employees based on the progress of pupils. It also still requires school districts to reduce the evaluation to writing, to transmit a copy to the employee, and to conduct a meeting with the employee to discuss the evaluation and assessment.[111] These activities are not new.

However, the test claim legislation, beginning January 1, 2000[112], imposes a new requirement on school districts to evaluate the performance of certificated employees as it reasonably relates to the progress of pupils based not only on standards adopted by local school districts, but also on the academic content standards adopted by the *state*, as measured by the state adopted assessment tests.

The state academic content standards and the assessment tests that measure the academic progress of students were created in 1995 with the enactment of the California Assessment of Academic Achievement Act.[113] The act required the State Board of Education to develop and

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[108] Section 7801 of title 20 of the United States Code defines "highly qualified" as a teacher that has obtained full state certification as a teacher or passed the state teacher licensing examination, and holds a license to teach, and the teacher has not had certification requirements waived on an emergency, temporary, or provisional basis.

[109] Education Code section 44664, subdivision (a)(3), as amended by Statutes 2003, chapter 566.

[110] Former Education Code sections 13485-13490, as originally enacted by Statutes 1971, chapter 361.

[111] Education Code sections 44662, 44663, 44664.

[112] Statutes 1999, chapter 4 became operative and effective on January 1, 2000.

[113] Education Code section 60600 et seq.

adopt a set of statewide academically rigorous content standards in the core curriculum areas of reading, writing, mathematics, history/social science, and science to serve as the basis for assessing the academic achievement of individual pupils and of schools.[114] In addition, the Act established the Standardized Testing and Reporting Program (otherwise known as the STAR Program)[115], which requires each school district to annually administer to all pupils in grades 2 to 11 a nationally normed achievement test of basic skills, and an achievement test based on the state's academic content standards.[116] The Commission determined that the administration of the STAR test to pupils constitutes a partial reimbursable state-mandated program (CSM 97-TC-23).

Although evaluating the performance of a certificated employee based on the progress of pupils is not new, staff finds that the requirement to evaluate and assess the performance of certificated instructional employees that teach reading, writing, mathematics, history/social science, and science in grades 2 to 11, as it reasonably relates to the progress of pupils towards the state adopted academic content standards as measured by state adopted criterion referenced assessments is a new required act and, thus a higher level of service within the meaning of article XIII B, section 6 of the California Constitution.

This higher level of service is limited to the review of the results of the STAR test as it reasonably relates to the performance of those certificated employees that teach reading, writing, mathematics, history/social science, and science in grades 2 to 11, and to include in the written evaluation of those certificated employees the assessment of the employee's performance based on the STAR results for the pupils they teach during the evaluation periods specified in Education Code section 44664, and described below:

- once each year for probationary certificated employees;
- every other year for permanent certificated employees; and
- beginning January 1, 2004, every five years for certificated employees with permanent status who have been employed at least ten years with the school district, are highly qualified (as defined in 20 U.S.C. § 7801), and whose previous evaluation rated the employee as meeting or exceeding standards, if the evaluator and certificated employee being evaluated agree.[117]

Assess and evaluate permanent certificated, instructional and non-instructional, employees that receive an unsatisfactory evaluation once each year until the employee achieves a positive evaluation, or is separated from the school district (Ed. Code, § 44664, as amended by Stats. 1983, ch. 498).

The claimant is requesting reimbursement to conduct additional assessments and evaluations for permanent certificated employees that receive an unsatisfactory evaluation as follows:

> Conduct additional annual assessments and evaluations of permanent certificated instructional and non-instructional employees who have received an

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[114] Education Code section 60605, subdivision (a).

[115] Education Code section 60640, subdivision (a).

[116] Education Code section 60640, subdivision (b).

[117] Education Code section 44664, subdivision (a)(3), as amended by Statutes 2003, chapter 566.

> unsatisfactory evaluation. The school district must conduct the annual assessment and evaluation of a permanent certificated employee until the employee achieves a positive evaluation or is separated from the school district. This mandated activity is limited to those annual assessments and evaluations that occur in years in which the employee would not have been required to be evaluated as per Section 44664 (i.e., permanent certificated employees shall be evaluated every other year). When conducting these additional evaluations the full cost of the evaluation is reimbursable (e.g., evaluation under all criterion, preparing written evaluation, review of comments, and holding a hearing with the teacher).[118]

The Department of Finance agrees that the 1983 amendment to Education Code section 44664 imposes a reimbursable state-mandated activity.

Before the enactment of the test claim legislation, former Education Code section 13489 (as last amended by Stats. 1973, ch. 220) required that an evaluation for permanent certificated employees occur every other year. Former Education Code section 13489 stated in relevant part the following:

> Evaluation and assessment of the performance of each certificated employee shall be made on a continuing basis, at least once each school year for probationary personnel, and *at least every other year for personnel with permanent status*. The evaluation shall include recommendations, if necessary, as to areas of improvement in the performance of the employee. In the event an employee is not performing his duties in a satisfactory manner according to the standards prescribed by the governing board, the employing authority shall notify the employee in writing of such fact and describe such unsatisfactory performance. The employing authority shall thereafter confer with the employee making specific recommendations as to areas of improvement in the employee's performance and endeavor to assist him in such performance. (Emphasis added.)

In 1976, former Education Code section 13489 was renumbered to Education Code section 44664.[119] The test claim legislation (Stats. 1983, ch. 498) amended Education Code section 44664, by adding the following sentence: "When any permanent certificated employee has received an unsatisfactory evaluation, the employing authority shall *annually evaluate* the employee until the employee achieves a positive evaluation or is separated from the district." (Emphasis added.)[120]

Staff finds that Education Code section 44664, as amended by Statutes 1983, chapter 498, imposes a new required act and, thus, a new program or higher level of service by requiring school districts to perform additional evaluations for permanent certificated employees that

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[118] Exhibit A, Test Claim.

[119] Statutes 1976, chapter 1010.

[120] Statutes 2003, chapter 566, amended Education Code section 44664 by changing the word "when" to "if." The language now states the following: "~~When~~ If any permanent certificated employee has received an unsatisfactory evaluation, the employing authority shall annually evaluate the employee until the employee achieves a positive evaluation or is separated from the district."

perform the requirements of educational programs mandated by state or federal law and receive an unsatisfactory evaluation.

This higher level of service is limited to those annual assessments and evaluations that occur in years in which the permanent certificated employee would not have otherwise been evaluated pursuant to Education Code section 44664 (i.e., every other year) and lasts until the employee achieves a positive evaluation or is separated from the school district. This additional evaluation and assessment of the permanent certificated employee requires the school district to perform the following activities:

- evaluate and assess the certificated employee performance as it reasonably relates to the following criteria: (1) the progress of pupils toward the standards established by the school district of expected pupil achievement at each grade level in each area of study, and, if applicable, the state adopted content standards as measured by state adopted criterion referenced assessments; (2) the instructional techniques and strategies used by the employee; (3) the employee's adherence to curricular objectives; (4) the establishment and maintenance of a suitable learning environment, within the scope of the employee's responsibilities; and, if applicable, (5) the fulfillment of other job responsibilities established by the school district for certificated non-instructional personnel (Ed. Code, § 44662, subds. (b) and (c));
- the evaluation and assessment shall be reduced to writing. (Ed. Code, § 44663, subd. (a).) The evaluation shall include recommendations, if necessary, as to areas of improvement in the performance of the employee. If the employee is not performing his or her duties in a satisfactory manner according to the standards prescribed by the governing board, the school district shall notify the employee in writing of that fact and describe the unsatisfactory performance (Ed. Code, § 44664, subd. (b));
- transmit a copy of the written evaluation to the certificated employee (Ed. Code, § 44663, subd. (a));
- attach any written reaction or response to the evaluation by the certificated employee to the employee's personnel file (Ed. Code, § 44663, subd. (a)); and
- conduct a meeting with the certificated employee to discuss the evaluation (Ed. Code, § 44553, subd. (a)).

Issue 3: Does Education Code Section 44662 (As Amended by Stats. 1999, ch. 4) and Education Code Section 44664 (As Amended by Stats. 1983, ch. 498) Impose Costs Mandated by the State Within the Meaning of Government Code Section 17514?

As indicated above, staff finds that the following activities constitute a new program or higher level of service:

- evaluate and assess the performance of certificated instructional employees that perform the requirements of educational programs mandated by state or federal law as it reasonably relates to the instructional techniques and strategies used by the employee and the employee's adherence to curricular objectives (Ed. Code, § 44662, subd. (b), as amended by Stats. 1983, ch. 498);

- evaluate and assess the performance of certificated instructional employees that teach reading, writing, mathematics, history/social science, and science in grades 2 to 11 as it reasonably relates to the progress of pupils towards the state adopted academic content standards as measured by state adopted assessment tests (Ed. Code, § 44662, subd. (b), as amended by Stats. 1999, ch. 4); and
- assess and evaluate permanent certificated, instructional and non-instructional, employees that perform the requirements of educational programs mandated by state or federal law and receive an unsatisfactory evaluation in the years in which the permanent certificated employee would not have otherwise been evaluated until the employee receives achieves a positive evaluation, or is separated from the school district (Ed. Code, § 44664, as amended by Stats. 1983, ch. 498).

The Commission must continue its inquiry to determine if these activities result in increased costs mandated by the state pursuant to Government Code section 17514.

Government Code section 17514 defines "costs mandated by the state" as any increased cost a local agency or school district is required to incur as a result of a statute that mandates a new program or higher level of service. The claimant states that it has incurred significantly more than $200 to comply with the test claim statutes plead in this claim.[121, 122]

Staff finds that there is nothing in the record to dispute the costs alleged by the claimant. The parties have not identified any sources of state or federal funds appropriated to school districts that can be applied to the activities identified above. Moreover, none of the exceptions to finding a reimbursable state-mandated program under Government Code section 17556 apply to this claim.

Therefore, staff finds that Education Code section 44662 (as amended by Stats. 1999, ch. 4) and Education Code section 44664 (as amended by Stats. 1983, ch. 498), result in costs mandated by the state under Government Code section 17514.

CONCLUSION

Staff concludes that Education Code section 44662, as amended by Statutes 1999, chapter 4, and Education Code section 44664, as amended by Statutes 1983, chapter 498, mandate a new program or higher level of service for school districts within the meaning of article XIII B, section 6 of the California Constitution, and impose costs mandated by the state pursuant to Government Code section 17514 for the following activities only:

- Evaluate and assess the performance of certificated instructional employees that perform the requirements of educational programs mandated by state or federal law as it reasonably relates to the instructional techniques and strategies used by the employee and

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[121] Exhibit A, Test Claim and Declaration of Larry S. Phelps, Superintendent of Denair Unified School District.

[122] Staff notes that after this test claim was filed, Government Code section 17564 was amended to require that all test claims and reimbursement claims submitted exceed $1000 in costs. (Stats. 2002, ch. 1124.)

the employee's adherence to curricular objectives (Ed. Code, § 44662, subd. (b), as amended by Stats. 1983, ch. 498).

Reimbursement for this activity is limited to the review of the employee's instructional techniques and strategies and adherence to curricular objectives, and to include in the written evaluation of the certificated instructional employees the assessment of these factors during the following evaluation periods:

- once each year for probationary certificated employees;
- every other year for permanent certificated employees; and
- beginning January 1, 2004, every five years for certificated employees with permanent status who have been employed at least ten years with the school district, are highly qualified (as defined in 20 U.S.C. § 7801), and whose previous evaluation rated the employee as meeting or exceeding standards, if the evaluator and certificated employee being evaluated agree.

- Evaluate and assess the performance of certificated instructional employees that teach reading, writing, mathematics, history/social science, and science in grades 2 to 11 as it reasonably relates to the progress of pupils towards the state adopted academic content standards as measured by state adopted assessment tests (Ed. Code, § 44662, subd. (b), as amended by Stats. 1999, ch. 4).

  Reimbursement for this activity is limited to the review of the results of the STAR test as it reasonably relates to the performance of those certificated employees that teach reading, writing, mathematics, history/social science, and science in grades 2 to 11, and to include in the written evaluation of those certificated employees the assessment of the employee's performance based on the STAR results for the pupils they teach during the evaluation periods specified in Education Code section 44664, and described below:

  - once each year for probationary certificated employees;
  - every other year for permanent certificated employees; and
  - beginning January 1, 2004, every five years for certificated employees with permanent status who have been employed at least ten years with the school district, are highly qualified (as defined in 20 U.S.C. § 7801), and whose previous evaluation rated the employee as meeting or exceeding standards, if the evaluator and certificated employee being evaluated agree.

- Assess and evaluate permanent certificated, instructional and non-instructional, employees that perform the requirements of educational programs mandated by state or federal law and receive an unsatisfactory evaluation in the years in which the permanent certificated employee would not have otherwise been evaluated pursuant to Education Code section 44664 (i.e., every other year). The additional evaluations shall last until the employee achieves a positive evaluation, or is separated from the school district. (Ed. Code, § 44664, as amended by Stats. 1983, ch. 498). This additional evaluation and assessment of the permanent certificated employee requires the school district to perform the following activities:

  - evaluate and assess the certificated employee performance as it reasonably relates to the following criteria: (1) the progress of pupils toward the standards

established by the school district of expected pupil achievement at each grade level in each area of study, and, if applicable, the state adopted content standards as measured by state adopted criterion referenced assessments; (2) the instructional techniques and strategies used by the employee; (3) the employee's adherence to curricular objectives; (4) the establishment and maintenance of a suitable learning environment, within the scope of the employee's responsibilities; and, if applicable, (5) the fulfillment of other job responsibilities established by the school district for certificated non-instructional personnel (Ed. Code, § 44662, subds. (b) and (c));

- the evaluation and assessment shall be reduced to writing. (Ed. Code, § 44663, subd. (a).) The evaluation shall include recommendations, if necessary, as to areas of improvement in the performance of the employee. If the employee is not performing his or her duties in a satisfactory manner according to the standards prescribed by the governing board, the school district shall notify the employee in writing of that fact and describe the unsatisfactory performance (Ed. Code, § 44664, subd. (b));
- transmit a copy of the written evaluation to the certificated employee (Ed. Code, § 44663, subd. (a));
- attach any written reaction or response to the evaluation by the certificated employee to the employee's personnel file (Ed. Code, § 44663, subd. (a)); and
- conduct a meeting with the certificated employee to discuss the evaluation (Ed. Code, § 44553, subd. (a)).

Staff further finds that the activities listed above do not constitute reimbursable state-mandated programs with respect to certificated personnel employed in local, discretionary educational programs.

Finally, staff finds that all other statutes in the test claim not mentioned above are not reimbursable state-mandated programs within the meaning of article XIII B, section 6 and Government Code section 17514.

Recommendation

Staff recommends that the Commission adopt the staff analysis that partially approves the test claim for the activities listed above.

PAGES 42-100 LEFT BLANK INTENTIONALLY

EXHIBIT A

State of California
COMMISSION ON STATE MANDATES
1414 "K" Street, Suite 315
Sacramento, CA 95814
(916) 323-3562
CSM 1 (2 91)

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COMMISSION ON STATE MANDATES

TEST CLAIM FORM

Claim No.
98-TC-25

Local Agency or School District Submitting Claim

Denair Unified School District
P.O. Box 368
Denair, CA 95316

Contact Person — Telephone No.

Paul C. Minney, Esq. — Ph.: (925) 746-7660
Attorney for Mandated Cost Systems, Inc. — Fax: (925) 935-7995

Address

GIRARD & VINSON
Growers Square
1676 N. California Blvd., Suite 450
Walnut Creek, CA 94596

Representative Organization to be Notified

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

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

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

Chapter 4, Statutes of 1999 (AB 1)
Chapter 392, Statutes of 1995
Chapter 393, Statutes of 1986
Chapter 498, Statutes of 1983
Chapter 1216, Statutes of 1975

Education Code § 44660 (formerly Ed. Code § 13485)
Education Code § 44661 (formerly Ed. Code § 13486)
Education Code § 44662 (formerly Ed. Code § 13487)
Education Code § 44664 (formerly Ed. Code § 13489)
Education Code § 44665 (formerly Ed. Code § 13490)

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

Name and Title of Authorized Representative — Telephone:

Paul C. Minney, Attorney — (925) 746-7660

Signature of Authorized Representative — Date:

6/29/99

Larry S. Phelps, Superintendent
Denair Unified School District
P.O. Box 368
Denair, CA 95316
Telephone: (209) 632-7514
Fax: (209) 632-9194

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Attorney for Mandated Cost Systems, Inc.
and Authorized Representative of Test Claimant

BEFORE THE COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

Test Claim Of:	) CSM No.:_____
	) **TEST CLAIM OF DENAIR UNIFIED**
	) **SCHOOL DISTRICT**
DENAIR UNIFIED SCHOOL DISTRICT	)
	) **Chapter 4, Statutes of 1999 (AB 1)**
	) **Chapter 392, Statutes of 1995**
	) **Chapter 393, Statutes of 1986**
	) **Chapter 498, Statutes of 1983**
	) **Chapter 1216, Statutes of 1975**
	)
	) **Education Code § 44660 (formerly Ed. Code § 13485)**
	) **Education Code § 44661 (formerly Ed. Code § 13486)**
	) **Education Code § 44662 (formerly Ed. Code § 13487)**
	) **Education Code § 44663 (formerly Ed. Code § 13488)**
	) **Education Code § 44664 (formerly Ed. Code § 13489)**
	) **Education Code § 44665 (formerly Ed. Code § 13490)**
	)
_____	) ***The Stull Act***

TABLE OF CONTENTS

I. AUTHORITY FOR THE CLAIM

The Commission on State Mandates has the authority pursuant to Government section 17551(a) to hear and decide upon a claim by a local agency or school district that the local agency or school district is entitled to be reimbursed by the State for costs mandated by the State as required by Section 6 of Article XIIIB of the California Constitution. The Denair Unified School District ("Claimant") is a school district as defined in Government Code section 17519. This test claim is filed pursuant to Title 2, California Code of Regulations, section 1183.

II. STATEMENT OF THE CLAIM

This test claim alleges reimbursable costs mandated by the State by Chapter 4, Statutes of 1999[1] (AB 1) ("Chapter 4/99"), Chapter 392, Statutes of 1995[2] ("Chapter 392/95"), Chapter 393, Statutes of 1986[3] ("Chapter 393/86"), Chapter 498, Statutes of 1983[4] ("Chapter 498/83"),Chapter 1216, Statutes of 1975[5] ("Chapter 1216/75") and Education Code section 44660[6] (formerly Education Code section 13485), Education Code section 44661[7] (formerly Education Code section 13486), Education Code section 44662[8] (formerly Education Code section 13487), Education Code section 44663[9] (formerly Education Code section 13488), Education Code section 44664[10] (formerly Education Code section 13489), and Education Code section 44665[11] (formerly Education Code

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[1] Chapter 4, Statutes of 1999 is attached as Exhibit "A".

[2] Chapter 392, Statutes of 1995 is attached as Exhibit "B".

[3] Chapter 393, Statutes of 1986 is attached as Exhibit "C".

[4] Chapter 498, Statutes of 1983 is attached as Exhibit "D".

[5] Chapter 1216, Statutes of 1975 is attached as Exhibit "E".

[6] Education Code § 44660 is attached as Exhibit "F".

[7] Education Code § 44661 is attached as Exhibit "G".

[8] Education Code § 44662 is attached as Exhibit "H".

[9] Education Code § 44663 is attached as Exhibit "I".

[10] Education Code § 44664 is attached as Exhibit "J".

[11] Education Code § 44665 is attached as Exhibit "K".

section 13490), which together (1) require the county superintendent of schools to establish an conduct a uniform system of evaluation and assessment of the performance of all certificated personnel within the schools maintained by the county superintendent; (2) require school districts to assess and evaluate certificated noninstructional personnel, and (3) evaluate and assess certificated instructional personnel under new and revised criteria (e.g. pupil progress toward State adopted academic content standards).

III. ACTIVITIES REQUIRED UNDER THE STULL ACT

Article 5.5 (sections 13485-13498) of the 1959 Education Code was added by Chapter 361, Statutes of 1971.[12] Article 5.5 outlines the requirements for evaluation of certificated employees and is commonly referred to as the Stull Act. The Stull Act requirements, as outlined below, remained essentially unchanged until the passage of Chapter 1216, Statutes of 1975 (effective January 1, 1976).

A. Activities Required Under the Stull Act Prior to January 1, 1975

On December 31, 1974, school districts (but not county superintendent of schools) were required to do the following under the provisions of the Stull Act (Education Code section 13485-13489):[13]

1. Develop objective evaluation and assessment guidelines which included the following:
   a. The establishment of standards of expected student progress in each area of study and of techniques for the assessment for that progress;
   b. Assessment of certificated personnel competence as it relates to the established standards;
   c. Assessment of other duties normally required to be performed by certificated employees as an adjunct to their regular assignments;

[12] See Chapter 361, Statutes of 1971 (Education Code Sections 13485 to 13489) attached as Exhibit "L".

[13] Ibid.

d. The establishment of procedures and techniques for ascertaining that the certificated employee is maintaining proper control and is preserving a suitable learning environment.

2. Meet with and avail itself to the advice of certificated instructional personnel in the district's organization regarding the development and adoption of these guidelines and procedures.

3. Evaluate and assess certificated personnel[14] and reduce to writing a copy thereof and transmit to the certificated employee no later than sixty (60) days before the end of the school year in which the evaluation takes place.

4. Receive and review written responses from the certificated personnel who have been evaluated.

5. Meet with the certificated personnel to discuss the evaluation.

6. The recommendation shall include areas of improvement if necessary.

7. If the employee is not performing in a satisfactory manner according to the standards prescribed by the governing board, the district shall notify the employee in writing of such fact and describe the unsatisfactory performance and shall thereafter confer with the employee making specific recommendations as to areas of improvement in the employee's performance and endeavor to assist him/her in such performance.

B. Activities Added to the Stull Act Post 1975

The Stull Act has been significantly expanded upon over the years. The following summarizes the activities added to the Stull Act after to January 1, 1975:

Former Education Code section 13487 (now section 44662), was amended by Chap. 1216/75 (effective January 1, 1976) to require the development of standards of expected student "achievement" by grade level in each area of study. Prior to the revision, section 13487 only required school districts to establish standards of expected student progress in each area of study.

[14] Probationary certificated employees are to be evaluated at least each year. Permanent certificated personnel are to be evaluated at least every other school year.

Therefore, effective January 1, 1976, all school districts were required to rewrite their standards to reflect expected student "achievement" (as opposed to the prior requirement of expected student "progress") and to expand it standards to reflect expected student achievement at each "grade level".

Former Education Code section 13487 (now section 44662), was amended by Chap. 1216/75 (effective January 1, 1976) to require the development of job responsibilities for certificated noninstructional personnel, including, but not limited to, supervisory and administrative personnel. Prior to the amendment of this section, there was no requirement that school districts develop job responsibilities for certificated noninstructional personnel.

Former Education Code section 13487 (now section 44662), was amended by Chap. 1216/75 (effective January 1, 1976) to require the evaluation and assessment of the "competency" of noninstructional certificated personnel as it reasonably relates to the fulfillment of the established job responsibilities. Chap. 392/1995 amended section 44662 and changed the word "competency" to "performance." No prior statute or regulation required school districts to evaluate and assess noninstructional certificated personnel.

Former section 13488 (now section 44663) was amended by Chap. 393/86 to require a school district to receive and review responses from certificated noninstructional personnel regarding their evaluations. No prior statute or regulation required school districts to conduct this activity.

Former section 13488 (now section 44663) was amended by Chap. 393/86 to require a school district to conduct a meeting between the certificated noninstructional employee and the evaluator to discuss the evaluation and assessment. No prior statute or regulation required school districts to conduct this activity.

Former section 13489 (now section 44664), was amended by Chap. 498/83 to require school districts to conduct additional evaluations of certificated employees who receive an unsatisfactory evaluation. No prior statute or regulation required school districts conduct additional evaluations of certificated employees who receive an unsatisfactory evaluation.

Section 44662 was amended by Chap. 4/99 to include the requirement that school districts review a certificated employee's results of his/her participation in the Peer Assistance and

Review Program for Teachers as part of his/her assessment and evaluation. Chap. 4/99 was enacted in special session on April 6, 1999 and is effective ninety-one (91) days after the adjournment of the special session (See Article IV, Section 8). The Special Session of the Legislature adjourned on March 25, 1999. Therefore, Chap. 4/99 is effective on June 24, 1999.

Former Education Code section 13487 (now section 44662), was amended by Chap. 498/83 to require school districts to assess and evaluate certificated personnel under the following criterion: (a) the instructional techniques and strategies used by the certificated employee; and (b) the certificated employees adherence to curricular objectives.

Section 44662 was further amended by Chap. 4/99 (AB X1) to require school districts to assess and evaluate certificated personnel for the following: (a) the progress of pupils towards the state adopted academic content standards, if applicable, as measured by state adopted criterion referenced assessments. (This last section is effective on June 24, 1999). Chap. 4/99 was enacted in special session on April 6, 1999 and is effective ninety-one (91) days after the adjournment of the special session (See Article IV, Section 8). The special session of the Legislature adjourned on March 25, 1999. Therefore, Chap. 4/99 is effective on June 24, 1999. No prior statute or regulation required school districts to assess and evaluate certificated personnel under the above cited criterion.

Former Education Code section 13485 (now section 44660), was amended by Chap. 1216/75 (effective January 1, 1976) to include county superintendents of education in the Stull Act requirements of evaluation and assessment for certificated employees. No prior statute or regulation required county superintendent to comply with Stull Act provisions for certificated evaluations.

IV. REIMBURSABLE ACTIVITIES ALLEGED IN THIS TEST CLAIM

A. School Districts

Education Code sections 44660-44665 (formally sections 13685-13490) as amended by Chapters 1216/75, Chapters 498/83, Chapters 393/86, Chapters 392/95, and Chapter 4/99 require that school districts perform the following new reimbursable activities:

General:

1. Establish standards of expected pupil achievement at each grade level in each area of study.

Certificated Non-Instructional Employees:

1. Establish and define job responsibilities for certificated noninstructional personnel, including, but not limited to, supervisory and administrative personnel.
2. Evaluate and assess the performance of noninstructional certificated personnel as it reasonably relates to the fulfillment of the established job responsibilities.
3. Prepare and draft a written evaluation of the noninstructional certificated employee. The evaluation shall include recommendations, if necessary, as to areas of improvement.
4. Receive and review from a certificated noninstructional employee written responses regarding his/her evaluation.
5. Prepare and hold a meeting between the certificated noninstructional employee and the evaluator to discuss the evaluation and assessment.

Certificated Instructional Employees:

1. Evaluate and assess certificated instructional employee performance as it reasonably relates to:
   (a) The instructional techniques and strategies used by the certificated employee;
   (b) The certificated employees adherence to curricular objectives; and
   (c) The progress of pupils towards the state adopted academic content standards, if applicable, as measured by state adopted criterion referenced assessments. (This last section is effective on June 24, 1999). (See attached chart comparing 1999 Stull Act Evaluation Criterion to the December 30, 1974 Stull Act Evaluation Criterion, marked as Exhibit "N").

Both Non-Instructional and Instructional Employees:

1. Conduct additional annual assessments and evaluations of permanent certificated instructional and noninstructional employees who have received an unsatisfactory evaluation. The school district must conduct the annual assessment and evaluation of a permanent certificated employee until the employee achieves a positive evaluation or is separated from the school district. This mandated reimbursable activity is limited to those annual assessments and evaluations which occur in years in which the employee would not have been required to be evaluated as per Section 44664 (i.e., permanent certificated employees shall be evaluated every other year). When conducting these additional evaluations the full cost of the evaluation is reimbursable (e.g., evaluation under all criterion, preparing written evaluation, review of comments, and holding a hearing with the teacher).
2. Receive and review, for purposes of a certificated employee's assessment and evaluation, if applicable, the results of an employee's participation in the Peer Assistance and Review Program for Teachers established by Article 4.5 (commencing with section 44500).

B. County Superintendent of Schools

Education Code sections 44660-44665 (formally sections 13685-13490) as amended by Chapters 1216/75, Chapters 498/83, Chapters 393/86, Chapters 392/95, and Chapters 4/99 require that county superintendent of schools perform the following new reimbursable activities:

1. County superintendents of schools must establish and conduct, in accordance with the Stull Act (Education Code sections 44660 - 44665), a uniform system of evaluation and assessment of the performance of certificated personnel which shall include the following reimbursable mandated activities:
   (a) Develop and adopt objective evaluation and assessment guidelines.
   (b) Confer with and receive advice from certificated county office of

(h) Prepare and draft a written evaluation of the certificated noninstructional employee. The evaluation shall include recommendations, if necessary, as to areas of improvement.

(i) Provide a written copy of the evaluation to the certificated instructional/noninstructional employee.

(j) Receive and review any written reaction or response to the evaluation from the certificated instructional/noninstructional employee.

(k) Prepare for and hold a meeting between the certificated instructional/noninstructional employee and the evaluator to discuss the evaluation.

(l) Conduct additional annual evaluations of permanent certificated instructional/noninstructional employees when the employee has received an unsatisfactory evaluation. The school district must maintain annual evaluations of the certificated employee until the employee achieves a positive evaluation or is separated from the district.

V. CONSTITUTIONAL PROVISIONS, FEDERAL REQUIREMENTS AND COURT DECISION AFFECTING THE MANDATED ACTIVITIES

There are neither state nor federal constitutional provisions which impact the mandates which are the subject of this test claim. There are not state or federal status or executive orders which materially impact the mandated activities which are subject to this test claim. There are no court decision which impact the mandated activities which are the subject of this test claim. In addition, none of the Government Code section 17556 statutory exemptions to a finding of costs mandated by the State apply to these statutes.

VI. ESTIMATED COSTS RESULTING FROM THE MANDATE

A. School Districts

It is estimated that the Claimant, Deniar Unified School District, will incur more than $200.00 in personal services, contracted services, training, supplies, (and other direct and indirect costs) in meeting the requirements mandated by Chapter 4, Statutes of 1999 (AB 1), Chapter 392,

Statutes of 1995, Chapter 393, Statutes of 1986, Chapter 498, Statutes of 1983, Chapter 1216, Statutes of 1975 and Education Code section 44660 (formerly Education Code section 13485), Education Code section 44661(formerly Education Code section 13486), Education Code section 44662(formerly Education Code section 13487), Education Code section 44663(formerly Education Code section 13488), Education Code section 44664 (formerly Education Code section 13489), and Education Code section 44665(formerly Education Code section 13490) as further set forth in the Declaration of Larry S. Phelps attached hereto and fully incorporated by reference herein.

VII. APPROPRIATIONS

No funds are appropriated by the statutes for reimbursement of these new costs mandated by the State and there is not other provision of law for recovery of costs for any other services.

VIII. CLAIM REQUIREMENTS

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

Exhibit "A"	Chapter 4, Statutes of 1999
Exhibit "B"	Chapter 392, Statutes of 1995
Exhibit "C"	Chapter 393, Statutes of 1986
Exhibit "D"	Chapter 498, Statutes of 1983
Exhibit "E"	Chapter 1216, Statutes of 1975
Exhibit "F"	Education Code § 44660
Exhibit "G"	Education Code § 44661
Exhibit "H"	Education Code § 44662
Exhibit "I"	Education Code § 44663
Exhibit "J"	Education Code § 44664
Exhibit "K"	Education Code § 44665
Exhibit "L"	Chapter 361, Statutes of 1971
Exhibit "M"	Declaration of Larry S. Phelps of Deniar Unified School District in Support of Test Claim

Exhibit "N" Comparison of Stull Act Evaluation Criterion Chart

IX. CERTIFICATION

I certify by my signature below that the statements made in this document are true and correct of my own knowledge, and as to all other matters, I believe them to be true and correct based upon the information and belief.

Executed on June 29, 1999, at Walnut Creek, California, by:

GIRARD & VINSON

By: _____
PAUL C. MINNEY, ESQ.
Attorney for Mandated Cost Systems, Inc. and
Authorized Representative of Test Claimant

D:\gandv8\mcs\pcm\stull act\test claim #2.wpdJune 28, 1999 (11:15AM)

AUTHORIZATION TO ACT AS REPRESENTATIVE
FOR DENAIR UNIFIED SCHOOL DISTRICT'S
TEST CLAIM

STULL ACT

I, Larry S. Phelps, Superintendent, Denair Unified School District, hereby authorize Paul C. Minney (or designee) of the Law Office of GIRARD & VINSON to act as the representative and sole contact of Denair Unified School District in the above-referenced Test Claim. All correspondence and communications regarding this test claim should be forwarded to:

Paul C. Minney, Esq.
GIRARD & VINSON
1676 North California Blvd., Suite 450
Walnut Creek, CA 94596
Telephone: (925) 746-7660
Fax: (925) 935-7995

Dated: 6-18-99

Larry S. Phelps, Superintendent
Denair Unified School District

Exhibit A

CHAPTER 4, STATUTES OF 1999

Assembly Bill No. 1

CHAPTER 4

An act to amend Sections 44662 and 44664 of, to add Section 44498 to, to add Article 4.5 (commencing with Section 44500) to Chapter 3 of Part 25 of, and to repeal Article 4 (commencing with Section 44490) of Chapter 3 of Part 25 of, the Education Code, relating to teachers, and making an appropriation therefor.

[Approved by Governor April 6, 1999. Filed with Secretary of State April 6, 1999.]

LEGISLATIVE COUNSEL'S DIGEST

AB 1, Villaraigosa. California Peer Assistance and Review Program for Teachers.

(1) Existing law establishes the California Mentor Teacher Program and provides that the primary function of a mentor teacher is to provide assistance and guidance to new teachers. Existing law authorizes mentor teachers to provide staff development for teachers and develop special curriculum.

This bill would make the California Mentor Teacher Program inoperative on July 1, 2001, and would repeal it as of January 1, 2002. The bill would establish the California Peer Assistance and Review Program for Teachers, which would become fully operational on July 1, 2001, when it would completely replace the California Mentor Teacher Program.

This bill would allow the governing board of a school district and the exclusive representative of the certificated employees in the school district to implement a peer assistance and review program for teachers. The bill would require teachers receiving assistance in the program to have permanent status if the school district has 250 or greater units of average daily attendance or to be a permanent or probationary employee if the school district has fewer than 250 units of average daily attendance and to volunteer to participate or be referred for participation in the program as a result of their biennial evaluation. The program would also require performance goals for individual teachers to be in writing, clearly stated, and aligned with pupil learning goals, assistance and review to include multiple observations of a teacher during periods of classroom instruction, a school district to provide sufficient staff development activities to assist teachers to improve their teaching skills and knowledge, a teacher's final evaluation on program participation to be made available for placement in the teacher's personnel file, and a monitoring component with a written record.

This bill would require a joint teacher administrator peer review panel to select consulting teachers and to annually evaluate the impact of the district's peer assistance and review program in order to improve the program.

This bill would provide that a school district that accepts state funds for purposes of this program agrees to negotiate the development and implementation of the program with the exclusive representative of the certificated employees in the school district, if the certificated employees in the district are represented by an exclusive representative.

This bill would provide that not more than 5% of the funds received by a school district for the Peer Assistance and Review Program for Teachers may be expended for administrative expenses.

This bill would permit a school district to notify the Superintendent of Public Instruction that it plans to implement a program and would require the superintendent to apportion funds to that school district for staff development activities and training for district personnel that are necessary to implement a program.

This bill would make a school district that does not elect to participate in the California Peer Assistance and Review Program for Teachers ineligible for any apportionment, allocation, or other funding from an appropriation for this program, for local assistance appropriated pursuant to Budget Act Item 6110-231-0001, for the Administrator Training and Evaluation Program, for the Instructional Time and Staff Development Reform Program, and for school development plans.

This bill would, commencing with the 2000–01 fiscal year, authorize a school district that receives funds for the California Peer Assistance and Review Program for Teachers to expend those funds also for the Marian Bergeson Beginning Teacher Support and Assessment System, the California Pre-Internship Teaching Program, district intern program, and other professional development, as described.

This bill would require the Superintendent of Public Instruction, subject to the availability of funding in the annual Budget Act, to contract with an independent evaluator on or before December 15, 2002, to prepare a comprehensive evaluation of the implementation, impact, cost, and benefit of the California Peer Assistance and Review Program for Teachers and to submit the evaluation to the Legislature, the Governor, and interested parties on or before January 1, 2004.

This bill would provide that state funding for this program subsequent to the 1999–2000 fiscal year is subject to an appropriation in the annual Budget Act.

(2) Existing law requires the governing board of each school district to evaluate and assess certificated employee performance as it reasonably relates to the progress of pupils toward the standards of expected pupil achievement established by the governing board.

This bill would require the governing board also to evaluate and assess certificated employee performance as it reasonably relates to the progress of pupils toward the state-adopted academic content standards as measured by state-adopted criterion referenced assessments, thereby imposing a state-mandated local program. The bill would require the results of an employee's participation in the Peer Assistance and Review Program to be considered in this evaluation. The bill would authorize a school district to require that a certificated employee who receives an unsatisfactory rating in this evaluation to participate in its Peer Assistance and Review Program.

(3) This bill would appropriate $125,082,000 for the 1999–2000 fiscal year from the General Fund to the Superintendent of Public Instruction, with $41,800,000 for the purpose of providing staff development activities and training for school district personnel that is necessary to implement the Peer Assistance and Review Program for Teachers, $83,200,000 for the purpose of the California Mentor Teacher Program, and $82,000 for support services for the Peer Assistance and Review Program for Teachers.

To the extent that funds appropriated by this bill are allocated to a school district or community college district, those funds would be applied toward the minimum funding requirements for school districts and community college districts imposed by Section 8 of Article XVI of the California Constitution.

(4) The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement, including the creation of a State Mandates Claims Fund to pay the costs of mandates that do not exceed $1,000,000 statewide and other procedures for claims whose statewide costs exceed $1,000,000.

This bill would provide that, if the Commission on State Mandates determines that the bill contains costs mandated by the state, reimbursement for those costs shall be made pursuant to these statutory provisions.

Appropriation: yes.

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

SECTION 1. It is the intent of the Legislature to establish a teacher peer assistance and review system as a critical feedback mechanism that allows exemplary teachers to assist veteran teachers in need of development in subject matter knowledge or teaching strategies, or both.

It is further the intent of the Legislature that a school district that operates a program pursuant to Article 4.5 (commencing with Section 44500) of Chapter 3 of Part 25 of the Education Code coordinate its employment policies and procedures for that program

with its activities for professional staff development, the Beginning Teacher Support and Assessment Program, and the biennial evaluations of certificated employees required pursuant to Section 44664.

SEC. 2. Section 44498 is added to the Education Code, to read:

44498. (a) When a school district notifies the Superintendent of Public Instruction that it plans to implement a program pursuant to Article 4.5 (commencing with Section 44500), this article shall not apply to that school district.

(b) This article shall become inoperative on July 1, 2001, and, as of January 1, 2002, is repealed, unless a later enacted statute that is enacted before January 1, 2002, deletes or extends the dates on which it becomes inoperative and is repealed.

SEC. 3. Article 4.5 (commencing with Section 44500) is added to Chapter 3 of Part 25 of the Education Code, to read:

Article 4.5. California Peer Assistance and Review Program for Teachers

44500. (a) There is hereby established the California Peer Assistance and Review Program for Teachers. The governing board of a school district and the exclusive representative of the certificated employees in the school district may develop and implement a program authorized by this article that meets local conditions and conforms with the principles set forth in subdivision (b).

(b) The following principles, at a minimum, shall be included in a locally developed program authorized by this article:

(1) A teacher participant shall be a permanent employee in a school district with 250 or greater units of average daily attendance or a permanent or probationary employee in a school district with fewer than 250 units of average daily attendance and volunteer to participate in the program or be referred for participation in the program as a result of an evaluation performed pursuant to subdivision (b) of Section 44664. In addition, teachers receiving assistance may be referred pursuant to a collectively bargained agreement.

(2) Performance goals for an individual teacher shall be in writing, clearly stated, aligned with pupil learning, and consistent with Section 44662.

(3) Assistance and review shall include multiple observations of a teacher during periods of classroom instruction.

(4) The program shall expect and strongly encourage a cooperative relationship between the consulting teacher and the principal with respect to the process of peer assistance and review.

(5) The school district shall provide sufficient staff development activities to assist a teacher to improve his or her teaching skills and knowledge.

(6) The program shall have a monitoring component with a written record.

(7) The final evaluation of a teacher's participation in the program shall be made available for placement in the personnel file of the teacher receiving assistance.

44501. A consulting teacher participating in a program operated pursuant to this article shall meet locally determined criteria and each of the following qualifications:

(a) The consulting teacher shall be a credentialed classroom teacher with permanent status or, in a school district with an average daily attendance of less than 250 pupils, a credentialed classroom teacher who has completed at least three consecutive school years as an employee of the school district in a position requiring certification qualifications.

(b) The consulting teacher shall have substantial recent experience in classroom instruction.

(c) The consulting teacher shall have demonstrated exemplary teaching ability, as indicated by, among other things, effective communication skills, subject matter knowledge, and mastery of a range of teaching strategies necessary to meet the needs of pupils in different contexts.

44502. (a) The governance structure of a program designed pursuant to this article shall include a joint teacher administrator peer review panel that shall select consulting teachers, review peer review reports prepared by consulting teachers, and make recommendations to the governing board of a school district regarding participants in the program, including forwarding to the governing board the names of individuals who, after sustained assistance, are not able to demonstrate satisfactory improvement.

(b) The majority of the panel shall be composed of certificated classroom teachers chosen to serve on the panel by other certificated classroom teachers. The remainder of the panel shall be composed of school administrators chosen to serve on the panel by the school district.

(c) The panel's procedures for selecting consulting teachers, at a minimum, shall require the following:

(1) Consulting teachers shall be selected by the majority vote of the panel.

(2) The selection process shall include provisions for classroom observation of the candidates for consulting teacher by the panel.

(d) The panel shall also annually evaluate the impact of the district's peer assistance and review program in order to improve the program. This evaluation may include, but is not limited to, interviews or surveys of the program participants. The panel may submit recommendations for improvement of the program to the governing board of the school district and to the exclusive representative of the certificated employees in the school district, if

the certificated employees in the district are represented by an exclusive representative.

44503. (a) The governing board of a school district that accepts state funds for purposes of this article agrees to negotiate the development and implementation of the program with the exclusive representative of the certificated employees in the school district, if the certificated employees in the district are represented by an exclusive representative. In a school district in which the certificated employees are not represented, the school district shall develop a Peer Assistance and Review Program for Teachers consistent with this article in order to be eligible to receive funding under this article.

(b) Functions performed pursuant to this article by certificated employees employed in a bargaining unit position shall not constitute either management or supervisory functions as defined by subdivisions (g) and (m) of Section 3540.1 of the Government Code.

(c) Teachers who provide assistance and review shall have the same protection from liability and access to appropriate defense as other public school employees pursuant to Division 3.6 (commencing with Section 810) of Title 1 of the Government Code.

(d) It is the intent of the Legislature that school districts be allowed to combine, by mutual agreement, their programs of peer assistance and review with those of other school districts.

(e) Not more than 5 percent of the funds received by a school district for the Peer Assistance and Review Program for Teachers may be expended for administrative expenses.

44504. (a) Except as provided in Section 44505, the California Peer Assistance and Review Program for Teachers shall become fully operational on July 1, 2001, on which date it shall completely replace the California Mentor Teacher Program established pursuant to Chapter 1302 of the Statutes of 1983 and set forth in Article 4 (commencing with Section 44490). This article is applicable to all school districts that elect to receive state funds for the California Peer Assistance and Review Program for Teachers. Commencing with the 2001–02 fiscal year, funding shall only be made available for purposes authorized by this article. A school district that elects to participate in the program established pursuant to this article shall certify to the Superintendent of Public Instruction that it has implemented a Peer Assistance and Review Program for Teachers pursuant to this article.

(b) A school district that does not elect to participate in the program authorized under this article by July 1, 2001, is not eligible for any apportionment, allocation, or other funding from an appropriation for the program authorized pursuant to this article or for any apportionments, allocations, or other funding from funding for local assistance appropriated pursuant to Budget Act Item 6110-231-0001, funding appropriated for the Administrator Training and Evaluation Program set forth in Article 3 (commencing with Section 44681) of Chapter 3.1 of Part 25, from an appropriation for

the Instructional Time and Staff Development Reform Program as set forth in Article 7.5 (commencing with Section 44579) of Chapter 3, or from an appropriation for school development plans as set forth in Article 1 (commencing with Section 44670.1) of Chapter 3.1 and the Superintendent of Public Instruction shall not apportion, allocate, or otherwise provide any funds to the district pursuant to those programs.

(c) Commencing February 1, 2002, a school district that elects not to participate in the program authorized under this article shall report annually at a regularly scheduled meeting of the governing board of the school district on the rationale for not participating in the program.

44505. (a) Between July 1, 1999, and June 30, 2000, a school district may notify the Superintendent of Public Instruction that it plans to implement, commencing July 1, 2000, a Peer Assistance and Review Program for Teachers pursuant to this article. Upon receipt of the notification by the school district, the Superintendent of Public Instruction shall apportion to the school district an amount equal to the number of mentor teachers that the state funded for the district in the 1999–2000 fiscal year pursuant to Article 4 (commencing with Section 44490) multiplied by two thousand eight hundred dollars ($2,800). The school district may use the funds apportioned pursuant to this section for activities necessary to implement the Peer Assistance and Review Program for Teachers.

(b) Between July 1, 2000, and May 31, 2001, a school district may notify the Superintendent of Public Instruction that it plans to implement, commencing July 1, 2001, a Peer Assistance and Review Program for Teachers pursuant to this article. On or before June 29, 2001, the Superintendent of Public Instruction shall apportion to every school district that provides this notification an amount equal to the number of mentor teachers that the state funded for the school district in the 1999–2000 school year pursuant to Article 4 (commencing with Section 44490) times a maximum of one thousand dollars ($1,000).

(c) The maximum amount of funds available for apportionment to school districts by the Superintendent of Public Instruction for allocation pursuant to subdivision (b) shall be the amount appropriated pursuant to subdivision (a) of Section 6 of the act adding this section, minus any funds apportioned by the Superintendent of Public Instruction to school districts pursuant to subdivision (a) as of June 30, 2000.

(d) A school district may use funds apportioned pursuant to this section for activities necessary to implement the Peer Assistance and Review Program for Teachers.

44506. (a) The state funding for this article subsequent to the 1999–2000 fiscal year is subject to an appropriation in the annual Budget Act. It is the intent of the Legislature that the funding for the

program for the 2000–01 fiscal year be at least equal to the 1999–2000 fiscal year appropriation for Article 4 (commencing with Section 44490) plus the amount apportioned pursuant to Section 44505.

(b) If a school district elects to implement a Peer Assistance and Review Program for Teachers after June 30, 2000, but before July 1, 2001, it is the intent of the Legislature that the school district's state apportionment for fiscal year 2000–01 be at least equal to the dollar amount the district received in the 1999–2000 fiscal year for purposes of Article 4 (commencing with Section 44490).

(c) A school district that receives funds for purposes of this article may also expend those funds for any of the following purposes:

(1) The Marian Bergeson Beginning Teacher Support and Assessment System as set forth in Article 4.5 (commencing with Section 44279.1) of Chapter 2.

(2) The California Pre-Internship Teaching Program as set forth in Article 5.6 (commencing with Section 44305) of Chapter 2.

(3) A district intern program as set forth in Article 7.5 (commencing with Section 44325) of Chapter 2.

(4) Professional development or other educational activities previously provided pursuant to Article 4 (commencing with Section 44490) of Chapter 3.

(5) Any program that supports the training and development of new teachers.

44507. Subject to the availability of funding in the annual Budget Act, the Superintendent of Public Instruction shall contract with an independent evaluator on or before December 15, 2002, to prepare a comprehensive evaluation of the implementation, impact, cost, and benefit of the California Peer Assistance and Review Program for Teachers. The evaluation shall be delivered to the Legislature, the Governor, and interested parties on or before January 1, 2004.

44508. For purposes of this article, "school district" includes a county office of education.

SEC. 4. Section 44662 of the Education Code is amended to read:

44662. (a) The governing board of each school district shall establish standards of expected pupil achievement at each grade level in each area of study.

(b) The governing board of each school district shall evaluate and assess certificated employee performance as it reasonably relates to:

(1) The progress of pupils toward the standards established pursuant to subdivision (a) and, if applicable, the state adopted academic content standards as measured by state adopted criterion referenced assessments.

(2) The instructional techniques and strategies used by the employee.

(3) The employee's adherence to curricular objectives.

(4) The establishment and maintenance of a suitable learning environment, within the scope of the employee's responsibilities.

(c) The governing board of each school district shall establish and define job responsibilities for certificated noninstructional personnel, including, but not limited to, supervisory and administrative personnel, whose responsibilities cannot be evaluated appropriately under the provisions of subdivision (b) and shall evaluate and assess the performance of those noninstructional certificated employees as it reasonably relates to the fulfillment of those responsibilities.

(d) Results of an employee's participation in the Peer Assistance and Review Program for Teachers established by Article 4.5 (commencing with Section 44500) shall be made available as part of the evaluation conducted pursuant to this section.

(e) The evaluation and assessment of certificated employee performance pursuant to this section shall not include the use of publishers' norms established by standardized tests.

(f) Nothing in this section shall be construed as in any way limiting the authority of school district governing boards to develop and adopt additional evaluation and assessment guidelines or criteria.

SEC. 5. Section 44664 of the Education Code is amended to read:

44664. (a) Evaluation and assessment of the performance of each certificated employee shall be made on a continuing basis, at least once each school year for probationary personnel, and at least every other year for personnel with permanent status. The evaluation shall include recommendations, if necessary, as to areas of improvement in the performance of the employee. If an employee is not performing his or her duties in a satisfactory manner according to the standards prescribed by the governing board, the employing authority shall notify the employee in writing of that fact and describe the unsatisfactory performance. The employing authority shall thereafter confer with the employee making specific recommendations as to areas of improvement in the employee's performance and endeavor to assist the employee in his or her performance. When any permanent certificated employee has received an unsatisfactory evaluation, the employing authority shall annually evaluate the employee until the employee achieves a positive evaluation or is separated from the district.

(b) Any evaluation performed pursuant to this article which contains an unsatisfactory rating of an employee's performance in the area of teaching methods or instruction may include the requirement that the certificated employee shall, as determined necessary by the employing authority, participate in a program designed to improve appropriate areas of the employee's performance and to further pupil achievement and the instructional objectives of the employing authority. If a district participates in the Peer Assistance and Review Program for Teachers established pursuant to Article 4.5 (commencing with Section 44500), any certificated employee who receives an unsatisfactory rating on an

evaluation performed pursuant to this section shall participate in the Peer Assistance and Review Program for Teachers.

(c) Hourly and temporary hourly certificated employees, other than those employed in adult education classes who are excluded by the provisions of Section 44660, and substitute teachers may be excluded from the provisions of this section at the discretion of the governing board.

SEC. 6. There is hereby appropriated for the 1999–2000 fiscal year the sum of one hundred twenty-five million eighty-two thousand dollars ($125,082,000) according to the following schedule:

(a) The sum of forty-one million eight hundred thousand dollars ($41,800,000) from the General Fund to the Superintendent of Public Instruction for the purposes of Section 44505 of the Education Code.

(b) The sum of eighty-three million two hundred thousand dollars ($83,200,000) from the General Fund to the Superintendent of Public Instruction for the purposes of Article 4 (commencing with Section 44490) of Chapter 3 of Part 25 of the Education Code.

(c) The sum of eighty-two thousand dollars ($82,000) is hereby appropriated from the General Fund to the Superintendent of Public Instruction to provide support services related to the program established pursuant to Section 44500 of the Education Code.

SEC. 7. Notwithstanding Section 17610 of the Government Code, if the Commission on State Mandates determines that this act contains costs mandated by the state, reimbursement to local agencies and school districts for those costs shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code. If the statewide cost of the claim for reimbursement does not exceed one million dollars ($1,000,000), reimbursement shall be made from the State Mandates Claims Fund.

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Exhibit B

CHAPTER 392, STATUTES OF 1995

Citation
LEGIS 392 (1995)
1995 Cal. Legis. Serv. Ch. 392 (A.B. 729) (WEST)

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CALIFORNIA 1995 LEGISLATIVE SERVICE
1995 Portion of 1995-96 Regular Session
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Additions are indicated by <<+ Text +>>; deletions by <<- Text ->>. Changes in tables are made but not highlighted.

CHAPTER 392
A.B. No. 729
SCHOOLS AND SCHOOL DISTRICTS--PERMANENT EMPLOYEES--DISMISSALS

Ch. 392

AN ACT to amend Sections 44662, 44932, 44934, and 44938 of the Education Code, relating to school employees.

[Approved by Governor August 10, 1995.]

[Filed with Secretary of State August 11, 1995.]

LEGISLATIVE COUNSEL'S DIGEST

AB 729, Davis. School employees: grounds for dismissal of a permanent employee.

Under existing law, a permanent employee shall not be dismissed, except for one or more of certain enumerated causes, including incompetency.

This bill would eliminate incompetency as one of the enumerated causes for dismissal of a permanent employee, and would instead provide that a permanent employee may be terminated for unsatisfactory performance.

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

Ch. 392, § 1

SECTION 1. Section 44662 of the Education Code is amended to read:

<< CA EDUC § 44662 >>

44662. (a) The governing board of each school district shall establish standards of expected pupil achievement at each grade level in each area of study.

(b) The governing board of each school district shall evaluate and assess certificated employee <<+performance+>> as it reasonably relates to:

(1) The progress of pupils toward the standards established pursuant to subdivision (a).

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Ch. 392, § 1

(2) The instructional techniques and strategies used by the employee.

(3) The employee's adherence to curricular objectives.

(4) The establishment and maintenance of a suitable learning environment, within the scope of the employee's responsibilities.

(c) The governing board of each school district shall establish and define job responsibilities for <<-* * *->>certificated noninstructional personnel, including, but not limited to, supervisory and administrative personnel, whose responsibilities cannot be evaluated appropriately under the provisions of subdivision (b), and shall evaluate and assess the <<+ performance+>> of <<+ those+>> noninstructional certificated employees as it reasonably relates to the fulfillment of those responsibilities.

(d) The evaluation and assessment of certificated employee <<+ performance+>> pursuant to this section shall not include the use of publishers' norms established by standardized tests.

(e) Nothing in this section shall be construed as in any way limiting the authority of school district governing boards to develop and adopt additional evaluation and assessment guidelines or criteria.

Ch. 392, § 2

SEC. 2. Section 44932 of the Education Code is amended to read:

<< CA EDUC § 44932 >>

44932. (a) No permanent employee shall be dismissed except for one or more the following causes:

(1) Immoral or unprofessional conduct.

(2) Commission, aiding, or advocating the commission of acts of criminal syndicalism, as prohibited by Chapter 188 <<-* * *->><<+of the+>> Statutes of 1919, or in any amendment thereof.

(3) Dishonesty.

(4) <<-* * *->><<+Unsatisfactory performance+>>.

(5) Evident unfitness for service.

(6) Physical or mental condition unfitting him <<+or her+>> to instruct or associate with children.

(7) Persistent violation of or refusal to obey the school laws of the state or reasonable regulations prescribed for the government of the public schools by the State Board of Education or by the governing board of the school district employing him <<+or her+>>.

(8) Conviction of a felony or of any crime involving moral turpitude.

(9) Violation of Section 51530 <<-* * *->>or conduct specified in Section 1028 of the Government Code, added by Chapter 1418 of the Statutes of 1947.

<<-* * *->>

<<+(10)+>> Knowing membership by the employee in the Communist Party.

<<+(11)+>> Alcoholism or other drug abuse which makes the employee unfit to instruct or associate with children.

(b) The governing board of a school district may suspend without pay for a specific period of time on grounds of unprofessional conduct a permanent certificated employee or, in a school district with an average daily attendan of less than 250 pupils, a probationary employee, pursuant to the procedures

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392, § 2

specified in Sections 44933, 44934, 44935, 44936, 44937, 44943, and 44944. This authorization shall not apply to any school district which has adopted a collective bargaining agreement pursuant to subdivision (b) of Section 3543.2 of the Government Code.

Ch. 392, § 3

SEC. 3. Section 44934 of the Education Code is amended to read:

<< CA EDUC § 44934 >>

44934. Upon the filing of written charges, duly signed and verified by the person filing them, with the governing board of the school district, or upon a written statement of charges formulated by the governing board, charging that there exists cause, as specified in Section 44932 or 44933, for the dismissal or suspension of a permanent employee of the district, the governing board may, upon majority vote, except as provided in this article if it deems the action necessary, give notice to the permanent employee of its intention to dismiss or suspend him or her at the expiration of 30 days from the date of service of the notice, unless the employee demands a hearing as provided in this article. Suspension proceedings may be initiated pursuant to this section only if the governing board has not adopted a collective bargaining agreement pursuant to subdivision (b) of Section 3543.2 of the Government Code.

Any written statement of charges of unprofessional conduct or <<-* * *->><<+unsatisfactory performance+>> shall specify instances of behavior and the acts or omissions constituting the charge so that the teacher will be able to prepare his <<+or her+>> defense. It shall, where applicable, state the statutes and rules which the teacher is alleged to have violated, but it shall also set forth the facts relevant to each occasion of alleged unprofessional conduct or <<-* * *->><<+unsatisfactory performance+>>.

This section shall also apply to the suspension of probationary employees in a school district with an average daily attendance of less than 250 pupils which has not adopted a collective bargaining agreement pursuant to subdivision (b) of Section 3542.2 of the Government Code.

Ch. 392, § 4

SEC. 4. Section 44938 of the Education Code is amended to read:

<< CA EDUC § 44938 >>

44938. (a) The governing board of any school district shall not act upon any charges of unprofessional conduct unless at least 45 calendar days prior to the date of the filing, the board or its authorized representative has given the employee against whom the charge is filed, written notice of the unprofessional conduct, specifying the nature thereof with such specific instances of behavior and with such particularity as to furnish the employee an opportunity to correct his or her faults and overcome the grounds for <<+the+>> charge. The written notice shall include the evaluation made pursuant to Article 11 (commencing with Section 44660) of Chapter 3<<-* * *->>, if applicable to the employee.

(b) The governing board of any school district shall not act upon any charges of <<-* * *->><<+unsatisfactory performance+>> unless it acts in accordance with

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CA LEGIS 392 (1995)

Ch. 392, § 4

the provisions of paragraph (1) or (2):

(1) At least 90 calendar days prior to the date of the filing, the board or its authorized representative has given the employee against whom the charge is filed, written notice of the <<-* * *->><<+unsatisfactory performance+>>, specifying the nature thereof with such specific instances of behavior and with such particularity as to furnish the employee an opportunity to correct his or her faults and overcome the grounds for the charge. The written notice shall include the evaluation made pursuant to Article 11 (commencing with Section 44660) of Chapter 3, if applicable to the employee.

(2) The governing board may act during the time period composed of the last one-fourth of the schooldays it has scheduled for purposes of computing apportionments in any fiscal year if, prior to the beginning of that time period, the board or its authorized representative has given the employee against whom the charge is filed, written notice of the <<-* * *->><<+ unsatisfactory performance+>>, specifying the nature thereof with such specific instances of behavior and with such particularity as to furnish the employee an opportunity to correct his or her faults and overcome the grounds for the charge. The written notice shall include the evaluation made pursuant to Article 11 (commencing with Section 44660) of Chapter 3, if applicable to the employee.

(c) "<<-* * *->><<+Unsatisfactory performance+>>" as used in this section means, and refers only to, the <<-* * *->><<+unsatisfactory performance+>> particularly specified as a cause for dismissal in Section 44932 and does not include any other cause for dismissal specified in Section 44932.

"Unprofessional conduct" as used in this section means, and refers to, the unprofessional conduct particularly specified as a cause for dismissal or suspension in Sections 44932 and 44933 and does not include any other cause for dismissal specified in Section 44932.

CA LEGIS 392 (1995)

END OF DOCUMENT

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Exhibit C

CHAPTER 393, STATUTES OF 1986

Typist-Clerk I	Typist-Clerk I
Account Clerk III	Account Clerk III
Account Clerk II	Account Clerk II
Account Clerk I	Account Clerk I
Administrative Clerk II	Administrative Clerk II
Administrative Clerk I	Administrative Clerk I
Traffic Supervisor	Traffic Supervisor

In the event that any classification, the number of positions prescribed for any classification, or the salary, benefits, personnel regulations, memorandum of understanding or affirmative action plan for any classification which is shown above is modified by the board of supervisors, a commensurate modification shall be made for the comparable court classifications. Any adjustment made pursuant to this section shall be effective the same date as the effective date of the action applicable to the respective and comparable county classifications, but shall remain in effect only until January 1 of the second year following the year in which such change is made, unless subsequently ratified by the Legislature.

SEC. 7. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because this act is in accordance with the request of a local agency or school district which desired legislative authority to carry out the program specified in this act.

CHAPTER 393

An act to amend Section 44663 of the Education Code, relating to certificated employees.

[Approved by Governor July 16, 1986. Filed with Secretary of State July 17, 1986.]

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

SECTION 1. Section 44663 of the Education Code is amended to read:

44663. (a) Evaluation and assessment made pursuant to this article shall be reduced to writing and a copy thereof shall be transmitted to the certificated employee not later than 30 days before the last schoolday scheduled on the school calendar adopted by the governing board for the school year in which the evaluation takes place. The certificated employee shall have the right to initiate a written reaction or response to the evaluation. This response shall become a permanent attachment to the employee's personnel file. Before the last schoolday scheduled on the school calendar adopted by the governing board for the school year, a meeting shall be held between the certificated employee and the evaluator to discuss the

evaluation.

(b) In the case of a certificated noninstructional employee, who is employed on a 12-month basis, the evaluation and assessment made pursuant to this article shall be reduced to writing and a copy thereof shall be transmitted to the certificated employee no later than June 30 of the year in which the evaluation and assessment is made. A certificated noninstructional employee, who is employed on a 12-month basis shall have the right to initiate a written reaction or response to the evaluation. This response shall become a permanent attachment to the employee's personnel file. Before July 30 of the year in which the evaluation and assessment takes place, a meeting shall be held between the certificated employee and the evaluator to discuss the evaluation and assessment.

SEC. 2. No reimbursement shall be made from the State Mandates Claims Fund pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code for costs mandated by the state pursuant to this act. It is recognized, however, that a local agency or school district may pursue any remedies to obtain reimbursement available to it under Part 7 (commencing with Section 17500) and any other provisions of law.

CHAPTER 394

An act to amend Section 72252 of the Education Code, relating to community colleges, and declaring the urgency thereof, to take effect immediately.

[Approved by Governor July 16, 1986. Filed with Secretary of State July 17, 1986.]

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

SECTION 1. It is the Legislature's intent, in enacting this act, to cause the provisions in Section 72252 of the Education Code, as amended by Chapter 46 of the Statutes of 1986, to become operative in time for implementation for the 1986–87 school year.

SEC. 2. Section 72252 of the Education Code is amended to read:

72252. (a) Commencing with the semester, term, or quarter that begins after July 31, 1984, the governing board of each community college district shall charge each student a fee, pursuant to this section.

(b) The fee prescribed by this section shall equal fifty dollars ($50) per semester for students enrolled in classes totaling six or more credit semester units, and five dollars ($5) per unit per semester for students enrolled in classes totaling less than six credit semester units.

The chancellor shall proportionately adjust the amount of the fee for term lengths based upon a quarter system or other alternative

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Exhibit D

CHAPTER 498, STATUTES OF 1983

amount for purposes of subdivision (a) or (b) in the next fiscal year.

(d) Any school district may apply for and receive funds for the purposes of this program.

44492.3. In the event that funds available for purposes of providing stipends to mentor teachers are insufficient to provide stipends for the maximum number of certificated classroom teachers authorized to be designated as mentors pursuant to subdivision (a) of Section 44492, the Superintendent of Public Instruction shall decrease the percentage multiplier established in subdivisions (a) and (b) of Section 44492 so that the allocation and authorized number of mentors for each participating school district would be decreased on a pro rata basis.

44492.5. On or before November 15, 1983, the Superintendent of Public Instruction shall submit a report to the Legislature which shall include the superintendent's plan for the programmatic review of applications submitted by districts for funding pursuant to Section 44492, and a summary of the implementation of the California Mentor Teacher Program to date.

44493. Participating school districts receiving funding pursuant to Section 44492 shall establish a special account exclusively for the support of the mentor teacher program. None of the funds allocated by the superintendent pursuant to subdivision (a) of Section 44492 for purposes of providing stipends to mentor teachers shall be used by the participating district for the cost of administering the program.

44494. (a) On or before September 1 of each year, participating school districts which receive funding pursuant to subdivision (a) of Section 44492 shall allocate no less than four thousand dollars ($4,000) to provide each qualified mentor with an additional annual stipend over and above the regular salary to which he or she is entitled. Participating school districts which receive funding pursuant to subdivision (b) of Section 44492 shall allocate the full amount so received to provide a qualified mentor with an additional annual stipend over and above the regular salary to which he or she is entitled. This stipend shall not be counted as salary or wages for purposes of calculating employer contribution rates or employee benefits under the State Teachers' Retirement System.

(b) A mentor may propose that the district allocate all or part of the stipend for his or her professional growth or release time.

(c) The governing board may designate certificated employees as mentor teachers pursuant to Section 44491 and pay these persons the additional annual stipend authorized under subdivision (a) for a period not to exceed three consecutive school years. Upon completing three years as a mentor teacher, an individual may be reviewed and renominated.

(d) The subject of participation by a school district or an individual certificated classroom teacher in a mentor teacher program shall not be included within the scope of representation in collective bargaining among a public school employer and eligible employee organizations.

44495. The selection procedures for the designation of certificated classroom teachers as mentor teachers shall, at a minimum, provide for the following:

(a) A selection committee shall be established to nominate candidates for selection as mentor teachers. The majority of the committee shall be composed of certificated classroom teachers chosen to serve on the committee by other certificated classroom teachers. The remainder of the committee shall be composed of school administrators, chosen to serve on the committee by other school administrators. The governing board of a participating school district shall consider including parents, pupils, or other public representatives in the selection process, and may, at its option, include such persons.

(b) Candidates for mentor teacher shall be nominated by the majority vote of the selection committee.

(c) The selection process shall include provisions for classroom observation of candidates by administrators and classroom teachers employed by the district.

(d) The final designation of any person as a mentor teacher shall be by action of the governing board of the school district from persons nominated pursuant to subdivision (b). The governing board may reject any nominations.

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44496. (a) Persons designated as mentor teachers pursuant to this article shall be assigned duties and responsibilities in accordance with the following:

(1) The primary function of a mentor teacher shall be to provide assistance and guidance to new teachers. A mentor teacher may also provide assistance and guidance to more experienced teachers.

(2) Mentor teachers may provide staff development for teachers, and may develop special curriculum.

(3) A mentor teacher shall not participate in the evaluation of teachers.

(b) No administrative or pupil personnel services credential shall be required of any mentor teacher. Each mentor teacher shall spend, on the average, not less than 60 percent of his or her time in the direct instruction of pupils.

SEC. 29. Section 44662 of the Education Code is amended to read:

44662. (a) The governing board of each school district shall establish standards of expected pupil achievement at each grade level in each area of study.

(b) The governing board of each school district shall evaluate and assess certificated employee competency as it reasonably relates to:

(1) The progress of pupils toward the standards established pursuant to subdivision (a).

(2) The instructional techniques and strategies used by the employee.

(3) The employee's adherence to curricular objectives.

(4) The establishment and maintenance of a suitable learning

environment, within the scope of the employee's responsibilities.

(c) The governing board of each school district shall establish and define job responsibilities for those certificated noninstructional personnel, including, but not limited to, supervisory and administrative personnel, whose responsibilities cannot be evaluated appropriately under the provisions of subdivision (b), and shall evaluate and assess the competency of such noninstructional certificated employees as it reasonably relates to the fulfillment of those responsibilities.

(d) The evaluation and assessment of certificated employee competence pursuant to this section shall not include the use of publishers' norms established by standardized tests.

(e) Nothing in this section shall be construed as in any way limiting the authority of school district governing boards to develop and adopt additional evaluation and assessment guidelines or criteria.

SEC. 30. Section 44663 of the Education Code is amended to read:

44663. Evaluation and assessment made pursuant to this article shall be reduced to writing and a copy thereof shall be transmitted to the certificated employee not later than 30 days before the last schoolday scheduled on the school calendar adopted by the governing board for the school year in which the evaluation takes place. The certificated employee shall have the right to initiate a written reaction or response to the evaluation. Such response shall become a permanent attachment to the employee's personnel file. Before the last schoolday scheduled on the school calendar adopted by the governing board for the school year, a meeting shall be held between the certificated personnel and the evaluator to discuss the evaluation.

SEC. 31. Section 44664 of the Education Code is amended to read:

44664. (a) Evaluation and assessment of the performance of each certificated employee shall be made on a continuing basis, at least once each school year for probationary personnel, and at least every other year for personnel with permanent status. The evaluation shall include recommendations, if necessary, as to areas of improvement in the performance of the employee. In the event an employee is not performing his or her duties in a satisfactory manner according to the standards prescribed by the governing board, the employing authority shall notify the employee in writing of such fact and describe such unsatisfactory performance. The employing authority shall thereafter confer with the employee making specific recommendations as to areas of improvement in the employee's performance and endeavor to assist the employee in such performance. When any permanent certificated employee has received an unsatisfactory evaluation, the employing authority shall annually evaluate the employee until the employee achieves a positive evaluation or is separated from the district.

(b) An evaluation performed pursuant to this article which contains an unsatisfactory rating of an employee's performance in the area of teaching methods or instruction may include the requirement that the certificated employee shall, as determined necessary by the employing authority, participate in a program designed to improve appropriate areas of the employee's performance and to further pupil achievement and the instructional objectives of the employing authority.

(c) Hourly and temporary hourly certificated employees, other than those employed in adult education classes who are excluded by the provisions of Section 44660, and substitute teachers may be excluded from the provisions of this section at the discretion of the governing board.

SEC. 32. Article 2 (commencing with Section 44680) of Chapter 3.1 of Part 25 of the Education Code is repealed.

SEC. 33. Article 2 (commencing with Section 44680) is added to Chapter 3.1 of Part 25 of the Education Code, to read:

Article 2. Local Staff Development and Teacher Education and Computer Centers

44680. As used in this article, "teacher education and computer centers" means those centers established by the Superintendent of Public Instruction to provide those functions previously provided by the state school resource centers and the professional development and program improvement centers.

44680.02. The Superintendent of Public Instruction, with the advice of the county superintendents of schools, shall establish 15 or more teacher education and computer centers in the state in such a manner as to provide staff development resources to all parts of the state.

44680.03. The purpose of the teacher education and computer centers is to provide staff development resources to teachers, administrators, other school personnel, and other persons providing services to schools. These staff development resources shall be provided in all areas of the curriculum, but especially in mathematics, science, technology, and other curriculum areas for which there are significant shortages of qualified, certificated teachers. The centers shall provide these resources in cooperation with institutions of higher education, business, and industry.

44680.04. The teacher education and computer centers shall serve the following functions:

(a) Provide training for classroom teachers and school staffs, including: (1) activities to promote the principal's ability to support instructional improvement and the teacher's ability to diagnose learning needs, (2) the development of program content, (3) the use of multiple instructional approaches, and (4) assessment of student outcomes.

(b) Provide assistance to school personnel develo[illegible] site-based staff development programs including: (1) assessment of school staff development needs, (2) development of school staff [illegible]

Exhibit E

CHAPTER 1216, STATUTES OF 1975

CHAPTER 1216

An act to amend Sections 13405, 13410, 13413, 13485, and 13486 of, to repeal Section 13487 of, and to add Section 13487 to, the Education Code, relating to public schools, and making an appropriation therefor.

[Approved by Governor September 30, 1975. Filed with Secretary of State September 30, 1975.]

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

SECTION 1. Section 13405 of the Education Code is amended to read:

13405. The notice shall not be given between May 15th and September 15th in any year. It shall be in writing and be served upon the employee personally or by United States registered mail addressed to him at his last known address. A copy of the charges filed, containing the information required by Section 11503 of the Government Code, together with a copy of the provisions of this article, shall be attached to the notice.

SEC. 2. Section 13410 of the Education Code is amended to read:

13410. The notice of suspension and intention to dismiss, shall be in writing and be served upon the employee personally or by United States registered mail addressed to the employee at his last known address. A copy of the charges filed, containing the information required by Section 11503 of the Government Code, together with a copy of the provisions of this article, shall be attached to the notice. If the employee does not demand a hearing within the 30-day period, he may be dismissed upon the expiration of 30 days after service of the notice.

SEC. 3. Section 13413 of the Education Code is amended to read:

13413. (a) In the event a hearing is requested by the employee, the hearing shall be commenced within 60 days from the date of the employee's demand for a hearing. The hearing shall be initiated, conducted, and a decision made in accordance with Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code, provided, however, that the hearing date shall be established after consultation with the employee and the governing board, or their representatives, and the Commission on Professional Competence shall have all the power granted to an agency therein, except that the right of discovery of the parties shall not be limited to those matters set forth in Section 11507.6 of the Government Code but shall include the rights and duties of any party in a civil action brought in a superior court. In all cases, discovery shall be completed prior to seven calendar days before the date upon which the hearing commences. If any continuance is granted pursuant to Section 11524 of the Government Code, the time limitation for commencement of the hearing as provided in this

subdivision shall be extended for a period of time equal to such continuance; provided, however, that such extension shall not include that period of time attributable to an unlawful refusal by either party to allow the discovery provided for in this section.

If the right of discovery granted under the preceding paragraph is denied by either the employee or the governing board, all the remedies in Section 2034 of the Code of Civil Procedure shall be available to the party seeking discovery and the court of proper jurisdiction, to entertain his motion, shall be the superior court of the county in which the hearing will be held.

The time periods in this section and of Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code and of Article 3 (commencing with Section 2016) of Chapter 3 of Title 3 of Part 4 of the Code of Civil Procedure shall not be applied so as to deny discovery in a hearing conducted pursuant to this section.

The superior court of the county in which the hearing will be held may, upon motion of the party seeking discovery, suspend the hearing so as to comply with the requirement of the preceding paragraph.

No witness shall be permitted to testify at the hearing except upon oath or affirmation. No testimony shall be given or evidence introduced relating to matters which occurred more than four years prior to the date of the filing of the notice. Evidence of records regularly kept by the governing board concerning the employee may be introduced, but no decision relating to the dismissal or suspension of any employee shall be made based on charges or evidence of any nature relating to matters occurring more than four years prior to the filing of the notice.

(b) The hearing provided for in this section shall be conducted by a Commission on Professional Competence. One member of the commission shall be selected by the employee, one member shall be selected by the governing board, and one member shall be a hearing officer of the State Office of Administrative Procedure who shall be chairman and a voting member of the commission and shall be responsible for assuring that the legal rights of the parties are protected at the hearing. If either the governing board or the employee for any reason fails to select a commission member at least seven calendar days prior to the date of the hearing, such failure shall constitute a waiver of the right to selection, and the county board of education or its specific designee shall immediately make the selection. When the county board of education is also the governing board of the school district or has by statute been granted the powers of a governing board, the selection shall be made by the Superintendent of Public Instruction, who shall be reimbursed by the school district for all costs incident to the selection.

The member selected by the governing board and the member selected by the employee shall not be related to the employee and shall not be employees of the district initiating the dis[illegible]l and shall

hold a currently valid credential and have at least five years' experience within the past 10 years in the discipline of the employee.

(c) The decision of the Commission on Professional Competence shall be made by a majority vote and the commission shall prepare a written decision containing findings of fact, determinations of issues and a disposition either:

(1) That the employee should be dismissed.

(2) That the employee should not be dismissed.

The decision of the Commission on Professional Competence shall be deemed to be the final decision of the governing board.

The board may adopt from time to time such rules and procedures not inconsistent with provisions of this section, as may be necessary to effectuate this section.

The governing board and the employee shall have the right to be represented by counsel.

(d) (1) If the member selected by the governing board or the member selected by the employee is employed by any school district in California, such member shall, during any service on a Commission on Professional Competence, continue to receive salary, fringe benefits, accumulated sick leave, and other leaves and benefits from the district in which the member is employed, but shall receive no additional compensation or honorariums for service on the commission.

(2) If service on a Commission on Professional Competence occurs during summer recess or vacation periods, the member shall receive compensation proportionate to that received during the current or immediately preceding contract period from the member's employing district.

(e) If the governing board orders the dismissal of the employee, the governing board and the employee shall share equally the expenses of the hearing, including the cost of the hearing officer; and the state shall pay any costs incurred under subdivision (d) (2) above, and the reasonable expenses, as determined by the hearing officer, of the member selected by the governing board and the member selected by the employee, and the cost of the substitute or substitutes, if any, for the member selected by the governing board and the member selected by the employee. The State Controller shall pay all claims submitted pursuant to this paragraph from the General Fund, and may prescribe reasonable rules, regulations and forms for the submission of such claims. The employee and the governing board shall pay their own attorney fees.

If the governing board orders that the employee not be dismissed, the governing board shall pay all expenses of the hearing, including the cost of the hearing officer, and any costs incurred under subdivision (d) (2) above, and the reasonable expenses, as determined by the hearing officer, of the member selected by the governing board and the member selected by the employee, and the cost of the substitute or substitutes, if any, for the member selected by the governing board and the member selected by the employee, and reasonable attorney fees incurred by the employee.

SEC. 4. Section 13485 of the Education Code is amended to read:

13485. It is the intent of the Legislature that governing boards establish a uniform system of evaluation and assessment of the performance of all certificated personnel within each school district of the state, including schools conducted or maintained by county superintendents of education. The system shall involve the development and adoption by each school district of objective evaluation and assessment guidelines which may, at the discretion of the governing board, be uniform throughout the district or, for compelling reasons, be individually developed for territories or schools within the district, provided that all certificated personnel of the district shall be subject to a system of evaluation and assessment adopted pursuant to this article.

This article does not apply to certificated personnel who are employed on an hourly basis in adult education classes.

SEC. 5. Section 13486 of the Education Code is amended to read:

13486. In the development and adoption of guidelines and procedures pursuant to this article, the governing board shall avail itself of the advice of the certificated instructional personnel in the district's organization of certificated personnel; provided, however, that the development and adoption of guidelines pursuant to this article shall also be subject to the provisions of Article 5 (commencing with Section 13080) of Chapter 1 of this division.

SEC. 6. Section 13487 of the Education Code is repealed.

SEC. 7. Section 13487 is added to the Education Code, to read:

13487. (a) The governing board of each school district shall establish standards of expected student achievement at each grade level in each area of study.

(b) The governing board of each school district shall evaluate and assess certificated employee competency as it reasonably relates to (1) the progress of students toward the established standards, (2) the performance of those noninstructional duties and responsibilities, including supervisory and advisory duties, as may be prescribed by the board, and (3) the establishment and maintenance of a suitable learning environment within the scope of the employee's responsibilities.

(c) The governing board of each school district shall establish and define job responsibilities for those certificated noninstructional personnel, including, but not limited to, supervisory and administrative personnel, whose responsibilities cannot be evaluated appropriately under the provisions of subdivision (b), and shall evaluate and assess the competency of such noninstructional certificated employees as it reasonably relates to the fulfillment of those responsibilities.

(d) The evaluation and assessment of certificated employee competence pursuant to this section shall not include the use of publishers' norms established by standardized tests.

(e) Nothing in this section shall be construed as in any way

limiting the authority of school district governing boards to develop and adopt additional evaluation and assessment guidelines or criteria.

SEC. 8. The sum of twenty-five thousand dollars ($25,000) is hereby appropriated from the General Fund to the State Controller for allocation and disbursement pursuant to subdivision (c) of Section 13413 of the Education Code.

SEC. 9. Notwithstanding Section 2231 of the Revenue and Taxation Code, there shall be no reimbursement pursuant to this section nor shall there be any appropriation made by this act, except as provided in Section 8 of this act, because any costs incurred by a local agency pursuant to this act are the result of an action initiated by the local agency.

CHAPTER 1217

An act to add Article 2.4 (commencing with Section 283) to Chapter 2 of Division 1 of the Health and Safety Code, relating to pregnant women, making an appropriation therefor, and declaring the urgency thereof, to take effect immediately.

[Approved by Governor September 30, 1975. Filed with Secretary of State September 30, 1975.]

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

SECTION 1. Article 2.4 (commencing with Section 283) is added to Chapter 2 of Division 1 of the Health and Safety Code, to read:

Article 2.4. High-risk Pregnancy

283. It is the intent of the Legislature in enacting this article to provide, to the extent practicable, pilot programs designed to develop, test, and expand services to pregnant women who are considered highly likely to personally suffer morbidity or mortality from their pregnancy or deliver handicapped children.

283.2. "High-risk pregnant woman," as used in this article, means any pregnant woman determined to be at high risk of delivering a defective or handicapped, or stillborn infant due to premature labor.

283.4. The State Department of Health may establish one or more pilot programs not to exceed three years in duration, to provide personal health care services in the perinatal period to high-risk pregnant women.

283.6. With respect to such pilot programs, the state department shall do the following:

(a) Establish guidelines for the treatment and list minimum services.

(b) Develop applications for grants or contracts to provide funding.

(c) Designate approved applicants as providers of services to high-risk pregnant women.

(d) Provide surveillance and supervision of the pilot projects.

(e) Encourage development of new forms of treatment.

(f) Seek federal funds, as well as funds from other public or private organizations or agencies, to carry out the provisions of this article.

(g) Provide appropriate staff to carry out the provisions of this article.

(h) Set standards for financial eligibility, including a patient repayment schedule based on reasonable rates, subject to the maximum utilization of patient third-party reimbursement sources.

283.8. In order to assure that maximum utilization of patient third-party reimbursement sources, the state department shall develop a schedule of reimbursement at reasonable rates for all services rendered pursuant to this article. Inquiry shall be made of all recipients of services under this article as to their entitlement for third-party reimbursement for medical services. Where such entitlement exists, it shall be billed.

284. The Director of Health shall set priorities and establ[illegible] standards for services for high-risk pregnant women and perinat[illegible] care centers funded under this article, so that the aggregate cost for each fiscal year of the pilot programs does not exceed the total of amounts appropriated by the state for such purpose for the fiscal year and any federal or other funds available for such purpose.

284.2. The state department shall submit an interim report of its findings derived from the pilot programs to the Legislature and to the Secretary of the Health and Welfare Agency on or before June 30, 1977, and shall submit a final report on or before June 30, 1979. The reports shall consider the effectiveness of the pilot programs in reducing the incidence and severity of defects or handicaps of children born to high-risk pregnant women and in reducing the infant and mother morbidity rate for such women and their infants, and shall consider the related economic impact of each such pilot program.

284.4. Except with respect to the reporting duties specified in Section 284.2, this article shall remain in effect only until January 1, 1979, and shall have no force or effect on or after such date, unless a later enacted statute, which is chaptered before January 1, 1979, deletes or extends such date.

SEC. 2. The sum of six million dollars ($6,000,000) is hereby appropriated from the General Fund to the Department of Health for the purposes of Article 2.4 (commencing with Section 283) of Chapter 2 of Division 1 of the Health and Safety Code, as added by this act, for expenditure as follows:

(a) One million dollars ($1,000,000) during the 19[illegible]6 fiscal year.

(b) Two million dollars ($2,000,000) during the 19[illegible]7 fiscal year.

Exhibit F

EDUCATION CODE § 44660

Article 11. Evaluation and Assessment of Performance of Certificated Employees

44660. It is the intent of the Legislature that governing boards establish a uniform system of evaluation and assessment of the performance of all certificated personnel within each school district of the state, including schools conducted or maintained by county superintendents of education. The system shall involve the development and adoption by each school district of objective evaluation and assessment guidelines which may, at the discretion of the governing board, be uniform throughout the district or, for compelling reasons, be individually developed for territories or schools within the district, provided that all certificated personnel of the district shall be subject to a system of evaluation and assessment adopted pursuant to this article.

This article does not apply to certificated personnel who are employed on an hourly basis in adult education classes.

Exhibit G

EDUCATION CODE § 44661

44661. In the development and adoption of guidelines and procedures pursuant to this article, the governing board shall avail itself of the advice of the certificated instructional personnel in the district's organization of certificated personnel; provided, however, that the development and adoption of guidelines pursuant to this article shall also be subject to the provisions of Article 1 (commencing with Section 7100) of Chapter 2 of Part 5 of Division 1 of Title 1.

Exhibit H

EDUCATION CODE § 44662

44662. (a) The governing board of each school district shall establish standards of expected student achievement at each grade level in each area of study.

(b) The governing board of each school district shall evaluate and assess certificated employee competency as it reasonably relates to (1) the progress of students toward the established standards, (2) the performance of those noninstructional duties and responsibilities, including supervisory and advisory duties, as may be prescribed by the board, and (3) the establishment and maintenance of a suitable learning environment within the scope of the employee's responsibilities.

(c) The governing board of each school district shall establish and define job responsibilities for those certificated noninstructional personnel, including, but not limited to, supervisory and administrative personnel, whose responsibilities cannot be evaluated appropriately under the provisions of subdivision (b), and shall evaluate and assess the competency of such noninstructional certificated employees as it reasonably relates to the fulfillment of those responsibilities.

(d) The evaluation and assessment of certificated employee competence pursuant to this section shall not include the use of publishers' norms established by standardized tests.

(e) Nothing in this section shall be construed as in any way limiting the authority of school district governing boards to develop and adopt additional evaluation and assessment guidelines or criteria.

Exhibit I

EDUCATION CODE § 44663

44663. Evaluation and assessment made pursuant to this article shall be reduced to writing and a copy thereof shall be transmitted to the certificated employee not later than 60 days before the end of each school year in which the evaluation takes place. The certificated employee shall have the right to initiate a written reaction or response to the evaluation. Such response shall become a permanent attachment to the employee's personnel file. Before the end of the school year, a meeting shall be held between the certificated personnel and the evaluator to discuss the evaluation.

Exhibit J

EDUCATION CODE § 44664

44664. Evaluation and assessment of the performance of each certificated employee shall be made on a continuing basis, at least once each school year for probationary personnel, and at least every other year for personnel with permanent status. The evaluation shall include recommendations, if necessary, as to areas of improvement in the performance of the employee. In the event an employee is not performing his duties in a satisfactory manner according to the standards prescribed by the governing board, the employing authority shall notify the employee in writing of such fact and describe such unsatisfactory performance. The employing authority shall thereafter confer with the employee making specific recommendations as to areas of improvement in the employee's performance and endeavor to assist him in such performance.

Hourly and temporary hourly certificated employees, other than those employed in adult education classes who are excluded by the provisions of Section 44660, and substitute teachers may be excluded from the provisions of this section at the discretion of the governing board.

Exhibit K

EDUCATION CODE § 44665

44665. For purposes of this article, "employing authority" means the superintendent of the school district in which the employee is employed, or his designee, or in the case of a district which has no superintendent, a school principal or other person designated by the governing board.

Exhibit L

CHAPTER 361, STATUTES OF 1971

CHAPTER 361

An act to amend Sections 13403, 13404, 13404.5, 13405, 13406, 13407, 13408, 13409, 13410, 13412, and 13439 of, to add Sections 13413, and 13414 to, to add Article 5.5 (commencing with Section 13485) to Chapter 2 of Division 10 of, and to repeal Sections 13413, 13414, 13415, 13416, 13417, 13418, 13419, 13420, 13421, 13422, 13423, 13424, 13425, 13426, 13427, 13428, 13429, 13430, 13431, 13432, 13433, 13434, 13435, 13436, 13437, 13438, and 13440 of, the Education Code, relating to certificated employees.

[Approved by Governor July 20, 1971. Filed with Secretary of State July 20, 1971.]

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

SECTION 1. Section 13403 of the Education Code is amended to read:

13403. No permanent employee shall be dismissed except for one or more of the following causes:

(a) Immoral or unprofessional conduct.

(b) Commission, aiding, or advocating the commission of acts of criminal syndicalism, as prohibited by Chapter 188, Statutes of 1919, or in any amendment thereof.

(c) Dishonesty.

(d) Incompetency.

(e) Evident unfitness for service.

(f) Physical or mental condition unfitting him to instruct or associate with children.

(g) Persistent violation of or refusal to obey the school laws of the state or reasonable regulations prescribed for the government of the public schools by the State Board of Education or by the governing board of the school district employing him.

(h) Conviction of a felony or of any crime involving moral turpitude.

(i) Violation of Section 9031 of this code or conduct specified in Section 1028 of the Government Code, added by Chapter 1418 of the Statutes of 1947.

(j) Violation of any provision in Sections 12952 to 12958, inclusive, of this code.

(k) Knowing membership by the employee in the Communist Party.

SEC. 2. Section 13404 of the Education Code is amended to read:

13404. Upon the filing of written charges, duly signed and verified by the person filing them, with the governing board of the school district, or upon a written statement of charges formulated by the governing board, charging that there exists cause for the dismissal of a permanent employee of the district, the governing board may, upon majority vote, except as provided in this article if it deems the action necessary, give notice to the permanent employee of its intention to dismiss him

at the expiration of 30 days from the date of service of the notice, unless the employee demands a hearing as provided in this article.

Any written statement of charges of unprofessional conduct or incompetency shall specify instances of behavior and the acts or omissions constituting the charge so that the teacher will be able to prepare his defense. It shall, where applicable, state the statutes and rules which the teacher is alleged to have violated, but it shall also set forth the facts relevant to each occasion of alleged unprofessional conduct or incompetency.

SEC. 3. Section 13404.5 of the Education Code is amended to read:

13404.5. No report on the fitness of a teacher in a dismissal proceeding shall be received from a statewide professional organization by a governing board unless the teacher shall have been given, prior to the preparation of the report in its final form, the opportunity to submit in writing his or her comments on the report and unless a copy of the report in final form is given to the teacher investigated at least 10 days prior to its submission to the board.

Such a report shall not be distributed other than to the governing board and those persons participating in its preparation, unless the teacher does not demand a hearing as provided by Section 13406.

SEC. 4. Section 13405 of the Education Code is amended to read:

13405. The notice shall not be given between May 15th and September 15th in any year. It shall be in writing and be served upon the employee personally or by United States registered mail addressed to him at his last known address. A copy of the charges filed, together with a copy of the provisions of this article, shall be attached to the notice.

SEC. 5. Section 13406 of the Education Code is amended to read:

13406. If the employee does not demand a hearing by filing a written request for hearing with the governing board, he may be dismissed at the expiration of the 30-day period.

SEC. 6. Section 13407 of the Education Code is amended to read:

13407. The governing board of any school district shall not act upon any charges of unprofessional conduct or incompetency unless during the preceding term or half school year prior to the date of the filing of the charge, and at least 90 days prior to the date of the filing, the board or its authorized representative has given the employee against whom the charge is filed, written notice of the unprofessional conduct or incompetency, specifying the nature thereof with such specific instances of behavior and with such particularity as to furnish the employee an opportunity to correct his faults and overcome the grounds for such charge. The written notice shall include the evaluation made pursuant to Article 5.5 (commencing with Section 13485) of this chapter. "Unprofessional conduct" and

"incompetency" as used in this section means, and refers only to, the unprofessional conduct and incompetency particularly specified as a cause for dismissal in Section 13403 and does not include any other cause for dismissal specified in that section.

SEC. 7. Section 13408 of the Education Code is amended to read:

13408. Upon the filing of written charges, duly signed and verified by the person filing them with the governing board of a school district, or upon a written statement of charges formulated by the governing board, charging a permanent employee of the district with immoral conduct, conviction of a felony or of any crime involving moral turpitude, with incompetency due to mental disability, with willful refusal to perform regular assignments without reasonable cause, as prescribed by reasonable rules and regulations of the employing school district, with violation of Section 9031, with knowing membership by the employee in the Communist Party or with violation of any provision in Sections 12952 to 12958, inclusive, the governing board may, if it deems such action necessary, immediately suspend the employee from his duties and give notice to him of his suspension, and that 30 days after service of the notice, he will be dismissed, unless he demands a hearing.

If the permanent employee is suspended upon charges of knowing membership by the employee in the Communist Party or for any violation of Section 9031, 12952, 12953, 12954, 12957, or 12958, he may within 10 days after service upon him of notice of such suspension file with the governing board a verified denial, in writing, of the charges. In such event the permanent employee who demands a hearing within the 30-day period shall continue to be paid his regular salary during the period of suspension and until the entry of the decision of the Commission on Professional Competence, if and during such time as he furnishes to the school district a suitable bond, or other security acceptable to the governing board, as a guarantee that the employee will repay to the school district the amount of salary so paid to him during the period of suspension in case the decision of the Commission on Professional Competence is that he shall be dismissed. If it is determined that the employee may not be dismissed, the school district shall reimburse the employee for the cost of the bond.

SEC. 8. Section 13409 of the Education Code is amended to read:

13409. Whenever any certificated employee of a school district is charged with the commission of any sex offense as defined in Section 12912 by complaint, information or indictment filed in a court of competent jurisdiction, the governing board of the school district shall immediately place the employee upon compulsory leave of absence for a period of time extending for not more than 10 days after the date of the entry of the judgment in the proceedings. The governing board of the school district may extend the compulsory leave of absence of the employee beyond such period by giving notice

to the employee within 10 days after the entry of judgment in the proceedings that the employee will be dismissed at the expiration of 30 days from the date of service of the notice, unless the employee demands a hearing as provided in this article.

Any employee placed upon compulsory leave of absence pursuant to this section shall continue to be paid his regular salary during the period of his compulsory leave of absence if and during such time as he furnishes to the school district a suitable bond, or other security acceptable to the governing board, as a guarantee that the employee will repay to the school district the amount of salary so paid to him during the period of the compulsory leave of absence in case the employee is convicted of such charges, or fails or refuses to return to service following an acquittal of the offense or dismissal of the charges. If the employee is acquitted of the offense, or the charges against him are dismissed, the school district shall reimburse the employee for the cost of the bond upon his return to service in the school district.

If the employee does not elect to furnish bond, or other security acceptable to the governing board of the district, and if the employee is acquitted of the offense, or the charges against him are dismissed, the school district shall pay to the employee his full compensation for the period of the compulsory leave of absence upon his return to service in the school district.

Whenever any certificated employee of a school district is charged with the commission of any narcotics offense as defined in Section 12912.5, or a violation of subdivision 1 of Section 261 of the Penal Code, Sections 11530 to 11532, inclusive, 11540, or 11910 to 11915, inclusive, insofar as such sections relate to subdivision (c) of Section 11901, of the Health and Safety Code, by complaint, information, or indictment filed in a court of competent jurisdiction, the governing board of the school district may immediately place the employee upon compulsory leave in accordance with the procedure in this section.

SEC. 9. Section 13410 of the Education Code is amended to read:

13410. The notice of suspension and intention to dismiss, shall be in writing and be served upon the employee personally or by United States registered mail addressed to the employee at his last known address. A copy of the charges filed, together with a copy of the provisions of this article, shall be attached to the notice. If the employee does not demand a hearing within the 30-day period, he may be dismissed upon the expiration of 30 days after service of the notice.

SEC. 10. Section 13412 of the Education Code is amended to read:

13412. When any employee who has been served with notice of the governing board's intention to dismiss him demands a hearing, the governing board shall have the option either (a)

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to rescind its action, or (b) schedule a hearing on the matter.

SEC. 11. Section 13413 of the Education Code is repealed.

SEC. 12. Section 13413 is added to the Education Code, to read:

13413. In the event a hearing is requested by the employee, the hearing shall be commenced within 60 days from the date of the employee's demand for a hearing. The hearing shall be conducted and a decision made in accordance with Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code, and the Commission on Professional Competence shall have all the power granted to an agency therein.

No witness shall be permitted to testify at the hearing except upon oath or affirmation. No testimony shall be given or evidence introduced relating to matters which occurred more than four years prior to the date of the filing of the notice. Evidence of records regularly kept by the governing board concerning the employee may be introduced, but no decision relating to the dismissal or suspension of any employee shall be made based on charges or evidence of any nature relating to matters occurring more than four years prior to the filing of the notice.

In those causes specified in subdivisions (b), (f), (h), (i), (j), and (k) of Section 13403, the hearing shall be conducted by a hearing officer whose decision shall be binding on the board. In the event the employee is charged with any of the causes specified in subdivisions (a), (c), (d), (e), and (g) of Section 13403, the hearing shall be conducted by a Commission on Professional Competence. One member of the panel shall be selected by the employee, one member shall be selected by the governing board, and one member shall be a hearing officer of the State Office of Administrative Procedure who shall be chairman and a voting member of the competency panel and shall be responsible for assuring that the legal rights of the employee are protected at the hearing. If either the governing board or the employee for any reason fails to select a commission member at least seven days prior to the date of the hearing, such failure shall constitute a waiver of the right to selection, and the county board of education or its specific designee shall immediately make the selection. When the county board of education is also the governing board of the school district, the selection shall be made by the Superintendent of Public Instruction, who shall be reimbursed by the school district for all costs incident to the selection.

The member selected by the governing board and the member selected by the employee shall have at least five years' experience in the specific educational function of the accused as set forth in Section 13055.

In those instances where the employee has been charged with any of the causes specified in subdivisions (a), (c), (d), (e), and (g) of Section 13403, the decision shall be made, by a majority vote, by the Commission on Professional Competence which shall prepare a written decision containing findings of fact, determinations of issues and a disposition either:

(a) That the employee should be dismissed.

(b) That the employee should not be dismissed.

In those instances where the employee has been charged with any of the causes specified in subdivisions (a), (c), (d), (e), and (g) of Section 13403, the decision of the Commission on Professional Competence shall be deemed to be the final decision of the governing board.

The board may adopt from time to time such rules and procedures not inconsistent with provisions of this section, as may be necessary to effectuate this section.

The governing board and the employee shall have the right to be represented by counsel.

If the governing board orders the dismissal of the employee, the governing board and the employee shall share equally the expenses of the hearing, including the cost of the hearing officer. The employee and the governing board shall pay their own attorney fees.

If the governing board orders that the employee not be dismissed, the governing board shall pay all expenses of the hearing, including the cost of the hearing officer, and reasonable attorney fees incurred by the employee.

SEC. 13. Section 13414 of the Education Code is repealed.

SEC. 13.5. Section 13414 is added to the Education Code, to read:

13414. The decision of the Commission on Professional Competence may, on petition of either the governing board or the employee, be reviewed by a court of competent jurisdiction in the same manner as a decision made by a hearing officer under Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code. The court, on review, shall exercise its independent judgment on the evidence. The proceeding shall be set for hearing at the earliest possible date and shall take precedence over all other cases, except older matters of the same character and matters to which special precedence is given by law.

SEC. 14. Section 13415 of the Education Code is repealed.

SEC. 15. Section 13416 of the Education Code is repealed.

SEC. 16. Section 13417 of the Education Code is repealed.

SEC. 17. Section 13418 of the Education Code is repealed.

SEC. 18. Section 13419 of the Education Code is repealed.

SEC. 19. Section 13420 of the Education Code is repealed.

SEC. 20. Section 13421 of the Education Code is repealed.

SEC. 21. Section 13422 of the Education Code is repealed.

SEC. 22. Section 13423 of the Education Code is repealed.

SEC. 23. Section 13424 of the Education Code is repealed.

SEC. 24. Section 13425 of the Education Code is repealed.

SEC. 25. Section 13426 of the Education Code is repealed.

SEC. 26. Section 13427 of the Education Code is repealed.

SEC. 27. Section 13428 of the Education Code is repealed.

SEC. 28. Section 13429 of the Education Code is repealed.

SEC. 29. Section 13430 of the Education Code is repealed.
SEC. 30. Section 13431 of the Education Code is repealed.
SEC. 31. Section 13432 of the Education Code is repealed.
SEC. 32. Section 13433 of the Education Code is repealed.
SEC. 33. Section 13434 of the Education Code is repealed.
SEC. 34. Section 13435 of the Education Code is repealed.
SEC. 35. Section 13436 of the Education Code is repealed.
SEC. 36. Section 13437 of the Education Code is repealed.
SEC. 37. Section 13438 of the Education Code is repealed.
SEC. 38. Section 13439 of the Education Code is amended to read:

13439. If the employee has been suspended pending the hearing, he shall be reinstated within five days after the governing board's decision in his favor, and shall be paid full salary by the governing board for the period of his suspension.

SEC. 39. Section 13440 of the Education Code is repealed.

SEC. 40. Article 5.5 (commencing with Section 13485) is added to Chapter 2 of Division 10 of the Education Code, to read:

Article 5.5. Evaluation and Assessment of Performance of Certificated Employees

13485. It is the intent of the Legislature to establish a uniform system of evaluation and assessment of the performance of certificated personnel within each school district of the state. The system shall involve the development and adoption by each school district of objective evaluation and assessment guidelines.

13486. In the development and adoption of these guidelines and procedures, the governing board shall avail itself of the advice of the certificated instructional personnel in the district's organization of certificated personnel.

13487. The governing board of each school district shall develop and adopt specific evaluation and assessment guidelines which shall include but shall not necessarily be limited in content to the following elements:

(a) The establishment of standards of expected student progress in each area of study and of techniques for the assessment of that progress.

(b) Assessment of certificated personnel competence as it relates to the established standards.

(c) Assessment of other duties normally required to be performed by certificated employees as an adjunct to their regular assignments.

(d) The establishment of procedures and techniques for ascertaining that the certificated employee is maintaining proper control and is preserving a suitable learning environment.

13488. Evaluation and assessment made pursuant to this article shall be reduced to writing and a copy thereof shall be transmitted to the certificated employee not later than 60 days before the end of each school year in which the evaluation takes place. The certificated employee shall have the right

to initiate a written reaction or response to the evaluation. Such response shall become a permanent attachment to the employee's personnel file. Before the end of the school year, a meeting shall be held between the certificated personnel and the evaluator to discuss the evaluation.

13489. Evaluation and assessment of the performance of each certificated employee shall be made on a continuing basis, at least once each school year for probationary personnel, and at least every other year for personnel with permanent status. The evaluation shall include recommendations, if necessary, as to areas of improvement in the performance of the employee. In the event an employee is not performing his duties in a satisfactory manner according to the standards prescribed by the governing board, the employing authority shall notify the employee in writing of such fact and describe such unsatisfactory performance. The employing authority shall thereafter confer with the employee making specific recommendations as to areas of improvement in the employee's performance and endeavor to assist him in such performance.

SEC. 41. Sections 1 to 39 of this act shall become operative on the 61st day after the final adjournment of the 1972 Regular Session of the Legislature.

SEC. 42. Article 5 (commencing with Section 13401) and Article 5.5 (commencing with Section 13485) of Chapter 2 of Division 10 of the Education Code shall not apply to certificated employees in community colleges if Senate Bill No. 696 or Assembly Bill No. 3032 is enacted at the 1971 Regular Session of the Legislature.

CHAPTER 362

An act to add Sections 989.2 and 989.3 to, and to add Article 3.8 (commencing with Section 989.4) to Chapter 6 of Division 4 of, the Military and Veterans Code, relating to veterans' loans and making an appropriation therefor, and declaring the urgency thereof, to take effect immediately.

[Approved by Governor July 20, 1971. Filed with Secretary of State July 20, 1971.]

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

SECTION 1. Section 989.2 is added to the Military and Veterans Code, to read:

989.2. In addition to any amounts appropriated by Section 989.1, there is hereby appropriated, from any surplus money in the Farm and Home Building Fund of 1943, not required to meet any immediate demand which has accrued against the fund, without regard to fiscal years, the sum of one million dollars ($1,000,000), or so much thereof as may be necessary to carry out the provisions of this article.

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Exhibit M

DECLARATION OF LARRY S. PHELPS

Larry S. Phelps, Superintendent
Denair Unified School District
P.O. Box 368
Denair, CA 95216
Telephone: (209) 632-7514
Fax: (209) 632-9194

Paul C. Minney, Esq.
GIRARD & VINSON
1676 N. California Blvd., Ste. 450
Walnut Creek, CA 94596
Telephone: (925) 746-7660
Facsimile: (925) 935-7995

Attorney for Mandated Cost Systems, Inc. and
Authorized Representative of Claimant
Denair Unified School District

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

Test Claim Of: **DENIAR UNIFIED SCHOOL DISTRICT**	CSM NO. DECLARATION OF SUPERINTENDENT LARRY S. PHELPS, DENIAR UNIFIED SCHOOL DISTRICT IN SUPPORT OF TEST CLAIM CSM *THE STULL ACT*

I, Larry S. Phelps, Superintendent, Deniar Unified School District, make the following declaration and statement:

1. In my capacity as Superintendent, I have knowledge of Deniar Unified School District's teacher evaluation and assessment procedures and requirements. I am familiar with the provisions and requirements of Chapter 4, Statutes of 1999 (AB 1) ("Chapter 4/99"), Chapter 392, Statutes of 1995 ("Chapter 392/95"), Chapter 393, Statutes of 1986 ("Chapter 393/86"), Chapter

498, Statutes of 1983 ("Chapter 498/83"),Chapter 1216, Statutes of 1975 ("Chapter 1216/75") and Education Code section 44660 (formerly Education Code section 13485), Education Code 44661 (formerly Education Code section 13486), Education Code section 44662 (formerly Education Code section 13487), Education Code section 44663 (formerly Education Code section 13488), Education Code section 44664 (formerly Education Code section 13489), and Education Code section 44665 (formerly Education Code section 13490), which together (1) require the county superintendent of schools to establish an conduct a uniform system of evaluation and assessment of the performance of all certificated personnel within the schools maintained by the county superintendent; (2) require school districts to assess and evaluate certificated noninstructional personnel, and (3) evaluate and assess certificated instructional personnel under new and revised criteria (e.g. pupil progress toward State adopted academic content standards) which require Deniar Unified School District to:

1. Establish standards of expected pupil achievement at each grade level in each area of study.
2. Establish and define job responsibilities for certificated noninstructional personnel, including, but not limited to, supervisory and administrative personnel.
3. Evaluate and assess the performance of noninstructional certificated personnel as it reasonably relates to the fulfillment of the established job responsibilities.
4. Prepare and draft a written evaluation of the noninstructional certificated employee. The evaluation shall include recommendations, if necessary, as to areas of improvement.
5. Receive and review from a certificated noninstructional employee written responses regarding his/her evaluation.
6. Prepare and hold a meeting between the certificated noninstructional employee and the evaluator to discuss the evaluation and assessment.
7. Evaluate and assess certificated instructional employee performance as it reasonably relates to:
   (a) The instructional techniques and strategies used by the certificated employee;
   (b) The certificated employees adherence to curricular objectives; and

(c) The progress of pupils towards the state adopted academic content standards, if applicable, as measured by state adopted criterion referenced assessments. (This last section is effective on June 24, 1999).

8. Conduct additional annual assessments and evaluations of permanent certificated instructional and noninstructional employees who have received an unsatisfactory evaluation. The school district must conduct the annual assessment and evaluation of a permanent certificated employee until the employee achieves a positive evaluation or is separated from the school district. This mandated reimbursable activity is limited to those annual assessments and evaluations which occur in years in which the employee would not have been required to be evaluated as per section 44664 (i.e., permanent certificated employees shall be evaluated every other year). When conducting these additional evaluations the full cost of the evaluation is reimbursable (e.g., evaluation under all criterion, preparing written evaluation, review of comments, and holding a hearing with the teacher).

9. Receive and review, for purposes of a certificated employee's assessment and evaluation, if applicable, the results of an employee's participation in the Peer Assistance and Review Program for Teachers established by Article 4.5 (commencing with section 44500).

I am informed and believe that prior to the test claim legislation, there was no responsibility for Deniar Unified School District to engage in the activities set forth above.

It is estimated that Deniar Unified School District will/has incurred significantly more than $200.00 to implement these new duties mandated by the State for which Deniar Unified School District has not been reimbursed by any federal, state, or local agency, and for which it cannot otherwise obtain reimbursement.

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

Executed this 18th day of June, 1999, in Denair, California.

Larry S. Phelps, Superintendent

Exhibit N

COMPARISON OF STULL ACT EVALUATION CRITERION CHART

COMPARISON OF STULL ACT EVALUATION CRITERION

Requirements as of December 30, 1974	Evaluation Criterion 1999
The governing board of each school district shall evaluate and assess certificated employee performance as its relates to: (a) The progress of pupils toward the established standards of the district by area of study. (b) The assessment of other duties normally required to be performed by certificated employees as an adjunct to their regular assignments. (c) Maintaining proper control and is preserving a suitable learning environment.	The governing board of each school district evaluate and assess certificated employee performance as it reasonably relates to: (1) The progress of pupils toward the established standards and, if applicable, the state adopted academic content standards as measured by state adopted criterion referenced assessments; (2) The instructional techniques and strategies used by the employee; (3) The employee's adherence to curricular objectives; and (4) The establishment and maintenance of a suitable learning environment, within the scope of the employee's responsibilities.

DEPARTMENT OF FINANCE
GRAY DAVIS, GOVERNOR
915 L STREET ■ SACRAMENTO CA ■ 95814-3706 ■ WWW.DOF.CA.GOV

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COMMISSION ON STATE MANDATES

March 2, 2001

Ms. Paula Higashi
Executive Director
Commission on State Mandates
1300 I Street, Suite 950
Sacramento, CA 95814

Dear Ms Higashi:

As requested in your letter of January 23, 2001, the Department of Finance (Finance) has reviewed the test claim submitted by the Denair Unified School District asking the Commission to determine whether specified costs incurred under Chapter 4, Statutes of 1999, Chapter 392, Statutes of 1995, Chapter 393, Statutes of 1986, Chapter 498, Statutes of 1983 and Chapter 1216, Statutes of 1975, are reimbursable state mandated costs (Claim No. CSM-98-TC-25 "Stull Act"). Commencing with page five of the test claim, Claimant has identified the following new duties, which it asserts are reimbursable state mandates:

Pursuant to Chapter 1216/75, develop standards for expected student achievement by grade level in each area of study.

As initially implemented, Section 13487(a) of the Stull Act (Chapter 361/71) required the "establishment of standards of expected student progress in each area of study and of techniques for the assessment of that progress." The Claimant alleges reimbursable costs associated with the amendment of Section 13487 (a) by Chapter 1216/75 to require the establishment of "standards of expected student achievement at each grade level in each area of study."

Finance notes that in practice, school district standards required by Chapter 361/71 would have had to have been differentiated by grade in order to provide a measure of "expected student progress". Finance also notes that changing the term "expected student progress" to the term "expected student achievement" is a wording change that would not require additional work on the part of school districts. These changes did not require additional work on the part of school districts, and therefore, are not reimbursable.

Pursuant to Chapter 1216/75, develop job responsibilities for certificated non-instructional personnel, and evaluate and assess the competency of those personnel as it relates to the fulfillment of the job responsibilities.

The Claimant alleges reimbursable costs associated with this chapter's requirements that the governing board of each school district (a) establish and define job responsibilities for those certificated non-instructional personnel whose responsibilities could not be appropriately

evaluated under the existing provisions of the Stull Act, and (b) evaluate and assess the performance of these personnel as it relates to the fulfillment of the job responsibilities.

Finance notes that Chapter 361/71 required school districts to establish evaluation and assessment guidelines for certificated employees. Since Chapter 361/71 did not specify that such guidelines were solely for certificated, instructional staff, it is reasonable to determine that these guidelines were to be established for all certificated staff, both instructional and non-instructional. These changes in Chapter 1216/75 are clarifying in nature, did not result in additional requirements, and therefore, are not reimbursable.

Pursuant to Chapter 393/86, prepare a written evaluation of the performance of each certificated non-instructional employee which, if appropriate, shall include recommendations as to areas of improvement.

The Claimant alleges reimbursable costs associated with this chapter's requirement that evaluations and assessments made of certificated non-instructional staff be furnished to those staff in writing, and that they include, if appropriate, recommendations as to areas of improvement.

Finance notes that Chapter 361/71 contained these requirements for certificated staff. Since Chapter 361/71 did not specify that these requirements were solely for certificated, instructional staff, it is reasonable to determine that these requirements applied to all certificated staff, both instructional and non-instructional. These changes in Chapter 1216/75 are clarifying in nature, did not result in additional requirements, and therefore, are not reimbursable.

Pursuant to Chapter 393/86, receive and review written responses from certificated non-instructional employees regarding their evaluations.

Section 44663 (b) of Chapter 393/86 stipulates that a certificated non-instructional employee shall have the right to initiate a written reaction or response to his evaluation. It does not, however, require the school district to review the employee's written reaction or response.

Specifically, Section 44663 (b) states that "(a) certificated non-instructional employee, who is employed on a 12-month basis shall have the right to initiate a written reaction or response to the evaluation. This response shall become a permanent attachment to the employee's personnel file." As Chapter 393/86 does not require school districts to review written responses received from certificated non-instructional staff in regard to their evaluations, we do not believe that the reimbursement of costs associated with that activity is warranted.

Additionally, Finance notes that Chapter 361/71 stated that certificated employees had the right to initiate a written reaction or response to the evaluation. Since Chapter 361/71 did not specify that this right applied solely to certificated, instructional staff, it is reasonable to determine that this right applied to all certificated staff, both instructional and non-instructional. These changes in Chapter 1216/75 are clarifying in nature, did not result in additional requirements, and therefore, are not reimbursable.

Pursuant to Chapter 393/86, prepare and hold meetings between certificated non-instructional personnel and their evaluators to discuss individual employee evaluations and assessments.

Section 44663 (b) of Chapter 393/86 requires the evaluators of certificated non-instructional personnel to meet with those individuals for the purpose of discussing both their evaluation and their assessment.

Finance notes that Chapter 361/71 contained these requirements for certificated staff. Since Chapter 361/71 did not specify that these requirements were solely for certificated, instructional staff, it is reasonable to determine that these requirements applied to all certificated staff, both instructional and non-instructional. These changes in Chapter 1216/75 are clarifying in nature, did not result in additional requirements, and therefore, are not reimbursable.

Pursuant to Chapter 4/99, evaluate and assess certificated instructional employee performance as it relates to (a) the instructional techniques and strategies used by the certificated employee, (b) the certificated employee's adherence to curricular objectives, and (c) the progress of students toward the state academic standards, as measured by state-adopted assessments.

The Claimant alleges reimbursable costs associated with this chapter's requirement, contained in Section 44662 (b), that school districts evaluate and assess the performance of certificated instructional employees as it relates to (a) the instructional techniques and strategies they employ, (b) their adherence to curricular objectives and (c) the progress of their students toward attainment of state academic standards, as measured by state-adopted assessments.

Finance acknowledges that school districts may have incurred reimbursable costs associated with this chapter's requirement that they evaluate and assess the performance of certificated instructional employees as it relates to the progress of their students toward the attainment of state academic standards, as measured by state-adopted assessments.

To the extent that districts may have had to modify their assessment and evaluation methods to determine whether instructional staff are adhering to the curricular objectives and instructional techniques and strategies associated with the updated state academic standards, Finance acknowledges that mandated costs may have been incurred.

Pursuant to Chapter 498/83, conduct additional annual assessments and evaluations of permanent certificated instructional and non-instructional staff who have received unsatisfactory evaluations, until such time as the employee either receives a positive evaluation or is separated from the school district.

As implemented, Section 13489 of the Stull Act (Chapter 361/71) required school districts to evaluate the performance of permanent certificated staff at least once every two years. Claimant alleges reimbursable costs associated with this chapter's requirement that permanent certificated staff who have received an unsatisfactory evaluation be evaluated at least once

every year, until such time as they either receive a satisfactory evaluation, or are separated from the school district.

Finance acknowledges that school districts may have incurred mandated costs in implementing this requirement.

Pursuant to Chapter 4/99, receive and review, for purposes of a certificated employee's assessment and evaluation, the results of the employee's participation in the Peer Assistance and Review Program.

The Claimant alleges reimbursable costs associated with this chapter's requirement that, for those school districts that participate in the Peer Assistance and Review Program, the results of a certificated employee's participation in the Program be reviewed pursuant to the district's assessment and evaluation of the employee's performance.

Finance notes that Chapter 4/99, which implemented the Peer Assistance and Review Program, contains no language requiring school districts to participate in the Program. Consequently, as participation in the Program is voluntary, Finance does not believe that school districts are eligible for reimbursement of costs associated with Program participation.

Pursuant to Chapter 1216/75, county offices of education that conduct or maintain schoolsites shall perform the activities required by the Stull Act.

Chapter 361/71, which implemented the Stull Act, only extended the Act's requirements to school districts. The Claimant alleges reimbursable costs associated with Chapter 1216/75, which extended the Stull Act's requirements to county offices of education that conduct or maintain individual schoolsites.

The Claimant further alleges costs associated with the implementation by county offices of education of the requirements of Chapter 498/83, Chapter 393/86, Chapter 392/95 and Chapter 4/99.

To the extent that county offices of education did not implement the provisions of the Stull Act prior to the passage of Chapter 1216/75, pursuant to their understanding that those provisions applied only to school districts, Finance concurs that mandated costs may have been incurred when they implemented the Stull Act pursuant to the requirements of Chapter 1216/75.

In regard to the additional activities related to the Stull Act required by Chapter 1216/75, Chapter 498/83, Chapter 393/86, and Chapter 392/95 for which Claimant alleges reimbursable costs, Finance applies to county offices of education the same criteria that we applied to school districts in responding to the previous eight points. In regard to the allegation of costs associated with Chapter 4/99, Finance again notes that this legislation contains no language requiring that local education agencies participate in the program it created. Consequently, we do not believe that any costs incurred as a result of participating in the program are reimbursable.

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

If you have any questions regarding this letter, please contact Michael Wilkening, Principal Program Budget Analyst at (916) 445-0328, or Jim Lombard, state mandates claims coordinator for the Department of Finance, at (916) 445-8913.

Sincerely,

Kathryn Radtkey-Gaither
Program Budget Manager

Attachment

Attachment A

DECLARATION OF
DEPARTMENT OF FINANCE
CLAIM NO. 98-TC-25, THE STULL ACT

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

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

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

March 2, 2001
at Sacramento, CA

Michael Wilkening

PROOF OF SERVICE

Test Claim Name: The Stull Act
Test Claim Number: 98-TC-25

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

On March 2, 2001, I served the attached recommendation of the Department of Finance in said cause, by facsimile to the Commission on State Mandates and by placing a true copy thereof: (1) to claimants and nonstate agencies enclosed in a sealed envelope with postage thereon fully prepaid in the United States Mail at Sacramento, California, and (2) to state agencies in the normal pickup location at 915 L Street, 7th Floor, for Interagency Mail Service, addressed as follows:

A-16
Ms. Paula Higashi, Executive Director
Commission on State Mandates
1300 I Street, Suite 950
Sacramento, CA 95814

B-8
State Controller's Office
Division of Accounting & Reporting
Attention: Jim Spano
3301 C Street, Room 518
Sacramento, CA 95816

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

Vavrinek Trine Day & Co., LLP
Attention: Andy Nichols
12150 Tributary Point Drive, Suite 150
Gold River, CA 95670

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

E-8
Department of Education
School Business Services
Attention: Gerry Shelton
560 J Street, Suite 150
Sacramento, CA 95814

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

San Diego City Schools
Attention: Gamy Rayburn
4100 Normal Street, Room 3251
San Diego, CA 92103-2682

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

Denair Unified School District
Attention: Larry Phelps
PO Box 368
Denair, CA 95316

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

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 March 2, 2001 at Sacramento, CA.

Jennifer Nelson

EXHIBIT C

SM Y&M

LAW OFFICES OF SPECTOR, MIDDLETON, YOUNG & MINNEY, LLP

May 31, 2002

RECEIVED
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COMMISSION ON
STATE MANDATES

PAUL C. MINNEY
JAMES E. YOUNG
MICHAEL S. MIDDLETON
D[illegible] I. SPECTOR

LISA A. CORR
AMANDA J. MCKECHNIE
DAVID E. SCRIBNER
PHILLIP MURRAY
JESSICA J. HAWTHORNE

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

Re: **Rebuttal to Department of Finance's Opposition**
The Stull Act, CSM 98-TC-25
Denair Unified School District, Claimant
Education Code Sections 44660-44665
Statutes of 1999, Chapter 4 et al.

Dear Ms. Higashi:

This letter addresses issues raised by the Department of Finance ("Finance") in its opposition and recommendation on *The Stull Act* test claim. Finance contends that the majority of activities claimed in this test claim do not impose reimbursable state-mandated activities upon school districts and county offices of education because prior law required districts to engage in the claimed activities. The claimant addresses each of Finance's arguments below.

Develop Standards for Expected Student Achievement by Grade Level in Each Area of Study

Finance is correct in that prior law required school districts to establish "standards of expected student *progress* in each area of study." (Emphasis added.) Current law requires school districts to establish "standards of expected student achievement *at each grade level* in each area of study." (Emphasis added.) Finance contends that the change in law is a simple change of words that "would not require additional work on the part of school districts." The claimant disagrees.

Prior law only required that the standards of expected student achievement be established to show student progress. Under prior law, these standards may have tracked student progress over time. For example, a school district may have established reading standards for pupils upon graduating from the eighth grade. Under the test claim legislation, school districts no longer have the ability to determine over what period standards of expected student achievement will be established: The standards must be established by each grade level. The new standards outlined in the test claim legislation align more closely with the state's new content standards as outlined in the original test claim filing.[1]

Develop Job Responsibilities for Certificated Noninstructional Personnel, and Evaluate and Assess the Competency of These Personnel as it Relates to the Fulfillment of the Job Responsibilities

Finance contends that since prior law required school districts to establish evaluation and assessment guidelines for certificated staff, this would include both certificated instructional and noninstructional staff. Therefore, Finance concludes that this activity is not reimbursable as it was required under prior law. The claimant disagrees.

In 1971, the Legislature added section 13487 to the Education Code.[2] As originally added, section 13487 provided:

> "The governing board of each school district shall develop and adopt specific evaluation and assessment guidelines which shall include but shall not necessarily be limited in content to the following elements:
>
> "(a) The establishment of standards of *expected student progress in each area of study* and of techniques for the assessment of that progress.
>
> "(b) Assessment of certificated personnel competence as it relates to the established standards.
>
> "(c) Assessment of other duties normally required to be performed by the certificated employees as an adjunct to their regular assignments.
>
> "(d) The establishment of procedures and techniques for ascertaining that the certificated employee is maintaining proper control and is preserving a suitable learning environment." (Emphasis added.)

In 1975, the Legislature repealed section 13487 and added new section 13487 to provide:[3]

---

[1] *See* comparison chart of pre-1975 Education Code section 13487 and the current version of section 13487 (now codified as section 44662) attached as Exhibit A. This chart outlines additional language and activities added by the Legislature after 1975 and the resulting activities school districts must engage in to effectuate the mandate.

[2] Section 13487 was later amended and renumbered as section 44662 by the test claim legislation.

"(a) The governing board of each school district shall establish standards of *expected student achievement at each grade level in each area of study.*

"(b) The governing board of each school district shall evaluate and assess certificated employee competency as it reasonably relates to (1) the progress of students toward the established standards, (2) *the performance of those noninstructional duties and responsibilities, including supervisory and advisory duties, as may be prescribed by the board, and (3) the establishment and maintenance of a suitable learning environment within the scope of the employee's responsibilities.*

"(c) *The governing board of each school district shall establish and define job responsibilities for those certificated noninstructional personnel, including, but not limited to, supervisory and administrative personnel, whose responsibilities cannot be evaluated appropriately under the provisions of subdivision (b), and shall evaluate and assess the competency of such noninstructional certificated employees as it reasonably relates to the fulfillment of those responsibilities.*

"(d) The evaluation and assessment of certificated employee competence pursuant to this section shall not include the use of publishers' norms established by standardized tests.

"(e) Nothing in this section shall be construed as in any way limiting the authority of school district governing boards to develop and adopt additional evaluation and assessment guidelines or criteria." (Emphasis added.)

The test claim legislation further amended and renumbered section 13487 to 44662, which currently provides:

"(a) The governing board of each school district shall establish standards of expected student achievement at each grade level in each area of study.

"(b) *The governing board of each school district shall evaluate and assess certificated employee performance as it reasonably relates to*:

"(1) *The progress of pupils toward the standards established pursuant to subdivision (a) and, if applicable, the state adopted academic content standards as measured by state adopted criterion referenced assessments.*

"(2) *The instructional techniques and strategies used by the employee.*

"(3) *The employee's adherence to curricular objectives.*

"(4) *The establishment and maintenance of a suitable learning environment, within the scope of the employee's responsibilities.*

[3] The Legislative amendments made to section 13487 in 1975 were not operative until January 1, 1976.

> "(c) The governing board of each school district shall establish and define job responsibilities for certificated noninstructional personnel, including, but not limited to, supervisory and administrative personnel, whose responsibilities cannot be evaluated appropriately under the provisions of subdivision (b), and shall evaluate and assess the performance of those noninstructional certificated employees as it reasonably relates to the fulfillment of those responsibilities. . . ." (Emphasis added.)

The Legislature clearly amended section 44662, formerly section 13487, to include language pertaining to the evaluation and assessment of certificated noninstructional personnel. Finance contends that these amendments simply clarify what was required under prior law. Sutherland on Statutory Construction ("Sutherland") provides guidelines when attempting to divine legislative intent behind amendments that add obligations to existing statutes.

Sutherland provides the following concerning the nature of an amendatory act:

> "[A]ny change of the scope or effect of an existing statute, by addition, omission, or substitution of provisions, which does not wholly terminate its existence, whether by an act purporting to amend, repeal, revise, or supplement, or by an act independent and original in form, is treated as amendatory. [Footnote omitted] Generally, *such an act indicates a legislative intention that the meaning of the statute has been changed and raises the presumption that the legislature intended to change the law.* [Footnote omitted.]"[4] (Emphasis added.)

Sutherland further provides:

> "The courts have declared that the mere fact that the legislature enacts an amendment indicates that it thereby intended to change the original act by creating a new right or withdrawing an existing one. [Footnote omitted.] *Therefore, any material change in the language of the original act is presumed to indicate a change in legal rights.* . . . [Footnote omitted.] *The legislature is presumed to know the prior construction of terms in the original act.* . . . [Footnote omitted.] *Thus, in interpreting an amendatory act there is a presumption of change in legal rights.*"[5] (Emphasis added.)

The original Stull Act under Education Code section 13487 was intended for teachers. As such, the Act provided for the evaluation and assessment of certificated instructional employees, or teachers, but no one else. If the Commission were to agree with Finance's contention that prior law included the activities associated with assessing and evaluating

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[4] Sutherland on Statutory Construction, Volume 1A, Section 22:1. Nature of an amendatory act, pages 239-241 (Sixth Edition, 2002 Revision.)

[5] *Id.* at section 22:30. –Presumption of change, pages 357-366.

certificated instructional employees as well as certificated noninstrucitonal employees, then it would be asserting that the Legislature performed a useless act. Why would the Legislature, on two separate occasions, amend a section to include specific activities related to certificated noninstructional employees if those activities were included in prior law? The Legislature would not. Indeed, statutes are to be construed to avoid such an interpretation.

As for Finance's contention that the amendments made by the test claim legislation were clarifying in nature, the rules of statutory construction preclude the Commission from making this finding. Several facts refute Finance's position. First, the very nature of an amendatory act is centered on a change in legal rights. There is a difference between simply clarifying one's legal rights and changing one's legal rights through an amendatory act. The test claim legislation amended legal rights by expanding the language associated with those certificated noninstructional employees that must be evaluated and assessed. Second, the amendments to section 13487 came five years after its initial enactment. It seems that if the Legislature intended to clarify the operation of section 13487, it would have done so closer in time to the original enactment date.

Based on the foregoing, the claimant asserts that the test claim legislation imposed additional activities upon school districts related to the assessment and evaluation of certificated noninstructional employees not required under prior law. Therefore, the test claim has imposed reimbursable state-mandated activities upon school districts.[6]

Prepare a Written Evaluation of the Performance of Each Certificated Noninstructional Employee Which, if Appropriate, Shall Include Recommendations as to Areas of Improvement

Finance contends that the test claim legislation simply clarified prior law and therefore the activities associated with preparing a written evaluation that includes recommendation for improvement for each certificated noninstructional employee do not impose additional reimbursable activities upon school districts. Finance fails to provide any support for this legal conclusion. The claimant disagrees.

As outlined in the previous section, the rules of statutory construction do not support Finance's contention that the test claim legislation simply clarified prior law. Rather, the test claim legislation expanded those legal rights and responsibilities of the governing board as it relates to the assessment and evaluation of certificated noninstructional employees. This would include the activities associated with the written evaluation process claimed in the test claim. Therefore, the claimant contends that the test claim legislation has imposed reimbursable state-

[6] *See* comparison chart of pre-1975 Education Code section 13487 and the current version of section 13487 (now codified as section 44662) attached as Exhibit A. This chart outlines additional language and activities added by the Legislature after 1975 and the resulting activities school districts must engage in to effectuate the mandate.

mandated activities upon school districts related to the provision of a written evaluation of certificated noninstructional employees.[7]

Receive and Review Written Responses From Certificated Noninstructional Employees Regarding Their Evaluations

Finance contends that the test claim legislation does not require school districts to receive and review responses from certificated noninstructional employees. In addition, Finance asserts that the test claim legislation simply clarified prior law and therefore these activities do not impose additional reimbursable activities upon school districts. However, Finance fails to provide any support for this legal conclusion. The claimant disagrees.

Finance correctly notes that Statutes of 1986, Chapter 393 amended Education Code section 44663, subdivision (b), to allow certificated noninstructional employees to "initiate a written reaction or response to the evaluation." Finance then contends that review of written responses received from employees is not a reimbursable activity because the school district does not have to respond. However, Finance does not recognize the mandated activity of receipt and review of the written employee response and the cost of adding the response to the employee's file. The school would have to review the request made by the employee to determine if it is proper and whether them district will respond. Any reaction or response by the school would necessarily be based on the written request filed by the employee, so the activities associated with reviewing such a request would be reimbursable.

As for Finance's contention that the test claim legislation simply clarified prior law, the rules of statutory construction do not support this contention. Rather, the test claim legislation expanded those legal rights and responsibilities of the governing board as it relates to the assessment and evaluation of certificated noninstructional employees. This would include the activities associated with the written evaluation process claimed in the test claim. Therefore, the claimant contends that the test claim legislation has imposed reimbursable state-mandated activities upon school districts related to the receipt and review of written responses filed by certificated noninstructional employees.

Prepare and Hold Meetings Between Certificated Noninstructional Personnel and Their Evaluators to Discuss Individual Employee Evaluations and Assessments

Finance contends that the test claim legislation simply clarified prior law and therefore these activities do not impose additional reimbursable activities upon school districts. However, Finance fails to provide any support for this legal conclusion. The claimant disagrees.

As outlined in the previous section, the rules of statutory construction do not support Finance's contention that the test claim legislation simply clarified prior law. Rather, the test

[7] *Ibid.*

claim legislation expanded those legal rights and responsibilities of the governing board as it relates to the assessment and evaluation of certificated noninstructional employees. This would include the activities associated with the written evaluation process claimed in the test claim. Therefore, the claimant contends that the test claim legislation has imposed reimbursable state-mandated activities upon school districts related to preparing and holding meetings to discuss individual evaluations and assessments.

Evaluate and Assess Certificated Instructional Employee Performance as it Relates to: (a) the Instructional Techniques and Strategies Used by the Certificated Employee; (b) the Certificated Employee's Adherence to Curricular Objectives; and (c) the Progress of Students Toward the State Academic Standards, as Measured by State-Adopted Assessments

Finance agrees with the claimant that the test claim legislation has imposed reimbursable state-mandated activities upon school districts related to the activities listed above. The claimant further asserts that the three evaluation and assessment criteria listed above impose ongoing reimbursable state-mandated activities upon school districts.

Conduct Additional Annual Assessments and Evaluations of Permanent Certificated Instructional and Noninstructional Staff Who Have Received Unsatisfactory Evaluations, Until Such Time as the Employee Either Receives a Positive Evaluation or is Separated From the School District

Finance agrees with the claimant that the test claim legislation has imposed reimbursable state-mandated activities upon school districts related to the activities listed above.

Receive and Review, for Purposes of a Certificated Employee's Assessment and Evaluation, the Results of the Employee's Participation in the Peer Assistance and Review Program

Finance contends that participation in the Peer Assistance and Review Program is voluntary on the part of school districts. Therefore, the activities associated with receipt and review of an employee's participation in the Program does not impose reimbursable state-mandated activities upon school districts. The claimant disagrees.

The legislative intent behind the amendments to the Stull Act was to ensure that school districts adopt objective, uniform evaluation and assessment guidelines that effectively assess certificated employee performance. To meet this desired goal, school districts that participate in the Peer Assistance and Review Program must include an employee's results of participation in the employee's evaluation. If this information was not considered by the district, inconsistent, incomplete, and inaccurate evaluations and assessments would occur – a result contrary to the Legislature's stated intent. Therefore, the claimant contends that the activities associated with the receipt and review of an employee's participation in the Peer Assistance and Review Program impose reimbursable state-mandated activities upon school districts.

County Offices of Education that Conduct or Maintain Schoolsites Shall Perform the Activities Required by the Stull Act

Finance recognizes that before the 1975 amendments to the Stull Act that county offices of education were *not* subject to the Act and that the activities outlined in Statutes of 1975, Chapter 1216 impose reimbursable state-mandated activities upon county offices of education. However, Finance contends that the remaining test claim legislation activities do not impose reimbursable state-mandated activities upon county offices of education for the reasons it argued for school districts.

Finance fails to recognize that since the Stull Act did not impose pre-1975 activities upon county offices of education that all of the post-1975 amendments to the Stull Act impose entirely *new* activities upon county offices of education. Before the enactment of the test claim legislation, county offices of education were not required to perform the mandated activities as outlined in the test claim. Moreover, even if county offices of education were voluntarily engaging in activities similar to the claimed Stull Act activities before the 1975 amendment, this does not preclude reimbursement under Government Code section 17565. Section 17565 states that if a local agency or school district has voluntarily incurred costs that are subsequently mandated by the state, the state shall reimburse the local agency or school district for those costs incurred after the operative date of the mandate.

* * *

If you have any questions concerning this rebuttal, please feel free to give me a call at (916) 646-1400.

Sincerely,
LAW OFFICES OF SPECTOR, MIDDLETON, YOUNG & MINNEY, LLP

Paul C. Minney
ATTORNEY AT LAW

Enclosure
Cc: Mailing List

EXHIBIT A

COMPARISON OF PRE-1975 AND CURRENT REQUIREMENTS UNDER EDUCATION CODE SECTION 44662

PRE-1975 REQUIREMENTS EDUCATION CODE SECTION 13487	CURRENT REQUIREMENTS EDUCATION CODE SECTION 44662	HIGHER LEVEL OF SERVICE FOR THE FOLLOWING ACTIVITIES
The governing board of each school district shall develop and adopt specific evaluation and assessment guidelines which shall include but shall not necessarily be limited in content to the following elements:	NO SIMILAR PROVISION IN CURRENT LAW	NONE
(a) The establishment of standards of expected student progress in each area of study and of techniques for the assessment of that progress.	(a) The governing board of each school district shall establish standards of expected student achievement at each grade level in each area of study.	Establish standards of expected student achievement at *each grade level* in each area of study.
(b) Assessment of certificated personnel competence as it relates to the established standards.	(b) *The governing board of each school district shall evaluate and assess certificated employee performance as it reasonably relates to*: (1) *The progress of pupils toward the standards established pursuant to subdivision (a) and, if applicable, the state adopted academic content standards as measured by state adopted criterion referenced assessments.*	Assessment of certificated employee performance as it reasonably relates to the state adopted academic content standards as measured by state adopted criterion referenced assessments.
(c) Assessment of other duties normally required to be performed by the certificated employees as an adjunct to their regular assignments.	(2) *The instructional techniques and strategies used by the employee.* (3) *The employee's adherence to curricular objectives.*	NONE

PRE-1975 REQUIREMENTS EDUCATION CODE SECTION 13487	CURRENT REQUIREMENTS EDUCATION CODE SECTION 44662	HIGHER LEVEL OF SERVICE FOR THE FOLLOWING ACTIVITIES
(d) The establishment of procedures and techniques for ascertaining that the certificated employee is maintaining proper control and is preserving a suitable learning environment.	(4) *The establishment and maintenance of a suitable learning environment, within the scope of the employee's responsibilities*	NONE
NO SIMILAR PROVISION IN PRIOR LAW	(c) The governing board of each school district shall establish and define job responsibilities for certificated noninstructional personnel, including, but not limited to, supervisory and administrative personnel, whose responsibilities cannot be evaluated appropriately under the provisions of subdivision (b), and shall evaluate and assess the performance of those noninstructional certificated employees as it reasonably relates to the fulfillment of those responsibilities.	Establish and define job responsibilities for certificated noninstructional personnel who cannot be evaluated under subdivision (b); evaluate and assess those noninstructional certificated employees under these new guidelines.

Mr. Andy Nichols, Senior Manager
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Gold River, CA 95670

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Mr. Gerry Shelton, (E-8)
Department of Education
School Business Services
560 J Street, Suite 150
Sacramento, CA 95814

Jeannie Oropeza
Department of Finance
915 L Street, 7th Floor
Sacramento, CA 95814

Mr. Edward Parraz, Superintendent
Denair Unified SD
3460 Lester Road
Denair, CA 95316

PROOF OF SERVICE

STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

I am employed in the county of Sacramento, State of California. I am over the age of 18 and not a party to the within action; my business address is 7 Park Center Drive, Sacramento, California 95825.

On May 31, 2002, I served the foregoing document(s) described as

Rebuttal to Department of Finance's Opposition
The Stull Act 98-TC-25

to the persons/parties listed on the attached Mailing List via first class mail and facsimile, and to the Commission on State Mandates via first class mail and facsimile.

I declare under the penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on May 31, 2002, at **Sacramento, California.**

Melanie McAlpine

,FORNIA
MISSION ON STATE MANDATES
INTH STREET, SUITE 300
CRAMENTO, CA 95814
ONE: (916) 323-3562
: (916) 445-0278
E-mail: csminfo@csm.ca.gov

July 3, 2002

Mr. Paul C. Minney
Spector, Middleton, Young & Minney, LLP
7 Park Center Drive
Sacramento, CA 95825

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

RE: **Status of Claimants/Tentative Hearing Date**
***The Stull Act*, 98-TC-25**
Education Code Sections 44660, 44661, 44662, 44664, 44665
As Added or Amended by Statutes of 1975, Chapter 1216; Statutes of 1983, Chapter 498; Statutes of 1986, Chapter 393; Statutes of 1995, Chapter 392; and Statutes of 1999, Chapter 4
Denair Unified School District, Claimant

Dear Mr. Minney:

We are in the process of completing the Draft Staff Analysis for this claim. The record indicates that the claimant, a school district, is seeking reimbursement for activities performed by county offices of education. In this respect, the claimant alleges that compliance with the Stull Act is new as to counties and, thus, counties are entitled to reimbursement for all activities under the Stull Act.

Based on the record, however, it appears that the test claim is procedurally defective as to county offices of education. No county office of education has appeared in this action as a claimant, nor filed a declaration alleging mandated costs exceeding $200, as expressly required by Government Code section 17564.

Therefore, unless the test claim is perfected as to county offices of education, the findings in the Draft Staff Analysis and Final Analysis necessarily will be limited to school districts.

Tentative Hearing Date

This test claim is tentatively set for hearing on Thursday, September 26, 2002 at 9:30 a.m. in Room 126 of the State Capitol, Sacramento, California. If you would like to request postponement of the hearing, please refer to section 1183.01, subdivision (c)(2), of the Commission's regulations.

If you have any questions, please contact Camille Shelton at (916) 323-3562.

Sincerely,

Paula Higashi
Executive Director

cc. Mailing List (current mailing list attached)

MAILED:
FAXED:
DATE: 7/3/02 INITIAL:
CHRON:
FILE:
WORKING BINDER:

Commission on State Mandates

Original List Date: 07/07/1999 **Mailing Information**

Last Updated: 06/12/2002

List Print Date: 07/03/2002

Mailing List

Claim Number: 98-TC-25

Issue: The Stull Act

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Denair Unified School District

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Commission on State Mandates

Original List Date: 07/07/1999 **Mailing Information**

Last Updated: 06/12/2002

List Print Date: 07/03/2002

Mailing List

Claim Number: 98-TC-25

Issue: The Stull Act

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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.)

EXHIBIT E

SMY&M

LAW OFFICES OF SPECTOR, MIDDLETON, YOUNG & MINNEY, LLP

RECEIVED
SEP 0 9 2003
COMMISSION ON
STATE MANDATES

September 5, 2003

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

PAUL C. MINNEY
JAMES E. YOUNG
MICHAEL S. MIDDLETON
DIEL I. SPECTOR

LISA A. CORR
AMANDA J. MCKECHNIE
DAVID E. SCRIBNER
PHILLIP MURRAY
JESSICA J. HAWTHORNE
MATHEW D. MARINELLI

Re: **Test Claim Representation**

Dear Paula:

Below is a list of test claims my office is authorized to act as the claimants' representative before the Commission on State Mandates. Effective September 8, 2003, please remove my office from the corresponding mail list, as we will no longer be representing the claimants in these matters. Steve Smith, from MCSed, will be taking over these claims and should be added to the Commission's mail list on these claims. We are working with the claimants and MCSed to obtain new Authorizations to Act as Representative from each of the claimants and MCSed will file them as they are completed.

- *Acquisition of Agricultural Land for a School Site*
- *Adult Education Enrollment Reporting*
- *CELDT*
- *CalSTRS Creditable Compensation*
- *Healthy Schools Act of 2000*
- *High School Exit Examination*
- *Notification to Teachers: Pupils Subject to Suspension or Expulsion II*
- *School Accountability Report Cards II*
- *The Stull Act*

My firm will continue its representation on the following claims: (1) *Charter Schools Collective Bargaining*; and (2) *Charter Schools III*.

* * *

If you have any questions or comments concerning this letter, please feel free to contact me at (916) 646-1400.

Sincerely,
LAW OFFICES OF SPECTOR, MIDDLETON, YOUNG & MINNEY, LLP

Paul C. Minney
ATTORNEY AT LAW

I:\Client Files\Commission on State Mandates\LBT P Higashi re Test Claim Representation to CSM 090503.doc

EXHIBIT F

Schools Mandate Group
A JPA Dedicated to Making the State Accountable to You

One Capitol Mall, Suite 200
Sacramento, California 95814
T (916) 444-7260 F (916) 444-7261

RECEIVED
JAN 05 2004
COMMISSION ON
STATE MANDATES

Fax

To:	Nancy Patton	From:	David E. Scribner
Fax:	445-0278	Pages:	2
Phone:		Date:	January 5, 2004
Re:	The Stull Act Authorization	CC:	

☐ Urgent ☑ For Review ☐ Please Comment ☐ Please Reply

Authorization to Add the Schools Mandate Group as a Co-Claimant and Designating it as Lead Claimant

Stull Act (Teacher Evaluations)

I, Edward Parraz, Superintendent, hereby request that the Schools Mandate Group be added as a co-claimant to the *Stull Act (Teacher Evaluations)* test claim and be designated lead claimant. All correspondence and communications regarding this Test Claim should be forwarded to:

Schools Mandate Group
David E. Scribner, Executive Director
One Capitol Mall, Suite 200
Sacramento, California 95814
Telephone: (916) 444-7260
Facsimile: (916) 444-7261

Dated: 11/14/03

EDWARD PARRAZ
SUPERINTENDENT
Denair Unified School District

COMMISSION ON STATE MANDATES
980 NINTH STREET, SUITE 300
SACRAMENTO, CA 95814
PHONE: (916) 323-3562
(916) 445-0278
Email: csminfo@csm.ca.gov

January 8, 2004

Mr. Edward Parraz, Superintendent
Denair Unified School District
P.O. Box 368
Denair, CA 95316

Mr. David E. Scribner, Executive Director
Schools Mandate Group
One Capitol Mall, Suite 200
Sacramento, CA 95814

RE: **Claimant's Request to Amend Test Claim to Add Schools Mandate Group as Co-Claimant**
The Stull Act (CSM 98-TC-25)
Education Code Sections 44660 – 44665 (formerly Ed. Code §§ 13485-13490)
Statutes 1975, Chapter 1216; Statutes 1983, Chapter 498; Statutes 1986, Chapter 393; Statutes 1995, Chapter 392; Statutes 1999, Chapter 4
Denair Unified School District, Claimant

Dear Mr. Parraz and Mr. Scribner:

On January 5, 2004, the Commission received a request from the claimant to amend this test claim to add the Schools Mandate Group as a co-claimant and to designate the Schools Mandate Group as the lead claimant.

The claimant's request to amend the test claim is denied. As described below, the Schools Mandate Group is not an eligible claimant for purposes of reimbursement under Article XIII B, section 6 of the California Constitution and Government Code section 17500 et seq.

The Schools Mandate Group is a joint powers authority established pursuant to the Joint Exercise of Powers Act ("Act") in Government Code section 6500 et seq.[1] Under the Act, school districts and local agencies are authorized to enter into agreements to "jointly exercise any power common to the contracting parties."[2] The entity provided to administer or execute the agreement (in this case the Schools Mandate Group) may be a firm or corporation, including a nonprofit corporation, designated in the agreement.[3] A joint powers authority is a separate entity from the parties to the agreement and is not legally considered to be the same entity as its contracting parties.[4]

---

[1] According to the letter dated November 20, 2003, by the Schools Mandate Group to the Commission's Chief Legal Counsel, the Schools Mandate Group has been "legally established consistent with Government Code section 6500 et seq."

[2] Government Code section 6502

[3] Government Code section 6506

[4] Government Code section 6507; 65 Opinions of the California Attorney General 618, 623 (1982).

According to the joint powers agreement in this case, the Schools Mandate Group was established "to permit the filing of test claims, incorrect reduction claims, parameters and guidelines amendments, requests for rulemaking, and any other related activities, including litigation and lobbying, that will assist the JPA and/or its member agencies to protect their right to full reimbursement for mandated costs under the State's mandate reimbursement program (Cal. Const. Art. XIII B, § 6; Gov. Code, § 17500 et seq.)." The Schools Mandate Group does not have the delegated authority to perform a school district's education-related activities.

The test claim at issue in this case involves the Stull Act. The Stull Act requires the governing board of each school district to develop and adopt specific guidelines to evaluate and assess certificated personnel. The Commission will be required to determine whether the Stull Act imposes a reimbursable state-mandated program on school districts within the meaning of article XIII B, section 6 of the California Constitution.

To implement article XIII B, section 6, the Legislature enacted Government Code section 17500 et seq. as the "sole and exclusive procedure by which a local agency or school district may claim reimbursement for costs mandated by the state as required by Section 6 of Article XIII B of the California Constitution.[5] The Commission, like the court, is required to limit enforcement to the procedures established by the Legislature in Government Code section 17500 et seq.[6]

Government Code sections 17550 and 17551 authorize local agencies and school districts to file test claims seeking reimbursement pursuant to article XIII B, section 6. Government Code section 17519 defines "school district" to mean "any school district, community college district, or county superintendent of schools." Government Code section 17520 defines "special district" to include "joint powers agency." The term "special district" appears in the definition of "local agency,"[7] but does not appear in the definition of "school district." In construing the mandate reimbursement statutes, the Commission must apply the definitions provided by the Legislature.[8] Where a defined term is absent from one statute, yet appears in another code section within the same statutory scheme, the term cannot be read into that section in which it does not appear.[9] Thus, based on the plain language of the statutes, the Schools Mandate Group, as a joint powers authority for contracting school districts, is not a claimant.

This conclusion is further supported by the courts' interpretation of article XIII B, section 6. In 1991, the California Supreme Court decided *Kinlaw v. State of California, supra.* In *Kinlaw*, medically indigent adults and taxpayers brought an action against the state alleging that the state violated article XIII B, section 6 by enacting legislation that shifted financial responsibility for the funding of health care for medically indigent adults to the counties. The Supreme Court denied the claim, holding that the medically indigent adults and taxpayers lacked standing to

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[5] Government Code section 17552

[6] *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 334.

[7] Government Code section 17518

[8] Government Code section 17510

[9] *Moncharsh v. Heily & Blasé* (1992) 3 Cal.4th 1, 26.

prosecute the action and that the plaintiffs have no right to reimbursement under article XIII B, section 6.[10] The court stated the following:

> Plaintiffs' argument that they must be permitted to enforce section 6 as individuals because their right to adequate health care services has been compromised by the failure of the state to reimburse the county for the cost of services to medically indigent adults is unpersuasive. *Plaintiffs' interest,* although pressing, *is indirect* and does not differ from the interest of the public at large in the financial plight of local government. Although the basis for the claim that the state must reimburse the county for its costs of providing the care that was formerly available to plaintiffs under Medi-Cal is that AB 799 created a state mandate, plaintiffs have no right to have any reimbursement expended for health care services of any kind.[11] (Emphasis added.)

The Supreme Court's ruling in *Kinlaw* is relevant here. Like the plaintiffs in *Kinlaw*, the School Mandates Group, as a separate entity from the contracting school districts, is not directly affected by the test claim legislation. The Legislature, in the Stull Act, imposed requirements on school districts, which may result in a reimbursable state-mandated program for school districts. But, the Stull Act does not impose any duties on the Schools Mandate Group, or any other joint powers authority. As expressed in an opinion of the California Attorney General, a joint powers authority "is simply not a city, a county, [a school district], or the state as those terms are normally used."[12] Thus, under the *Kinlaw* decision, the School Mandates Group lacks standing in this case to act as a claimant.

In 1997, the Third District Court of Appeal decided *Redevelopment Agency of the City of San Marcos v. Commission on State Mandates* (1997) 55 Cal.App.4th 976. Although Government Code section 17520 expressly includes redevelopment agencies in the definition of "special districts" that are eligible to file test claims with the Commission, the court found that redevelopment agencies are not subject to article XIII B, section 6 since they not bound by the spending limitations in article XIII B, and are not required to expend any "proceeds of taxes." The court stated the following:

> Because of the nature of the financing they receive, tax increment financing, redevelopment agencies are not subject to this type of appropriations limitations or spending caps; they do not expend any "proceeds of taxes." Nor do they raise, through tax increment financing, "general revenues for the local entity."[13]

The Third District Court of Appeal affirmed the *Redevelopment Agency* decision in *City of El Monte v. Commission on State Mandates* (2000) 83 Cal.App.4th 266, 281, again finding that redevelopment agencies are not entitled to claim reimbursement for state-mandated costs because they are not required to expend "proceeds of taxes."

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[10] *Kinlaw, supra*, 54 Cal.3d at pages 334-335.

[11] *Ibid.*

[12] 65 Opinions of the California Attorney General 618, 623 (1982).

[13] *Redevelopment Agency, supra*, 55 Cal.App.4th at page 986.

In the present case, the Schools Mandate Group is also not subject to the appropriations limitation of article XIII B and does not expend any "proceeds of taxes" within the meaning of article XIII B. Therefore, the Schools Mandate Group is not entitled to reimbursement as an eligible claimant pursuant to article XIII B, section 6.

Please contact Camille Shelton, Senior Commission Counsel, if you have any questions regarding the above.

Sincerely,

Paula Higashi

Paula Higashi
Executive Director

c. Mailing list

Enc. Supporting Documents

Briefs and Other Related Documents

Supreme Court of California,
In Bank.

Philip I. MONCHARSH, Plaintiff and Appellant,
v.
HEILY & BLASE et al., Defendants and Respondents.

No. S020997.

July 30, 1992.
Rehearing Denied Sept. 24, 1992.

Attorney petitioned to vacate and modify arbitration award entered under his employment agreement with law firm in dispute arising over fees generated by attorney's clients after attorney left firm. The Superior Court, Santa Barbara County, No. 179759, Thomas R. Adams, J., confirmed arbitrator's award, and appeal was taken. The Court of Appeal affirmed, and review was granted. The Supreme Court, Lucas, C.J., held that arbitrator's award was not subject to judicial review.

Affirmed.

Kennard, J., filed opinion concurring in part and dissenting in part in which Mosk, J., joined.

West Headnotes

[1] **Arbitration** 63.1
33k63.1 Most Cited Cases

[1] **Arbitration** 63.2
33k63.2 Most Cited Cases

Arbitrator's decision is not generally reviewable for errors of fact or law, whether or not such error appears on face of award and causes substantial injustice to the parties. West's Ann.Cal.C.C.P. § 1280 et seq.

[2] **Arbitration** 29.1
33k29.1 Most Cited Cases

In cases involving private arbitration, scope of arbitration is matter of agreement between the parties and powers of arbitrator are limited and circumscribed by agreement or stipulation of submission. West's Ann.Cal.C.C.P. § 1280 et seq.

[3] **Arbitration** 82(1)
33k82(1) Most Cited Cases

Generally, parties to private arbitration impliedly agree that arbitrator's decision will be both binding and final. West's Ann.Cal.C.C.P. § 1280 et seq.

[4] **Arbitration** 61
33k61 Most Cited Cases

Courts will not review validity of arbitrator's reasoning. West's Ann.Cal.C.C.P. § 1280 et seq.

[5] **Arbitration** 73.7(2)
33k73.7(2) Most Cited Cases

Court may not review sufficiency of evidence supporting arbitrator's award. West's Ann.Cal.C.C.P. § 1280 et seq.

[6] **Arbitration** 63.3
33k63.3 Most Cited Cases
(Formerly 33k63)

By voluntarily submitting to arbitration, parties have agreed to bear risk that arbitrator will make a mistake in return for quick, inexpensive, and conclusive resolution to their dispute. West's Ann.Cal.C.C.P. § 1280 et seq.

[7] **Arbitration** 63.3
33k63.3 Most Cited Cases
(Formerly 33k63)

Claim that arbitrator reached erroneous decision did not subject arbitration award to judicial review under statute permitting vacation of arbitration award when arbitrators exceed their powers, absent claim that arbitrator resolved issues parties did not agree to arbitrate. West's Ann.Cal.C.C.P. § § 1286.2(d), 1286.6(b, c).

[8] **Arbitration** 68
33k68 Most Cited Cases

Attorney's claim that fee-splitting provision of his employment agreement with law firm was illegal and in violation of public policy was not waived by attorney's failure to object to arbitration on that ground, where attorney raised illegality issue before arbitrator. West's Ann.Cal.C.C.P. § § 1281, 1281.2.

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[9] Arbitration 7.2
33k7.2 Most Cited Cases

If contract includes arbitration agreement, and grounds exist to revoke entire contract, such grounds would also vitiate arbitration agreement; thus, if otherwise enforceable arbitration agreement is contained in illegal contract, party may avoid arbitration altogether. West's Ann.Cal.C.C.P. § § 1281, 1281.2.

[10] Arbitration 7.2
33k7.2 Most Cited Cases

When alleged illegality goes only to portion of contract that does not include arbitration agreement, entire controversy, including issue of illegality, remains arbitrable. West's Ann.Cal.C.C.P. § § 1281, 1281.2.

[11] Arbitration 68
33k68 Most Cited Cases

Unless party is claiming entire contract is illegal, or arbitration agreement itself is illegal, he or she need not raise illegality question prior to participating in arbitration process, so long as issue is raised before arbitrator; failure to raise claim before arbitrator, however, waives claim for any further judicial review. West's Ann.Cal.C.C.P. § § 1281, 1281.2.

[12] Arbitration 76(3)
33k76(3) Most Cited Cases

Attorney's claim that fee-splitting provision of his employment contract with law firm that was interpreted and enforced by arbitrator was illegal and violated public policy as reflected in Rules of Professional Conduct was not ground for judicial review of arbitrator's decision in dispute over fees generated by attorney's clients after he left firm. West's Ann.Cal.C.C.P. § 1280 et seq.; Code of Prof.Resp., DR 2-107, DR 2-108, DR 2-109.

[13] Arbitration 76(3)
33k76(3) Most Cited Cases

There may be some limited and exceptional circumstances justifying judicial review of arbitrator's decision when party claims illegality affects only portion of underlying contract; such cases would include those in which granting finality to arbitrator's decision would be inconsistent with protection of party's statutory rights.

***184 **900 *5 Philip I. Moncharsh, in pro. per.

Townsend & Townsend, Paul W. Vapnek and Mark L. Pettinari, San Francisco, for plaintiff and appellant.

DeWitt F. Blase, in pro. per.

Heily & Blase, and John R. Johnson, Ventura, for defendants and respondents.

*6 LUCAS, Chief Justice.

[1] We granted review in this case to decide, inter alia, the extent to which a trial court may review an arbitrator's decision for errors of law. For the reasons discussed below, we conclude an arbitrator's decision is not generally reviewable for errors of fact or law, whether or not such error appears on the face of the award and causes substantial injustice to the parties. There are, however, limited exceptions to this general rule, which we also discuss below.

FACTS

On June 16, 1986, appellant Philip Moncharsh, an attorney, was hired by respondent Heily & Blase, a law firm. As a condition of employment as an associate attorney in the firm, Moncharsh signed an agreement containing a number of provisions governing various aspects of his employment. One provision (hereafter referred to as "paragraph X-C") stated: "X C. EMPLOYEE- ATTORNEY agrees not to do anything to cause, encourage, induce, entice, recommend, suggest, mention or otherwise cause or contribute to any of FIRM'S clients terminating the attorney-client relationship with FIRM, and/or substituting **901 ***185 FIRM and retaining or associating EMPLOYEE- ATTORNEY or any other attorney or firm as their legal counsel. In the event that any FIRM client should terminate the attorney-client relationship with FIRM and substitute EMPLOYEE-ATTORNEY or another attorney or law firm who[m] EMPLOYEE-ATTORNEY suggested, recommended or directed as client's successor attorney, then, in addition to any costs which client owes FIRM up to the time of such substitution, as to all fees which EMPLOYEE-ATTORNEY may actually receive from that client or that client's successor attorney on any such cases, BLASE will receive eighty percent (80%) of said fee and EMPLOYEE-ATTORNEY will receive twenty percent (20%) of said fee."

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Moncharsh terminated his employment with Heily & Blase on February 29, 1988. DeWitt Blase, the senior partner at Heily & Blase, contacted 25 or 30 of Moncharsh's clients, noted that they had signed retainer agreements with his firm, and explained that he would now be handling their cases. Five clients, whose representation by Moncharsh predated his association with Heily & Blase, chose to have Moncharsh continue to represent them. A sixth client, Ringhof, retained Moncharsh less than two weeks before he left the firm. Moncharsh continued to represent all six clients after he left the firm.

When Blase learned Moncharsh had received fees at the conclusion of these six cases, he sought a quantum meruit share of the fees as well as a percentage of the fees pursuant to paragraph X-C of the employment agreement. Blase rejected Moncharsh's offer to settle the matter for only a *7 quantum meruit share of the fees. The parties then invoked the arbitration clause of the employment agreement [FN1] and submitted the matter to an arbitrator.

FN1. The arbitration clause provided: "Any dispute arising out of this Agreement shall be subject to arbitration under the rules of the American Arbitration Association. No arbitrator shall have any power to alter, amend, modify or change any of the terms of this agreement. The decision of the arbitrator shall be final and binding on FIRM and EMPLOYEE- ATTORNEY." None of the rules of the American Arbitration Association have any bearing on the issues raised in this case.

The arbitrator heard two days of testimony [FN2] and the matter was submitted on the briefs and exhibits. In his brief, Moncharsh argued (1) Heily & Blase was entitled to only a quantum meruit share of the fees, (2) Moncharsh and Blase had an oral agreement to treat differently the cases Moncharsh brought with him to Heily & Blase, (3) the employment agreement had terminated and was therefore inapplicable, (4) the agreement was one of adhesion and therefore unenforceable, and (5) paragraph X-C is unenforceable because it violates public policy, the Rules of Professional Conduct of the State Bar, and because it is inconsistent with *Fracasse v. Brent* (1972) 6 Cal.3d 784, 100 Cal.Rptr. 385, 494 P.2d 9, and *Champion v. Superior Court* (1988) 201 Cal.App.3d 777, 247 Cal.Rptr. 624.

FN2. The hearing before the arbitrator was not reported.

In its brief, Heily & Blase contended paragraph X-C (1) is clear and unequivocal, (2) is not unconscionable, and (3) represented a reasonable attempt to avoid litigation and was thus akin to a liquidated damages provision. In addition, "To the extent it becomes important to the Arbitrator's decision," Heily & Blase alleged that Moncharsh solicited the six clients to remain with him, and further suggested that Moncharsh retained those six because it was probable that financial settlements would soon be forthcoming in all six matters. Heily & Blase contrasted these six matters with the other cases Moncharsh left with the firm, all of which allegedly required a significant amount of additional legal work.

The arbitrator ruled in Heily & Blase's favor, concluding that any oral side agreement between Moncharsh and Blase was never documented and that Moncharsh was thus bound by the written employee agreement. Further, the arbitrator ruled that, "except for client Ringhof, [paragraph X-C] is not unconscionable, and it does not violate the rules of professional conduct. At the time MR. MONCHARSH agreed to the employment contract, he was a mature, experienced attorney, with employable ***186 **902 skills. Had he not been willing to agree to the eighty/twenty (80/20) split on termination, he could simply have refused to sign the document, negotiated something different, or if negotiations were unsuccessful, his choice was to leave his employment.... [*8 ¶] ... The Arbitrator excludes the Ringhof client from the eighty/twenty (80/20) split because that client was obtained at the twilight of MR. MONCHARSH'S relationship with HEILY & BLASE, and an eighty/twenty (80/20) split with respect to that client would be unconscionable."

Moncharsh petitioned the superior court to vacate and modify the arbitration award. (Code Civ.Proc., § 1286.2; all subsequent statutory references are to this code unless otherwise stated.) Heily & Blase responded by petitioning the court to confirm the award. (§ 1285.) The court ruled that, "The arbitrator's findings on questions of both law and fact are conclusive. A court cannot set aside an arbitrator's error of law no matter how egregious." The court allowed an exception to this rule, however, "where the error appears on the face of the award." Finding no such error, the trial court denied Moncharsh's petition to vacate and granted Heily &

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Blase's petition to confirm the arbitrator's award.

On appeal, the Court of Appeal also recognized the rule, announced in previous cases, generally prohibiting review of the merits of the arbitrator's award. It noted, however, that an exception exists when "an error of law appears on the face of the ruling and then only if the error would result in substantial injustice." Although Moncharsh claimed paragraph X-C violated law, public policy, and the State Bar Rules of Professional Conduct, the appellate court disagreed and affirmed the trial court judgment.

We granted review and directed the parties to address the limited issue of whether, and under what conditions, a trial court may review an arbitrator's decision.

DISCUSSION

1. The General Rule of Arbitral Finality

[2] The parties in this case submitted their dispute to an arbitrator pursuant to their written agreement. This case thus involves private, or nonjudicial, arbitration. (See *Blanton v. Womancare, Inc.* (1985) 38 Cal.3d 396, 401-402 & fn. 5, 212 Cal.Rptr. 151, 696 P.2d 645 [discussing the differences between judicial and nonjudicial arbitration].) In cases involving private arbitration, "[t]he scope of arbitration is ... a matter of agreement between the parties" (*Ericksen, Arbuthnot, McCarthy, Kearney & Walsh, Inc. v. 100 Oak Street* (1983) 35 Cal.3d 312, 323, 197 Cal.Rptr. 581, 673 P.2d 251 [hereafter *Ericksen*]), and " '[t]he powers of an arbitrator are limited and circumscribed by the agreement or stipulation of submission.' " *9(*O'Malley v. Petroleum Maintenance Co.* (1957) 48 Cal.2d 107, 110, 308 P.2d 9 [hereafter *O'Malley*], quoting *Pac. Fire etc. Bureau v. Bookbinders' Union* (1952) 115 Cal.App.2d 111, 114, 251 P.2d 694.)

Title 9 of the Code of Civil Procedure, as enacted and periodically amended by the Legislature, represents a comprehensive statutory scheme regulating private arbitration in this state. (§ 1280 et seq.) Through this detailed statutory scheme, the Legislature has expressed a "strong public policy in favor of arbitration as a speedy and relatively inexpensive means of dispute resolution." (*Ericksen, supra*, 35 Cal.3d at p. 322, 197 Cal.Rptr. 581, 673 P.2d 251; *Madden v. Kaiser Foundation Hospitals* (1976) 17 Cal.3d 699, 706-707, 131 Cal.Rptr. 882, 552 P.2d 1178; *Victoria v. Superior Court* (1985) 40 Cal.3d 734, 750, 222 Cal.Rptr. 1, 710 P.2d 833 [dis. opn. of Lucas, J.]; *City of Oakland v. United Public Employees* (1986) 179 Cal.App.3d 356, 363, 224 Cal.Rptr. 523; see also *Shearson/American Express Inc. v. McMahon* (1987) 482 U.S. 220, 226, 107 S.Ct. 2332, 2337, 96 L.Ed.2d 185 [Federal Arbitration Act, 9 U.S.C. § 1 et seq., establishes federal policy in favor of arbitration].) Consequently, courts will " 'indulge every intendment to give effect to such proceedings.' " (*Doers v. Golden Gate Bridge etc. Dist.* (1979) 23 Cal.3d 180, 189, 151 Cal.Rptr. 837, 588 P.2d 1261, quoting ***187**903*Pacific Inv. Co. v. Townsend* (1976) 58 Cal.App.3d 1, 9, 129 Cal.Rptr. 489.) Indeed, more than 70 years ago this court explained: "The policy of the law in recognizing arbitration agreements and in providing by statute for their enforcement is to encourage persons who wish to avoid delays incident to a civil action to obtain an adjustment of their differences by a tribunal of their own choosing." (*Utah Const. Co. v. Western Pac. Ry. Co.* (1916) 174 Cal. 156, 159, 162 P. 631 [hereafter *Utah Const.*].) "Typically, those who enter into arbitration agreements expect that their dispute will be resolved without necessity for any contact with the courts." (*Blanton v. Womancare, Inc., supra*, at p. 402, fn. 5, 212 Cal.Rptr. 151, 696 P.2d 645.)

[3] The arbitration clause included in the employment agreement in this case specifically states that the arbitrator's decision would be both binding and final. The parties to this action thus clearly intended the arbitrator's decision would be final. Even had there been no such expression of intent, however, it is the general rule that parties to a private arbitration impliedly agree that the arbitrator's decision will be both binding and final. [FN3] Indeed, "The very essence of the term 'arbitration' [in this context] connotes a binding award." (*Blanton v. Womancare, Inc., supra*, 38 Cal.3d at p. 402, 212 Cal.Rptr. 151, 696 P.2d 645; citing Domke on Commercial Arbitration (rev. ed. 1984) p. 1 [hereafter *10 Domke].) In the early years of this state, this court opined that, "When parties agree to leave their dispute to an arbitrator, they are presumed to know that his award will be final and conclusive...." (*Montifiori v. Engels* (1853) 3 Cal. 431, 434.) One commentator explains, "Even in the absence of an explicit agreement, conclusiveness is expected; the essence of the arbitration process is that an arbitral award shall put the dispute to rest." (Comment, *Judicial Deference to Arbitral Determinations: Continuing Problems of Power and Finality* (1976) 23 UCLA L.Rev. 948-949 [hereafter *Judicial Deference*].) It has thus been observed that, "The parties [to an arbitration] can take a measure of comfort in knowing that the arbitrator's award will almost certainly mean an end to the dispute."

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(Oehmke, Commercial Arbitration (1987) § 6:10, p. 140 [hereafter Oehmke].)

FN3. We assume for this discussion of general principles that an enforceable arbitration agreement exists. We do not address here the situation where one party advances a legal theory that would vitiate the parties' voluntary agreement to submit to arbitration. (See § 1281.2 [court will not order arbitration if "[g]rounds exist for the revocation of the agreement"].)

This expectation of finality strongly informs the parties' choice of an arbitral forum over a judicial one. The arbitrator's decision should be the end, not the beginning, of the dispute. (See Feldman, *Arbitration Modernized--The New California Arbitration Act* (1961) 34 So.Cal.L.Rev. 413, 414, fn. 11.) Expanding the availability of judicial review of such decisions "would tend to deprive the parties to the arbitration agreement of the very advantages the process is intended to produce." (*Victoria v. Superior Court, supra,* 40 Cal.3d at p. 751, 222 Cal.Rptr. 1, 710 P.2d 833 [dis. opn. of Lucas, J.]; see generally, *Judicial Deference, supra,* 23 UCLA L.Rev. at p. 949.)

Ensuring arbitral finality thus requires that judicial intervention in the arbitration process be minimized. (*City of Oakland v. United Public Employees, supra,* 179 Cal.App.3d at p. 363, 224 Cal.Rptr. 523; *Lindholm v. Galvin* (1979) 95 Cal.App.3d 443, 450-451, 157 Cal.Rptr. 167.) Because the decision to arbitrate grievances evinces the parties' intent to bypass the judicial system and thus avoid potential delays at the trial and appellate levels, arbitral finality is a core component of the parties' agreement to submit to arbitration. Thus, an arbitration decision is final and conclusive *because the parties have agreed that it be so.* By ensuring that an arbitrator's decision is final and binding, courts simply assure that the parties receive the benefit of their bargain. [FN4]

FN4. Professor Feldman suggests that, "Psychologically and economically, the parties having selected their own decider, they would, on the whole, be satisfied with his award, as the best which could be had under the circumstances." (Feldman, *Arbitration Law in California: Private Tribunals for Private Government* (1957) 30 So.Cal.L.Rev. 375, 384 [discussing the arbitration scheme under the 1927 law].)

***188 **904 Moreover, "[a]rbitrators, unless specifically required to act in conformity with rules of law, may base their decision upon broad principles of justice and equity, and in doing so may expressly or impliedly reject a claim *11 that a party might successfully have asserted in a judicial action." (*Sapp v. Barenfeld* (1949) 34 Cal.2d 515, 523, 212 P.2d 233; see also *Morris v. Zuckerman* (1968) 69 Cal.2d 686, 691, 72 Cal.Rptr. 880, 446 P.2d 1000; *Grunwald-Marx, Inc. v. L.A. Joint Board* (1959) 52 Cal.2d 568, 589, 343 P.2d 23.) As early as 1852, this court recognized that, "The arbitrators are not bound to award on principles of dry law, but may decide on principles of equity and good conscience, and make their award *ex aequo et bono* [according to what is just and good]." (*Muldrow v. Norris* (1852) 2 Cal. 74, 77.) "As a consequence, arbitration awards are generally immune from judicial review. 'Parties who stipulate in an agreement that controversies that may arise out of it shall be settled by arbitration, may expect not only to reap the advantages that flow from the use of that nontechnical, summary procedure, but also to find themselves bound by an award reached by paths neither marked nor traceable and not subject to judicial review.' (*Case v. Alperson* (1960) 181 Cal.App.2d 757, 759, 5 Cal.Rptr. 635 ...)" (*Nogueiro v. Kaiser Foundation Hospitals* (1988) 203 Cal.App.3d 1192, 1195, 250 Cal.Rptr. 478.)

[4][5] Thus, both because it vindicates the intentions of the parties that the award be final, and because an arbitrator is not ordinarily constrained to decide according to the rule of law, it is the general rule that, "The merits of the controversy between the parties are not subject to judicial review." (*O'Malley, supra,* 48 Cal.2d at p. 111, 308 P.2d 9; *Griffith Co. v. San Diego Col. for Women* (1955) 45 Cal.2d 501, 510, 289 P.2d 476; *Pacific Vegetable Oil Corp. v. C.S.T. Ltd.* (1946) 29 Cal.2d 228, 233, 174 P.2d 441 [hereafter *Pacific Vegetable*].) More specifically, courts will not review the validity of the arbitrator's reasoning. (*Grunwald-Marx, Inc. v. L.A. Joint Board, supra,* 52 Cal.2d at p. 589, 343 P.2d 23; *Nogueiro v. Kaiser Foundation Hospitals, supra,* 203 Cal.App.3d at p. 1195, 250 Cal.Rptr. 478; *Ray Wilson Co. v. Anaheim Memorial Hospital Assn.* (1985) 166 Cal.App.3d 1081, 1091, 213 Cal.Rptr. 62; *American & Nat. etc. Baseball Clubs v. Major League Baseball Players Assn.* (1976) 59 Cal.App.3d 493, 498, 130 Cal.Rptr. 626 [hereafter *Baseball Players*].) Further, a court may not review the sufficiency of the evidence supporting an arbitrator's

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award. (*Morris v. Zuckerman, supra*, 69 Cal.2d at 691, 72 Cal.Rptr. 880, 446 P.2d 1000; *Pacific Vegetable, supra*, 29 Cal.2d at p. 238, 174 P.2d 441; *Nogueiro v. Kaiser Foundation Hospitals, supra*, 203 Cal.App.3d at p. 1195, 250 Cal.Rptr. 478; see generally, 6 Cal.Jur.3d (rev.), Arbitration and Award, § 76, pp. 133-134.)

[6] Thus, it is the general rule that, with narrow exceptions, an arbitrator's decision cannot be reviewed for errors of fact or law. In reaffirming this general rule, we recognize there is a risk that the arbitrator will make a mistake. That risk, however, is acceptable for two reasons. First, by voluntarily submitting to arbitration, the parties have agreed to bear that risk in return for a quick, inexpensive, and conclusive resolution to their dispute. *12 See *That Way Production Co. v. Directors Guild of America, Inc.* (1979) 96 Cal.App.3d 960, 965, 158 Cal.Rptr. 475 [hereafter *That Way*].) As one commentator explains, "the parties to an arbitral agreement knowingly take the risks of error of fact or law committed by the arbitrators and that this is a worthy 'trade-off' in order to obtain speedy decisions by experts in the field whose practical experience and worldly reasoning will be accepted as correct by other experts." (Sweeney, *Judicial Review of Arbitral Proceedings* (1981-1982) 5 Fordham Int'l L.J. 253, 254.) "In other words, it is within the power of the arbitrator to make a mistake either legally or factually. When parties opt for the forum of arbitration they agree to be bound by the decision of that forum knowing that arbitrators, like judges, are fallible." **905 ***189(*That Way, supra*, at p. 965, 158 Cal.Rptr. 475.)

Griffith Co. v. San Diego Col. for Women, supra, 45 Cal.2d 501, 289 P.2d 476, is illustrative. In that case, the plaintiff contracted to build certain buildings for the defendant college. When work was delayed, a dispute arose and the matter was submitted to arbitration. When a split arbitration panel ruled in the defendant's favor, the plaintiff moved the superior court to vacate the award, claiming, inter alia, that "the decision is arbitrary, harsh and inequitable; that it is contrary to law; and that it is not coextensive with the issues submitted." (*Id.* at p. 510, 289 P.2d 476.) This court rejected these contentions, stating, " 'Even if the arbitrator decided [the] point incorrectly, he did decide it. The issue was admitted properly before him. Right or wrong the parties have contracted that such a decision should be conclusive. At most, it is an error of law, not reviewable by the courts.' " (*Id.* at pp. 515-516, 289 P.2d 476, quoting *Crofoot v. Blair Holdings Corp.* (1953) 119 Cal.App.2d 156, 189, 260 P.2d 156 [*Crofoot* disapproved on other grounds, *Posner v. Grunwald-Marx, Inc.* (1961) 56 Cal.2d 169, 183], 14 Cal.Rptr. 297, 363 P.2d 313.)

A second reason why we tolerate the risk of an erroneous decision is because the Legislature has reduced the risk to the parties of such a decision by providing for judicial review in circumstances involving serious problems with the award itself, or with the fairness of the arbitration process. As stated *ante*, private arbitration proceedings are governed by title 9 of the Code of Civil Procedure, sections 1280-1294.2. Section 1286.2 sets forth the grounds for vacation of an arbitrator's award. It states in pertinent part: "[T]he court shall vacate the award if the court determines that: [¶] (a) The award was procured by corruption, fraud or other undue means; [¶] (b) There was corruption in any of the arbitrators; [¶] (c) The rights of such party were substantially prejudiced by misconduct of a neutral arbitrator; [¶] (d) The arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted; or [¶] (e) The rights of such party were substantially prejudiced by the refusal of the arbitrators to postpone the hearing upon sufficient cause being shown therefor or by the refusal of the *13 arbitrators to hear evidence material to the controversy or by other conduct of the arbitrators contrary to the provisions of this title."

In addition, section 1286.6 provides grounds for correction of an arbitration award. That section states in pertinent part: "[T]he court, unless it vacates the award pursuant to Section 1286.2, shall correct the award and confirm it as corrected if the court determines that: [¶] (a) There was an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award; [¶] (b) The arbitrators exceeded their powers but the award may be corrected without affecting the merits of the decision upon the controversy submitted; or [¶] (c) the award is imperfect in a matter of form, not affecting the merits of the controversy."

The Legislature has thus substantially reduced the possibility of certain forms of error infecting the arbitration process itself (§ 1286.2, subds. (a), (b), (c)), of an arbitrator exceeding the scope of his or her arbitral powers (§ § 1286.2, subd. (d), 1286.6, subd. (b)), of some obvious and easily correctable mistake in the award (§ 1286.6, subd. (a)), of one party being unfairly deprived of a fair opportunity to present his or her side of the dispute (§ 1286.2, subd. (e)), or of some other technical problem with the award (§

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1286.6, subd. (c)). In light of these statutory provisions, the residual risk to the parties of an arbitrator's erroneous decision represents an acceptable cost--obtaining the expedience and financial savings that the arbitration process provides--as compared to the judicial process.

Although it is thus the general rule that an arbitrator's decision is not ordinarily reviewable for error by either the trial or appellate courts, Moncharsh contends three exceptions to the general rule apply to his case. First, he claims a court may review an arbitrator's decision if an error of law is ***190 **906 apparent on the face of the award and that error causes substantial injustice. Second, he claims the arbitrator exceeded his powers. (§ 1286.2, subd. (d).) Third, he argues courts will not enforce arbitration decisions that are illegal or violate public policy. We discuss each point seriatim.

2. Error on the Face of the Arbitration Decision

A review of the pertinent authorities yields no shortage of proclamations that a court may vacate an arbitrator's decision when (i) an error of law appears on the face of the decision, and (ii) the error causes substantial injustice. (See, e.g., *Abbott v. California State Auto. Assn.* (1977) 68 Cal.App.3d 763, 771, 137 Cal.Rptr. 580.) Indeed, some cases hold the error *14 need only appear on the face of the award, with no mention of resulting injustice. (See, e.g., *Park Plaza, Ltd. v. Pietz* (1987) 193 Cal.App.3d 1414, 1420, 239 Cal.Rptr. 51.) As previously noted, however, the Legislature has set forth grounds for vacation (§ 1286.2) and correction (§ 1286.6) of an arbitration award and "[a]n error of law is not one of the grounds." (*Nogueiro v. Kaiser Foundation Hospitals, supra*, 203 Cal.App.3d at p. 1195, 250 Cal.Rptr. 478, and cases cited.) Because Moncharsh contends that an additional exception to the general rule for errors of law is authorized by both common law and statute, we next determine the genesis of that notion as well as its continuing validity.

a. *The Early Common Law Rule*

We begin with *Muldrow v. Norris, supra*, 2 Cal. 74 [hereafter *Muldrow*], a case arising before the enactment of any arbitration statutes in this state. In *Muldrow*, a dispute arose between the parties and they agreed to submit the matter to a panel of three arbitrators, whose decision "should be final and conclusive." (*Ibid.*) The arbitrators reached a decision and Norris, the losing party, sought to vacate the award. This court ruled in his favor, and we quote the opinion at length because it exemplifies the contradictory rule of judicial review that has been repeated in modified form since those early days:

"The first point we propose to examine, is, as to the power of the Court below to inquire into the award now before us. It is a well settled principle that courts of equity, in the absence of statutes, will set aside awards for fraud, mistake, or accident, and it makes no difference whether the mistake be one of fact or law. It is true, under a general submission, arbitrators have power to decide upon the law and facts: and a mere mistake of law cannot be taken advantage of. The arbitrators are not bound to award on principles of dry law, but may decide on principles of equity and good conscience, and make their award *ex aequo et bono*. If, however, they mean to decide according to the law, and mistake the law, the courts will set their award aside. A distinction seems to have been taken in the books between general and special awards. In the case of a general finding, it appears to be well settled that courts will not inquire into mistakes by evidence *aliunde*: but where the arbitrators have made any point a matter of judicial inquiry by spreading it upon the record, and they mistake the law in a palpable and material point, their award will be set aside. [Citation.] The mere act of setting forth their reasons must be considered for the purpose of enabling those dissatisfied to take advantage of them. [Citation.] In all cases where the arbitrators give the reasons of their finding, they are supposed to have intended to decide according to law, and to refer the point for the opinion of the Court. In such cases, if they mistake the law, the award must be set aside; *15 for it is not the opinion they intended to give, the same having been made through mistake. [Citation.] In the case already cited, the Court says, 'these special awards are not to be commended, as arbitrators may often decide with perfect equity between parties, and not give good reasons for their decision; but when a special award is once before the Court, it must stand or fall by its own intrinsic correctness, tested by legal principles.' [Citations.]" (2 Cal. at pp. 77-78.)

The *Muldrow* court concluded: "In the case before us, the arbitrators have set forth the particular grounds upon which ***191 **907 their finding was based: and it follows from the authorities already cited, that the correctness of the principles by which they must be supposed to have been governed is a proper subject for judicial inquiry." (2 Cal. at p. 78.)

Although *Muldrow, supra*, thus acknowledged that, at common law, an arbitrator need not follow the law in arriving at a decision, and that "a mere mistake of law cannot be taken advantage of" (2 Cal. at p. 77),

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the opinion qualified that statement and held that an award reached by an arbitrator may nevertheless be reversed if the error is "spread[ ] ... upon the record" and the mistake is on a "palpable and material point." (*Ibid.*) *Muldrow* also stated that when an arbitrator gives reasons to support his decision, the award was subject to full-blown judicial oversight, and "must stand and fall by its own intrinsic correctness, tested by legal principles." (*Id.* at p. 78.) [FN5]

> FN5. By ensuring some measure of judicial control over arbitral awards, *Muldrow, supra,* was typical of courts from that early era in exhibiting suspicion of private arbitration as a means of dispute resolution. Thus, for example, courts had held that a common law submission to arbitration was revocable at any time prior to the award. (See *California Academy of Sciences v. Fletcher* (1893) 99 Cal. 207, 209, 33 P. 855; 3 Cal.Jur., Arbitration and Award § 19, p. 55.) In addition, early courts held agreements to arbitrate future disputes were unenforceable, both at common law and under the early statutes. (*Blodgett Co. v. Bebe Co.* (1923) 190 Cal. 665, 214 P. 38; Feldman, *Arbitration Law in California: Private Tribunals for Private Government, supra,* 30 So.Cal.L.Rev. at p. 382.) Even under the initial arbitration statutes, courts held invalid an agreement that the arbitrator's decision was final and that no appeal could be taken therefrom. (*Kreiss v. Hotaling* (1892) 96 Cal. 617, 621, 31 P. 740; *In re Joshua Hendy Machine Works* (1908) 9 Cal.App. 610, 611, 99 P. 1110.)

Later that same term, this court again addressed the issue. In *Tyson v. Wells* (1852) 2 Cal. 122, the parties agreed to submit their commercial dispute to a referee, whose decision was to be final. When the losing party challenged the referee's ruling, this court concluded the finality accorded a referee's report pursuant to statute was the same as for an arbitrator's ruling at common law. (*Id.* at p. 130.) This time avoiding any suggestion that an arbitrator's decision was subject to unqualified judicial review, we stated: "it may be regarded as the settled rule, that the Court will not disturb the award of an arbitrator ... unless the error which is complained of, whether it be of *16 law or fact, appears on the face of the award." (*Id.* at p. 131.) Although the court purported to be following *Muldrow, supra,* 2 Cal. 74, there was no qualification that the error must be on a "palpable and material point." (*Id.* at p. 77.)

Six months later, we addressed the issue again. In *Headley v. Reed* (1852) 2 Cal. 322, another case involving a reference, we wrote, "According to the rule settled in [*Muldrow*], the decision of the referee can only be set aside on account of fraud or *gross error of law or fact apparent on its face.*" (*Id.* at p. 325, italics added.) The *Headley* court thus injected a new factor into the *Muldrow* test--gross error--but did not repeat *Muldrow*'s assertion that an arbitrator's decision was subject to full-blown judicial review.

These three early cases--*Muldrow, Tyson, Headley*--involved arbitration (or a reference, which was considered functionally equivalent to arbitration) at common law. From them, we can perceive the beginnings of the rule permitting judicial review of an arbitrator's ruling if error appeared on the face of the award.

b. *The Development of Statutory Law before 1927*

Around the time the aforementioned cases were decided, the Legislature enacted the Civil Practice Act of 1851 and established the rules governing statutory arbitration. In section 386 of that act, the Legislature specified the grounds on which a court could vacate an arbitrator's award. "The Court, on motion, may vacate the award upon either of the following grounds ...: [¶] 1st. That it was procured by corruption or fraud: [¶] 2d. That the arbitrators were guilty of misconduct, or committed gross error in refusing, on cause shown, to postpone the hearing, or in refusing **908 ***192 to hear pertinent evidence, or otherwise acted improperly, in a manner by which the rights of the party were prejudiced: [¶] [3d.] That the arbitrators exceeded their powers in making their award; or that they refused, or improperly omitted, to consider a part of the matters submitted to them; or that the award is indefinite, or cannot be performed." (Stats. 1851, ch. 4, § 386, pp. 112-113, hereafter section 386 of the Civil Practice Act.) Significantly, there was no express provision permitting judicial review if there was a gross error on the face of the award. Nor was a court permitted to vacate an award if it concluded it lacked "intrinsic [legal] correctness," as suggested in *Muldrow, supra,* 2 Cal. at pages 77-78.

This court first considered section 386 of the Civil Practice Act in *Peachy et al. v. Ritchie* (1854) 4 Cal. 205 (hereafter *Peachy*). In that case, the losing party to an arbitration moved to vacate the award, claiming among other *17 things that "the arbitrators refused to hear pertinent evidence," and "the

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arbitrators exceeded their powers." (*Id.* at p. 206.) The trial court "refused to entertain the motion" on procedural grounds. (*Id.* at p. 207.) Although the grounds asserted in support of the motion to vacate seemed to fall within the then-existing statutory grounds for vacation, this court refused to examine the decision of the court below, finding the asserted grounds to vacate the award "wholly insufficient. [¶] Our Statute is but a re-affirmance of the common law, and gives to the parties no higher rights than they might have asserted in a court of equity in case of mistake, fraud or accident. The misconduct, contemplated by the Statute, was intended to apply to improper conduct in fact, such as that of a witness or juror, as contra-distinguished from mere error of judgment. [¶] The whole doctrine of Arbitration was fully reviewed by this Court in the case of *Muldrow v. Norris*, 2 Cal. 74; in which we decided that we would not disturb the general finding of arbitrators, and that an award could not be set aside except in the cases there mentioned." (*Peachy, supra*, 4 Cal. at p. 207, punctuation and capitalization in original.)

The *Peachy* opinion is noteworthy for two reasons. First, it failed to construe strictly the terms of the statute. Thus, although the appellant raised grounds for review that were apparently permitted under section 386 of the Civil Practice Act (i.e., claims that the arbitrator failed to hear pertinent evidence and exceeded his powers), the court declined to invoke those statutory provisions. Instead, it concluded that the new statute was merely an affirmation of the common law and that the statute granted disputants no greater rights than they would have had before its enactment. The court concluded that permitting a litigant to attack an award on the asserted statutory grounds would destroy this mode of adjusting private differences. (*Peachy, supra*, 4 Cal. at p. 207.)

Second, *Peachy* reaffirmed the availability of judicial review of arbitration awards as limited in *Muldrow, supra*, 2 Cal. 74, expressly mentioning mistake, fraud, and accident. Thus, despite the enactment of section 386 of the Civil Practice Act, the availability of judicial review of arbitration awards was still controlled by the common law principles established in earlier cases. (*Peachy, supra*, 4 Cal. at p. 207.)

The evolution away from an emphasis on the common law, first suggested by the enactment of the Civil Practice Act of 1851, continued in *Carsley v. Lindsay* (1859) 14 Cal. 390. In that case, partners in the Salamander Iron Works desired to dissolve their partnership and submitted their dispute to an arbitrator, who found in Carsley's favor. When Lindsay successfully moved the trial court to vacate the award, Carsley appealed. In support of the trial court's decision, Lindsay argued, inter alia, that the award was properly *18 vacated because it was contrary to law and evidence. This court rejected that argument, reasoning, "we are not aware that an award of an Arbitrator can be impeached on this ground.... An impeachment on this ground was not admissible at common law, and, if it were, our statute, (Practice Act, [§] 385 *et seq.*) prescribes *other* grounds, as those upon which *alone* the award can be ***193 **909 vacated by the District Court upon motion." (*Carsley, supra*, at p. 394, first italics in original, second added, citing *Muldrow, supra*, 2 Cal. 74; *Peachy, supra*, 4 Cal. 205.) Although *Carsley* cited *Muldrow* and its progeny, it is clear the court had subtly shifted its position to place greater reliance on the statutory provisions as the exclusive grounds on which an arbitration award could be vacated.

This trend continued when, in 1872, section 386 of the Civil Practice Act was codified without change as Code of Civil Procedure former section 1287. We addressed the new statute in *In re Connor* (1900) 128 Cal. 279, 60 P. 862. In that case, Pratt and Connor had a dispute over a promissory note and submitted the controversy to an arbitrator, who found in Connor's favor. Pratt moved to modify the award, and to vacate a portion of it. When the trial court denied his motion, he appealed, claiming witnesses in the hearing below were not sworn. This court affirmed, reasoning, "Where controversies are voluntarily submitted to arbitrators who need not be, and frequently are not, learned in the law, it is not contemplated that their awards will be viewed in the light of that strict adherence to legal rules and procedure which is expected in purely judicial trials." (*Id.* at pp. 281-282, 60 P. 862.) After quoting *Muldrow, supra*, 2 Cal. 74, the *Connor* court flatly stated: "*the only grounds for a motion to vacate or modify an award are specified in sections 1287 and 1288 of the code;* and the grounds for vacating an award (Code Civ.Proc., sec. 1287) include only cases of fraud, corruption, misconduct, 'or gross error,.... These grounds do not include mere ordinary errors nor even faults of judgment. They refer to things that are 'gross.' " (*In re Connor, supra* at p. 282, 60 P. 862, italics added.)

By the time of *In re Connor, supra*, then, this court had declined to perpetuate *Muldrow*'s suggestion that courts could indulge in unfettered review of the "intrinsic correctness" of an arbitrator's decision. Indeed, the opposite was true; courts following the legislative scheme concluded the grounds for

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vacating an award were exclusively those set forth by statute. The *Connor* court, however, retained an exception to this general rule. *Muldrow*'s holding permitting judicial review of errors "spread upon the record" affecting a "palpable and material point" (*Muldrow, supra,* 2 Cal. at p. 77), was transmogrified in *In re Connor* into a rule permitting judicial review of an award if it contained a "gross" error, although former section 1287 did not specify that ground as a permissible reason to vacate an award. *19 *In re Connor, supra,* 128 Cal. at p. 282, 60 P. 862.) Thus, although emphasizing the exclusivity of the statutory grounds for vacating an arbitration award, the *Connor* court retained a vestige of the common law rule that provided more generous judicial oversight.

Sixteen years later, this court retreated somewhat from *In re Connor, supra,* 128 Cal. 279, 60 P. 862, and apparently returned to the rule developed in earlier cases (most notably *Muldrow, supra,* 2 Cal. 74, and especially *Peachy, supra,* 4 Cal. 205), that deemphasized the exclusivity of the statutory grounds for vacating an award. In *Utah Const., supra,* 174 Cal. 156, 162 P. 631, a dispute arose between a railroad and a construction company over whether a debt had been discharged. The parties submitted their dispute to an arbitrator, who ruled in the railroad's favor. The construction company moved to vacate the award and appealed when the trial court denied its motion. We affirmed the trial court's decision, citing *Muldrow, supra,* 2 Cal. 74, and its progeny. "The code provisions are in aid of the common-law remedy of arbitration, a reaffirmance thereof, and do not alter its principles. [Citations.] An award made upon an unqualified submission cannot be impeached on the ground that it is contrary to law, unless the error appears on its face and causes substantial injustice. (*Carsley v. Lindsay* [*supra*,] 14 Cal. 390; Morse on Arbitration, 296.)" (*Utah Const., supra,* 174 Cal. at pp. 160-161, 162 P. 631.)

Although *Carsley v. Lindsay, supra,* 14 Cal. 390, was cited in support, the basis for this court's apparent resurrection of the common law dominated view of judicial review of arbitration awards is puzzling. As ***194 **910 explained, *ante,* at pages 192-193 of 10 Cal.Rptr.2d, at pages 908-909 of 832 P.2d, *Carsley* held that an arbitrator's award cannot be "impeached" merely because it contained an error of law, and that even if it could, section 386 of the Civil Practice Act (then codified verbatim in former section 1287) set forth the exclusive grounds to vacate an award. (*Carsley v. Lindsay, supra* at p. 394.) Thus, close scrutiny reveals *Carsley* does not support the proposition for which it was cited in the *Utah Const.* opinion.

Utah Const.'s citation to Morse, The Law of Arbitration and Award (1872), is similarly unavailing. That treatise states that when parties submit to an arbitrator under a general submission, "such award is conclusive as well of the law as the fact; and the court upon the return of such an award will not inquire whether the referees, thus authorized, have decided correctly upon principles of law or not." (*Id.* at p. 296, fn. omitted.) As is clear, Morse does not provide support for the conclusion in *Utah Const., supra,* 174 Cal. 156, 162 P. 631, that a court can vacate an arbitration award for a legal error appearing on the face of the award causing substantial injustice.

By the time this court decided *Utah Const., supra,* 174 Cal. 156, 162 P. 631, the law governing judicial review of arbitration awards was in a state of flux. The *20 initial common law view permitting unfettered review of an award's "intrinsic correctness," first set forth in *Muldrow, supra,* 2 Cal. 74, had fallen by the wayside. More importantly, an alternate rule permitting review of an error—or perhaps, a "gross" error—on the face of the award causing substantial injustice, also begun with *Muldrow,* waned with the advent of statutes (first in 1851, then in 1872) governing the area, and had also apparently fallen into disfavor (*Carsley v. Lindsay, supra,* 14 Cal. 390), although the notion was not completely abandoned. (*In re Connor, supra,* 128 Cal. 279, 60 P. 862.) By 1916, however, that notion had been revived in *Utah Const., supra,* 174 Cal. 156, 162 P. 631. Indeed, *Utah Const.* has been cited in appellate decisions in the last 10 years for this very proposition. (See, e.g., *Park Plaza, Ltd. v. Pietz, supra,* 193 Cal.App.3d at p. 1420, 239 Cal.Rptr. 51.) After 1927, the limits of judicial review of arbitration awards would evolve still further, this time shaped by additional legislation.

c. *Development of the Law After 1927*

By 1926, the popularity of private arbitration as a viable alternate to resolving disputes outside court was in decline. "[W]idespread dissatisfaction with our laws respecting arbitration [had] been often expressed by chambers of commerce, mercantile associations and business men generally." (First Rep. of the Judicial Council of Cal. (1926) exhibit B, p. 57 [hereafter First Report].) In addition, there were indications that the organized bar also opposed private arbitration. (See Proceedings of the Fifteenth Annual Meeting Cal. State Bar Assn. (1924) pp. 70-73, quoted in Feldman, *Arbitration Law in California: Private Tribunals for Private*

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Government, supra, 30 So.Cal.L.Rev. at p. 388, fn. 42.) In 1926, Los Angeles County reported its clerk filed only three submissions to arbitrate; Alameda County reported no petitions were filed that year. (First Report, *supra,* p. 57.)

The reason for the dearth of submissions to arbitration could be traced to two factors. First, private arbitration was no more efficient than regular judicial adjudication due to the statutory rule permitting a disputant to revoke his or her submission to arbitrate "at any time before the award is made." (Former § 1283; see also First Report, *supra,* p. 58.) Second, private arbitration was not viewed as a particularly valuable method of dispute resolution because courts would not enforce contractual provisions agreeing to submit *future* disputes to arbitration. (*Blodgett Co. v. Bebe Co., supra,* 190 Cal. at p. 667, 214 P. 38.)

These perceived flaws were remedied when, in 1927, the Legislature amended the statutes governing private arbitration. (Stats.1927, ch. 225, p. 403 et seq.) We may infer that by amending the existing statutes in response *21 to the report to the ***195 **911 Judicial Council of California, the Legislature intended to encourage the use of private arbitration. The 1927 amendments thus represent a clear legislative expression of public policy in favor of private arbitration as an alternate method of dispute resolution.

In addition to those changes, former section 1287--setting forth the grounds for vacating an arbitration award--was recodified and renumbered as new section 1288. That section provided in pertinent part: "In either of the following cases the superior court of the county or city and county in which said arbitration was had must make an order vacating the award, upon the application of any party to the arbitration: [¶] (*a*) Where the award was procured by corruption, fraud or undue means. [¶] (*b*) Where there was corruption in the arbitrators, or either of them. [¶] (*c*) Where the arbitrators were guilty of misconduct, in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence, pertinent and material to the controversy; or of any other misbehaviors, by which the rights of any party have been prejudiced. [¶] (*d*) Where the arbitrators exceeded their powers, or so imperfectly executed them, that a mutual, final and definite award, upon the subject matter submitted, was not made." (Stats.1927, ch. 225, § 9, pp. 406-407.)

The major changes in the new statute were: (i) the addition in subdivision (a) permitting vacation when the award was procured by "undue means"; and (ii) the addition to subdivision (d) permitting vacation when the arbitrators "so imperfectly executed [their powers] that a mutual, final and definite award ... was not made." (Former § 1288, Stats.1927, ch. 225, § 9, p. 407.)

The limits of judicial review of an arbitration award under the 1927 amendments were addressed in *Pacific Vegetable, supra,* 29 Cal.2d 228, 174 P.2d 441. In that case, the seller claimed its contract with a buyer to ship copra from the Fiji Islands to San Diego, California, was cancelled due to the outbreak of World War II. The matter was submitted to an arbitration panel, which found in favor of the seller. The buyer moved in superior court to vacate the award, claiming it was not given an adequate opportunity to address the seller's arguments.

The *Pacific Vegetable* court stated that, "The merits of the controversy between the parties are not subject to judicial review. By section 1288 of the Code of Civil Procedure the superior court has power to vacate an award [quoting the terms of section 1288]." (*Pacific Vegetable, supra,* 29 Cal.2d at p. 233, 174 P.2d 441.) Later, the court explained, "The form and sufficiency of the evidence, and the credibility and good faith of the parties, in the absence of *22 corruption, fraud or undue means in obtaining an award, are not matters for judicial review." (*Id.* at p. 238, 174 P.2d 441.) It is significant that the court twice emphasized the statutory grounds for vacating an award, but never reiterated the old common law based rule permitting review for an error on the face of the award that causes substantial injustice. In this way, the *Pacific Vegetable* court suggested that former section 1288--and not the common law--established the limits of judicial review of arbitration awards. [FN6]

FN6. Although *Pacific Vegetable, supra,* 29 Cal.2d 228, 174 P.2d 441, thus implied the statutory grounds were exclusive, its ultimate meaning was somewhat ambiguous, for it also noted that " 'The statutory provisions for a review thereof are manifestly for the sole purpose of preventing the misuse of the proceeding, where corruption, fraud, misconduct, *gross error, or mistake* has been carried into the award to the substantial prejudice of a party to the proceeding.' " (*Id.* at p. 240, 174 P.2d 441, quoting *Utah Const., supra,* 174 Cal. at p. 159, 162 P. 631, italics added.) Because this quotation came in a paragraph discussing the

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requirement that a challenger must show prejudice flowing from the alleged error, however, it is doubtful the court meant to embrace the old rule permitting a court to vacate an award when error appeared on the face of the award causing substantial injustice.

A few years after *Pacific Vegetable, supra,* 29 Cal.2d 228, 174 P.2d 441, the murky issue of the scope of judicial review of arbitration awards gained some much-needed clarity. In ***196**912*Crofoot v. Blair Holdings Corp., supra,* 119 Cal.App.2d 156, 260 P.2d 156 [hereafter *Crofoot*], Justice Raymond Peters, then the Presiding Justice of the Court of Appeal for the First Appellate District, Division One, confronted a case involving alleged fraud in a complex stock deal. After numerous lawsuits were filed in California and New York, the interested parties agreed to submit the entire matter to arbitration. Following presentation of evidence to the arbitrator, he rendered a five-page award accompanied by findings and opinions covering two hundred fifteen pages. The overall result was a judgment in favor of Blair Holdings Corporation (Blair) and against Crofoot. Blair successfully moved in superior court to correct and confirm the award, and Crofoot appealed.

At the outset, the Court of Appeal explained that after the 1927 amendments to the Code of Civil Procedure, written agreements to arbitrate were governed exclusively by statute and there was "no field for a common law arbitration to operate...." (*Crofoot, supra,* 119 Cal.App.2d at p. 181, 260 P.2d 156.) The appellate court therefore rejected Crofoot's argument that the arbitrator lacked jurisdiction because Blair never secured a court order submitting the cases to arbitration. "Prior to [1927], it was undoubtedly the law that both common law and statutory arbitrations existed in this state, that in the absence of [a court] order of submission the arbitration was deemed to be a common law arbitration, and that in such common law arbitration the award could only be enforced by an independent action and could not be entered as a judgment.... [¶] Since 1927, however, these limitations on statutory *23 arbitration no longer exist." (*Id.* at pp. 180-181, 260 P.2d 156.) After noting some of the differences between common law and statutory arbitration, the appellate court concluded, "that by the adoption of the 1927 statute, the Legislature intended to adopt a comprehensive 'all-inclusive' statutory scheme applicable to all written agreements to arbitrate, and that in such cases the doctrines applicable to a common law arbitration were abolished." (*Id.* at p. 182, 260 P.2d 156.) [FN7]

FN7. This conclusion was foreshadowed three years earlier by a scholarly article on which the *Crofoot* court relied. (See *Crofoot, supra,* 119 Cal.App.2d at p. 182, 260 P.2d 156.) The article noted that "The present statute, a detailed one, contravenes common law principles almost point by point. Legislative purpose to abolish applicable common law might be found from this fact alone. The statute obliterates all guideposts under which the previous statutes permitted notice whether one was contracting for statutory or common law arbitration. It is reasonable that parties who voluntarily agree in writing to arbitrate should be bound by the statute and should not as an afterthought be permitted to escape from their contract through the portals of the common law." (Kagel, *Labor and Commercial Arbitration Under the California Arbitration Statute* (1950) 38 Cal.L.Rev. 799, 809.)

On the question of arbitral finality, the *Crofoot* court was more circumspect, admitting "The law is not quite so clear as to a court's powers of review over questions of law. The earlier cases held that the court had the power to review errors of law, at least where they appeared upon the face of the award. [FN[8]] (*In re Frick,* 130 Cal.App. 290, 19 P.2d 836; *Utah Const. Co. v. Western Pac. Ry. Co.,* 174 Cal. 156, 162 P. 631.) The later cases have gone much farther in granting finality to the award even as to questions of law. In *Pacific Vegetable Oil Corp. v. C.S.T., Ltd.,* [*supra,*] 29 Cal.2d 228, 233, 174 P.2d 441, it was bluntly held that 'The merits of the controversy between the parties are not subject to judicial review.' " (*Crofoot, supra,* 119 Cal.App.2d at p. 185, 260 P.2d 156.) After surveying cases that note an arbitrator need not rule in conformity with the law, the *Crofoot* court made a dramatic conclusion: "Under these cases it must be held that in the absence of some limiting clause in the arbitration agreement, the merits of the award, either on questions of fact or of law, *may not be reviewed except as provided in the statute.*" (*Crofoot, supra,* 119 Cal.App.2d at p. 186, 260 P.2d 156, italics added.)

FN8. At this point, the *Crofoot* court inserted a footnote and stated: "But even

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> prior to 1927 it was held that only 'gross' errors of an arbitrator were reviewable--*In re Connor*, 128 Cal. 279, 282 [60 P. 862]."

This bold statement reflected the end result of many years of evolution in the ***197 **913 law, from the common law roots of *Muldrow, supra*, 2 Cal. 74, through the growth of the rule permitting review of errors on the face of the award (*Utah Const., supra*, 174 Cal. at pp. 160-161, 162 P. 631), and through the important changes occasioned by the 1927 amendments as interpreted first by *Pacific Vegetable, supra*, 29 Cal.2d 228, 174 P.2d 441, and then definitively by *Crofoot, supra*, 119 Cal.App.2d 156, 260 P.2d 156. Later opinions of this court relied heavily on the reasoning and conclusion of the *Crofoot* opinion to declare that the sole grounds for *24 vacating an arbitration award were those set forth by statute. (See *O'Malley, supra*, 48 Cal.2d at pp. 111-112, 308 P.2d 9; *Griffith Co. v. San Diego Col. for Women, supra*, 45 Cal.2d at pp. 515-516, 289 P.2d 476.)

In the years following *Crofoot, supra*, 119 Cal.App.2d 156, 260 P.2d 156, a large majority of appellate decisions also adopted the *Crofoot* conclusion that former section 1288 set forth the exclusive means for vacating an arbitration award. (*Cecil v. Bank of America* (1956) 142 Cal.App.2d 249, 251, 298 P.2d 24 ["the merits of the award ... may not be reviewed except as provided in the statute"]; *Downer Corp. v. Union Paving Co.* (1956) 146 Cal.App.2d 708, 715, 304 P.2d 756 [same]; *Wetsel v. Garibaldi* (1958) 159 Cal.App.2d 4, 13, 323 P.2d 524, disapproved on other grounds, *Posner v. Grunwald-Marx, Inc., supra*, 56 Cal.2d at p. 183, 14 Cal.Rptr. 297, 363 P.2d 313 [same]; *Ulene v. Murray Millman of California* (1959) 175 Cal.App.2d 655, 660, 346 P.2d 494 [same]; *Meat Cutters Local No. 439 v. Olson Bros.* (1960) 186 Cal.App.2d 200, 203-204, 8 Cal.Rptr. 789 [same]; *Government Employees Ins. Co. v. Brunner* (1961) 191 Cal.App.2d 334, 340-341, 12 Cal.Rptr. 547 [same]; but see, *U.S. Plywood Corp. v. Hudson Lumber Co.* (1954) 124 Cal.App.2d 527, 532, 269 P.2d 93 [reiterating the "error on face of award" standard].) Some cases did not expressly recognize the exclusiveness of the statutory grounds, but implied that point by flatly stating the merits of an arbitration award were not subject to judicial review. (*Atlas Floor Covering v. Crescent House & Garden, Inc.* (1958) 166 Cal.App.2d 211, 216, 333 P.2d 194; *Gerard v. Salter* (1956) 146 Cal.App.2d 840, 846, 304 P.2d 237.)

In 1956, the Legislature authorized the California Law Revision Commission to study and determine whether the statutory arbitration scheme should be revised. (Assem. Conc. Res. No. 10, Stats. 1957 (1956 Reg.Sess.) res. ch. 42, p. 264.) The Commission's report was transmitted to the Governor in December 1960. (Recommendation and Study Pertaining to Arbitration (Dec.1960) 3 Cal.Law Revision Com.Rep. (1960) [hereafter Arbitration Study].) On the subject of the scope of judicial review, the report explained that, "Nothing in the California statute defines the permissible scope of review by the courts. Numerous court rulings have, however, developed the following basic principles which set the limits for any court review: [¶] ... [¶] (2) Merits of an arbitration award either on questions of fact or of law may not be reviewed *except as provided for in the statute* in the absence of some limiting clause in the arbitration agreement. [¶] ... [FN[9]] [¶](5) Statutory provisions for a review of arbitration proceedings are for the sole purpose of preventing misuse of the proceedings where corruption, *25 fraud,misconduct, gross error or mistake [FN[10]] has been carried into the award to the substantial prejudice of a party to the proceedings." (Arbitration Study, *supra*, pp. G-53 to G-54, italics added.)

> FN9. For this proposition, the report cited *O'Malley, supra*, 48 Cal.2d 107, 308 P.2d 9, and *Crofoot, supra*, 119 Cal.App.2d 156, 260 P.2d 156, among other cases.

> FN10. Although the inclusion of the phrase "gross error or mistake" may suggest the commission approved of (or at least recognized) the rule permitting judicial review of gross errors on the face of the award causing substantial injustice, the report later refutes this notion, stating, "Even a gross error or mistake in an arbitrator's judgment is not sufficient grounds for vacation, unless the error amounts to actual or constructive fraud." (Arbitration Study, *supra*, p. G-55.)

The Arbitration Study emphasized that arbitration should be the end of the dispute and that "the ordinary concepts of judicial appeal and review are not applicable to ***198 **914 arbitration awards. Settled case law is based on this assumption." (Arbitration Study, *supra*, p. G-54.) After surveying the state of the law, the report concluded that

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although the California statutes do not "attempt to express the exact limits of court review of arbitration awards, ... no good reason exists to codify into the California statute the case law as it presently exists." (*Ibid.*) Further, the report recommended that the "present grounds for vacating an award should be left substantially unchanged." (*Id.* at p. G-57.) The report of the California Law Revision Commission thus concluded that the state of the law, as represented by *Crofoot, supra*, 119 Cal.App.2d 156, 260 P.2d 156, and its progeny, should not be altered by any statutory amendments.

The California Legislature thereafter enacted a revision of the arbitration statutes. (Stats.1961, ch. 461, p. 1540 et seq.) Former section 1288, which had set forth the grounds on which an award could be vacated, was slightly altered and renumbered as new section 1286.2, and this section still controls today. [FN11] The new grounds are "substantially a restatement of the grounds set out in a bit more archaic form in the 1927 statute." (Feldman, *Arbitration Modernized--The New California Arbitration Act*, *supra*, 34 So.Cal.L.Rev. at p. 433.) It is significant that there is no mention of the rule permitting judicial review for errors apparent on the face of the arbitration award causing substantial injustice. We may infer from this omission that the Legislature intended to reject that rule, and instead adopt the position taken in case law and endorsed in the Arbitration Study, that is, "that in the absence of some limiting clause in the arbitration agreement, the merits of the award, either on questions of fact or of law, may not be reviewed except as provided in the statute." (*Crofoot, supra*, 119 Cal.App.2d at p. 186, 260 P.2d 156.)

FN11. The current version of section 1286.2 is quoted on page 189 of 10 Cal.Rptr.2d, page 905 of 832 P.2d.

The Legislature's intent is further revealed by an examination of other statutes. For example, in providing for arbitrating disputes arising from public construction contracts, section 1296 directs that "a court shall ... **26** vacate the award if after review of the award it determines either that the award is not supported by substantial evidence or that it is based on an error of law." By specifically providing in that provision for judicial review and correction of error, but not in section 1286.2, we may infer that the Legislature did not intend to confer traditional judicial review in private arbitration cases. "'Where a statute, with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject ... is significant to show that a different intention existed.' [Citation.]" (*People v. Drake* (1977) 19 Cal.3d 749, 755, 139 Cal.Rptr. 720, 566 P.2d 622.)

The law has thus evolved from its common law origins and moved towards a more clearly delineated scheme rooted in statute. A majority of California appellate decisions have followed the modern rule, established by *Pacific Vegetable, supra*, 29 Cal.2d 228, 174 P.2d 441, and *Crofoot, supra*, 119 Cal.App.2d 156, 260 P.2d 156, and generally limit judicial review of private arbitration awards to those grounds specified in sections 1286.2 and 1286.6. (See, e.g., *Severtson v. Williams Construction Co.* (1985) 173 Cal.App.3d 86, 92-93, 220 Cal.Rptr. 400; *Lindholm v. Galvin, supra*, 95 Cal.App.3d at pp. 450-451, 157 Cal.Rptr. 167; *Baseball Players, supra*, 59 Cal.App.3d at p. 498, 130 Cal.Rptr. 626; *Santa Clara-San Benito etc. Elec. Contractors' Assn. v. Local Union No. 332* (1974) 40 Cal.App.3d 431, 437, 114 Cal.Rptr. 909; *State Farm Mut. Auto. Ins. Co. v. Guleserian* (1972) 28 Cal.App.3d 397, 402, 104 Cal.Rptr. 683; *Jones v. Kvistad* (1971) 19 Cal.App.3d 836, 840-843, 97 Cal.Rptr. 100; *Allen v. Interinsurance Exchange* (1969) 275 Cal.App.2d 636, 641, 80 Cal.Rptr. 247; *Durand v. Wilshire Ins. Co.* (1969) 270 Cal.App.2d 58, 61, 75 Cal.Rptr. 415.)

This view is consistent with a large majority of decisions in other states. Although **915 ***199 California has not adopted the Uniform Arbitration Act, more than half the states have done so. (See 7 West's U. Laws Ann. (1985) U. Arbitration Act, 1991 Cum.Ann. Pocket Pt., p. 1.) The statutory grounds to vacate a private arbitration award set forth in the uniform law largely mirror those codified in section 1286.2, however, [FN12] and most states have concluded that these grounds are exclusive. (See, e.g., *Verdex Steel and Const. Co. v. Board of Supervisors* (1973) 19 Ariz.App. 547 [509 P.2d 240]; *27*Affiliated Marketing, Inc. v. Dyco Chem. & Coatings, Inc.* (Fla.Dist.Ct.App.1976) 340 So.2d 1240, 1242, cert. den. 353 So.2d 675; *Morrison-Knudsen v. Makahuena Corp.* (1983) 66 Hawaii 663, 668 [675 P.2d 760]; *Bingham County Com'n v. Interstate Elec. Co.* (1983) 105 Idaho 36, 42 [665 P.2d 1046, 1052]; *Konicki v. Oak Brook Racquet Club, Inc.* (1982) 110 Ill.App.3d 217, 223 [65 Ill.Dec. 819, 823, 441 N.E.2d 1333, 1337]; *State, Dept. of Admin., Per. Div. v. Sightes* (Ind.Ct.App.1981) 416 N.E.2d 445, 450; *City of Sulphur v. Southern Builders* (La.Ct.App.1991) 579 So.2d 1207, 1210, cert. den. 587 So.2d 699; *Plymouth-Carver School*

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Dist. v. J. Farmer (1990) 407 Mass. 1006, 1007 [553 N.E.2d 1284, 1285] [rescript opinion]; *AFSCME Council 96 v. Arrowhead Reg. Corr. Bd.* (Minn.1984) 356 N.W.2d 295, 299; *Savage Educ. Ass'n. v. Trustees of Richland Cty.* (1984) 214 Mont. 289, 295-296 [692 P.2d 1237, 1240]; *New Sky Clown Casino, Inc. v. Baldwin* (1987) 103 Nev. 269, 271 [737 P.2d 524, 525] [*per curiam*]; *Kearny PBA No. 21 v. Town of Kearny* (1979) 81 N.J. 208, 220-221 [405 A.2d 393, 399]; *Cyclone Roofing Co. v. David M. LaFave Co.* (1984) 312 N.C. 224, 233-234 [321 S.E.2d 872, 879]; *Aamot v. Eneboe* (S.D.1984) 352 N.W.2d 647, 649; *Util. Trailer Sales of Salt Lake v. Fake* (Utah 1987) 740 P.2d 1327, 1329; *Milwaukee Police Asso. v. City of Milwaukee* (1979) 92 Wis.2d 175, 181-182 [285 N.W.2d 133, 136-137]; but see *Texas West Oil & Gas Corp. v. Fitzgerald* (Wyo.1986) 726 P.2d 1056, 1060-1061 [finding statutory grounds to vacate an arbitration award not exclusive].)

> FN12. Section 12 of the Uniform Arbitration Act states in pertinent part:
> "(a) Upon application of a party, the court shall vacate an award where:
> "(1) The award was procured by corruption, fraud or other undue means;
> "(2) There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party;
> "(3) The arbitrators exceeded their powers;
> "(4) The arbitrators refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of Section 5, as to prejudice substantially the rights of a party; or
> "(5) There was no arbitration agreement and the issue was not adversely determined in proceedings under Section 2 and the party did not participate in the arbitration hearing without raising the objection; but the fact that the relief was such that it could not or would not be granted by a court of law or equity is not a ground for vacating or refusing to confirm the award." (7 West's U.Laws Ann. (1985) U. Arbitration Act, § 12, subd. (a).)

Although the matter would seem to have been put to rest, several California decisions rendered since the 1961 statutory amendments have inexplicably resurrected the view in *Utah Const., supra*, 174 Cal. 156, 162 P. 631, that an arbitration award may be vacated when an error appears on the face of the award and causes substantial injustice. (See, e.g., *Schneider v. Kaiser Foundation Hospitals* (1989) 215 Cal.App.3d 1311, 1317, 264 Cal.Rptr. 227; *Park Plaza, Ltd. v. Pietz, supra*, 193 Cal.App.3d at p. 1420, 239 Cal.Rptr. 51; *Ray Wilson Co. v. Anaheim Memorial Hospital Assn., supra*, 166 Cal.App.3d at p. 1091, 213 Cal.Rptr. 62; *Hirsch v. Ensign* (1981) 122 Cal.App.3d 521, 529, 176 Cal.Rptr. 17; *Abbott v. California State Auto Assn., supra*, 68 Cal.App.3d at p. 771, 137 Cal.Rptr. 580; *Campbell v. Farmer's Ins. Exch.* (1968) 260 Cal.App.2d 105, 111-112, 67 Cal.Rptr. 175; see generally, 6 Cal.Jur.3d, Arbitration and Award, § 83, pp. 145-147.)

In light of the development of decisional law embracing as exclusive the statutory grounds to vacate an arbitration award, as well as the apparent *28 intent of the Legislature to generally exclude nonstatutory grounds to vacate an award, we adhere to the *Pacific Vegetable/Crofoot* line of cases that limit judicial review of private arbitration awards to those cases in which **916 there ***200 exists a statutory ground to vacate or correct the award. Those decisions permitting review of an award where an error of law appears on the face of the award causing substantial injustice have perpetuated a point of view that is inconsistent with the modern view of private arbitration and are therefore disapproved.

3. The Arbitrator Did Not Exceed His Powers

[7] Section 1286.2, subdivision (d), provides for vacation of an arbitration award when "The arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted." Moncharsh argues this statutory exception to the rule generally precluding judicial review of arbitration awards applies to his case. It is unclear, however, on what theory Moncharsh would have us conclude the arbitrator exceeded his powers. It is well settled that "arbitrators do not exceed their powers merely because they assign an erroneous reason for their decision." (*O'Malley, supra*, 48 Cal.2d at p. 111, 308 P.2d 9; *Hacienda Hotel v. Culinary Workers Union* (1985) 175 Cal.App.3d 1127, 1133, 223 Cal.Rptr. 305.) A contrary holding would permit the exception to swallow the rule of limited judicial review; a litigant could always contend the arbitrator erred and thus exceeded his powers. To the extent Moncharsh argues his case comes within section 1286.2, subdivision (d) merely because the arbitrator reached an erroneous decision, we reject the point.

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Moreover, consistent with our arbitration statutes and subject to the limited exceptions discussed in section 4 *post*, it is within the "powers" of the arbitrator to resolve the entire "merits" of the "controversy submitted" by the parties. (§ 1286.2, subd. (d); § 1286.6, subd. (b), (c).) Obviously, the "merits" include all the contested issues of law and fact submitted to the arbitrator for decision. The arbitrator's resolution of these issues is what the parties bargained for in the arbitration agreement. Moncharsh does not argue that the arbitrator's award strayed beyond the scope of the parties' agreement by resolving issues the parties did not agree to arbitrate. The agreement to arbitrate encompassed "[a]ny dispute arising out of" the employment contract. The parties' dispute over the allocation of attorney's fees following termination of employment clearly arose out of the employment contract; the arbitrator's award does no more than resolve that dispute. Under these circumstances, the arbitrator was within his "powers" in resolving the questions of law presented to him. The award is not subject to vacation or correction based on any of the statutory grounds asserted by Moncharsh.

*29 4. Illegality of the Contract Permits Judicial Review

Moncharsh next contends the arbitrator's award is subject to judicial review because paragraph X-C of the employment agreement is illegal and in violation of public policy. Focussing on the fee-splitting provision of the employment agreement, he contends that, despite the limited scope of judicial review of arbitration awards, such review has historically been available when one party alleges the underlying contract, a portion thereof, or the resulting award, is illegal or in violation of public policy. Before addressing the merits of the claim, we first discuss whether Moncharsh adequately preserved the issue for appellate review.

a. *Waiver*

[8] Respondent Heily & Blase suggests Moncharsh waived the issue of illegality by failing to object to arbitration on this ground. We reject the claim because, as we explain below, Moncharsh's allegation that paragraph X-C was illegal, even if true, does not render illegal either (i) the entire employment agreement, or (ii) the agreement to arbitrate itself. Accordingly, his illegality claim was an arbitrable one; and he did not waive the issue by failing to object to arbitration on this ground.

Section 1281.2 states that when a written agreement to arbitrate exists, the court shall compel the parties to arbitrate their dispute "unless it determines that: [¶] ... [¶] (b) *Grounds exist for the revocation of* ***201 **917 *the agreement.*" (Italics added.) Although this statute does not expressly state whether grounds must exist to revoke the entire contract, the arbitration agreement only, or some other provision of the contract, a fair reading of the statutory scheme reveals the Legislature must have meant revocation of the arbitration agreement.

For example, section 1281 states "A written agreement *to submit to arbitration* an existing controversy ... is valid .... save upon such grounds as exist for the revocation of any contract." (Emphasis added.) Section 1281.2 also speaks in terms of an "arbitration agreement" and a "written agreement to arbitrate." Thus, the plain meaning of section 1281.2 requires enforcement of the *arbitration* agreement unless there exist grounds for revocation of that agreement.

[9] If a contract includes an arbitration agreement, and grounds exist to revoke the entire contract, such grounds would also vitiate the arbitration agreement. Thus, if an otherwise enforceable arbitration agreement is contained in an illegal contract, a party may avoid arbitration altogether. *30(*California State Council of Carpenters v. Superior Court* (1970) 11 Cal.App.3d 144, 157, 89 Cal.Rptr. 625 [hereafter *Carpenters*]; *Bianco v. Superior Court* (1968) 265 Cal.App.2d 126, 71 Cal.Rptr. 322.)

[10] By contrast, when--as here--the alleged illegality goes to only a portion of the contract (that does not include the arbitration agreement), the entire controversy, including the issue of illegality, remains arbitrable. (*Green v. Mt. Diablo Hospital Dist.* (1989) 207 Cal.App.3d 63, 71, 254 Cal.Rptr. 689; *Carpenters, supra*, 11 Cal.App.3d at p. 157, 89 Cal.Rptr. 625; *Baseball Players, supra*, 59 Cal.App.3d at p. 503, 130 Cal.Rptr. 626 (dis. opn. of Brown (H.C.), J.) ["question of illegality is one which may be considered by the arbitrators"].) [FN13]

FN13. *Ericksen, supra*, 35 Cal.3d 312, 197 Cal.Rptr. 581, 673 P.2d 251, does not compel a different result. In that case, we held that when one party to an arbitration agreement claimed fraud in the inducement of the contract, the entire controversy was nevertheless an arbitrable one, and the question of whether fraud existed was properly determined by the arbitrator, and

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not by a court of law. Although fraud in the inducement could result in "revocation of the agreement" (§ 1281.2), we distinguished that case from those in which a party claimed illegality of the underlying agreement. (*Ericksen, supra,* at pp. 316-317, fn. 2, 197 Cal.Rptr. 581, 673 P.2d 251.) Moreover, we reasoned that requiring a party claiming fraud in the inducement to submit the claim to arbitration was justified because, "The difference between a breach of contract and such fraudulent inducement turns upon determination of a party's state of mind at the time the contract was entered into, and we ought not close our eyes to the practical consequences of a rule which would allow a party to avoid an arbitration commitment by relying upon that distinction." (*Id.* at pp. 322-323, 197 Cal.Rptr. 581, 673 P.2d 251.)

We apply this rule here. Moncharsh does not contend the alleged illegality constitutes grounds to revoke the entire employment contract. Nor does he contend the alleged illegality voids the arbitration clause of that contract. Accordingly, the legality of the fee-splitting provision was a question for the arbitrator in the first instance. Thus, Moncharsh was not required to first raise the issue of illegality in the trial court in order to preserve the issue for later judicial review.

The issue would have been waived, however, had Moncharsh failed to raise it *before the arbitrator.* Any other conclusion is inconsistent with the basic purpose of private arbitration, which is to finally decide a dispute between the parties. Moreover, we cannot permit a party to sit on his rights, content in the knowledge that should he suffer an adverse decision, he could then raise the illegality issue in a motion to vacate the arbitrator's award. A contrary rule would condone a level of "procedural gamesmanship" that we have condemned as "undermining the advantages of arbitration." (*Ericksen, supra,* 35 Cal.3d at p. 323, 197 Cal.Rptr. 581, 673 P.2d 251 [rejecting a rule permitting determination by courts of preliminary issues prior to submission to arbitration]; see also *Christensen v. Dewor Developments* (1983) 33 Cal.3d 778, 783-784, 191 Cal.Rptr. 8, 661 P.2d 1088 [condemning filing of pre- ***202 **918 arbitration lawsuit in order to obtain pleadings that would reveal opponent's legal strategy].) Such a waste of arbitral and judicial time and resources should not be permitted.

*31 [11] We thus hold that unless a party is claiming (i) the entire contract is illegal, or (ii) the arbitration agreement itself is illegal, he or she need not raise the illegality question prior to participating in the arbitration process, so long as the issue is raised before the arbitrator. Failure to raise the claim before the arbitrator, however, waives the claim for any future judicial review. Because Moncharsh raised the illegality issue before the arbitrator, the issue was thus properly preserved for our review.

b. *Judicial Review of Claims of Illegality*

[12] Although Moncharsh acknowledges the general rule that an arbitrator's legal, as well as factual, determinations are final and not subject to judicial review, he argues that judicial review of the arbitrator's decision is warranted on the facts of this case. In support, he claims that the fee-splitting provision of the contract that was interpreted and enforced by the arbitrator was "illegal" and violative of "public policy" as reflected in several provisions of the Rules of Professional Conduct. Such illegality, he claims, has been recognized as a ground for judicial review as stated in a line of cases emanating from this court's decision in *Loving & Evans v. Blick* (1949) 33 Cal.2d 603, 204 P.2d 23 [hereafter *Loving & Evans*].

Loving & Evans, supra, 33 Cal.2d 603, 204 P.2d 23, involved a dispute about money due on a construction contract for remodeling done on appellant Blick's premises. In his pleading before the arbitrator, Blick claimed as a "separate and special defense" that respondent contractors could not legally recover because they were unlicensed in violation of the Business and Professions Code. The arbitrator found in respondents' favor, and they moved to confirm the award. Blick objected to the award on grounds that one of the respondents was unlicensed in violation of the code. The trial court granted the motion to confirm, but that judgment was reversed by this court. Although we recognized the general rule that the merits of a dispute before an arbitrator are not subject to judicial review, "the rules which give finality to the arbitrator's determination of ordinary questions of fact or of law are inapplicable *where the issue of illegality of the entire transaction* is raised in a proceeding for the enforcement of the arbitrator's award." (*Id.* at p. 609, 204 P.2d 23, italics added.)

The Court of Appeal reached a similar result in *All Points Traders, Inc. v. Barrington Associates* (1989) 211 Cal.App.3d 723, 259 Cal.Rptr. 780 [hereafter *All Points Traders*]. In that case, Barrington Associates

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(hereafter Barrington), an investment banking firm, sought payment of a commission for its assistance in negotiating the transfer of all the corporate stock of appellant All Points Traders. The arbitrator found in Barrington's favor and *32 the trial court confirmed the award. Nevertheless, the Court of Appeal reversed, finding the commission agreement between the parties was invalid and unenforceable in its entirety because Barrington did not hold a real estate broker's license as required by Business and Professions Code section 10130 et seq. The appellate court reasoned that "The Legislature selected the specific means to protect the public and has expressed its intention in section 10136 [prohibiting an unlicensed broker from bringing an action to collect a commission]," and that "Enforcement of *the contract* for a commission would be in direct contravention of the statute and against public policy." (*All Points Traders, supra,* at p. 738, 259 Cal.Rptr. 780 [italics added].)

Both *Loving & Evans, supra,* 33 Cal.2d 603, 204 P.2d 23, and *All Points Traders, supra,* 211 Cal.App.3d 723, 259 Cal.Rptr. 780, permitted judicial review of an arbitrator's ruling where a party claimed the entire contract or transaction was illegal. By contrast, Moncharsh challenges but a single provision of the overall employment contract. Accordingly, neither ***203**919*Loving & Evans, supra,* nor *All Points Traders, supra,* authorizes judicial review of his claim. [FN14]

FN14. To the extent that *Webb v. West Side District Hospital* (1983) 144 Cal.App.3d 946, 193 Cal.Rptr. 80, suggests judicial review of an arbitrator's decision is routinely available where one party claims merely that a portion of a contract is illegal, we disapprove that suggestion.

[13] We recognize that there may be some limited and exceptional circumstances justifying judicial review of an arbitrator's decision when a party claims illegality affects only a portion of the underlying contract. Such cases would include those in which granting finality to an arbitrator's decision would be inconsistent with the protection of a party's statutory rights. (Accord *Shearson/American Express Inc. v. McMahon* (1987) 482 U.S. 220, 225-227, 107 S.Ct. 2332, 2336-2337, 96 L.Ed.2d 185 [federal statutory claims are arbitrable under the Federal Arbitration Act unless party opposing arbitration demonstrates "that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue"].)

Without an explicit legislative expression of public policy, however, courts should be reluctant to invalidate an arbitrator's award on this ground. The reason is clear: the Legislature has already expressed its strong support for private arbitration and the finality of arbitral awards in title 9 of the Code of Civil Procedure. (§ 1280 et seq.) Absent a clear expression of illegality or public policy undermining this strong presumption in favor of private arbitration, an arbitral award should ordinarily stand immune from judicial scrutiny.

Moncharsh contends, as he did before the arbitrator, that paragraph X-C is illegal and violates public policy because, inter alia, it violates former rules *33 2-107 [prohibiting unconscionable fees], 2-108 [prohibiting certain types of fee splitting arrangements], and 2-109 [prohibiting agreements restricting an attorney's right to practice], of the Rules of Professional Conduct of State Bar. [FN15] We perceive, however, nothing in the Rules of Professional Conduct at issue in this case that suggests resolution by an arbitrator of what is essentially an ordinary fee dispute would be inappropriate or would improperly protect the public interest. Accordingly, judicial review of the arbitrator's decision is unavailable.

FN15. Rules of Professional Conduct former rules 2-107, 2-108, and 2- 109, were recodified in substantially the same form in new rules 4-200, 2- 200, and 1-500, respectively.

CONCLUSION

We conclude that an award reached by an arbitrator pursuant to a contractual agreement to arbitrate is not subject to judicial review except on the grounds set forth in sections 1286.2 (to vacate) and 1286.6 (for correction). Further, the existence of an error of law apparent on the face of the award that causes substantial injustice does not provide grounds for judicial review.

Finally, the normal rule of limited judicial review may not be avoided by a claim that a provision of the contract, construed or applied by the arbitrator, is "illegal," except in rare cases when according finality to the arbitrator's decision would be incompatible with the protection of a statutory right. We conclude that Moncharsh has demonstrated no reason why the strong presumption in favor of the finality of the arbitral award should not apply here.

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The judgment of the Court of Appeal is affirmed.

PANELLI, ARABIAN, BAXTER and GEORGE, JJ., concur.

KENNARD, Justice, concurring and dissenting.

The majority holds that when a trial court is presented with an arbitration award that is erroneous on its face and will cause substantial injustice, the court has no choice but to confirm it. (Maj. opn., *ante*, at pp. 184, 203 of 10 Cal.Rptr.2d, at pp. 900, 919 of 832 P.2d.) Because an order confirming an arbitration award results in the entry of a judgment with the same force and effect as a judgment in a civil action (Code Civ. Proc., § 1287.4), the majority's holding requires our trial courts not only to ***204 **920 tolerate substantial injustice, but to become its active agent.

I cannot join the majority opinion. I will not agree to a decision inflicting upon this state's trial courts a duty to promote injustice by confirming arbitration awards they know to be manifestly wrong and substantially *34 unjust. Nor can I accept the proposition, necessarily implied although never directly stated in the majority opinion, that the general policy in favor of arbitration is more important than the judiciary's solemn obligation to do justice.

Nothing in this state's statutory or decisional law compels the rule the majority announces. On the contrary, the majority has misperceived legislative intent, misconstrued the relevant statute, and misunderstood the decisional law establishing the scope of review for arbitration decisions. Worst of all, the majority has forsaken the goal that has defined and legitimized the judiciary's role in society--to strive always for justice.

I

The object of government is justice. "Justice is the end of government. It is the end of civil society. It ever has been, and ever will be pursued, until it be obtained, or until liberty be lost in the pursuit." (James Madison, *The Federalist*, No. 51.) As the preamble to the United States Constitution affirms, our country was founded to "establish justice."

Justice is a special obligation of the judiciary. Every court has the power and the duty to "amend and control its process and orders so as to make them conform to law and justice." (Code Civ.Proc., § 128, subd. (a)(8).) When they construe statutes, courts are enjoined to do so in a way that will promote justice. (E.g., Civ.Code, § 4; Code Civ. Proc., § 4; Ed.Code, § 2; Pen.Code, § 4.) And, because the very purpose of our legal system is to do justice between the parties (*Sand v. Concrete Service Co.* (1959) 176 Cal.App.2d 169, 172, 1 Cal.Rptr. 257), the interests of justice are paramount in all legal proceedings (*Travis v. Southern Pacific Co.* (1962) 210 Cal.App.2d 410, 425, 26 Cal.Rptr. 700). In short, justice is the "sole justification of our law and courts." (Gitelson & Gitelson, *A Trial Judge's Credo Must Include His Affirmative Duty to be an Instrumentality of Justice* (1966) 7 Santa Clara Law. 7, 8.)

The majority never mentions the judiciary's paramount obligation to do justice, and the rule it announces--which requires trial courts to endorse decisions known to be substantially unjust--is its very antithesis. By filling its discussion with references to the expectations of the parties, the development of decisional law over the course of a century, and legislative intent as evidenced in our statute, the majority implies both that these considerations support its holding and that they are more important than doing justice.

The majority is wrong on both counts. For the judiciary, nothing can be more important than justice. This proposition is so self-evident that no *35 further elaboration is necessary. Moreover, as we shall see, respect for parties' freedom to contract, the development of decisional law, the relevant statute, and ascertainable legislative intent belie rather than support the majority's holding.

II

As a method of dispute resolution, arbitration is generally faster and cheaper than judicial proceedings, but it has fewer safeguards against error. For this reason, parties who agree to binding arbitration must be deemed to have accepted the increased risk of error inherent in their chosen system. The majority takes this proposition, unobjectionable in itself, and from it jumps to the conclusion that parties who agree to arbitration thereby agree also to be bound by an award that on its face is manifestly erroneous and results in substantial injustice. But the conclusion defies both logic and experience. Reasonable contracting parties would never assume a risk that is so unnecessary and self-

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destructive.

The majority goes astray when it equates substantial injustice with a mere mistake. The two are not the same. Mistakes commonly occur in the course of dispute resolution **921 ***205 proceedings without producing substantial injustice. As our state Constitution recognizes, determining whether a mistake has been made, and determining whether an injustice has occurred, are separate and distinct inquiries. (Cal. Const., art. VI, § 13 [court cannot set aside a judgment for error unless the error resulted in a miscarriage of justice].)

Parties who agree to resolve their disputes by arbitration should not and do not expect busy trial courts to comb the records of arbitration proceedings to determine whether any error has occurred and, if so, the effect of the error. But they no doubt do expect, and ought to be able to expect, that if the award on its face is erroneous and results in substantial injustice, a court asked to confirm the award will not turn a blind eye to the consequences of its action, but will instead take the only course consistent with its fundamental mandate, and will vacate the award.

Moreover, even if the parties were to do what is virtually inconceivable by expressly agreeing that the arbitrator's award would be binding even if substantially unjust, the agreement would not bind the judiciary. The exercise of judicial power cannot be controlled or compelled by private agreement or stipulation. (See *California State Auto. Assn. Inter-Ins. Bureau v. Superior Court* (1990) 50 Cal.3d 658, 664, 268 Cal.Rptr. 284, 788 P.2d 1156; *Clarendon Ltd. v. Nu-West Industries, Inc.* (3d Cir.1991) 936 F.2d 127, 129 ["action by the court can be neither purchased nor parleyed by the *36 parties"].) As the United States Supreme Court has remarked, a court should refuse to be "the abettor of iniquity." (*Precision Co. v. Automotive Co.* (1945) 324 U.S. 806, 814, 65 S.Ct. 993, 997, 89 L.Ed. 1381.)

III

To support its holding radically curtailing judicial review of arbitration awards, the majority surveys the decisional law of California since 1850. Undeterred by the plain language of the decisions, which is almost uniformly contrary to the majority's holding, the majority attempts to penetrate the surface of the opinions in order to trace the ebb and flow of more than a century's dark currents of judicial thought. Thus, the majority relies on what it terms "subtle shifts" in the decisions, "transmogrification" of principles, and citations in one opinion that on "close scrutiny" are alleged to be at odds with a clear statement of law in the opinion's text. (Maj. opn., *ante*, at pp. 193, 194 of 10 Cal.Rptr.2d, at pp. 909, 910 of 832 P.2d.) As an exercise in divination or telepathy, the majority's discussion is fascinating. But as sober legal analysis, the majority's discussion is simply wrong. From the outset, this court has consistently--until now-- acknowledged that courts should refuse to permit use of the judiciary's awesome coercive power to perpetrate a substantial injustice.

In the first decision cited by the majority, *Muldrow v. Norris* (1852) 2 Cal. 74, this court held that it would not enforce an erroneous arbitration award when the error was on a "palpable and material point." (*Id.* at p. 77.) Although this court used a verbal formulation--"palpable and material point"--different from the term "substantial injustice" that became the standard expression in later cases (e.g., *Utah Const. Co. v. Western Pac. Ry. Co.* (1916) 174 Cal. 156, 160-161, 162 P. 631), the concept is the same. To be on a "palpable and material point," an error must be of real importance or great consequence (Webster's Ninth New Collegiate Dict. (1988) p. 733), or, in other words, an error that causes substantial injustice.

Other early decisions used the term "gross error" to describe the very same ground for vacating an arbitration award. (E.g., *Headley v. Reed* (1852) 2 Cal. 322, 325; *In re Connor* (1900) 128 Cal. 279, 282, 60 P. 862.) An error is "gross" if it is glaringly noticeable, "because of inexcusable badness or objectionableness." (Webster's Ninth New Collegiate Dict., *supra*, p. 538.) Thus, the term "gross error," like the "palpable and material point" formulation, represents an early articulation of what has subsequently become known as error causing substantial injustice.

***206 **922 Fairly read, the decisions of this court, although varying semantically, uniformly and firmly support the proposition that the judiciary will not *37 knowingly perpetuate and enforce an arbitration award that is substantially unjust. This court has adopted the same standard for determining when a court should decline to follow the rule known as law of the case. (See *People v. Shuey* (1975) 13 Cal.3d 835, 846, 120 Cal.Rptr. 83, 533 P.2d 211 ["a manifest misapplication of existing principles resulting in substantial injustice"]; accord, *George Arakelian Farms, Inc. v. Agricultural Labor Relations Bd.* (1989) 49 Cal.3d 1279, 1291, 265 Cal.Rptr. 162, 783 P.2d 749.)

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The Courts of Appeal have correctly interpreted our decisions. In case after case, they have reaffirmed the rule that a court will vacate an arbitration award when error appears on the face of the award and causes substantial injustice. (E.g., *Cobler v. Stanley, Barber, Southard, Brown & Associates* (1990) 217 Cal.App.3d 518, 526, 265 Cal.Rptr. 868; *All Points Traders, Inc. v. Barrington Associates* (1989) 211 Cal.App.3d 723, 736, 259 Cal.Rptr. 780; *National Football League Players' Assn. v. National Football League Management Council* (1986) 188 Cal.App.3d 192, 199, 233 Cal.Rptr. 147; *Ray Wilson Co. v. Anaheim Memorial Hospital Assn.* (1985) 166 Cal.App.3d 1081, 1090, 213 Cal.Rptr. 62; *Abbott v. California State Auto. Assn.* (1977) 68 Cal.App.3d 763, 771, 137 Cal.Rptr. 580; *Campbell v. Farmers Ins. Exch.* (1968) 260 Cal.App.2d 105, 112, 67 Cal.Rptr. 175.)

Searching for some departure from this prominent line of authority, the majority relies heavily on the Court of Appeal decision in *Crofoot v. Blair Holdings Corp.* (1953) 119 Cal.App.2d 156, 260 P.2d 156 (disapproved on another ground in *Posner v. Grunwald-Marx, Inc.* (1961) 56 Cal.2d 169, 183, 14 Cal.Rptr. 297, 363 P.2d 313), but its reliance is misplaced. *Crofoot* cites this court's opinion in *Pacific Vegetable Oil Corp. v. C.S.T., Ltd.* (1946) 29 Cal.2d 228, 174 P.2d 441, for the proposition that courts had recently narrowed somewhat the judicial review of arbitration awards for legal error. (*Crofoot, supra,* 119 Cal.App.2d at p. 185, 260 P.2d 156.) But neither *Crofoot* nor *Pacific Vegetable* suggests that review had become so narrow that courts were obliged to confirm awards containing obvious error causing substantial injustice. Indeed, *Pacific Vegetable* affirms that courts review arbitration awards to prevent " 'misuse of the proceeding, where corruption, fraud, misconduct, *gross error,* or mistake has been carried into the award to the *substantial prejudice* of a party to the proceeding.' " (*Pacific Vegetable, supra,* at p. 240, 174 P.2d 441, quoting *Utah Const. Co. v. Western Pac. Ry. Co., supra,* 174 Cal. 156, 159, 162 P. 631, italics added.) Thus, legal error is a proper basis on which to challenge an arbitration award, provided that "the error appears on its face and causes substantial injustice." (*Utah Const. Co. v. Western Pac. Ry. Co., supra,* at p. 161, 162 P. 631.)

As the majority notes, the *Crofoot* opinion does state that the merits of an arbitration award may not be judicially reviewed except as provided in the *38 statute. (*Crofoot v. Blair Holdings Corp., supra,* 119 Cal.App.2d 156, 186, 260 P.2d 156.) Because the relevant statute, Code of Civil Procedure section 1286.2, does not say in so many words that an arbitration award may be challenged for obvious error causing substantial injustice, the majority concludes that a court may not vacate an award on this ground. But this conclusion is wrong. Our statute does not, by negative implication or otherwise, mandate injustice.

IV

Code of Civil Procedure section 1286.2 lists five grounds for vacating an arbitration award. This statutory list is reproduced in the margin. [FN1] Although the statute **923 ***207 states only that a court "shall vacate the award" if any of these grounds is present, the majority construes the statute as precluding a court from vacating an arbitration award on any ground not specifically defined in the statute. In thus construing the statutory list, the majority ignores the statute's legislative history.

FN1. "(a) The award was procured by corruption, fraud or other undue means; [¶] (b) There was corruption in any of the arbitrators; [¶] (c) The rights of such party were substantially prejudiced by misconduct of a neutral arbitrator; [¶] (d) The arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted; or [¶] (e) The rights of such party were substantially prejudiced by the refusal of the arbitrators to postpone the hearing upon sufficient cause being shown therefor or by the refusal of the arbitrators to hear evidence material to the controversy or by other conduct of the arbitrators contrary to the provisions of this title."

Code of Civil Procedure section 1286.2 is essentially unchanged from its 1927 predecessor (Stats.1927, ch. 225, § 9, p. 406), and materially the same as the original provision enacted in 1851 (Stats.1851, ch. 5, § 386, pp. 112-113). (See maj. opn., *ante,* at pp. 189, 191, 194-195 of 10 Cal.Rptr.2d, at pp. 905, 907, 910-911 of 832 P.2d.) The Legislature enacted section 1286.2 in its present form in 1961 (Stats.1961, ch. 461, § 2, p. 1540) following a recommendation and study of the California Law Revision Commission. (Recommendation and Study Relating to Arbitration (Dec.1960) 3 Cal.Law Revision Com.Rep. (1961), p. G-1 et seq.) In its

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report to the Legislature, the commission separately and expressly addressed the subject of judicial review of arbitration awards. Because the commission accurately stated California law on this subject, and because its statement belies the majority's reading of the statute, the commission's comment is worth quoting in some detail:

"*Nothing in the California statute defines the permissible scope of review by the courts.* Numerous court rulings have, however, developed the following basic principles which set the limits for any court review: ... [¶] (5) Statutory provisions for a review of arbitration proceedings are for the sole *39 purpose of preventing misuse of the proceedings where corruption, fraud, misconduct, gross error or mistake has been carried into the award to the substantial prejudice of a party to the proceedings.... [¶] Neither the Uniform Arbitration Act nor other state statutes attempt to express the exact limits of court review of arbitration awards. And no good reason exists to codify into the California statute the case law as it presently exists." (Recommendation and Study Relating to Arbitration, *supra*, 3 Cal.Law Revision Com.Rep., pp. G-53-G-54, fns. omitted, italics added.)

The commission, in other words, did not intend to either alter or codify the judicially established grounds for challenging an arbitration award. Contrary to the majority's view, Code of Civil Procedure section 1286.2 was never meant to define the "permissible scope of review by the courts" or to "express the exact limits of court review of arbitration awards." Thus, the statute does not preclude a court from vacating an arbitration award on a ground well established by decisional law.

In words that closely track the language this court used in *Pacific Vegetable Oil Corp. v. C.S.T., Ltd., supra*, 29 Cal.2d 228, 240, 174 P.2d 441, the commission acknowledged that one purpose of judicial review is to prevent gross errors or mistakes from being carried into an award to the substantial prejudice of a party, that is, substantial injustice. (Recommendation and Study Relating to Arbitration, *supra*, 3 Cal.Law Revision Com.Rep. (1961), p. G-55.) Code of Civil Procedure section 1286.2 may not be read as barring a court from vacating an arbitration award when these conditions are present.

The majority attempts to evade the obvious import of the commission's statement by referring to language in another part of the report that "[e]ven a gross error or mistake in an arbitrator's judgment is not sufficient grounds for vacation unless the error amounts to actual or constructive fraud." (Maj. opn., *ante*, at p. 197, fn. 10 of 10 Cal.Rptr.2d, at p. 913, fn. 10 of 832 P.2d.) But this statement is not in the portion of the commission's report setting forth the basic principles governing judicial review. Moreover, it is derived from a federal district court case expressly recognizing that "Gross error or mistake prejudicing substantially the rights of a party" ***208 **924 is a ground for vacating an arbitration award under California law. (*Lundblade v. Continental Ins. Co.* (N.D.Cal.1947) 74 F.Supp. 795, 797.) Finally, the word "fraud" as used in the Commission's statement includes a mistake that prevents the fair exercise of judgment(*California Sugar Etc. Agency v. Penovar* (1914) 167 Cal. 274, 279, 139 P. 671), and thus includes gross errors or mistakes that result in substantial injustice.

Even if one were to conclude, contrary to the report of the Law Revision Commission, that Code of Civil Procedure section 1286.2 defines the permissible scope of review by the courts, it still would not follow that a court *40 cannot vacate an award for error appearing on the award's face and resulting in substantial injustice. Under the statute, a court must vacate an award if it determines that "[t]he arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted." (Code Civ.Proc., § 1286.2, subd. (d).) As the Courts of Appeal have recognized time and again, arbitrators exceed their statutory powers when they make an award that is erroneous on its face and results in substantial injustice. (E.g., *Cobler v. Stanley, Barber, Southard, Brown & Associates, supra*, 217 Cal.App.3d 518, 526, 265 Cal.Rptr. 868; *All Points Traders, Inc. v. Barrington Associates, supra*, 211 Cal.App.3d 723, 736, 259 Cal.Rptr. 780; *Greenfield v. Mosley* (1988) 201 Cal.App.3d 735, 744-745, 247 Cal.Rptr. 314; *Ray Wilson Co. v. Anaheim Memorial Hospital Assn., supra*, 166 Cal.App.3d 1081, 1090, 213 Cal.Rptr. 62; *Abbott v. California State Auto. Assn., supra*, 68 Cal.App.3d 763, 771, 137 Cal.Rptr. 580; see also *Times Mirror Co. v. Superior Court* (1991) 53 Cal.3d 1325, 1333, 283 Cal.Rptr. 893, 813 P.2d 240 [excess of jurisdiction not confined to subject-matter jurisdiction, but includes acts in excess of authority as defined in the Constitution, statutes, or judicial decisions]; *Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 288, 109 P.2d 942 [same].)

V

Despite my disagreement with the reasoning of the majority opinion, I agree with the result it reaches. This is not a case in which error appearing on the

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face of an arbitration award would cause a substantial injustice.

The agreement was negotiated between sophisticated parties; the disparity in bargaining power between the parties was not substantial; there is no indication of harm to the clients or other third parties; and there is no basis in the arbitrator's award for finding that the fees were wholly disproportionate to the services rendered. Therefore, the award was not substantially unjust.

CONCLUSION

Although I concur in the result, I cannot join the majority to support judicially sanctioned and enforced substantial injustice. The majority's holding violates the most basic obligation of the judiciary, and is inconsistent with both our well-established decisional law and our statute.

MOSK, J., concurs.

10 Cal.Rptr.2d 183, 3 Cal.4th 1, 832 P.2d 899

Briefs and Other Related Documents (Back to top)

- 1992 WL 12024418 (Appellate Brief) Petition for Rehearing (Aug. 14, 1992)
- 1991 WL 11014963 (Appellate Brief) Reply Brief on the Merits (Oct. 10, 1991)
- 1991 WL 11014961 (Appellate Brief) Brief on the Merits of Phillip I. Moncharsh (Aug. 22, 1991)
- 1991 WL 11014962 (Appellate Brief) Petition of Philip I. Moncharsh for Review by the Supreme Court (May. 13, 1991)
- 1991 WL 11033619 (Appellate Filing) Petition of Philip I. Moncharsh for Review by the Supreme Court (May. 13, 1991)

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powers of the cities under the agreement, including the employment of security officers for law enforcement activities.

The questions presented for analysis concern certain consequences resulting from the employment of the security officers by the airport authority.

1. Distribution of Fines

The first question to be resolved is whether the distribution of fines resulting from the issuance of parking citations and the making of arrests by the airport security officers are governed by the provisions of Penal Code section 1463. [FN2] We conclude that only the limited provisions of subdivision (3) of the statute would be applicable to the facts presented.

Section 1463 provides:

'Except as otherwise specifically provided by law:

'(1) All fines and forfeitures including Vehicle Code fines and forfeitures collected upon conviction or upon the forfeiture of bail, together with moneys deposited as bail, in any municipal court or justice court, shall, as soon as practicable after the receipt thereof, be deposited with the county treasurer of the county in which such court is situated. The moneys so deposited shall be distributed as follows:

*2 '(a) Once a month there shall be transferred into the proper funds of the county an amount equal to the fines and forfeitures collected during the preceding month upon the conviction or upon the forfeiture of bail following arrests made by officers or other persons employed by the state or by the county in which such court is situated, exclusive of fines or forfeitures or forfeitures of bail collected from any person arrested by a state officer and charged with the commission of a misdemeanor under the Vehicle Code within the limits of a city within the county.

'(b) Except as otherwise provided in this subdivision, once a month there shall be transferred into the traffic safety fund of each city in the county an amount equal to 50 percent of all fines and forfeitures collected during the preceding month upon the conviction or upon the forfeiture of bail from any person arrested by a state officer and charged with the commission of a misdemeanor under the Vehicle Code within that city, and an amount equal to the remaining 50 percent shall be transferred to the special road fund of the county; provided, however, that the board of supervisors of the county may, by resolution, provide that not more than 50 percent of the amount to be transferred to the special road fund of the county, be transferred into the general fund of the county.

'Once a month there shall be transferred into the general fund of the county an amount equal to that percentage of the fines and forfeitures collected during the preceding month upon the conviction or upon the forefeiture of bail from any person arrested by a state officer and charged with the commission of a misdemeanor under the Vehicle Code on state highways constructed as freeways whereon city police officers enforced the provisions of the Vehicle Code on April 1, 1965, within the limits of a city within the county which is set forth in the schedule appearing in subparagraph (c) of this paragraph (1). If this paragraph is applicable within a city, it shall apply uniformly throughout the city to all freeways regardless of the date of freeway construction or completion.

'(c) Once a month there shall be transferred into the general fund of the

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county an amount equal to that percentage of the fines and forfeitures collected during the preceding month upon conviction or upon the forfeiture of bail following arrests made by officers or other persons employed by each city in the county which is set forth in the following schedule:

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County percentage 11

'. . . .

'In any county for which a county percentage is set forth in the above schedule and which contains a city which is not listed or which is hereafter created, there shall be transferred to the county general fund the county percentage. In any county for which no county percentage is set forth, and in which a city is hereafter created, there shall be transferred to the county general fund 15 percent.

*3 'A county and city therein may, by mutual agreement, adjust the percentages herein.

'(d) Once a month there shall be transferred to each city in the county an amount equal to the total sum remaining after the transfers provided for in subparagraphs (b) and (c) above have been made of the fines and forfeitures collected during the preceding month upon conviction or upon the forfeiture of bail following arrests made by officers or other persons employed by such city or arrests made by state officers for misdemeanor violations of the Vehicle Code.

'. . . .

'(3) Notwithstanding any other provision of law, in the event that a county or court elects to discontinue processing the posting of bail for an issuing agency, the city, district or other issuing agency may elect to receive, deposit, accept forfeitures and otherwise process the posting of bail for parking violations for which such city, district, or other issuing agency has issued a written notice of parking violation pursuant to Section 41103 of the Vehicle Code. Notwithstanding paragraph (1), if the city, district, or other issuing agency processes such posting of bail, the issuing agency may retain the forfeited bail collected.

'For the purposes of this subdivision, neither the California Highway Patrol, nor a sheriff's office when acting on a contract basis for a city, shall be deemed an 'issuing agency'.

'The issuing agency may elect to contract with the county, a municipal or justice court, or another issuing agency within the county to provide for the processing of the posting of bail for such parking violations.

'No provision of this section shall be construed to require any county or municipal or justice court to process the posting of bail for a city, district or other issuing agency prior to the filing of a complaint. If a county or court has been processing the posting of bail for an issuing agency, and if the county or court elects to terminate the processing of the posting of bail the issuing agency and the county or court shall reach agreement for the transfer of the processing activity. The agreement shall permit the county or court to phase out, and the issuing agency to phase in, personnel, equipment, and facilities that may have been acquired or need to be acquired in contemplation of a long-term commitment to process the posting of bail for the issuing agency's parking violations.' (Emphases added.) [FN3]

Besides the comprehensive language of section 1463, the Legislature has made particular provision for the California State University and Colleges (§ 1463.5a), the University of California (§ 1463.6), community service districts (§ 1463.10),

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transit districts (§ 1463.11), school districts (§ 1463.12), port districts (§ 1463.13), and the San Diego Metropolitan Transit District (§ 1463.19). While these specific provisions would govern over the more general provisions of section 1463 where both would otherwise be applicable, an airport operated under a joint powers agreement would not come within their express terms. Hence, if any statutory language concerning fine distributions is applicable to a joint powers airport, it must be section 1463.

*4 As can readily be observed, the provisions of section 1463 are complex and interrelated. They have been examined numerous times by the judiciary (see County of Los Angeles v. City of Alhambra (1980) 27 Cal.3d 184; City of San Diego v. Municipal Court (1980) 102 Cal.App.3d 775; Board of Trustees v. Municipal Court, supra, 95 Cal.App.3d 322) and this office (see 63 Ops.Cal.Atty.Gen. 888 (1980); 55 Ops.Cal.Atty.Gen. 256 (1972); 53 Ops.Cal.Atty.Gen. 29 (1970); 34 Ops.Cal.Atty.Gen. 283 (1959); 25 Ops.Cal.Atty.Gen. 122 (1955)). The Legislature, however, has often amended the statute, and none of the above-cited authorities have considered the language and question now at issue.

The critical aspects of section 1463 are: (1) where did the arrest or notification [FN4] take place, (2) who is the employer of the person who made the arrest or notification, and (3) what public entity is processing the fine payment.

In the factual situation presented for analysis, the arrest or notification occurs in the City of Burbank, and the employer of the person who makes the arrest or notification is the airport authority.

The easiest situation to dispose of is where the airport authority processes the parking violation fines under section 1463, subdivision (3). [FN5] It 'may retain the forfeited bail collected' without distribution to any other agency in such situation. Subdivision (3) also authorizes the issuing agency to contract with some other agency to process the parking violation fines; the contract provisions would then govern the distribution of fines collected.

Where subdivision (3) is inapplicable (e.g., in all nonparking violation situations), we look to the provisions of subdivision (1). Here, we find an apparent hiatus. Subdivision (1) initially places the fines 'with the county treasurer of the county' but not into any particular county fund. Distribution to a specific county fund (or city fund) depends upon whether the person is arrested or notified by an employee of the state (subds. (1)(a), (1)(b), (1)(d)), an employee of the county (subd. (1)(a)), or an employee of a city (subds. (1)(c), (1)(d)). [FN6]

Is a person hired by an airport authority under a joint powers agreement an employee of the state, a county, or a city? We believe not.

First, Government Code section 6507 states that an agency created to exercise joint powers on behalf of public agencies 'is a public entity separate from the parties to the agreement.' Accordingly, even though here the airport authority was initially created by three cities, it is not legally considered to be the same entity as its contracting parties. [FN7]

Second, the Legislature has found it necessary to provide special statutes, as previously mentioned, for such entities as community service districts, transit

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districts, and port districts. (See § § 1463.10, 1463.11, 1463.13, 1463.13.) The functions of these public agencies would appear to be more analogous to that of the airport authority herein than the operations of the state, counties, and cities specified in subdivision (1) of section 1463. Community service districts, for example, may by formed '[t]o provide and maintain public airports and landing places for aerial traffic,' as well as 'maintenance of a police department or other public protection to protect and safeguard life and property.' (Gov. Code, § 61600.) If the Legislature believed such entities required their own statutes rather than be characterized as the state, a county, or a city under subdivision (1) of section 1463, a joint powers agreement airport should likewise not be characterized as one of the three latter types of public entities.

*5 In interpreting statutory enactments, we "should ascertain the intent of the Legislature so as to effectuate the purpose of the law." (People v. Davis (1981) 29 Cal.3d 814, 828.) "An equally basic rule of statutory constructing is, however, that courts are bound to give effect to statutes according to the usual, ordinary import of the language employed in framing them." (California Teachers Assn. v. San Diego Community College Dist. (1981) 28 Cal.3d 692, 698.)

A joint powers airport authority may imply not a city, a county, or the state and those entities normally listed. We do not believe that the Legislature intended to cover joint powers agencies under the provisions of subdivision (1) of section 1463. Subdivision (3) of section 1463, on the other hand, would be available for the disposition of fines under the conditions expressed therein.

In answer to the first question, therefore, we conclude that the provisions of section 1463 do not govern the distribution of fines resulting from the issuance of parking citations and the making of arrests by airport security officers at the Burbank-Glendale-Pasadena Airport except where the airport authority itself processes the parking violation fines or contracts for such services.

2. 'Deputized' Airport Security Officers

The second question presented is the same as the first, except an additional premise is provided: the Chief of the Burbank Police Department 'deputizes' the airport security officers. Would such action render applicable the provisions of subdivision (1) of section 1463 in that the security officers would be 'employees of a city'? We conclude that it would not.

Preliminarily, we note that the proper term to be used in the inquiry is 'appoint' rather than 'deputize.' Section 830.6, subdivision (a) states:

'(1) Whenever any qualified person is deputized or appointed by the proper authority as a reserve or auxiliary sheriff or city policeman . . . and is assigned specific police functions by such authority, such person is a peace officer; provided, such person qualifies as set forth in Section 832.6, and provided further, that the authority of such person as a peace officer shall extend only for the duration of such specific assignment.

'(2) Whenever any qualified person is deputized or appointed by the proper authority as a reserve or auxiliary sheriff or city policeman . . . and is so designated by local ordinance or, if the local agency is not authorized to act by ordinance, by resolution, either individually or by class, and is assigned to the

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prevention and detection of crime and the general enforcement of the laws of this state by such authority, such person is a peace officer; provided such person qualifies as set forth in paragraph (1) of subdivision (a) of section 832.6, and provided further, that the authority of such person shall include the full powers and duties of a peace officer as provided by Section 830.1.'
'Deputize' refers to sheriffs, while 'appoint' refers to policemen.

*6 We need not consider, however, whether section 830.6 would be applicable to the facts presented herein. (See 56 Ops.Cal.Atty.Gen. 390, 393 (1973).) 'Deputizing' the airport security officers would not change their employment relationship with the airport authority for purposes of section 1463, subdivision (1). Salaries of the officers would still be paid by the airport authority under the postulated facts. While the term 'employed' is not easily defined and may have different meanings in different contexts (see Laeng v. Workmen's Comp. Appeals Bd. (1972) 6 Cal.3d 771, 777; Edwards v. Hollywood Canteen (1946) 27 Cal.2d 802, 805-807; Golden West Broadcasters, Inc. v. Superior Court (1981) 114 Cal.App.3d 947, 958-959), a determination that the officers were the 'employees' of the City of Burbank by being 'deputized' would be inimical to the purposes of section 1493.

In 25 Ops.Cal.Atty.Gen. 122, 123 (1955), we stated:
'Subdivision (1)(c) of Penal Code section 1463 provides that a fine or forfeiture of bail shall be distributed between the county and the city employing the arresting officer, according to a schedule contained in that section . . . [W]e feel it is clear that it was the intention of the Legislature to provide that the city whose employee made the original arrest should participate in the distribution of a subsequently imposed fine in order to reimburse the city of its expenses in law enforcement.'
We said in 53 Ops.Cal.Atty.Gen. 29, 31 (1970):
'The distribution scheme of Penal Code section 1463 is dependent upon the identity of the 'arresting' officer. It appears that the intent of the Legislature was to reimburse the entity which made the arrest for the costs of its law enforcement.'

Consequently, as long as the airport authority is responsible for the compensation of the security officers, the latter may not be considered the employees of the City of Burbank even if 'deputized' by the Burbank Police Chief. It would be incongruous to benefit the City of Burbank where it did not provide the funds for maintaining the airport security officers. [FN8]

In answer to the second question, therefore, we conclude that even if the Chief of the Burbank Police Department were to 'deputize' the airport security officers, the distribution of fines resulting from arrests and the issuance of parking citations by the officers would not be governed by the provisions of section 1463 except where the airport authority itself processes the parking violation fines or contracts for such services under subdivision (3) of the statute.

3. Peace Officer Status

The third question concerns whether the airport security officers have peace officer status while off duty and not involved in law enforcement activities relating to the airport. We conclude that they do not have such status in the

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specified circumstances.

In relevant part, section 830.4 states:

'The following persons are peace officers while engaged in the performance of their duties in or about the properties owned, operated, or administered by their employing agency, or when they are required by their employer to perform their duties anywhere within the political subdivision which employs them. Such officers shall also have the authority of peace officers anywhere in the state as to an offense committed, or which there is probable cause to believe has been committed, with respect to persons or property the protection of which is the duty of such officer or when making an arrest pursuant to Section 836 of the Penal Code as to any public offense with respect to which there is an immediate danger to person or property or the escape of the perpetrator of the offense. Such peace officers may carry firearms only if authorized by and under such terms and conditions as are specified by their employing agency:

*7 '. . . .

'(k) Any person regularly employed as an airport law enforcement officer by a city, county, or district operating the airport or by a joint powers agency, created pursuant to [§ § 6500-6583] of the Government Code, operating the airport.' (Emphasis added.)

Under section 830.4, the airport security officers 'are' peace officers (i.e., have the 'status' of peace officers) depending upon their performance of law enforcement duties relating to the airport. (See Fowler v. State Personnel Bd., (1982) 134 Cal.App.3d 964, 970.)

Giving meaning to the language as to when one is a peace officer under section 830.4, we believe that the airport security officers are not peace officers when they are off duty and not performing their airport related activities.

It should be noted, however, that a person who is not a peace officer may nevertheless have certain peace officer powers. We recently examined the distinction between the status and the authority of a peace officer in various contexts. (65 Ops.Cal.Atty.Gen. ---- (Sept. 3, 1982) No. 81-1216.) With regard to section 830.4, the situations in which persons are granted 'the authority of peace officers' involve the powers of making arrests.

We need not dwell here, however, on the various 'powers' of peace officers. 'Status' refers to one's position or rank in relation to others (Webster's New Internat. Dict. (3d ed. 1966) p. 2230), which we do not equate with the various attributes of the position itself.

Hence, we conclude in answer to the third question that the airport security officers do not have peace officer status while off duty and not involved in law enforcement activities relating to the airport.

GEORGE DEUKMEJIAN

Attorney General

RODNEY O. LILYQUIST

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Deputy Attorney General

[FN1]. The authorizing legislation for entering into joint powers agreements is Government Code sections 6500-6583, whereby 'public agencies by agreement may jointly exercise any power common to the contracting parties.' (Gov. Code, § 6502.)

[FN2]. All section references hereafter are to the Penal Code unless otherwise indicated.

[FN3]. 'Forfeitures' here mean the same thing as 'fines.' (Board of Trustees v. Municipal Court (1977) 95 Cal.App.3d 322, 326.) Also, it is to be noted that the percentages listed in subdivision (1) are the percentages that go to the counties for arrests made in the listed cities.

[FN4]. In the typical situation of a parking violation, the person is 'notified' rather than 'arrested' by placing the parking ticket on the vehicle. (See County of Los Angeles v. City of Alhambra, supra, 27 Cal.3d 184, 193-194; 63 Ops.Cal.Atty.Gen. 29, 31, (1970).) Although subdivision (1) of section 1463 distributes the percentages of the fines collected depending in part on who has 'arrested' the person for a 'misdemeanor,' the same distribution formula is followed when a notification has been made of a parking violation 'infraction.' (See Veh. Code, § 42201.5; County of Los Angeles v. City of Alhambra, supra, 27 Cal.3d 184, 194.)

[FN5]. We look to subdivision (3) first because it would control over the provisions of subdivision (1) when both might otherwise be applicable. The latter subdivision begins with the phrase 'Except as otherwise specifically provided by law,' while the former begins, 'Notwithstanding any other provision of law.' (See In re Marriage of Dover (1971) 15 Cal.App.3d 675, 678, fn. 3; State of California v. Superior Court (1965) 238 Cal.App.2d 691, 695-696.)

[FN6]. Under subdivision (1) of the statute, the counties receive 100 percent of the fines, except where the arrests take place within a city. In the latter case, each city receives between 25 and 95 percent, depending on the circumstances and the particular percentage specified by the Legislature in the statute. Normally, a city will get most of the money resulting from arrests within its boundaries.

[FN7]. If the character of the contracting parties were controlling, a joint powers agreement between a city and county would present obvious difficulties, as would an agreement between two counties and a city, and so forth.

[FN8]. On the other hand, if the City of Burbank agrees to provide its employees for airport law enforcement duties under the joint powers agreement, a different conclusion would be reached. Other arrangements could also be made under the joint

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powers agreement that would possibly render applicable the provisions of subdivision (1) of the statute.

65 Ops. Cal. Atty. Gen. 618, 1982 WL 156003 (Cal.A.G.)

END OF DOCUMENT

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Original List Date: 7/7/1999
Last Updated: 1/5/2004
List Print Date: 01/09/2004
Claim Number: 98-TC-25
Issue: The Stull Act

Mailing Information: Other

Mailing List

TO ALL PARTIES AND INTERESTED PARTIES:

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

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EXHIBIT H

STATE OF CALIFORNIA ARNOLD SCHWARZEI

COMMISSION ON STATE MANDATES
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: (916) 445-0278
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February 11, 2004

Mr. Gerald Shelton
California Department of Education
Fiscal and Administrative Services Division
1430 N Street, Suite 2213
Sacramento, CA 95814

RE: **Request for Comments from the Department of Education**
The Stull Act (CSM 98-TC-25)
Education Code Sections 44660 – 44665 (formerly Ed. Code §§ 13485-13490)
Statutes 1975, Chapter 1216; Statutes 1983, Chapter 498; Statutes 1986, Chapter 393;
Statutes 1995, Chapter 392; Statutes 1999, Chapter 4
Denair Unified School District, Claimant

Dear Mr. Shelton:

We are in the process of reviewing the above-referenced test claim and preparing a draft staff analysis. This test claim is tentatively scheduled for hearing on May 27, 2004.

The record for this claim, however, does not contain any comments from the Department of Education. Therefore, we are requesting that the Department of Education file comments on the test claim by **Wednesday, February 25, 2004**. Comments filed by the Department of Education by February 25, 2004, will be analyzed in the draft staff analysis.

Please contact Camille Shelton, Senior Commission Counsel, if you have any questions regarding the above.

Sincerely,

Paula Higashi
Executive Director

c. Mailing list

Original List Date: 7/7/1999
Last Updated: 1/5/2004
List Print Date: 02/11/2004
Claim Number: 98-TC-25
Issue: The Stull Act

Mailing Information: Other

Mailing List

TO ALL PARTIES AND INTERESTED PARTIES:

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March 19, 2004

Mr. Edward Parraz, Superintendent
Denair Unified School District
P.O. Box 368
Denair, CA 95316

RE: **Draft Staff Analysis/Hearing Date/Request for Additional Briefing**
The Stull Act (CSM 98-TC-25)
Education Code Sections 44660 – 44665 (formerly Ed. Code §§ 13485-13490)
Statutes 1975, Chapter 1216; Statutes 1983, Chapter 498; Statutes 1986, Chapter 393; Statutes 1995, Chapter 392; Statutes 1999, Chapter 4
Denair Unified School District, Claimant

Dear Mr. Parraz:

The draft staff analysis for this test claim is enclosed for your review and comment.

Written Comments/Request for Additional Briefing

Any party or interested person may file written comments on the draft staff analysis by **April 9, 2004.** In your comments, we are requesting additional briefing on the following issues:

1. Are there any sources of state or federal funds appropriated to school districts that can be applied to the activities identified in the draft staff analysis as reimbursable state-mandated activities for the evaluation of certificated personnel under the Stull Act?
2. Are the state-mandated activities identified in the draft staff analysis reimbursable under article XIII B, section 6 of the California Constitution for the evaluation of certificated personnel employed in local, discretionary educational programs?

You are advised that the Commission's regulations require comments filed with the Commission to be simultaneously served on other interested parties on the mailing list, and to be accompanied by a proof of service on those parties. If you would like to request an extension of time to file comments, please refer to section 1183.01, subdivision (c)(1), of the Commission's regulations.

Hearing

This test claim is set for hearing **May 27, 2004,** at 9:30 a.m. in Room 126 of the State Capitol, Sacramento, California. The final staff analysis will be issued on or about May 6, 2004. Please let us know in advance if you or a representative of your agency will testify at the hearing, and if other witnesses will appear. If you would like to request

postponement of the hearing, please refer to section 1183.01, subdivision (c)(2), of the Commission's regulations.

Please contact Camille Shelton at (916) 323-8215 if you have any questions.

Sincerely,

PAULA HIGASHI
Executive Director

Enclosures: Mailing List and Draft Staff Analysis

MAILED: Mail List 3/19/04
DATE:
CHRON:
WORKING BINDER:
FAXED:
INITIAL: VS
FILE:

Hearing Date: May 27, 2004
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ITEM
TEST CLAIM
DRAFT STAFF ANALYSIS

Education Code Sections 44660-44665
(Former Ed. Code, §§ 13485-13490)

Statutes 1975, Chapter 1216; Statutes 1983, Chapter 498; Statutes 1986, Chapter 393; Statutes 1995, Chapter 392; Statutes 1999, Chapter 4

The Stull Act (98-TC-25)

Denair Unified School District, Claimant

EXECUTIVE SUMMARY

STAFF WILL INSERT THE EXECUTIVE SUMMARY IN THE FINAL ANALYSIS

STAFF ANALYSIS

Claimant

Denair Unified School District

Chronology

07/07/99	Claimant files test claim
07/07/99	Test claim deemed complete
08/10/99	Commission receives request for extension of time to file comments by the Department of Finance
08/12/99	Department of Finance's request for extension of time granted until October 6, 1999
01/23/01	Letter to Department of Finance issued regarding the status of comments
03/08/01	Department of Finance files comments on test claim
05/31/02	Claimant files rebuttal
07/03/02	Letter issued to claimant's representative advising claimant that analysis will be limited to school districts, and not county offices of education, since no county office of education has made an appearance as a claimant, nor filed a declaration alleging mandated costs pursuant to Government Code section 17564
09/09/03	Spector, Middleton, Young & Minney withdraw as claimant's representative
01/05/04	Claimant files a request to amend test claim to add the Schools Mandate Group, a joint powers authority, as a co-claimant and to designate the Schools Mandate Group as the lead claimant
01/08/04	Claimant's request to amend test claim is denied
02/11/04	Letter to Department of Education issued requesting comments on the test claim
--/--/--	Draft Staff Analysis issued

Background

This test claim addresses the Stull Act. The Stull Act was originally enacted in 1971 to establish a uniform system of evaluation and assessment of the performance of "certificated personnel" within each school district. (Former Ed. Code, §§ 13485-13490.)[1] The Stull Act required the governing board of each school district to develop and adopt specific guidelines to evaluate and assess certificated personnel[2], and to avail itself of the advice of certificated instructional personnel before developing and adopting the guidelines.[3] The evaluation and assessment of the certificated personnel was required to be reduced to writing and a copy transmitted to the

---

[1] Statutes 1971, chapter 361.

[2] Former Education Code section 13487.

[3] Former Education Code section 13486.

employee no later than sixty days before the end of the school year.[4] The employee then had the right to initiate a written response to the evaluation, which became a permanent part of the employee's personnel file.[5] The school district was also required to hold a meeting with the employee to discuss the evaluation.[6]

Former Education Code section 13489 required that the evaluation and assessment be continuous. For probationary employees, the evaluation had to occur once each school year. For permanent employees, the evaluation was required every other year. Former section 13489 also required that the evaluation include recommendations, if necessary, for areas of improvement in the performance of the employee. If the employee was not performing his or her duties in a satisfactory manner according to the standards, the "employing authority"[7] was required to notify the employee in writing, describe the unsatisfactory performance, and confer with the employee making specific recommendations as to areas of improvement and endeavor to assist in the improvement.

In 1976, the Legislature renumbered the provisions of the Stull Act. The Stull Act can now be found in Education Code sections 44660-44665.[8]

The test claim legislation, enacted between 1975 and 1999, amended the Stull Act. The claimant alleges that the amendments constitute a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution.[9]

Staff notes that the claimant, a school district, alleges that compliance with the Stull Act is new as to county offices of education and, thus, counties are entitled to reimbursement for all activities under the Stull Act. [10]

To date, no county office of education has appeared in this action as a claimant, nor filed a declaration alleging mandated costs exceeding $1000, as expressly required by Government Code section 17564 and section 1183 of the Commission's regulations.

---

[4] Former Education Code section 13488.

[5] *Ibid.*

[6] *Ibid.*

[7] Former Education Code section 13490 defined "employing authority" as "the superintendent of the school district in which the employee is employed, or his designee, or in the case of a district which has no superintendent, a school principal or other person designated by the governing board."

[8] Statutes 1976, chapter 1010.

[9] In 1999, the Legislature added Education Code section 44661.5 to the Stull Act. (Stats. 1999, ch. 279.) Education Code section 44661.5 authorizes a school district to include objective standards from the National Board for Professional Teaching Standards or any objective standards from the California Standards for the Teaching Profession when developing evaluation and assessment guidelines. The claimant did not include Education Code section 44661.5 in this test claim.

[10] Exhibit A, Test Claim, pages 7-9.

Therefore, the test claim has not been perfected as to county offices of education. The findings in this analysis, therefore, are limited to school districts.

Claimant's Position

The claimant contends that the test claim legislation constitutes a reimbursable state-mandated program for the following "new" activities:

- Rewrite standards for employee assessment to reflect expected student "achievement" (as opposed to the prior requirement of expected student "progress") and to expand the standards to reflect expected student achievement at each "grade level." (Stats. 1975, ch. 1216.)
- Develop job responsibilities for certificated non-instructional personnel, including but not limited to, supervisory and administrative personnel. (Stats. 1975, ch. 1216.)
- Assess and evaluate non-instructional personnel. (Stats. 1975, ch. 1216; Stats. 1995, ch. 392.)
- Receive and review responses from certificated non-instructional personnel regarding the employee's evaluation. (Stats. 1986, ch. 393.)
- Conduct a meeting between the certificated non-instructional employee and the evaluator to discuss the evaluation and assessment. (Stats. 1986, ch. 393.)
- Conduct additional evaluations of certificated employees who receive an unsatisfactory evaluation. (Stats. 1983, ch. 498.)
- Review the results of a certificated instructional employee's participation in the Peer Assistance and Review Program for Teachers as part of the assessment and evaluation. (Stats. 1999, ch. 4.)
- Assess and evaluate the performance of certificated instructional personnel as it relates to the instructional techniques and strategies used and the employee's adherence to curricular objectives. (Stats. 1983, ch. 498.)
- Assess and evaluate certificated instructional personnel as it relates to the progress of pupils towards the state adopted academic content standards, if applicable, as measured by state adopted criterion referenced assessments. (Stats. 1999, ch. 4.)
- Assess and evaluate certificated personnel employed by county superintendents of education. (Stats. 1975, ch. 1216.)[11]

Department of Finance's Position

The Department of Finance filed comments on March 6, 2001, contending that most of the activities requested by the claimant do not constitute reimbursable state-mandated activities. The Department of Finance states, however, that the following activities "may" be reimbursable:

[11] Exhibit A, Test Claim.

- Assess and evaluate the performance of certificated instructional personnel as it relates to the progress of students toward the attainment of state academic standards, as measured by state-adopted assessments.
- Modification of assessment and evaluation methods to determine whether instructional staff is adhering to the curricular objectives and instructional techniques and strategies associated with the updated state academic standards.
- Assess and evaluate permanent certificated staff that has received an unsatisfactory evaluation at least once each year, until the employee receives a satisfactory evaluation, or is separated from the school district.
- Implementation of the Stull Act by county offices of education.[12]

Discussion

The courts have found that article XIII B, section 6 of the California Constitution[13] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[14] "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."[15] 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.[16] In addition, the required activity or task must be new, constituting a "new program," or it must create a "higher level of service" over the previously required level of service.[17]

---

[12] Exhibit B.

[13] Article XIII B, section 6 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 such local government for the costs of such program or increased level of service, except that the Legislature may, but need not, provide such subvention of funds for the following mandates: (a) Legislative mandates requested by the local agency affected; (b) Legislation defining a new crime or changing an existing definition of a crime; or (c) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975."

[14] *Department of Finance v. Commission on State Mandates* (2003) 30 Cal.4th 727, 735.

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

[16] *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 174. In *Department of Finance v. Commission on State Mandates*, *supra*, 30 Cal.4th at page 742, the court agreed that "activities undertaken at the option or discretion of a local government entity (that is, actions undertaken without any legal compulsion or threat of penalty for nonparticipation) do not trigger a state mandate and hence do not require reimbursement of funds - even if the local entity is obligated to incur costs as a result of its discretionary decision to participate in a particular program or practice." The court left open the question of whether non-legal compulsion could result in a reimbursable state mandate, such as in a case where

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.[18] 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.[19] Finally, the newly required activity or increased level of service must impose costs mandated by the state.[20]

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.[21] 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."[22]

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

Certain statutes in the test claim legislation do not require school districts to perform activities and, thus, are not subject to article XIII B, section 6.

In order for a statute to be subject to article XIII B, section 6 of the California Constitution, the statutory language must require local agencies or school districts to perform an activity or task. If the statutory language does not mandate local agencies or school districts to perform a task, then compliance with the test claim statute is within the discretion of the local entity and a reimbursable state-mandated program does not exist.

Here, there are two test claim statutes, Education Code section 44664, subdivision (b) (as amended by Stats. 1983, ch, 498 and Stats. 1999, ch. 4) and Education Code section 44662, subdivision (d) (as amended by Stats. 1999, ch. 4) that do not require school districts to perform activities and, thus, are not subject to article XIII B, section 6 of the California Constitution.

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failure to participate in a program results in severe penalties or "draconian" consequences. (*Id.*, at p. 754.)

[17] *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, 835-836.

[18] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; *Lucia Mar, supra,* 44 Cal.3d 830, 835.

[19] *Lucia Mar, supra*, 44 Cal.3d 830, 835.

[20] *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; Government Code sections 17514 and 17556.

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

[22] *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817; *County of Sonoma, supra,* 84 Cal.App.4th 1265, 1280.

Education Code section 44664, subdivision (b), as amended by Statutes 1983, chapter 498. In 1983, the Legislature amended Education Code section 44664 by adding subdivision (b). Subdivision (b) authorizes a school district to require a certificated employee that receives an unsatisfactory evaluation to participate in a program to improve the employee's performance. Education Code section 44664, subdivision (b), stated the following:

> Any evaluation performed pursuant to this article which contains an unsatisfactory rating of an employee's performance in the area of teaching methods or instruction *may* include the requirement that the certificated employee shall, as determined by the employing authority, participate in a program designed to improve appropriate areas of the employee's performance and to further pupil achievement and the instructional objectives of the employing authority. (Emphasis added.)

The plain language of the statute authorizes, but does not mandate, a school district to require its certificated employees to participate in a program designed to improve performance if the employee receives an unsatisfactory evaluation. Thus, staff finds that Education Code section 44664, subdivision (b), as amended by Statutes 1983, chapter 498, does not mandate school districts to perform an activity and, thus, it is not subject to article XIII B, section 6 of the California Constitution.

Education Code section 44662, subdivision (d), and Education Code section 44664, subdivision (b), as amended by Statutes 1999, chapter 4. In 1999, the Legislature amended Education Code section 44664, subdivision (b), by adding the following underlined sentence:

> Any evaluation performed pursuant to this article which contains an unsatisfactory rating of an employee's performance in the area of teaching methods or instruction may include the requirement that the certificated employee shall, as determined by the employing authority, participate in a program designed to improve appropriate areas of the employee's performance and to further pupil achievement and the instructional objectives of the employing authority. If a district participates in the Peer Assistance and Review Program for Teachers established pursuant to Article 4.5 (commencing with Section 44500), any certificated employee who receives an unsatisfactory rating on an evaluation performed pursuant to this section shall participate in the Peer Assistance and Review Program for Teachers.

The 1999 test claim legislation also amended Education Code section 44662 by adding subdivision (d), which states:

> Results of an employee's participation in the Peer Assistance and Review Program for Teachers established by Article 4.5 (commencing with Section 44500) shall be made available as part of the evaluation conducted pursuant to this section.

The claimant requests reimbursement to "receive and review, for purposes of a certificated employee's assessment and evaluation, if applicable, the results of an employee's participation in

the Peer Assistance and Review Program for Teachers established by Article 4.5 (commencing with section 44500.)"[23]

The Department of Finance contends that reviewing the results of the Peer Assistance and Review Program, as part of the Stull Act evaluation of the employee's performance, is not a reimbursable state-mandated activity because participation in the Peer Assistance and Review Program is voluntary.[24]

In response to the Department of Finance, the claimant states the following:

> The legislative intent behind the amendments to the Stull Act was to ensure that school districts adopt objective, uniform evaluation and assessment guidelines that effectively assess certificated employee performance. To meet this desired goal, school districts that participate in the Peer Assistance and Review Program must include an employee's results of participation in the employee's evaluation. If this information was not considered by the district, inconsistent, incomplete, and inaccurate evaluations and assessments would occur – a result contrary to the Legislature's stated intent. Therefore, the claimant contends that the activities associated with the receipt and review of an employee's participation in the Peer Assistance and Review Program impose reimbursable state-mandated activities upon school districts.[25]

For the reasons described below, staff finds that the receipt and review of the results of an employee's participation in the Peer Assistance and Review Program is not a state-mandated activity and, therefore, the 1999 amendments to Education Code sections 44662 and 44664 are not subject to article XIII B, section 6 of the California Constitution.

In *Department of Finance v. Commission on State Mandates*[26], the Supreme Court reviewed test claim legislation that required school site councils to post a notice and an agenda of their meetings. The court determined that school districts were not legally compelled to establish eight of the nine school site councils and, thus, school districts were not mandated by the state to comply with the notice and agenda requirements for these school site councils.[27] The court reviewed the ballot materials for article XIII B, which provided that "a state mandate comprises something that a local government entity is required or forced to do."[28] The ballot summary by the Legislative Analyst further defined "state mandates" as "requirements imposed on local governments by legislation or executive orders."[29]

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[23] Exhibit A, Test Claim, page 7.

[24] Exhibit B.

[25] Exhibit C, Claimant Rebuttal, page 7.

[26] *Department of Finance, supra*, 20 Cal.4th 727.

[27] *Id.* at page 731.

[28] *Id.* at page 737.

[29] *Ibid.*

The court also reviewed and affirmed the holding of the *City of Merced* case.[30, 31] The court stated the following:

> In *City of Merced*, the city was under no legal compulsion to resort to eminent domain-but when it elected to employ that means of acquiring property, its obligation to compensate for lost business goodwill was not a reimbursable state mandate, because the city was not require to employ eminent domain in the first place. Here as well, if a school district elects to participate in or continue participation in any underlying *voluntary* education-related funded program, the district's obligation to comply with the notice and agenda requirements related to that program does not constitute a reimbursable state mandate. (Emphasis in original.)[32]

Thus, the Supreme Court held as follows:

> [W]e reject claimants' assertion that they have been legally compelled to incur notice and agenda costs, and hence are entitled to reimbursement from the state, based merely upon the circumstance that notice and agenda provisions are mandatory elements of education-related programs in which claimants have participated, *without regard to whether claimant's participation in the underlying program is voluntary or compelled.* [Emphasis added.][33]

The Supreme Court left undecided whether a reimbursable state mandate "might be found in circumstances short of legal compulsion—for example, if the state were to impose a substantial penalty (independent of the program funds at issue) upon any local entity that declined to participate in a given program."[34]

The decision of the California Supreme Court in *Department of Finance* is relevant and its reasoning applies in this case. The Supreme Court explained that "the proper focus under a legal compulsion inquiry is upon the nature of the claimants' participation in the underlying programs themselves."[35] Thus, based on the Supreme Court's decision, the Commission is required to determine if the underlying program (in this case, participation in the Peer Assistance and Review Program) is a voluntary decision at the local level or is legally compelled by the state.

The Peer Assistance and Review Program and the amendment to the Stull Act to reflect the Peer Assistance and Review Program were sponsored by Governor Davis and were enacted by the Legislature during the 1999 special legislative session on education. As expressly provided in the legislation, the intent of the Legislature, in part, was to coordinate the Peer Assistance and

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[30] *Id.* at page 743.

[31] *City of Merced v. State of California* (1984) 153 Cal.App.3d 777.

[32] *Ibid.*

[33] *Id.* at page 731.

[34] *Ibid.*

[35] *Id.* at page 743.

Review Program with the evaluations of certificated employees under the Stull Act. Section 1 of the 1999 test claim legislation states the following:

> It is the intent of the Legislature to establish a teacher peer assistance and review system as a critical feedback mechanism that allows exemplary teachers to assist veteran teachers in need of development in subject matter knowledge or teaching strategies, or both.
>
> It is further the intent of the Legislature that a school district that operates a program pursuant to Article 4.5 (commencing with Section 44500) of Chapter 3 of Part 25 of the Education Code coordinate its employment policies and procedures for that program with its activities for professional staff development, the Beginning Teacher Support and Assessment Program, and the biennial evaluations of certificated employees required pursuant to Section 44664 [of the Stull Act].

The plain language of Education Code section 44500, subdivision (a), authorizes, but does not require, school districts to participate in the Peer Assistance and Review Program. That section states in pertinent part that "[t]he governing board of a school district and the exclusive representative of the certificated employees in the school district *may* develop and implement a program authorized by this article that meets local conditions and conforms with the principles set forth in subdivision (b)." (Emphasis added.) If a school district implements the program, the program must assist a teacher to improve his or her teaching skills and knowledge, and provide that the final evaluation of a teacher's participation in the program be made available for placement in the personnel file of the teacher receiving assistance. (Ed. Code, § 44500, subd. (b).) Furthermore, school districts that participate in the Peer Assistance and Review Program receive state funding pursuant to Education Code sections 44505 and 44506.

Therefore, staff finds that school districts are not legally compelled to participate in the Peer Assistance and Review Program and, thus, not legally compelled to receive and review the results of the program as part of the Stull Act evaluation.

Staff further finds that school districts are not practically compelled to participate in the Peer Assistance and Review Program and review the results as part of the Stull Act evaluation. In *Department of Finance*, the California Supreme Court, when considering the practical compulsion argument raised by the school districts, reviewed its earlier decision in *City of Sacramento v. State of California* (1990) 50 Cal.3d 51.[36] The *City of Sacramento* case involved test claim legislation that extended mandatory coverage under the state's unemployment insurance law to include state and local governments and nonprofit corporations. The state legislation was enacted to conform to a 1976 amendment to the Federal Unemployment Tax Act, which required for the first time that a "certified" state plan include unemployment coverage of employees of public agencies. States that did not comply with the federal amendment faced a loss of a federal tax credit and an administrative subsidy.[37] The local agencies, knowing that federally mandated costs are not eligible for state subvention, argued against a federal mandate. The local agencies contended that article XIII B, section 9 requires clear legal compulsion not

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[36] *Department of Finance, supra*, 30 Cal.4th at pages 749-751.

[37] *City of Sacramento, supra*, 50 Cal.3d at pages 57-58.

present in the Federal Unemployment Tax Act.[38] The state, on the other hand, contended that California's failure to comply with the federal "carrot and stick" scheme was so substantial that the state had no realistic "discretion" to refuse. Thus, the state contended that the test claim statute merely implemented a federal mandate and that article XIII B, section 9 does not require strict legal compulsion to apply.[39]

The Supreme Court in *City of Sacramento* concluded that although local agencies were not strictly compelled to comply with the test claim legislation, the legislation constituted a federal mandate. The Supreme Court concluded that because the financial consequences to the state and its residents for failing to participate in the federal plan were so onerous and punitive, and the consequences amounted to "certain and severe federal penalties" including "double taxation" and other "draconian" measures, the state was mandated by federal law to participate in the plan.[40]

The Supreme Court applied the same analysis in the *Department of Finance* case and found that the practical compulsion finding for a state mandate requires a showing of "certain and severe penalties" such as "double taxation" and other "draconian" consequences. The Court stated the following:

> Even assuming, for purposes of analysis only, that our construction of the term "federal mandate" in *City of Sacramento* [citation omitted], applies equally in the context of article XIII B, section 6, for reasons set below we conclude that, contrary to the situation we described in that case, claimants here have not faced "certain and severe ... penalties" such as "double ... taxation" and other "draconian" consequences ...[41]

Although there are statutory consequences for not participating in the Peer Assistance and Review Program, staff finds that the consequences do not constitute the type of draconian penalties described in the *Department of Finance* case.

Pursuant to Education Code section 44504, subdivision (b), school districts that do not participate in the Peer Assistance and Review Program are not eligible to receive state funding for specified programs. Education Code section 44504, subdivision (b), states the following:

> A school district that does not elect to participate in the program authorized under this article by July 1, 2001, is not eligible for any apportionment, allocation, or other funding from an appropriation for the program authorized pursuant to this article or for any apportionments, allocations, or other funding from funding for local assistance appropriated pursuant to the Budget Act Item 6110-231-0001, funding appropriated for the Administrator Training and Evaluation Program set forth in Article 3 (commencing with Section 44681) of Chapter 3.1 of Part 25, from an appropriation for the Instructional Time and Staff Development Reform Program as set forth in Article 7.5 (commencing with Section 44579) of Chapter 3, or from an appropriation for school development plans as set forth in

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[38] *Id.* at page 71.

[39] *Ibid.*

[40] *Id.* at pages 73-76.

[41] *Department of Finance, supra*, 30 Cal.4th at page 751.

> Article 1 (commencing with Section 44670.1) of Chapter 3.1 and the Superintendent of Public Instruction shall not apportion, allocate, or otherwise provide any funds to the district pursuant to those programs.

The funding appropriated under the programs specified in Education Code section 44504, subdivision (b), are not state-mandated programs. Most are categorical programs undertaken at the discretion of the school district in order to receive grant funds. For example, the funding appropriated pursuant to the Budget Act Item 6110-231-0001 is local assistance funding to school districts "for the purpose of the Proposition 98 educational programs specified in subdivision (b) of Section 12.40 of this act." (Stats. 1999, ch. 50, State Budget Act.) The education programs specified in subdivision (b) of Section 12.40 of the 1999 State Budget Act include the Tenth Grade Counseling Program, the Reader Service for Blind Teacher Program, and the Home to School Transportation Program. (A full list of the educational programs identified in section 12.40 of the 1999 State Budget Act is provided in the footnote below.)[42]

The same is true for the other programs identified in Education Code section 44504, subdivision (b), all of which are voluntary: i.e., the Administrator Training and Evaluation Program, the Instructional Time and Staff Development Reform Program, and the School Development Plans Program.

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[42] Section 12.40 of the 1999 State Budget Act identifies the following programs: Item 6110-108-0001 – Tenth Grade Counseling (Ed. Code, § 48431.7); Item 6110-110-0001 – Reader Service for Blind Teachers (Ed. Code, §§ 45371, 44925); Item 6110-111-0001 – Home to School Transportation and Small District Transportation (Ed. Code, § 41850, 42290); Item 6110-116-0001 – School Improvement Program (Ed. Code, § 52000 et seq.); Item 6110-118-0001 – State Vocational Education (in lieu of funds otherwise appropriated pursuant to Business and Professions Code section 19632); Item 6110-119-0001 – Educational Services for Foster Youth (Ed. Code, § 42920 et seq.); Item 6110-120-0001 – Pupil Dropout Prevention Programs (Ed. Code, §§ 52890, 52900, 54720, 58550); Item 6110-122-0001 – Specialized Secondary Programs (Ed. Code, § 58800 et seq.); Item 6110-124-0001 – Gifted and Talented Pupil Program (Ed. Code, § 52200 et seq.); Item 6110-126-0001 – Miller-Unruh Basic Reading Act of 1965 (Ed. Code, § 54100 et seq.); Item 6110-127-0001 – Opportunity Classes and Programs (Ed. Code, § 48643 et seq.); Item 6110-128-0001 – Economic Impact Aid (Ed. Code, §§ 54020, 54031, 54033, 54040); Item 6110-131-0001 – American Indian Early Childhood Education Program (Ed. Code, § 52060 et seq.); Item 6110-146-0001 – Demonstration Programs in Intensive Instruction (Ed. Code, § 58600 et seq.); Item 6110-151-0001 – California Indian Education Centers (Ed. Code, § 33380); Item 6110-163-0001 – The Early Intervention for School Success Program (Ed. Code, § 54685 et seq.); Item 6110-167-0001 – Agricultural Vocational Education Incentive Program (Ed. Code, § 52460 et seq.); Item 6110-180-0001 – grant money pursuant to the federal Technology Literacy Challenge Grant Program; Item 6110-181-0001 – Educational Technology Programs (Ed. Code, § 51870 et seq.); Item 6110-193-0001 – Administrator Training and Evaluation Program, School Development Plans and Resource Consortia, Bilingual Teacher Training Program; Item 6110-197-0001 – Instructional Support-Improving School Effectiveness – Intersegmental Programs; Item 6110-203-0001 – Child Nutrition Programs (Ed. Code, §§ 41311, 49536, 49501, 49550, 49552, 49559); Item 6110-204-0001 – 7th and 8th Grad Math Academies; and Item 6110-209-0001 – Teacher Dismissal Apportionments (Ed. Code, § 44944).

Accordingly, staff finds that the 1999 amendment to Education Code sections 44662, subdivision (d), and 44664, subdivision (b), do not impose a mandate on school districts to receive and review the results of the Peer Assistance and Review Program as part of the Stull Act evaluation and, thus, these sections are not subject to article XIII B, section 6 of the California Constitution.

The remaining test claim legislation constitutes a program within the meaning of article XIII B, section 6.

In order for the remaining test claim legislation to be subject to article XIII B, section 6 of the California Constitution, the legislation must constitute a "program." The California Supreme Court, in the case of *County of Los Angeles* v. *State of California*[43], defined the word "program" within the meaning of article XIII B, section 6 as a program that carries out the governmental function of providing a service to the public, or laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state. Only one of these findings is necessary to trigger the applicability of article XIII B, section 6.[44]

The test claim legislation addresses the evaluation and assessment of the performance of certificated employees of a school district. Legislative intent of the test claim legislation is provided in Education Code section 44660 as follows:

> It is the intent of the Legislature that governing boards establish a uniform system of evaluation and assessment of the performance of all certificated personnel within each school district of the state, including schools conducted or maintained by county superintendents of education. The system shall involve the development and adoption by each school district of objective evaluation and assessment guidelines, which may, at the discretion of the governing board, be uniform throughout the district, or for compelling reasons, be individually developed for territories or schools within the district, provided that all certificated personnel of the district shall be subject to a system of evaluation and assessment adopted pursuant to this article.[45]

Staff finds that objectively evaluating the performance of certificated personnel within a school district carries out the governmental function of providing a service to the public. Public education is a governmental function within the meaning of article XIII B, section 6. The California Supreme Court in *Lucia Mar* stated that "the contributions called for [in the test claim legislation] are used to fund a 'program' . . . for the education of handicapped children is clearly a governmental function providing a service to the public."[46] Additionally, the court in the *Long*

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[43] *County of Los Angeles, supra,* 43 Cal.3d at page 56.

[44] *Carmel Valley Fire Protection Dist., supra,* 190 Cal.App.3d at page 537.

[45] As originally enacted, former Education Code section 13485 stated the legislative intent as follows: "It is the intent of the Legislature to establish a uniform system of evaluation and assessment of the performance of certificated personnel within each school district of the state. The system shall involve the development and adoption by each school district of objective evaluation and assessment guidelines."

[46] *Lucia Mar, supra,* 44 Cal.3d at page 835.

Beach Unified School District case held that "although numerous private schools exist, education in our society is considered to be a peculiarly governmental function."[47] In addition, the test claim legislation imposes unique requirements on school districts.

Therefore, staff finds that the remaining test claim legislation constitutes a program and, thus, is subject to article XIII B, section 6 of the California Constitution.

Issue 2: Does the test claim legislation impose a new program or higher level of service within the meaning of article XIII B, section 6 of the California Constitution?

The California Supreme Court and the courts of appeal have held that article XIII B, section 6 was not intended to entitle local agencies and school districts for all costs resulting from legislative enactments, but only those costs mandated by a new program or higher level of service imposed on them by the state.[48] Generally, to determine if the program is new or imposes a higher level of service, the analysis must compare the test claim legislation with the legal requirements in effect immediately before the enactment of the test claim legislation.[49]

As indicated above, the Stull Act was enacted in 1971. The test claim legislation, enacted from 1975 to 1999, amended the Stull Act. The issue is whether the amendments constitute a new program or higher level of service within the meaning of article XIII B, section 6 of the California Constitution.

Develop job responsibilities for certificated non-instructional personnel, and assess and evaluate the performance of certificated non-instructional personnel (Former Ed. Code, §§ 13485, 13487, as amended by Stats. 1975, ch. 1216; Ed. Code, § 44663, as amended by Stats. 1986, ch. 393).

The claimant is requesting reimbursement for the following activities relating to certificated non-instructional employees:

- Establish and define job responsibilities for certificated non-instructional personnel, including, but not limited to, supervisory and administrative personnel.
- Evaluate and assess the performance of certificated non-instructional personnel as it reasonably relates to the fulfillment of the established job responsibilities.
- Prepare and draft a written evaluation of the certificated non-instructional employee. The evaluation shall include recommendations, if necessary, as to areas of improvement.
- Receive and review from a certificated non-instructional employee written responses regarding the evaluation.
- Prepare and hold a meeting between the certificated non-instructional employee and the evaluator to discuss the evaluation and assessment.[50]

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[47] *Long Beach Unified School District, supra*, 225 Cal.App.3d at page 172.

[48] *Lucia Mar Unified School Dist., supra*, 44 Cal.3d at page 834; *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1816.

[49] *Lucia Mar Unified School Dist., supra*, 44 Cal.3d at page 835.

[50] Exhibit A, Test Claim, page 6.

As originally enacted in 1971, the Stull Act stated in former Education Code section 13485 the following:

> It is the intent of the Legislature to establish a uniform system of evaluation and assessment of the performance of certificated personnel within each school district of the state. The system shall involve the development and adoption by each school district of objective evaluation and assessment guidelines.

Former Education Code section 13486 stated the following:

> In the development and adoption of these guidelines and procedures, the governing board shall avail itself of the advice of the certificated instructional personnel in the district's organization of certificated personnel.

Former Education Code section 13487 required school districts to develop and adopt specific evaluation and assessment guidelines for certificated personnel. Former section 13487 stated the following:

> The governing board of each school district shall develop and adopt specific evaluation and assessment guidelines which shall include but shall not necessarily be limited in content to the following elements:
>
> (a) The establishment of standards of expected student progress in each area of study and of techniques for the assessment of that progress.
>
> (b) Assessment of certificated personnel as it relates to the established standards.
>
> (c) Assessment of other duties normally required to be performed by certificated employees as an adjunct to their regular assignments.
>
> (d) The establishment of procedures and techniques for ascertaining that the certificated employee is maintaining proper control and is preserving a suitable learning environment.

Former Education Code section 13488 required that the evaluation and assessment be reduced to writing, that an opportunity to respond be given to the certificated employee, and that a meeting be held between the certificated employee and the evaluator to discuss the evaluation. Former section 13488 stated the following:

> Evaluation and assessment made pursuant to this article shall be reduced to writing and a copy thereof shall be transmitted to the certificated employee not later than 60 days before the end of each school year in which the evaluation takes place. The certificated employee shall have the right to initiate a written reaction or response to the evaluation. Such response shall become a permanent attachment to the employee's personnel file. Before the end of the school year, a meeting shall be held between the certificated personnel and the evaluator to discuss the evaluation.

And former Education Code section 13489 required that the evaluation and assessment be performed on a continuing basis, and that the evaluation include necessary recommendations as to areas of improvement. Former Education Code section 13489, as enacted in 1971, stated the following:

> Evaluation and assessment of the performance of each certificated employee shall be made on a continuing basis, at least once each school year for probationary personnel, and at least every other year for personnel with permanent status. The evaluation shall include recommendations, if necessary, as to areas of improvement in the performance of the employee. In the event an employee is not performing his duties in a satisfactory manner according to the standards prescribed by the governing board, the employing authority shall notify the employee in writing of such fact and describe such unsatisfactory performance. The employing authority shall thereafter confer with the employee making specific recommendations as to areas of improvement in the employee's performance and endeavor to assist him in such performance.

In addition, section 42 of the 1971 statute provided a specific exemption for certificated employees of community colleges if a related bill was enacted. Section 42 stated the following:

> Article 5 (commencing with Section 13401) and Article 5.5 (commencing with Section 13485) of Chapter 2 of Division 10 of the Education Code shall not apply to certificated employees in community colleges if Senate Bill No. 696 or Assembly Bill No. 3032 is enacted at the 1971 Regular Session of the Legislature.

According to the history, Senate Bill 696 was enacted as Statutes 1971, chapter 1654. Thus, certificated employees of community colleges were not required to comply with the Stull Act.

In 1972, former Education Code section 13485 was amended to specifically exclude from the requirements of the Stull Act certificated personnel employed on an hourly basis in adult education classes.[51]

In 1973, former Education Code section 13489 was amended to exclude hourly and temporary certificated employees and substitute teachers, at the discretion of the governing board, from the requirement to evaluate and assess on a continuing basis.[52]

Thus, under prior law, school districts were required to perform the following activities as they related to "certificated personnel":

- Develop and adopt specific evaluation and assessment guidelines for the performance of "certificated personnel."
- Evaluate and assess "certificated personnel" as it relates to the established standards.
- Prepare and draft a written evaluation of the "certificated employee." The evaluation shall include recommendations, if necessary, as to areas of improvement.

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[51] Statutes 1972, chapter 535.

[52] Statutes 1972, chapter 1973.

- Receive and review from a "certificated employee" written responses regarding the evaluation.
- Prepare and hold a meeting between the "certificated employee" and the evaluator to discuss the evaluation and assessment.

The test claim legislation, in 1975 (Stats. 1975, ch. 1216), amended the Stull Act by adding language relating to certificated "non-instructional" employees. As amended, former Education Code section 13485 stated in relevant part the following (with the amended language underlined):

> It is the intent of the Legislature that governing boards establish a uniform system of evaluation and assessment of the performance of all certificated personnel within each school district of the state . . . .

Former Education Code section 13487 was also repealed and reenacted by Statutes 1975, chapter 1216, as follows (amendments relevant to this issue are underlined):

> (a) The governing board of each school district shall establish standards of expected student achievement at each grade level in each area of study.
>
> (b) The governing board of each school district shall evaluate and assess certificated employee competency as it reasonably relates to (1) the progress of students toward the established standards, (2) the performance of those noninstructional duties and responsibilities, including supervisory and advisory duties, as may be prescribed by the board, and (3) the establishment and maintenance of a suitable learning environment within the scope of the employee's responsibilities.
>
> (c) The governing board of each school district shall establish and define job responsibilities for those certificated noninstructional personnel, including, but not limited to, supervisory and administrative personnel, whose responsibilities cannot be evaluated appropriately under the provisions of subdivision (b), and shall evaluate and assess the competency of such noninstructional employees as it reasonably relates to the fulfillment of those responsibilities. ...

The 1975 test claim legislation did not amend the requirements in former Education Code sections 13488 or 13489 to prepare written evaluations of certificated employees, receive responses to those evaluations, and conduct a meeting with the certificated employee to discuss the evaluation.

Additionally, in 1986, the test claim legislation (Stats. 1986, ch. 393) amended Education Code section 44663 (which derived from former Ed. Code, § 13488) by adding subdivision (b) to provide that the evaluation and assessment of certificated non-instructional employees shall be reduced to writing before June 30 of the year that the evaluation is made, that an opportunity to respond be given to the certificated non-instructional employee, and that a meeting be held between the certificated non-instructional employee and the evaluator to discuss the evaluation before July 30. Education Code section 44663, subdivision (b), as added by the test claim legislation, states the following:

> In the case of a certificated noninstructional employee, who is employed on a 12-month basis, the evaluation and assessment made pursuant to this article shall be reduced to writing and a copy thereof shall be transmitted to the certificated employee no later than June 30 of the year in which the evaluation and assessment is made. A certificated noninstructional employee, who is employed on a 12-month basis shall have the right to initiate a written reaction or response to the evaluation. This response shall become a permanent attachment to the employee's personnel file. Before July 30 of the year in which the evaluation and assessment take place, a meeting shall be held between the certificated employee and the evaluator to discuss the evaluation and assessment.

The claimant contends that the Stull Act, as originally enacted in 1971, required the assessment and evaluation of teachers, or certificated instructional employees, only. The claimant argues that when the Stull Act was amended in 1975 and 1986, it added the requirement for schools districts to develop job responsibilities to assess and evaluate the performance of non-instructional personnel. The claimant contends that under the rules of statutory construction, an amendment indicates the legislative intent to change the law. The claimant contends that this amendment imposed additional activities on school districts to develop job responsibilities and evaluate certificated non-instructional employees, which constitute a higher level of service.[53]

The Department of Finance argues that school districts have always had the requirement to assess and evaluate non-instructional personnel because the original legislation enacted in 1971 refers to all certificated personnel. The Department of Finance contends that the subsequent amendments that specifically list certificated non-instructional personnel, were clarifying edits and not new requirements.[54]

The Stull Act was an existing program when the test claim legislation was enacted. Thus, the issue is whether the 1975 and 1986 amendments to the Stull Act mandated an increased, or higher level of service to develop job responsibilities and to evaluate and assess certificated non-instructional employees. In 1987, the California Supreme Court in *County of Los Angeles v. State of California* expressly stated that the term "higher level of service" must be read in conjunction with the phrase "new program." Both are directed at *state-mandated increases in the services* provided by local agencies.[55]

In 1990, the Second District Court of Appeal decided the *Long Beach Unified School District* case, which challenged a test claim filed with the Board of Control on executive orders issued by the Department of Education to alleviate racial and ethnic segregation in schools.[56] The court determined that the executive orders did not constitute a "new program" since schools had an existing constitutional obligation to alleviate racial segregation.[57] However, the court found that the executive orders constituted a "higher level of service" because the requirements imposed by

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[53] Exhibit C.

[54] Exhibit B.

[55] *County of Los Angeles, supra*, 43 Cal.3d at page 56.

[56] *Long Beach Unified School District, supra*, 225 Cal.App.4th 155.

[57] *Id.* at page 173.

the state went beyond constitutional and case law requirements. The court stated in relevant part the following:

> The phrase "higher level of service" is not defined in article XIII B or in the ballot materials. [Citation omitted.] A mere increase in the cost of providing a service which is the result of a requirement mandated by the state is not tantamount to a higher level of service. [Citation omitted.] However, a review of the Executive Order and guidelines shows that a higher level of service is mandated because the requirements go beyond constitutional and case law requirements. . . .While these steps fit within the "reasonably feasible" description of [case law], the point is that these steps are no longer merely being suggested as options which the local school district may wish to consider but are *required acts. These requirements constitute a higher level of service.* We are supported in our conclusion by the report of the Board to the Legislature regarding its decision that the Claim is reimbursable: "Only those costs that are above and beyond the regular level of service for like pupils in the district are reimbursable."[58, 59]

Thus, in order for the 1975 and 1986 amendments to the Stull Act, relating to certificated non-instructional personnel, to impose a new program or higher level of service, the Commission must find that the state is imposing new required acts or activities on school districts beyond those already required by law.

For the reasons described below, staff finds that school districts have been required to develop job responsibilities for certificated non-instructional employees, evaluate and assess certificated non-instructional employees, draft written evaluations of certificated non-instructional employees, receive and review written responses to the evaluation from certificated non-instructional employees, and conduct meetings regarding the evaluation with certificated non-instructional employees under the Stull Act since 1971, before the enactment of the test claim legislation.

Claimant argues that the statutory amendments to the Stull Act, by themselves, reflect the legislative intent to change the law. However, the intent to change the law may not always be presumed by an amendment, as suggested by the claimant. The court has recognized that changes in statutory language can be intended to clarify the law, rather than change it.

> We assume the Legislature amends a statute for a purpose, but that purpose need not necessarily be to change the law. [Citation.] Our consideration of the surrounding circumstances can indicate that the Legislature made ... changes in statutory language in an effort only to clarify a statute's true meaning. [Citations omitted.][60]

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[58] *Ibid.*, emphasis added.

[59] See also, *County of Los Angeles v. Commission on State Mandates* (2003) 110 Cal.App.4th 1176, 1193-1194, where the Second District Court of Appeal followed the earlier rulings and held that in the case of an existing program, reimbursement is required only when the state is divesting itself of its responsibility to provide fiscal support for a program, or is forcing a new program on a locality for which it is ill-equipped to allocate funding.

[60] *Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 243.

Thus, to determine whether the Stull Act, as originally enacted in 1971, applied to all certificated employees of a school district, instructional and non-instructional employees alike, the Commission must apply the rules of statutory construction. Under the rules of statutory construction, the first step is to look at the statute's words and give them their plain and ordinary meaning. Where the words of the statute are not ambiguous, they must be applied as written and may not be altered in any way. Moreover, the intent must be gathered with reference to the whole system of law of which it is a part so that all may be harmonized and have effect.[61]

As indicated by the plain language of former Education Code sections 13485,13487, 13488, and 13489, school districts were required under prior law to develop evaluation and assessment guidelines for the evaluation of "certificated" employees, evaluate and assess "certificated" employees on a continuing basis, draft written evaluations of "certificated" employees, receive and review written response to the evaluation from "certificated" employees, and conduct meetings regarding the evaluation with "certificated" employees. The plain language of these statutes does not distinguish between instructional employees (teachers) and non-instructional employees (principals, administrators), or specifically exclude certificated non-instructional employees. When read in context with the whole system of law of which these statutes are a part, the requirements of the Stull Act originally applied to *all* certificated employees under prior law.

As enacted, the Stull Act was placed in Chapter 2 of Division 10 of the 1971 Education Code, a chapter addressing "Certificated Employees." Certificated employees are those employees directly involved in the educational process and include both instructional and non-instructional employees such as teachers, administrators, supervisors, and principals.[62] Certificated employees must be properly credentialed for the specific position they hold.[63] A "certificated person" was defined in former Education Code section 12908 as "a person who holds one or more documents such as a certificate, a credential, or a life diploma, which singly or in combination license the holder to engage in the school service designated in the document or documents." The definition of "certificated person" governs the construction of Division 10 of the former Education Code and is not limited to instructional employees.[64]

Thus, the plain language of former Education Code sections 13485,13487, 13488, and 13489 read within the context of Chapter 2 of Division 10 of the 1971 Education Code, a division that governs both instructional and non-instructional certificated employees, required school districts to develop evaluation and assessment guidelines and to evaluate both instructional and non-instructional certificated employees based on the guidelines on a continuing basis.

In addition, former Education Code section 13486, as enacted in 1971, expressly required school districts to avail themselves "of the advice of the *certificated instructional personnel* in the district's organization of certificated personnel" when developing and adopting the evaluation guidelines. (Emphasis added.) Former Education Code sections 13485,13487, 13488, and 13489, enacted at the same time, did not limit the evaluation and assessment requirements to

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[61] *People v. Thomas* (1992) 4 Cal.4th 206, 210.

[62] Former Education Code section 13187 et seq. of the 1971 Education Code.

[63] Former Education Code section 13251 et seq. of the 1971 Education Code.

[64] Former Education Code 12901 of the 1971 Education Code.

"certificated instructional personnel" only. Rather, "certificated employees" were required to be evaluated. Thus, had the Legislature intended to require school districts to evaluate and assess only teachers, as argued by claimant, they would have limited the requirements of former Education Code sections 13485,13487, 13488, 13489 to "certificated instructional personnel." Under the rules of statutory construction, the Commission is prohibited from altering the plain language of a statute, or writing into a statute, by implication, express requirements that the Legislature itself has not seen fit to place in the statute.[65]

Moreover, under prior law, the Legislature expressly excluded certain types of certificated employees from the requirements of the Stull Act, and never expressly excluded non-instructional employees. When the Stull Act was originally enacted in 1971, the Legislature excluded employees of community colleges from the requirements.[66] In 1972, the Legislature revisited the Stull Act and expressly excluded certificated personnel employed on an hourly basis in adult education classes.[67] In 1973, school districts were authorized to exclude hourly and temporary certificated employees, and substitute teachers from the evaluation requirement.[68] Under the rules of statutory construction, where exceptions to a general rule are specified by statute, other exceptions are not to be implied or presumed, absent a discernible and contrary legislative intent.[69] Thus, it cannot be implied from the plain language of the legislation that the Legislature intended to exclude certificated non-instructional employees from the requirements of the Stull Act.

The conclusion that the Stull Act applied to non-instructional employees under prior law is further supported by case law. In 1977, the First District Court of Appeal considered *Grant v. Adams*.[70] The *Grant* case involved a school district employee who was a certified teacher with credentials as an administrator who had been serving as a principal (a non-instructional employee) of an elementary school from 1973 through 1974. In May 1974, the employee was reassigned and demoted to a teaching position for the 1974-1975 school year.[71] The employee made the argument that the Stull Act, when coupled with other statutory provisions, created a property interest in his position as a principal and required that an evaluation be conducted before termination of an administrative assignment. The court disagreed with the employee's argument, holding that the Stull Act evaluation was not a precondition to reassignment or dismissal.[72] When analyzing the issue, the court made the following findings:

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[65] *Whitcomb v. California Employment Commission* (1944) 24 Cal.2d 753, 757; *In re Rudy L.* (1994) 29 Cal.App.4th 1007, 1011.

[66] Section 42 of Statutes 1971, chapter 361.

[67] Statutes 1972, chapter 535.

[68] Statutes 1973, chapter 220.

[69] *People v. Galambos* (2002) 104 Cal.App.4th 1147.

[70] *Grant v. Adams* (1977) 69 Cal.App.3d 127.

[71] *Id.* at page 130.

[72] *Id.* at pages 134-135.

> In 1971, the Legislature passed the so-called "Stull Act," Education Code sections 13485-13490. Among other things the Stull Act required that all school districts establish evaluation procedures for certificated personnel. (Ed. Code, § 13485.) *The state board of education developed guidelines for evaluation of administrators and teachers pursuant to the Stull Act. Respondents [school district] adopted those guidelines without relevant change in June 1972.* The guidelines called for evaluation of personnel on permanent status at least once every two years. Appellant was given no evaluation pursuant to the guidelines. (Emphasis added.)[73]

In 1979, the California Supreme Court decided *Miller v. Chico Unified School District Board of Education*, a case with similar facts.[74] In the *Miller* case, the employee was a principal of a junior high school from 1958 until 1976, when he was reassigned to a teaching position. In 1973, the school board adopted procedures to formally evaluate administrators pursuant to the Stull Act.[75] The employee received a Stull Act evaluation in 1973, 1974, and 1975.[76] In 1976, the school board requested the employee's cooperation in his fourth annual Stull evaluation report, but the employee refused on advice of counsel.[77] The employee sought reinstatement to his position as a principal on the ground that the school board failed to comply with the Stull Act.[78] The court denied the employee's request and made the following findings:

> The record indicates, however, that the school board substantially complied with the Stull Act's mandate that the board fix performance guidelines for its certificated personnel, evaluate plaintiff in light of such guidelines, inform plaintiff of the results of any evaluation, and suggest to plaintiff ways to improve his performance.
>
> The school board's guidelines provide for annual evaluations of supervisory personnel; accordingly, the board evaluated plaintiff in 1973, 1974, and 1975. Although plaintiff received generally satisfactory evaluations in 1973 and 1974, the board's evaluation report in 1974 contains suggestions for specific areas of improvement. . . .
>
> Plaintiff's final Stull Act evaluation in June 1975 plainly notified plaintiff "in writing" of any unsatisfactory conduct on his part, and in addition provided a forum for plaintiff's supervisors to make "specific recommendations as to areas of improvement in the employee's performance and endeavor to assist him in such performance." [Former Ed. Code, § 13489.) . . . .

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[73] *Id.* at page 143, footnote 3.

[74] *Miller v. Chico Unified School District Board of Education* (1979) 24 Cal.3d 703.

[75] *Id.* at page 707.

[76] *Id.* at pages 708-710, 717.

[77] *Id.* at page 709.

[78] *Id.* at page 716.

> The court is surely obligated to understand the purpose of.... [the Stull Act] and to apply those sections to the relevant facts.[79]

Finally, the legislative history of the 1986 test claim legislation supports the conclusion that the specific language added to the Stull Act was not intended to impose new required acts on school districts. As stated above, the test claim legislation (Stats. 1986, ch. 393) amended Education Code section 44663 by adding subdivision (b) to provide that the evaluation and assessment of certificated non-instructional employees shall be reduced to writing before June 30 of the year that the evaluation is made, that an opportunity to respond be given to the certificated non-instructional employee, and that a meeting be held between the certificated non-instructional employee and the evaluator to discuss the evaluation before July 30. The legislative history of Statutes 1986, chapter 393 (Assem. Bill No. 3878) indicates that the purpose of the bill was to extend for 45 days the *current* requirement for the evaluation of certificated non-instructional employees.[80] The analysis of Assembly Bill 3878 by the Assembly Education Committee, dated April 7, 1986, states the following:

> Current statute requires evaluations of noninstructional certificated employees on 12 month contracts to be conducted within 30 days before the last school day. This apparently is a problem for San Diego [Unified School District] because all evaluations are jammed in at the end of the school year. They feel it would make more sense to allow extra time to evaluate those on 12 month contracts and spread the process out over a longer period of time.[81]

The April 24, 1986 analysis of Assembly Bill 3878 by the Legislative Analyst states the following:

> Our review indicates that this bill does not mandate any new duties on school district governing boards, but simply extends the date by which evaluations of certain certificated employees must be completed.[82]

Based on the foregoing authorities, staff finds that school districts were required under prior law to perform the following activities:

- Develop and adopt specific evaluation and assessment guidelines for the performance of certificated non-instructional personnel.

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[79] *Id.* at pages 717-718.

[80] Letter from San Diego Unified School District to the Honorable Teresa Hughes, Chairperson of the Assembly Education Committee, on Assembly Bill 3878, April 4, 1986; Assembly Education Committee, Republican Analysis on Assembly Bill 3878, April 7, 1986; Department of Finance, Enrolled Bill Report on Assembly Bill 3878, April 21, 1986; Legislative Analyst, Analysis of Assembly Bill 3878, April 24, 1986; Assembly Education Committee, Republican Analysis on Assembly Bill 3878, April 26, 1986; Senate Committee on Education, Staff Analysis on Assembly Bill 3878, May 28, 1986; Legislative Analyst, Analysis of Assembly Bill 3878, June 18, 1986. (Exhibit ___.)

[81] *Id.* at page __.

[82] *Id.* at page ___.

- Evaluate and assess certificated non-instructional personnel as it relates to the established standards.
- Prepare and draft a written evaluation of the certificated non-instructional employee. The evaluation shall include recommendations, if necessary, as to areas of improvement.
- Receive and review from a certificated non-instructional employee written responses regarding the evaluation.
- Prepare and hold a meeting between the certificated non-instructional employee and the evaluator to discuss the evaluation and assessment.

Staff further finds that the language added to former Education Code section 13487 by the 1975 test claim legislation to "establish and define job responsibilities" for certificated non-instructional personnel falls within the preexisting duty to develop and adopt objective evaluation and assessment guidelines for all certificated employees, does not mandate any new required acts, and, thus, does not constitute a new program or higher level of service.[83]

Accordingly, staff finds that the 1975 and 1986 amendments to former Education Code sections 13485 and 13487 and Education Code section 44663 as they relate to certificated non-instructional employees do not constitute a new program or higher level of service.[84]

Establish standards of expected pupil achievement at each grade level in each area of study (Former Ed. Code, § 13487, as repealed and reenacted by Stats. 1975, ch. 1216).

The claimant is requesting reimbursement to establish standards of expected pupil achievement at each grade level in each area of study.

Former Education Code section 13487, as originally enacted in 1971, required school districts to develop and adopt specific evaluation and assessment guidelines for certificated personnel. Former section 13487 stated in relevant part the following:

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[83] *Long Beach Unified School District, supra*, 225 Cal.App.4th at page 173.

[84] Staff notes that the analysis by the Legislative Analyst on Senate Bill 777, which was enacted as Statutes 1975, chapter 1216, concludes that "there would also be undetermined increased local costs due to the addition of ... non-instructional certificated employees in evaluation and assessment requirements." (See, Exhibit ___, page ___.) The courts have determined, however, that legislative findings are not relevant to the issue of whether a reimbursable state-mandated program exists:

> [T]he statutory scheme [in Government Code section 17500 et seq.] contemplates that the Commission, as a quasi-judicial body, has the sole and exclusive authority to adjudicate whether a state mandate exists. Thus, any legislative findings are irrelevant to the issue of whether a state mandate exists . . . ." (*City of San Jose, supra*, 45 Cal.App.4th at pp. 1817-1818, quoting *County of Los Angeles v. Commission on State Mandates* (1995) 32 Cal.App.4th 805, 819, and *Kinlaw v. State of California, supra*, 54 Cal.3d at p. 333.)

The governing board of each school district shall develop and adopt specific evaluation and assessment guidelines which shall include but shall not necessarily be limited in content to the following elements:

(a) The establishment of standards of expected student progress in each area of study and of techniques for the assessment of that progress.

The test claim legislation, in Statutes 1975, chapter 1216, repealed and reenacted former Education Code section 13487. As reenacted, the statute provided the following (amendments relevant to this issue are reflected with strikeout and underline):

(a) The governing board of each school district shall establish standards of expected student ~~progress~~ achievement at each grade level in each area of study.

The claimant contends that the 1975 test claim legislation imposed a new program or higher level of service on school districts to rewrite standards for employee assessment to reflect expected student "achievement" (as opposed expected student "progress") and to expand the standards to reflect expected student achievement at each "grade level."[85] The claimant further states the following:

> Prior law only required that the standards of expected student achievement be established to show student progress. Under prior law, these standards may have tracked student progress over time. For example, a school district may have established reading standards for pupils upon graduating from eighth grade. Under the test claim legislation, school districts no longer have the ability to determine over what period standards of expected student achievement will be established: The standards must be established by each grade level. The new standards outlined in the test claim legislation align more closely with the state's new content standards . . ."[86]

The Department of Finance contends that the 1975 amendment to former Education Code section 13487 does not constitute a new program or higher level of service. The Department states the following:

> Finance notes that in practice, school district standards required by Chapter 361/71 would have had to have been differentiated by grade in order to provide a measure of "expected student progress." Finance also notes that changing the term "expected student progress" to the term "expected student achievement" is a wording change that would not require additional work on the part of school districts. These changes did not require additional work on the part of school districts, and therefore, are not reimbursable.[87,88]

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[85] Exhibit A, Test Claim, page 4.

[86] Exhibit C, page 2.

[87] Exhibit B, page 1.

[88] The Department of Finance's factual assertion is not supported by "documentary evidence ... authenticated by declarations under penalty of perjury signed by persons who are authorized and

In order for the 1975 reenactment of former Education Code section 13487 to constitute a new program or higher level of service, the Commission must find that the state is imposing new required acts or activities on school districts beyond those already required by law.[89] For the reasons below, staff finds that the 1975 reenactment of former Education Code section 13487 does not constitute a new program or higher level of service.

On its face, the activities imposed by the 1975 reenactment of former Education Code section 13487 do not appear different than the activities required by the original 1971 version of former Education Code section 13487. Both versions require that standards for evaluation be established so that certificated personnel are evaluated based on student progress. As originally enacted in 1971, "[t]he governing board of each school district shall develop and adopt specific evaluation and assessment guidelines which shall include ... the establishment of standards of *expected student progress* in each area of study ... [and the] ... assessment of certificated personnel competence as it relates to the established standards." (Emphasis added.) As reenacted in 1975, "[t]he governing board of each school district shall establish standards of expected student achievement at each grade level in each area of study ... and evaluate and assess certificated employee competency as it reasonably relates to ... *the progress of students toward the established standards*." (Emphasis added.)

In addition, the legislative history of the test claim statute, Statutes 1975, chapter 1216 (Sen. Bill No. 777), does not reveal an intention by the Legislature to impose new required acts. Legislative history simply indicates that the language was "modified."[90]

Moreover, claimant's argument, that the test claim statute imposes a higher level of service because, under prior law, school districts "may" have only tracked student progress over time (for example, by establishing "reading standards for pupils upon graduating from eighth grade"), is not persuasive. Under the claimant's interpretation, the performance of a first grade teacher could be evaluated and assessed based on reading standards for eighth grade students; students that the teacher did *not* teach. The Stull Act, as originally enacted, required the school district to evaluate and assess the performance of all certificated employees based on the progress of their pupils. In addition, the claimant's factual assertion is not supported by "documentary evidence ... authen ticated by declarations under penalty of perjury signed by persons who are authorized and competent to do so," as required by the Commission's regulations.[91]

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competent to do so," as required by the Commission's regulations. (Cal. Code Regs., tit. 2, § 1183.02, subd. (c)(1).)

[89] *County of Los Angeles, supra*, 43 Cal.3d at page 56; *Long Beach Unified School Dist., supra*, 225 Cal.App.4th at page 173; and *County of Los Angeles, supra*, 110 Cal.App.4th at pages 1193-1194.

[90] Senate Committee on Education, Staff Analysis on Senate Bill 777, as amended on May 7, 1975; Assembly Education Committee, Analysis of Senate Bill 777, as amended on August 12, 1975; Ways and Means Staff Analysis on Senate Bill 777, as amended on August 19, 1975; Legislative Analyst, Analysis of Senate Bill 777, as amended on August 19, 1975, dated August 22, 1975; Assembly Third Reading of Senate Bill 777, as amended on August 19, 1975. (Exhibit ___.)

[91] Cal. Code Regs., tit. 2, § 1183.02, subd. (c)(1).

Finally, assuming for the sake of argument only, that school districts were required to establish new standards of expected student achievement due to the 1975 test claim statute, that activity would have occurred outside the reimbursement period for this claim. The reimbursement period for this test claim, if approved by the Commission, begins July 1, 1998. The test claim statute was enacted in 1975, 23 years earlier than the reimbursement period. There is no requirement in the test claim statute that establishing the standards is an ongoing activity.

Therefore, based on the evidence in the record, staff finds that former Education Code section 13487 as reenacted by Statutes 1975, chapter 1216, does not impose a new program or higher level of service on school districts.

Evaluate and assess the performance of certificated instructional employees (Ed. Code, § 44662, subd. (b), as amended by Stats. 1983, ch. 498 and Stats. 1999, ch. 4).

The claimant requests reimbursement to evaluate and assess the performance of certificated instructional employees as it reasonably relates to the following:

- The instructional techniques and strategies used by the certificated employee (Stats. 1983, ch. 498);
- The certificated employee's adherence to curricular objectives (Stats 1983, ch. 498); and
- The progress of pupils towards the state adopted academic content standards as measured by state adopted criterion referenced assessments (Stats. 1999, ch. 4).[92]

The Department of Finance agrees that these activities constitute reimbursable state-mandated activities under article XIII B, section 6.[93]

For the reasons described below, staff finds that evaluating and assessing the performance of certificated instructional employees based on these factors constitutes a new program or higher level of service.

The instructional techniques and strategies used by the employee, and the employee's adherence to curricular objectives. In 1983, the test claim legislation amended Education Code section 44662, subdivision (b), to require the school district to evaluate and assess certificated employee competency as it reasonably relates to "the instructional techniques and strategies used by the employee," and "the employee's adherence to curricular objectives." (Stats. 1983, ch. 498.)

Before the 1983 test claim legislation was enacted, the Stull Act required school districts to establish an objective and uniform system of evaluation and assessment of the performance of certificated personnel.[94] When developing these guidelines, school districts were required to receive advice from certificated instructional personnel. The court interpreted this provision to require districts to meet and confer, and engage in collective bargaining, with representatives of certificated employee organizations before adopting the evaluation guidelines.[95] Thus,

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[92] Exhibit A, Test Claim, page 6.

[93] Exhibit B.

[94] Former Education Code sections 13485 and 13487.

[95] *Certificated Employees Council of the Monterey Peninsula Unified School District v. Monterey Peninsula Unified School District* (1974) 42 Cal.App.3d 328, 334.

certificated instructional employees were evaluated based on the guidelines developed through collective bargaining, and on the following criteria required by the state:

- The progress of students toward the established standards of expected student achievement at each grade level in each area of study; and
- The establishment and maintenance of a suitable learning environment within the scope of the employee's responsibilities.[96]

Under prior law, the evaluation had to be reduced to writing and a copy of the evaluation given to the employee. An evaluation meeting had to be held between the certificated employee and the evaluator to discuss the evaluation and assessment.[97]

The 1983 test claim statute still requires school districts to reduce the evaluation to writing, to transmit a copy to the employee, and to conduct a meeting with the employee to discuss the evaluation and assessment.[98] These activities are not new. However, the 1983 test claim statute amended the evaluation requirements by adding two new evaluation factors: the instructional techniques and strategies used by the employee, and the employee's adherence to curricular objectives. Thus, school districts are now required by the state to evaluate and assess the competency of certificated instructional employees as it reasonably relates to:

- The progress of students toward the established standards of expected student achievement at each grade level in each area of study;
- The instructional techniques and strategies used by the employee;
- The employee's adherence to curricular objectives; and
- The establishment and maintenance of a suitable learning environment, within the scope of the employee's responsibilities.

School districts may have been evaluating teachers on their instructional techniques and adherence to curricular objectives before the enactment of the test claim statute based on the evaluation guidelines developed through the collective bargaining process. But, the state did not previously require the evaluation in these two areas. Government Code section 17565 states that "if a ... school district, at its option, has been incurring costs which are subsequently mandated by the state, the state shall reimburse the ... school district for those costs after the operative date of the mandate."

Accordingly, staff finds that Education Code section 44662, subdivision (b), as amended by Statutes 1983, chapter 498, imposes a new required act and, thus, a new program or higher level of service on school districts to evaluate and assess the performance of certificated instructional employees as it reasonably relates to the instructional techniques and strategies used by the employee and the employee's adherence to curricular objectives.

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[96] Former Education Code section 13487, subdivision (b), as amended by Statutes 1975, chapter 1216.

[97] Former Education Code sections 13485-13490, as originally enacted by Statutes 1971, chapter 361.

[98] Education Code sections 44662, 44663, 44664.

Reimbursement for this activity is limited to the review of the employee's instructional techniques and strategies and adherence to curricular objectives, and to include in the written evaluation of the certificated instructional employees the assessment of these factors during the following evaluation periods:

- Once each year for probationary certificated employees;
- Every other year for permanent certificated employees; and
- Beginning January 1, 2004, every five years for certificated employees with permanent status who have been employed at least ten years with the school district, are highly qualified (as defined in 20 U.S.C., § 7801)[99], and whose previous evaluation rated the employee as meeting or exceeding standards, if the evaluator and certificated employee being evaluated agree.[100]

State adopted academic content standards as measured by state adopted assessment tests. In 1999, the test claim legislation (Stats. 1999, ch. 4) amended Education Code 44662, subdivision (b)(1), by adding the following underlined language:

> The governing board of each school district shall evaluate and assess certificated employee competency as it reasonably relates to:
>
> The progress of pupils toward the standards established pursuant to subdivision (a) [standards of expected pupil achievement at each grade level in each area of study] and, if applicable, the state adopted academic content standards as measured by state adopted criterion referenced assessments.

Before the 1999 test claim legislation, school districts were required to evaluate and assess certificated employees based on the progress of pupils. The progress of pupils was measured by standards, adopted by *local school districts*, of expected student achievement at each grade level in each area of study. The evaluation had to be reduced to writing and a copy of the evaluation given to the employee. An evaluation meeting had to be held between the certificated employee and the evaluator to discuss the evaluation and assessment.[101]

The 1999 test claim legislation still requires school districts to evaluate and assess certificated employees based on the progress of pupils. It also still requires school districts to reduce the evaluation to writing, to transmit a copy to the employee, and to conduct a meeting with the employee to discuss the evaluation and assessment.[102] These activities are not new.

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[99] Section 7801 of title 20 of the United States Code defines "highly qualified" as a teacher that has obtained full state certification as a teacher or passed the state teacher licensing examination, and holds a license to teach, and the teacher has not had certification requirements waived on an emergency, temporary, or provisional basis.

[100] Education Code section 44664, subdivision (a)(3), as amended by Statutes 2003, chapter 566.

[101] Former Education Code sections 13485-13490, as originally enacted by Statutes 1971, chapter 361.

[102] Education Code sections 44662, 44663, 44664.

However, the test claim legislation, beginning January 1, 2000[103], imposes a new requirement on school districts to evaluate the performance of certificated employees as it reasonably relates to the progress of pupils based not only on standards adopted by local school districts, but also on the academic content standards adopted by the *state*, as measured by the state adopted assessment tests.

The state academic content standards and the assessment tests that measure the academic progress of students were created in 1995 with the enactment of the California Assessment of Academic Achievement Act.[104] The act required the State Board of Education to develop and adopt a set of statewide academically rigorous content standards in the core curriculum areas of reading, writing, mathematics, history/social science, and science to serve as the basis for assessing the academic achievement of individual pupils and of schools.[105] In addition, the Act established the Standardized Testing and Reporting Program (otherwise known as the STAR Program)[106], which requires each school district to annually administer to all pupils in grades 2 to 11 a nationally normed achievement test of basic skills, and an achievement test based on the state's academic content standards.[107] The Commission determined that the administration of the STAR test to pupils constitutes a partial reimbursable state-mandated program (CSM 97-TC-23).

Although evaluating the performance of a certificated employee based on the progress of pupils is not new, staff finds that the requirement to evaluate and assess the performance of certificated instructional employees that teach reading, writing, mathematics, history/social science, and science in grades 2 to 11, as it reasonably relates to the progress of pupils towards the state adopted academic content standards as measured by state adopted criterion referenced assessments is a new required act and, thus a higher level of service within the meaning of article XIII B, section 6 of the California Constitution.

This higher level of service is limited to the review of the results of the STAR test as it reasonably relates to the performance of those certificated employees that teach reading, writing, mathematics, history/social science, and science in grades 2 to 11, and to include in the written evaluation of those certificated employees the assessment of the employee's performance based on the STAR results for the pupils they teach during the evaluation periods specified in Education Code section 44664, and described below:

- Once each year for probationary certificated employees;
- Every other year for permanent certificated employees; and
- Beginning January 1, 2004, every five years for certificated employees with permanent status who have been employed at least ten years with the school district, are highly qualified (as defined in 20 U.S.C., § 7801), and whose previous evaluation rated the

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[103] Statutes 1999, chapter 4 became operative and effective on January 1, 2000.

[104] Education Code section 60600 et seq.

[105] Education Code section 60605, subdivision (a).

[106] Education Code section 60640, subdivision (a).

[107] Education Code section 60640, subdivision (b).

employee as meeting or exceeding standards, if the evaluator and certificated employee being evaluated agree.[108]

Assess and evaluate permanent certificated, instructional and non-instructional, employees that receive an unsatisfactory evaluation once each year until the employee achieves a positive evaluation, or is separated from the school district (Ed. Code, § 44664, as amended by Stats. 1983, ch. 498).

The claimant is requesting reimbursement to conduct additional assessments and evaluations for permanent certificated employees that receive an unsatisfactory evaluation as follows:

> Conduct additional annual assessments and evaluations of permanent certificated instructional and non-instructional employees who have received an unsatisfactory evaluation. The school district must conduct the annual assessment and evaluation of a permanent certificated employee until the employee achieves a positive evaluation or is separated from the school district. This mandated activity is limited to those annual assessments and evaluations that occur in years in which the employee would not have been required to be evaluated as per Section 44664 (i.e., permanent certificated employees shall be evaluated every other year). When conducting these additional evaluations the full cost of the evaluation is reimbursable (e.g., evaluation under all criterion, preparing written evaluation, review of comments, and holding a hearing with the teacher).[109]

The Department of Finance agrees that the 1983 amendment to Education Code section 44664 imposes a reimbursable state-mandated activity.

Before the enactment of the test claim legislation, former Education Code section 13489 (as last amended by Stats. 1973, ch. 220) required that an evaluation for permanent certificated employees occur every other year. Former Education Code section 13489 stated in relevant part the following:

> Evaluation and assessment of the performance of each certificated employee shall be made on a continuing basis, at least once each school year for probationary personnel, and *at least every other year for personnel with permanent status*. The evaluation shall include recommendations, if necessary, as to areas of improvement in the performance of the employee. In the event an employee is not performing his duties in a satisfactory manner according to the standards prescribed by the governing board, the employing authority shall notify the employee in writing of such fact and describe such unsatisfactory performance. The employing authority shall thereafter confer with the employee making specific recommendations as to areas of improvement in the employee's performance and endeavor to assist him in such performance. (Emphasis added.)

In 1976, former Education Code section 13489 was renumbered to Education Code section 44664.[110] The test claim legislation (Stats. 1983, ch. 498) amended Education Code section

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[108] Education Code section 44664, subdivision (a)(3), as amended by Statutes 2003, chapter 566.

[109] Exhibit A, Test Claim.

[110] Statutes 1976, chapter 1010.

44664, by adding the following sentence: "When any permanent certificated employee has received an unsatisfactory evaluation, the employing authority shall *annually evaluate* the employee until the employee achieves a positive evaluation or is separated from the district." (Emphasis added.)[11]

Staff finds that Education Code section 44664, as amended by Statutes 1983, chapter 498, imposes a new required act and, thus, a new program or higher level of service by requiring school districts to perform additional evaluations for permanent certificated employees that receive an unsatisfactory evaluation.

This higher level of service is limited to those annual assessments and evaluations that occur in years in which the permanent certificated employee would not have otherwise been evaluated pursuant to Education Code section 44664 (i.e., every other year) and lasts until the employee achieves a positive evaluation or is separated from the school district. This additional evaluation and assessment of the permanent certificated employee requires the school district to perform the following activities:

- Evaluate and assess the certificated employee performance as it reasonably relates to the following criteria: (1) the progress of pupils toward the standards established by the school district of expected pupil achievement at each grade level in each area of study, and, if applicable, the state adopted content standards as measured by state adopted criterion referenced assessments; (2) the instructional techniques and strategies used by the employee; (3) the employee's adherence to curricular objectives; (4) the establishment and maintenance of a suitable learning environment, within the scope of the employee's responsibilities; and, if applicable, (5) the fulfillment of other job responsibilities established by the school district for certificated non-instructional personnel (Ed. Code, § 44662, subds. (b) and (c));
- The evaluation and assessment shall be reduced to writing. (Ed. Code, § 44663, subd. (a).) The evaluation shall include recommendations, if necessary, as to areas of improvement in the performance of the employee. If the employee is not performing his or her duties in a satisfactory manner according to the standards prescribed by the governing board, the school district shall notify the employee in writing of that fact and describe the unsatisfactory performance (Ed. Code, § 44664, subd. (b));
- Transmit a copy of the written evaluation to the certificated employee (Ed. Code, § 44663, subd. (a));
- Attach any written reaction or response to the evaluation by the certificated employee to the employee's personnel file (Ed. Code, § 44663, subd. (a)); and
- Conduct a meeting with the certificated employee to discuss the evaluation (Ed. Code, § 44553, subd. (a)).

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[11] Statutes 2003, chapter 566, amended Education Code section 44664 by changing the word "when" to "if." The language now states the following: "~~When~~ If any permanent certificated employee has received an unsatisfactory evaluation, the employing authority shall annually evaluate the employee until the employee achieves a positive evaluation or is separated from the district."

Issue 3: Does Education Code Section 44662 (As Amended by Stats. 1999, ch. 4) and Education Code Section 44664 (As Amended by Stats. 1983, ch. 498) Impose Costs Mandated by the State Within the Meaning of Government Code Section 17514?

As indicated above, staff finds that the following activities constitute a new program or higher level of service:

- Evaluate and assess the performance of certificated instructional employees as it reasonably relates to the instructional techniques and strategies used by the employee and the employee's adherence to curricular objectives (Ed. Code, § 44662, subd. (b), as amended by Stats. 1983, ch. 498).
- Evaluate and assess the performance of certificated instructional employees as it reasonably relates to the progress of pupils towards the state adopted academic content standards as measured by state adopted assessment tests (Ed. Code, § 44662, subd. (b), as amended by Stats. 1999, ch. 4); and
- Assess and evaluate permanent certificated, instructional and non-instructional, employees that receive an unsatisfactory evaluation in the years in which the permanent certificated employee would not have otherwise been evaluated until the employee receives achieves a positive evaluation, or is separated from the school district (Ed. Code, § 44664, as amended by Stats. 1983, ch. 498).

The Commission must continue its inquiry to determine if these activities result in increased costs mandated by the state pursuant to Government Code section 17514.

Government Code section 17514 defines "costs mandated by the state" as any increased cost a local agency or school district is required to incur as a result of a statute that mandates a new program or higher level of service. The claimant states that it has incurred significantly more than $200 to comply with the test claim statutes plead in this claim.[112, 113]

Staff finds that there is nothing in the record to dispute the costs alleged by the claimant, and that none of the exceptions to finding a reimbursable state-mandated program under Government Code section 17556 apply to this claim.

Therefore, staff finds that Education Code section 44662 (as amended by Stats. 1999, ch. 4) and Education Code section 44664 (as amended by Stats. 1983, ch. 498), result in costs mandated by the state under Government Code section 17514.

CONCLUSION

Staff concludes that Education Code section 44662, as amended by Statutes 1999, chapter 4, and Education Code section 44664, as amended by Statutes 1983, chapter 498, mandates a new

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[112] Exhibit A, Test Claim and Declaration of Larry S. Phelps, Superintendent of Denair Unified School District.

[113] Staff notes that after this test claim was filed, Government Code section 17564 was amended to require that all test claims and reimbursement claims submitted exceed $1000 in costs. (Stats. 2002, ch. 1124.)

program or higher level of service for school districts within the meaning of article XIII B, section 6 of the California Constitution, and imposes costs mandated by the state pursuant to Government Code section 17514 for the following activities only:

- Evaluate and assess the performance of certificated instructional employees as it reasonably relates to the instructional techniques and strategies used by the employee and the employee's adherence to curricular objectives (Ed. Code, § 44662, subd. (b), as amended by Stats. 1983, ch. 498).

  Reimbursement for this activity is limited to the review of the employee's instructional techniques and strategies and adherence to curricular objectives, and to include in the written evaluation of the certificated instructional employees the assessment of these factors during the following evaluation periods:

  - Once each year for probationary certificated employees;
  - Every other year for permanent certificated employees; and
  - Beginning January 1, 2004, every five years for certificated employees with permanent status who have been employed at least ten years with the school district, are highly qualified (as defined in 20 U.S.C., § 7801), and whose previous evaluation rated the employee as meeting or exceeding standards, if the evaluator and certificated employee being evaluated agree.

- Evaluate and assess the performance of certificated instructional employees as it reasonably relates to the progress of pupils towards the state adopted academic content standards as measured by state adopted assessment tests (Ed. Code, § 44662, subd. (b), as amended by Stats. 1999, ch. 4).

  Reimbursement for this activity is limited to the review of the results of the STAR test as it reasonably relates to the performance of those certificated employees that teach reading, writing, mathematics, history/social science, and science in grades 2 to 11, and to include in the written evaluation of those certificated employees the assessment of the employee's performance based on the STAR results for the pupils they teach during the evaluation periods specified in Education Code section 44664, and described below:

  - Once each year for probationary certificated employees;
  - Every other year for permanent certificated employees; and
  - Beginning January 1, 2004, every five years for certificated employees with permanent status who have been employed at least ten years with the school district, are highly qualified (as defined in 20 U.S.C., § 7801), and whose previous evaluation rated the employee as meeting or exceeding standards, if the evaluator and certificated employee being evaluated agree.

- Assess and evaluate permanent certificated, instructional and non-instructional, employees that receive an unsatisfactory evaluation in the years in which the permanent certificated employee would not have otherwise been evaluated pursuant to Education Code section 44664 (i.e., every other year). The additional evaluations shall last until the employee achieves a positive evaluation, or is separated from the school district. (Ed. Code, § 44664, as amended by Stats. 1983, ch. 498). This additional evaluation and

assessment of the permanent certificated employee requires the school district to perform the following activities:

- Evaluate and assess the certificated employee performance as it reasonably relates to the following criteria: (1) the progress of pupils toward the standards established by the school district of expected pupil achievement at each grade level in each area of study, and, if applicable, the state adopted content standards as measured by state adopted criterion referenced assessments; (2) the instructional techniques and strategies used by the employee; (3) the employee's adherence to curricular objectives; (4) the establishment and maintenance of a suitable learning environment, within the scope of the employee's responsibilities; and, if applicable, (5) the fulfillment of other job responsibilities established by the school district for certificated non-instructional personnel (Ed. Code, § 44662, subds. (b) and (c));
- The evaluation and assessment shall be reduced to writing. (Ed. Code, § 44663, subd. (a).) The evaluation shall include recommendations, if necessary, as to areas of improvement in the performance of the employee. If the employee is not performing his or her duties in a satisfactory manner according to the standards prescribed by the governing board, the school district shall notify the employee in writing of that fact and describe the unsatisfactory performance (Ed. Code, § 44664, subd. (b));
- Transmit a copy of the written evaluation to the certificated employee (Ed. Code, §44663, subd. (a));
- Attach any written reaction or response to the evaluation by the certificated employee to the employee's personnel file (Ed. Code, § 44663, subd. (a)); and
- Conduct a meeting with the certificated employee to discuss the evaluation (Ed. Code, § 44553, subd. (a)).

Staff finds that all other statutes in the test claim not mentioned above are not reimbursable state-mandated programs within the meaning of article XIII B, section 6 and Government Code section 17514.

Recommendation

Staff recommends that the Commission adopt the staff analysis that partially approves the test claim for the activities listed above.

§ 13483.45 Judicial review

The decision of the arbitrator or hearing officer, as the case may be, may, on petition of either the governing board or the employee, be reviewed by a court of competent jurisdiction in the same manner as a decision made by a hearing officer under Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code. The court, on review, shall exercise its independent judgment on the evidence. The proceeding shall be set for hearing at the earliest possible date and shall take precedence over all other cases, except older matters of the same character and matters to which special precedence is given by law.
(Added by Stats.1971, c. 1654, p. 3565, § 4, operative Sept. 1, 1972.)

Applicability of this section to certificated persons employed by a community college district, see note under § 13346.

§ 13483.50 Charges of office of administrative procedure; payment by district

The charges levied by the Office of Administrative Procedure shall be paid by the district.
(Added by Stats.1971, c. 1654, p. 3566, § 4, operative Sept. 1, 1972.)

Applicability of this section to certificated persons employed by a community college district, see note under § 13346.

§ 13484. Dismissal or penalty for immoral conduct, conviction of felony or crime involving moral turpitude; revocation of certificate

If a contract or regular employee is dismissed or penalized for immoral conduct or conviction of a felony or crime involving moral turpitude, the governing board shall transmit to the Chancellor, California Community Colleges, and to the county superintendent of schools which issued the certificate under which the employee was serving at the time of his dismissal or the imposition of his penalty, a statement setting forth the acts of the employee and a request that any certificate issued by the county board of education to the employee be revoked if the employee is not reinstated upon appeal.
(Added by Stats.1971, c. 1654, p. 3566, § 4, operative Sept. 1, 1972.)

Applicability of this section to certificated persons employed by a community college district, see note under § 13346.

ARTICLE 5.5 EVALUATION AND ASSESSMENT OF PERFORMANCE OF CERTIFICATED EMPLOYEES [NEW]

Sec.
13485. Intent; establishment of uniform system.
13486. Advice of certificated instructional personnel.
13487. Evaluation and assessment guidelines; elements.
13488. Transmission of written copy of evaluation and assessment to employee; response; discussion.
13489. Frequency; areas of employment; unsatisfactory performance; exclusion.
13490. Employing authority defined [New].

Article 5.5 was added by Stats.1971, c. 361, p. 726, § 40, operative September 1, 1972.

Applicability of chapter to certificated employees in community colleges, see note under section 13485.

§ 13485. Intent; establishment of uniform system

It is the intent of the Legislature to establish a uniform system of evaluation and assessment of the performance of certificated personnel within each school district of the state. The system shall involve the development and adoption by each school district of objective evaluation and assessment guidelines.

This article does not apply to certificated personnel who are employed on an hourly basis in adult education classes.

(Added by Stats.1971, c. 361, p. 726, § 40, operative Sept. 1, 1972. Amended by Stats. 1972, c. 535, p. 927, § 2, operative Sept. 1, 1972.)

Section 4 of Stats.1972, c. 535, p. 927, provides: "Section 2 of this act shall become operative at the same time as Section 40 of Chapter 361 of the Statutes of 1971 becomes operative [Sept. 1, 1972].

Section 1 of Stats.1972, c. 10, p. 10, urgency, eff. March 2, 1972, added section 41.5 to Stats.1971, c. 361, which reads as follows: "Section 40 of this act shall become operative on September 1, 1972."

Section 2 of Stats.1972, c. 10, p. 10, urgency, eff. March 2, 1972, provided: "In the event that this act becomes effective after the 61st day following the final adjournment of the 1971 Regular Session of the Legislature, it shall be given retroactive effect to that day, and shall be construed as deferring for all purposes the need to comply with Article 5.5 (commencing with Section 13485) of Chapter 2 of Division 10 of the Education Code until the date specified in Section 1 of this act."

Section 42 of Stats.1971, c. 361, p. 727, provided: "Article 5 (commencing with Section 13401) and Article 5.5 (commencing with Section 13485) of Chapter 2 of Division 10 of the Education Code shall not apply to certificated employees in community colleges if Senate Bill No. 690 or Assembly Bill No. 3082 is enacted at the 1971 Regular Session of the Legislature. [Senate Bill No. 690 was enacted as Stats. 1971, c. 1054 and Assembly Bill No. 3082 was not enacted.]"

§ 13486. Advice of certificated instructional personnel

In the development and adoption of these guidelines and procedures, the governing board shall avail itself of the advice of the certificated instructional personnel in the district's organization of certificated personnel.

(Added by Stats.1971, c. 361, p. 726, § 40, operative Sept. 1, 1972.)

Operative date, see note under section 13485.

§ 13487. Evaluation and assessment guidelines; elements

The governing board of each school district shall develop and adopt specific evaluation and assessment guidelines which shall include but shall not necessarily be limited in content to the following elements:

(a) The establishment of standards of expected student progress in each area of study and of techniques for the assessment of that progress.

(b) Assessment of certificated personnel competence as it relates to the established standards.

(c) Assessment of other duties normally required to be performed by certificated employees as an adjunct to their regular assignments.

(d) The establishment of procedures and techniques for ascertaining that the certificated employee is maintaining proper control and is preserving a suitable learning environment.

(Added by Stats.1971, c. 361, p. 726, § 40, operative Sept. 1, 1972.)

Operative date, see note under section 13485.

§ 13488. Transmission of written copy of evaluation and assessment to employee; response; discussion

Evaluation and assessment made pursuant to this article shall be reduced to writing and a copy thereof shall be transmitted to the certificated employee not later than 60 days before the end of each school year in which the evaluation takes place. The certificated employee shall have the right to initiate a written reaction or response to the evaluation. Such response shall become a permanent attachment to the employee's personnel file. Before the end of the school year, a meeting shall be held between the certificated personnel and the evaluator to discuss the evaluation.

(Added by Stats.1971, c. 361, p. 726, § 40, operative Sept. 1, 1972.)

Operative date, see note under section 13485.

§ 13489. Frequency; areas of employment; unsatisfactory performance; exclusion

Evaluation and assessment of the performance of each certificated employee shall be made on a continuing basis, at least once each school year for probationary personnel, and at least every other year for personnel with permanent status. The evaluation shall include recommendations, if necessary, as to areas of improvement

in the performance of the employee. In the event an employee is not performing his duties in a satisfactory manner according to the standards prescribed by the governing board, the employing authority shall notify the employee in writing of such fact and describe such unsatisfactory performance. The employing authority shall thereafter confer with the employee making specific recommendations as to areas of improvement in the employee's performance and endeavor to assist him in such performance.

Hourly and temporary hourly certificated employees, other than those employed in adult education classes who are excluded by the provisions of Section 13485, and substitute teachers may be excluded from the provisions of this section at the discretion of the governing board.

(Added by Stats.1971, c. 801, p. 727, § 40, operative Sept. 1, 1972. Amended by Stats. 1978, c. 220, p. —, § 1.)

Operative date, see note under section 13485.

§ 13480. Employing authority defined

For purposes of this article, "employing authority" means the superintendent of the school district in which the employee is employed, or his designee, or in the case of a district which has no superintendent, a school principal or other person designated by the governing board.

(Added by Stats.1971, c. 1654, p. 3568, § 6.)

Applicability of this section to persons employed by districts which maintain any of grades kindergarten through 12, see note under § 13345.

Library References
Words and Phrases (Perm. Ed.)

ARTICLE 6. SALARIES

Sec.

§ 13502. Governing board to fix compensation

3. Authority to fix compensation in general

Where one-session kindergarten teachers who were paid on a part-time basis were in fact full-time employees under statutory provisions, and where governing board had not set salaries for one-session teachers which were at least equal to the statutory minimum but less than salaries for two-session kindergarten teachers, the one-session teachers were entitled to the difference between the salaries paid to them and the full-time salaries prescribed by the salary schedule adopted by the governing board, and not merely to the difference between the salaries paid and the minimum salary prescribed for full-time teachers by § 13625. Campbell v. Graham-Armstrong (1973) 107 Cal.Rptr. 777, 509 P.2d 689, 9 C.3d 482.

School board's refusal to permit teacher to use one year of approved outside experience as basis for advancement on salary scale was not an abuse of discretion, where such policy was applied fairly and without discrimination and there was no showing that in making application for a leave of absence petitioning teacher was misled in any way as to credit he would receive for teaching in Germany. Lawe v. El Monte School Dist. of Los Angeles County (1968) 72 Cal.Rptr. 554, 267 C.A.2d 20.

5. —— Change of policy, effect on rating

Fact that at time nurses were employed and became permanent employees school district applied same salary schedule to nurses and teachers did not entitle the nurses to application of the salary schedule for teachers after district had established maximum salary for school nurses, in absence of showing that board had exercised its power arbitrarily. Masthan v. Santa Clara Elementary School Dist. (1969) 76 Cal.Rptr. 198, 270 C.A.2d 807.

6. Rules and regulations

It is within province of governing school board to determine extent to which credit is to be given for teaching experience outside the district and court is not free to interfere with such determination if policy is reasonable in nature and is applied fairly and without discrimination. Lawe v. El Monte School Dist. of Los Angeles County (1968) 72 Cal.Rptr. 554, 267 C.A.2d 20.

7. Classifications for salary purposes

A school board is authorized to fix compensation of school teachers, but salary schedules must not be arbitrary, discriminatory or unreasonable and if allowance is made for years of training and experience, the allowance must be uniform. Sayre v. Board of Trustees of Coalinga College Dist. (1970) 88 Cal.Rptr. 366, 9 C.A.3d 488.

Though school boards are empowered to adopt salary schedules making allowance for years of training and experience, giving postgraduate quarter units the same weight as is given to semester units for salary classification purposes would be arbitrary

and unreasonable. Shoban v. Board of Trustees of Desert Center Unified School Dist. (1960) 81 Cal.Rptr. 112, 270 C.A.2d 534.

School board has power to classify permanent certificated employees, even those with tenure, differently according to training, experience and duties. Eastham v. Santa Clara Elementary School Dist. (1960) 76 Cal.Rptr. 108, 270 C.A.2d 807.

5. Salary schedules in general

School district which operates junior college is obligated to compensate all its permanent employees who teach at junior college in a like manner, with permissible variations for relevant factors such as years of experience or educational background. Vittal v. Long Beach Unified School Dist. (1970) 87 Cal.Rptr. 319, 8 C.A.3d 112.

Governing board of school district has discretionary power to change or freeze salaries of permanent certificated employees. Eastham v. Santa Clara Elementary School Dist. (1960) 76 Cal.Rptr. 108, 270 C.A.2d 807.

10. Reduction in compensation

Although teacher at junior college complained every year that she should be entitled to permanent status but she contracted to teach at hourly rates, teacher waived right to be compensated on same basis as other permanent employees teaching the same subject. Vittal v. Long Beach Unified School Dist. (1970) 87 Cal.Rptr. 319, 8 C.A.3d 112.

13. —— Weight and sufficiency of evidence

In action challenging reclassification of teachers for salary purposes on basis of semester units, rather than both semester and quarter units, of postgraduate study, evidence that school board intended units to be semester units when it adopted salary regulation, that teachers' salary committee so understood its recommended salary schedule, and that other teachers were classified on basis of semester units supported the reclassification. Shoban v. Board of Trustees of Desert Center Unified School Dist. (1960) 81 Cal.Rptr. 112, 270 C.A. 2d 534.

§ 13503. Full-time employees

Every person employed by the district in a position requiring certification qualifications in a day school of the district for not less than the minimum schoolday for each day the schools of the district are maintained during the school year is a full-time employee and his compensation shall be fixed accordingly. Governing boards may require persons employed in positions requiring certification qualifications to serve a longer period of time in each schoolday than the minimums defined in Sections 11003 to 11008, inclusive, and 11052, in order to be compensated as full-time employees, provided all such employees in similar grades or levels are similarly required to serve such longer periods of time, and provided that the duties required of such persons during such extended time shall be directly related to and restricted to their normal * * * assignment. With respect to a unified school district, for the purposes of this section all day kindergarten and elementary schools of the unified school district shall be deemed to be maintained by one district, all day high schools of the unified school district shall be deemed to be maintained by a second and separate district, and all day junior colleges of the unified school district shall be deemed to be maintained by a third and separate district.

(Amended by Stats.1970, c. 102, p. 179, § 183; Stats.1970, c. 1372, p. 2588, § 1.)

Subordination of amendment by Stats. 1970, c. 102, p. 321, to other 1970 amendments or repeals, see note under section 52.

1. In general

One-session kindergarten teachers who each day taught for the minimum school day prescribed by § 11003 (repealed) for kindergarten pupils were "full-time employees," though teaching only 180 minutes while two-session kindergarten teachers were required to teach for 300 minutes, particularly where one-session teachers were on duty for additional time required of them under rules laid down by the governing board for such purposes as planning and meetings. Campbell v. Graham-Armstrong (1973) 107 Cal.Rptr. 777, 509 P.2d 689.

School district which operates junior college is obligated to compensate all its permanent employees who teach at junior college in a like manner, with permissible variations for relevant factors such as years of experience or educational background. Vittal v. Long Beach Unified School Dist. (1970) 87 Cal.Rptr. 319, 8 C.A.3d 112.

Certificated employees of a day junior college, including those employed in extended day programs, employed less than the length of time in minutes that full time employees are required to work, are entitled to pro rata percentage of the minimum annual wage prescribed by § 13526. 53 Ops.Atty. Gen. 218, 11-4-60.

§ 13506. Teachers

* * * Effective July 1, 1970, each person employed by a district in a position requiring certification qualifications except a person employed in a position requiring administrative or supervisory credentials, shall be classified on the salary schedule on the basis of uniform allowance for years of training and years of experience. Employees shall not be placed in different classifications on the schedule, nor paid different salaries, solely on the basis of the respective grade levels in which such employees serve.

Underline indicates changes or additions by amendment

LEGISLATIVE HISTORY
Statutes 1975, Chapter 1216
Senate Bill 777

SENATE COMMITTEE ON EDUCATION 5/75

Staff Analysis of
SB 777 (Stull)

As Amended May 7, 1975

Current Law

Provides that the governing board of each school district (K-12) shall develop and adopt specific guidelines for the evaluation of certificated personnel to include:

(a) Standards of expected student progress in each area of study and techniques for assessment of such progress.

(b) Assessment of personnel competence.

(c) Assessment of duties normally required in addition to daily assignments.

(d) Procedures and techniques for determining whether the employee is maintaining proper control and preserving a suitable learning environment.

Permanent certificated employees may be dismissed only for specified causes outlined in Education Code Sections 13403 and 13403.5, and upon the filing of written charges and notice of intention to dismiss after 30 days of the date of service The employee may demand a hearing:

(a) If the causes include acts of criminal syndicalism, conviction of felony or crime involving moral turpitude, physical or mental condition unfitting him to teach children, communist party membership, or advocacy or teaching communism, the hearing is conducted by a hearing officer whose decision is final.

(b) If the cause is immoral or unprofessional conduct, dishonesty, incompetence, evident unfitness for service, or persistent refusal to obey school rules, the hearing is conducted by a 3 member Commission on Professional Competence, whose decision is deemed to be the decision of the governing board. One of the members of the Commission is a hearing officer, one is selected by the district, and one by the employee.

If the employee is dismissed, the governing board and the employee share the cost of the hearing, including the hearing officer. Each handles their own attorney fees.

If the employee is retained, the governing board pays all expenses, including reasonable attorney fees incurred by the employee.

Proposed Law

Specifies that a charge must set forth in ordinary and concise language the acts or omissions alleged, to the end that the respondent may prepare a defense. It must specify the statutes and rules alleged to have been violated, but may not merely phrase the charges in the language of the statutes and rules.

Modifies the hearing procedure in the following ways:

(1) Provides that the hearing date be established after consultation with the employee and the governing board or its representatives.

(2) Provides that discovery be completed 7 calendar days rather than 1 week, prior to the set hearing date.

(3) Provides that a continuance extends the statutory limit for commencement of the hearing (60 days), but the extension cannot include time attributable to an unlawful refusal by either party to allow discovery.

(4) Provides that all hearings for all causes will be conducted by the Commission on Teacher Competency when a permanent teacher is charged. The decision of the panel is final.

(5) Provides that a member of the Commission on Teacher Competency selected by the teacher or the district:

(a) May not be related to the employee.

(b) May not be employed in the initiating district.

(c) Must hold a valid credential, and

(d) Must have the required 5 year's experience within the last 10 years.

(6) Provides that a member selected to serve on the Commission who is an employee of any school district will continue to receive regular salary from his own district, and that district will absorb the cost. No additional compensation is permitted, unless the member is on vacation or summer recess, in which case he will receive proportionate compensation.

Costs of payment for proportionate compensation, expenses of

substitutes, if any, and expenses incurred by the member selected by the governing board, and the member selected by the employee, are paid by the State, unless the district loses, in which case it must bear such costs in addition to all other costs.

Provides that the evaluation guidelines, at the board's discretion, be uniform throughout the district, or for compelling reasons, be individually developed for territories or schools.

Specifies that the development and adoption of guidelines be a subject of meeting and conferring under the Winton Act.

Modifies the minimum evaluation guidelines as follows:

(1) Evaluation of teacher competence must reasonably relate to:

(a) establishment of expected standards of pupil progress in each area of study,

(b) use of effective techniques for achieving progress toward standards, and

(c) achieving such progress

(2) Requires evaluation of duties that are a part of a regular assignment rather than an adjunct to.

(3) Requires evaluation of the establishment and maintenance of a suitable learning environment with the teacher's area of responsibility, rather than requiring evaluation of the ability to maintain control and preserving a suitable learning environment.

(4) Precludes use of publisher's norms established by standardized tests as assessment criteria.

Appropriates an unspecified amount for the state costs.

Waives provisions of SB 90 for any local costs.

8/11/75

ASSEMBLY EDUCATION COMMITTEE

BILL NO: SB 777 as amended August 12, 1975

AUTHOR: Stull

SUBJECT: Public schools: certificated employees: dismissal-evaluation.

BACKGROUND:

I. Dismissal Procedures:

Permanent certificated employees may be dismissed only for specified causes outlined in Education Code Sections 13404 and 13403.5, and upon the filing of written charges and notice of intention to dismiss after 30 days of the date of service. The employee may demand a hearing:

(a) If the causes include acts of criminal syndicalism, conviction of felony or crime involving moral turpitude, physical or mental condition unfitting him to teach children, communist party membership, or advocacy or teaching communism, the hearing is conducted by a hearing officer whose decision is final.

(b) If the cause is immoral or unprofessional conduct, dishonesty, incompetence, evident unfitness for service, or persistent refusal to obey school rules, the hearing is conducted by a 3 member Commission on Professional Competence, whose decision is deemed to be the decision of the governing board. One of the members of the Commission is a hearing officer, one is selected by the district, and one by the employee.

If the employee is dismissed, the governing board and the employee share the cost of the hearing, including the hearing officer. Each handles their own attorney fees.

If the employee is retained, the governing board pays all expenses, including reasonable attorney fees incurred by the employee.

(I. Evaluation of Certificated Employees:

Current law provides that the governing board of each school district (K-12) shall develop and adopt specific guidelines for the evaluation of certificated personnel to include:

(a) Standards of expected student progress in each area of study and techniques for assessment of such progress;

(b) Assessment of personal competence;

(c) Assessment of duties normally required in addition to daily assignments;

(d) Procedures and techniques for determining whether the employee is maintaining proper control and preserving a suitable learning environment.

ANALYSIS:

This measure specifies that a charge must set forth in ordinary and concise language the acts or omissions alleged, to the end that the respondent may prepare a defense. It must specify the statutes and rules alleged to have been violated, but may not merely charge the use of the language of the statutes and rules.

(b. The dismissal hearing procedure is modified as follows:

(1) The hearing date shall be established after consultation with the employee and the governing board or their representatives.

(2) In all cases, discovery shall be completed 7 calendar days rather than one week, prior to the set hearing date.

(3) A continuance may extend the statutory limit for commencement of the hearing (60 days), but the extension cannot include time attributable to an unlawful refusal by either party to allow discovery.

(4) All hearings for all causes will be conducted by the Commission on Teacher Competency when a permanent teacher is charged. The decision of the panel is final.

(5) A member of the Commission on Teacher Competency selected by the teacher or the district:

(a) May not be related to the employee.

(b) May not be employed in the initiating district.

(c) Must hold a valid credential, and

(d) Must have the required 5 year's experience within the last 10 years.

(6) A member selected to serve on the Commission who is an employee of any school district will continue to receive regular salary from his own district, and that district will absorb the cost. No additional compensation is permitted, unless the member is on vacation or summer recess, in which case he will receive proportionate compensation.

Cost and payment for proportionate compensation of substitutes, if any, shall be borne by the member

selected by the governing board, and the member selected by the employee, are paid by the State, unless the district loses, in which case it must bear such costs in addition to all other costs.

II. Evaluation of certificated employees:

This measure provides that the evaluation guidelines, at the board's discretion, be uniform throughout the district, or for compelling reasons, be individually developed for territories or schools.

It specifically provides that the development and adoption of guidelines be a subject of meeting and conferring under the Winton Act.

The certificated employee evaluation criteria is modified as follows:

1. Governing boards shall establish standards of expected student achievement at each grade level in each area of study.

2. Each certificated employee's competency shall be evaluated as it reasonably relates to the progress of students toward the established standards; the performance of those non-instructional duties and responsibilities, as may be prescribed by the board, and the establishment and maintenance of a suitable learning environment within the scope of the employee's responsibility.

3. Boards shall establish evaluation criteria for non-instructional personnel whose responsibilities cannot be evaluated appropriately under criteria for instructional personnel.

4. The evaluation and assessment of certificated employee competence pursuant to this section shall not include the use of publishers' norms established by standardized test.

Appropriates $25,000 for state costs, and waives SB 90 provisions for local costs.

LPC:bh

WAYS & MEANS STAFF ANALYSIS LAST AMENDED [illegible] AUTHOR [illegible] NO. SB 777

CONSULTANT [illegible] DUE 8/26 DEPT. OF FINANCE

FISCAL IMPACT APPROPRIATION STATE COST $25,000 Gen'l. Fund REVENUE LOSS
SB 90 COST

SUBJECT: Public schools: certificated employees: dismissal-evaluation.

BACKGROUND:

I. Dismissal Procedures:

Permanent certificated employees may be dismissed only for specified causes outlined in Education Code Sections 13404 and 13403.5, and upon the filing of written charges and notice of intention to dismiss after 30 days of the date of service. The employee may demand a hearing:

(a) If the causes include acts of criminal syndicalism, conviction of felony or crime involving moral turpitude, physical or mental condition unfitting him to teach children, communist party membership, or advocacy or teaching communism, the hearing is conducted by a hearing officer whose decision is final.

(b) If the cause is immoral or unprofessional conduct, dishonesty, incompetence, evident unfitness for service, or persistent refusal to obey school rules, the hearing is conducted by a 3 member Commission on Professional Competence, whose decision is deemed to be the decision of the governing board. One of the members of the Commission is a hearing officer, one is selected by the district, and one by the employee.

If the employee is dismissed, the governing board and the employee share the cost of the hearing, including the hearing officer. Each handles their own attorney fees.

If the employee is retained, the governing board pays all expenses, including reasonable attorney fees incurred by the employee.

II. [illegible] certificated [illegible]

[illegible]

[illegible]

WAYS & MEANS STAFF ANALYSIS LAST AMENDED _____ AUTHOR _____ NO. ___

CONSULTANT _____ DUE _____ DEPT. OF FINANCE _____

FISCAL IMPACT (Page 2) APPROPRIATION } STATE COST _____ REVENUE LOSS _____
SB 90 COST _____

(b) Assessment of personnel competence.

(c) Assessment of duties normally required in addition to daily assignments.

(d) Procedures and techniques for determining whether the employee is maintaining proper control and preserving a suitable learning environment.

ANALYSIS:

This measure specifies that a charge must set forth in ordinary and concise language the acts or omissions alleged, to the end that the respondent may prepare a defense. It must specify the statutes and rules alleged to have been violated, but may not merely phrase the charges in the language of the statutes and rules.

I. The dismissal hearing procedure is modified as follows:

(1) The hearing date shall be established after consultation with the employee and the governing board or its representatives.

(2) In all cases, discovery shall be completed in 7 calendar days rather than one week, prior to the set hearing date.

(3) A continuance may extend the statutory limit for commencement of the hearing (60 days), but the extension cannot include time attributable to an unlawful refusal by either party to allow discovery.

(4) All hearings for all cases will be conducted by the Commission on Teacher Competency who is presumed to order is charged. The decision of the panel is final.

(5) A member of the Commission on Teacher Competency elected by the teachers in the district:

(a) May not be related to the employee.

(b) May not be employed in the initiating district.

WAYS & MEANS STAFF ANALYSIS LAST AMENDED _____ AUTHOR _____ NO. _____

CONSULTANT _____ DUE _____ DEPT. OF FINANCE _____

FISCAL IMPACT APPROPRIATION } STATE COST _____ REVENUE LOSS _____
SB 90 COST _____

(c) Must hold a valid credential, and

(d) Must have the required 5 year's experience within the last 10 years in the discipline of the employee.

(6) A member selected to serve on the Commission who is an employee of any school district will continue to receive regular salary from his own district, and that district will absorb the cost. No additional compensation is permitted, unless the member is on vacation or summer recess, in which case he will receive proportionate compensation.

Costs of payment for proportionate compensation, expenses of substitutes, if any, and expenses incurred by the member selected by the governing board, and the member selected by the employee, are paid by the State, unless the district loses, in which case it must bear such costs in addition to all other costs.

II. Evaluation of certificated employees:

This measure provides that the evaluation guidelines, at the board's discretion, be uniform throughout the district, or for compelling reasons, be individually developed for territories or schools.

It specifically provides that the development and adoption of guidelines be a subject of meeting and conferring under the Winton Act.

The certificated employee evaluation criteria is modified as follows:

1. Governing boards shall establish standards of expected student achievement at each grade level in each area of study.

2. Each certificated employee's competency shall be evaluated as it reasonably relates to the progress of students toward the established standards, the performance of other instructional duties and responsibilities, as may be prescribed by the board, and the establishment and maintenance of a suitable learning environment within the scope of [illegible] responsibility.

S & MEANS STAFF ANALYSIS LAST AMENDED _____ AUTHOR _____ NO. _____

CONSULTANT _____ DUE _____ DEPT. OF FINANCE _____

FISCAL IMPACT APPROPRIATION } STATE COST _____ REVENUE LOSS _____
SB 90 COST _____

3. Boards shall establish evaluation criteria for non-instructional personnel whose responsibilities cannot be evaluated appropriately under criteria for instructional personnel.

4. The evaluation and assessment of certificated employee competence pursuant to this section shall not include the use of publishers' norms established by standardized test.

FISCAL IMPACT:
The measure appropriates $25,000 for reimbursement of expenses of the members of the Commission on Professional Competence which occur during summer recess or vacation periods. The measure waives further SB 90 requirement for any additional state mandated local costs. There would be an undeterminable additional local cost as a result of this measure.

2128

Legislative Analyst
August 22, 1975

ANALYSIS OF SENATE BILL NO. 777 (Stull)
As Amended in Assembly August 19, 1975
1975-76 Session

SB 777 (Am. 8/19/75)

Fiscal Effect:

Cost: General Fund appropriation of $25,000 to the State Controller to reimburse a portion of state mandated local costs pertaining to school district certificated employee dismissal proceedings. Bill disclaims any state obligation for remainder of such costs and for any state mandated local costs related to another provision of the bill which would include school district certificated employees in evaluation and assessment requirements.

Revenue: None.

Analysis:

This bill would modify existing law provisions concerning (1) dismissal proceedings by a school district governing board against a permanent certificated employee of the district, and (2) evaluation and assessment of the performance of school district certificated personnel.

Concerning dismissal proceedings the bill would specifically require:

1. Notice of suspension and intention to dismiss and charges filed with a dismissal notice must meet specified requirements.

2. Hearing dates and extensions must meet specified requirements.

3. Hearings must be conducted by the Commission on Professional Competence and not solely by a hearing officer.

Yellow book p69

SB 777 (Contd.)

4. Commission members must meet specified requirements such as not be related to the charged employee and not be employees of the same school district.

5. Commission members who are school district employees must receive specified remuneration.

6. School district governing boards, accused employees, and the State Controller must share in specified expenses related to a hearing if the employee is dismissed. If the employee is not dismissed, the school board must pay all expenses.

7. Expenses to be reimbursed by the State Controller include paying commission members from the General Fund for expenses and cost of substitutes when school is in session, or compensation equivalent to regular salary and fringe benefits for participation during summer recess or vacation periods. The bill appropriates $25,000 from the General Fund for this purpose.

Concerning evaluation and assessment of certificated personnel the bill would specifically:

1. Include certificated personnel of schools operated by county superintendents of schools.

2. Require evaluation of certificated non-instructional personnel by specified means.

3. Prohibit use of publisher's norms established in connection with standardized tests in evaluation and assessment guidelines.

4. Make other technical modifications to evaluation and assessment procedures.

SB 777 (Contd.)

Mandated Local Program. There would be undetermined increased local costs due to the requirement for reimbursement of expenses and compensation of members of the Commission on Professional Competence. Part would be covered by a General Fund appropriation of $25,000 to the State Controller. The Department of Finance estimates this cost at $25,000 - $40,000 annually. The bill disclaims any state obligation for the remainder of such costs which would be an estimated $6,000 - $16,000 annually.

There would also be undetermined increased local costs due to the addition of certificated employees of county superintendents of schools and non-instructional certificated employees in evaluation and assessment requirements. The bill disclaims any state obligation and makes no appopriation for such costs. The Department of Finance estimates minor or negligible additional local costs because of this added requirement.

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SB 777

ASSEMBLY THIRD READING

SB 777 (Stull) As amended: 19 August 1975

SENATE VOTE 22-1

ASSEMBLY ACTIONS:

COMMITTEE	ED.	VOTE	8-2	COMMITTEE	W. & M.	VOTE	13-0
Ayes:				Ayes:			
Nays:	Hughes, Vasconcellos			Nays:			

DIGEST

This bill would modify existing law concerning dismissal proceedings by a school district governing board against a permanent certificated employee of the district, and the evaluation and assessment of the performance of school district personnel.

FISCAL EFFECT

According to the Legislative Analyst, there would be undetermined increased local costs due to the requirement for reimbursement of expenses and compensation of members of the Commission on Professional Competence. Part would be covered by a General Fund appropriation of $25,000 to the State Controller. The Department of Finance estimates this cost at $25,000 - $40,000 annually. The bill disclaims any state obligation for the remainder of such costs which would be an estimated $6,650 - $10,000 annually.

There would also be undetermined increased local costs due to the addition of certificated employees of county superintendents of schools and non-instructional certificated employees in evaluation and assessment requirements. The bill disclaims any state obligation and makes no appropriation for such costs. The Department of Finance estimates minor or negligible additional local costs because of this added requirement.

COMMENTS

1. Dismissal Procedures:

Under existing law, permanent certificated employees may be dismissed only for specified causes and upon filing of written charges and notice of intention to dismiss after 30 days of the date of service. The employee may demand a hearing:

(a) If the causes include acts of criminal syndicalism, conviction of felony or crime involving moral turpitude, physical or mental condition unfitting him to teach children, membership in Communist Party, or advocacy of forcible overthrow, the hearing is conducted by a hearing officer whose decision is final.

(continued)

(b) If the cause is immoral or unprofessional conduct, dishonesty, incompetence, evident unfitness for service, or persistent refusal to obey school rules, the hearing is conducted by a three member Commission on Professional Competence, whose decision is deemed to be the decision of the governing board. One of the members of the Commission is a hearing officer, one is selected by the district, and one by the employee.

If the employee is dismissed, the governing board and the employee share the cost of the hearing, including the hearing officer. Each handles their own attorney fees.

If the employee is retained, the governing board pays all expenses, including reasonable attorney fees incurred by the employee.

II. Evaluation of Certificated Employees:

Current law provides that the governing board of each school district (K-12) shall develop and adopt specific guidelines for the evaluation of certificated personnel to include:

(a) Standards of expected student progress in each area of study and techniques for assessment of such progress.
(b) Assessment of personnel competence.
(c) Assessment of duties normally required in addition to daily assignments.
(d) Procedures and techniques for determining whether the employee is maintaining proper control and preserving a suitable learning environment.

This bill specifies that a charge must set forth in ordinary and concise language the acts or omissions alleged, to the end that the respondent may prepare a defense. It must specify the statutes and rules alleged to have been violated, but may not merely phrase the charges in the language of the statutes and rules. The bill requires that such charges contain the information required for accusations by the Administrative Procedure Act.

I. The dismissal hearing procedure is modified as follows:

(1) The hearing date shall be established after consultation with the employee and the governing board or its representatives.
(2) In all cases, discovery shall be completed seven calendar days rather than one week, prior to the set hearing date.
(3) A continuance may extend the statutory limit for commencement of the hearing (60 days), but the extension cannot include time attributable to an unlawful refusal by either party to allow discovery.
(4) All hearings for all causes will be conducted by the Commission on Professional Competence when a permanent teacher is charged. The decision of the Commission is final.
(5) A member of the Commission on Professional Competence selected by the teacher or the district

SB 777
Page 2

(a) May not be related to the employee.
(b) May not be employed in the initiating district.
(c) Must hold a valid credential, and
(d) Must have the required five year's experience within the last 10 years in the discipline of the employee.

(6) A member selected to serve on the Commission who is an employee of any school district will continue to receive regular salary from his own district, and that district will absorb the cost. No additional compensation is permitted, unless the member is on vacation or summer recess, in which case he will receive proportionate compensation.

Costs of payment for proportionate compensation, expenses of substitutes, if any, and expenses incurred by the member selected by the governing board, and the member selected by the employee, are paid by the State, unless the district loses, in which case it must bear such costs in addition to all other costs.

II. Evaluation of certificated employees:

This measure provides that the evaluation guidelines, at the board's discretion, be uniform throughout the district, or for compelling reasons, be individually developed for territories or schools.

specifically provides that the development and adoption of guidelines be a subject of meeting and conferring under the Winton Act.

certificated employee evaluation criteria is modified as follows:

(1) Governing boards shall establish standards of expected student achievement at each grade level in each area of study.
(2) Each certificated employee's competency shall be evaluated as it reasonably relates to the progress of students toward the established standards; the performance of those non-instructional duties and responsibilities, as may be prescribed by the board, and the establishment and maintenance of a suitable learning environment within the scope of the employee's responsibility.
(3) Boards shall establish evaluation criteria for non-instructional personnel whose responsibilities cannot be evaluated appropriately under criteria for instructional personnel.
(4) The evaluation and assessment of certificated employee competence pursuant to this section shall not include the use of publishers' norms established by standardized tests.

LEGISLATIVE HISTORY
Statutes 1986, Chapter 393
Assembly Bill 3878

SAN DIEGO CITY SCHOOLS
LEGISLATIVE OFFICES
1100 K Street, Suite 402, Sacramento, CA 95814 (916) 444-7242
EDUCATION CENTER
4100 Normal Street, San Diego, CA 92103-2682 (619) 293-8331

THOMAS W. PAYZANT
Superintendent
H. DAVID FISH
Legislative Programs Director

April 4, 1986

The Honorable Teresa Hughes
Chairman, Assembly Education Committee
California State Legislature
State Capitol Building, Room 4016
Sacramento, California 95814

RE: Assembly Bill 3878 (Chacon) - Certificated nonstructional employees

Dear Chairman Hughes:

Assembly Member Chacon has introduced Assembly 3878 at the request of the San Diego Unified School District. The District seeks the legislation to extend by 45 days the time period for the yearly evaluation of only those administrators who are on 12-month assignments. By extending the time for evaluation of these employees, it will reduce the number of evaluations that now must be performed by the end of the 10-month school year and provide time for more thorough, thoughtful and complete evaluations of all certificated personnel.

Your "aye" vote for AB 3878 will permit school districts to conduct evaluations in a more efficient and equitable manner.

Sincerely,

H. David Fish
Legislative Programs Director

HDF:pko

Attachment

cc: Assembly Member Chacon
Members, Assembly Education Committee
Janet Jamieson, Policy Consultant, Assembly Republican Caucus

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THOMAS W. PAYZANT
Superintendent
H. DAVID FISH
Legislative Programs Director

ASSEMBLY BILL 3878 - CHACON

Assembly Bill 3878 extends the time period for evaluating administrators on a 12-month assignment by approximately 45 days. Currently all certificated employees must be evaluated 30 days before the end of the school year. AB 3878 requires that 12-month administrators receive their evaluation no later June 30th.

The current evaluation timeline was based on the 10-month school year and assumed that all certificated personnel completed their assignment at the end of the school year. Some 12-month certificated administrators in San Diego Unified School District are responsible for evaluating principals and vice-principals at school sites and also must complete their own evaluation process at the same time. Extending the time to complete their evaluations would mean that a more thorough, thoughtful and complete evaluation could be conducted.

Additionally, school districts are not reqired to evaluate classified administrators 30 days before the end of the school year. It is possible for a school district to have different evaluation schedules for classified and certificated administrators. San Diego Unified School District has attempted to have the same process for all administrators. AB 3878 will assist in maintaining an equitable evaluation process by permitting the same amount of time to evaluate all administrators.

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ASSEMBLY EDUCATION COMMITTEE
REPUBLICAN ANALYSIS

AB 3878 (Chacon) -- CERTIFICATED NONINSTRUCTIONAL EMPLOYEES
Version: Original. Vice-Chairman: Chuck Bader
Recommendation: Oppose
Vote: Majority

Summary: This bill would address a problem in San Diego Unified School District, by extending for 45 days the current requirement for the evaluation of certificated noninstructional administrators on 12 month contracts.
Fiscal effect: Unknown

Supported by Opposed by Governor's position:

Comments: Current statue requires evaluations of noninstructional certificated employees on 12 month contracts to be conducted within 30 days before the last school day. This apparently is a problem for San Diego because all evaluations are jammed in at the end of the school year. They feel it would make more sense to allow extra time to evaluate those on 12 month contracts and spread the process out over a longer time frame. Why is this provision even in code? We should instead eliminate all reference to timelines for such evaluation of employees in code. This should be a local issue. It is not clear that this bill warrants changing current statute, since the sponsor does not know of any other district that has experienced such a problem.

Assembly Republican Committee Vote
Education -- 4/8/86
() Ayes:
Noes:
N.V.:
Abs.:
Consultant: Janet Jamieson

AB3878

Honorable Peter Chacon
Member of the Assembly
State Capitol, Room 5119
Sacramento, CA 95814

DEPARTMENT	AUTHOR	BILL NUMBER
Finance	Chacon	AB 3878
SPONSORED BY	RELATED BILLS	AMENDMENT DATE
		Original

BILL SUMMARY

AB 3878 establishes a separate performance evaluation timeframe for certificated noninstructional personnel employed on a twelve month basis.

SUMMARY OF COMMENTS

AB 3878 would provide greater flexibility for school districts in scheduling workload associated with evaluation of certificated staff by establishing a later due date for evaluations of certificated noninstructional personnel employed on a 12-month basis.

FISCAL SUMMARY--STATE LEVEL

Code/Department Agency or Revenue Type	SO LA CO RV	(Fiscal Impact by Fiscal Year) (Dollars in Thousands) FC 1985-86	FC 1986-87	FC 1987-88	Code Fund
None					

FISCAL SUMMARY--LOCAL LEVEL

Reimbursable Expenditures	None
Non-Reimbursable Expenditures	None
Revenues	None

ANALYSIS

A. Specific Findings

Under current law all certificated instructional and noninstructional personnel are evaluated and receive a copy of their evaluation at least 30 days before the last scheduled school day. In addition, a meeting is required between the evaluator and the certificated employee before the last scheduled school day.

AB 3878 creates a separate timeframe for this process for certificated noninstructional employees employed on a twelve month basis.

(continued)

POSITION: Department Director Date

Neutral, suggest amendment

Principal Analyst	Date	Program Budget Manager	Date	Governor's Office
(344) 34	4-21-86			Position noted
Diane M. Cummins				Position approved
				Position disapproved
				by: date:

E:S/0073E/2/(04-21-86)

BILL ANALYSIS/ENROLLED BILL REPORT Form DF-43 (Rev 03/86 500 Bu)

BILL ANALYSIS/ENROLLED BILL REPORT--(Continued) Form DF-43

AUTHOR	AMENDMENT DATE	BILL NUMBER
Chacon	Original	AB 3878

ANALYSIS

A. Specific Findings (continued)

Under AB 3878 certificated noninstructional personnel employed on a 12 month basis would receive a copy of their evaluations no later than June 30 and a meeting between the evaluator and employee would occur prior to July 30.

This would increase the flexibility of districts in scheduling workload associated with this requirement.

B. Fiscal Analysis

There are no State operational costs associated with AB 3878.

Although AB 3878 is identified as containing a State-mandated program, in the judgment of the Department of Finance no new program or increased level of service is required by AB 3878 and, therefore, there is no mandated program. See Local Mandate Analysis.

E:S/0073E/3/(04-20-86)

SUGGESTED AMENDMENT

AB 3878, Original

Page 3, Delete lines 2 through 10.

Page 3, after line one insert

SEC. 2. No appropriation is made by this act pursuant to Section 6 of Article XIII B of the California Constitution because this act does not mandate a new program or higher level of service on local government. It is recognized, however, that a local agency or school district may pursue any remedies to obtain reimbursement available to it under Chapter 4 (commencing with Section 17550) of Part 7 of Division 2 of Title 2 of the Government Code.

E:G/5/0073E/(4-21-86)

Form DF-44R (Rev. 4/86 W 500)

Local Cost ESTIMATE Department of Finance	NO. 1 ISSUE DATE APR 28 1986	BILL NUMBER AB 3878
	AUTHOR Chacon	DATE LAST AMENDED Original

I. SUMMARY OF LOCAL IMPACT:

AB 3878 establishes a separate performance evaluation timeframe for certificated noninstructional personnel employed on a twelve month basis.

II. FISCAL SUMMARY--LOCAL LEVEL

	1985-86	1986-87	1987-88
		(Dollars in Thousands)	
Reimbursable Expenditures:	--	--	--
Non-Reimbursable Expenditures:	--	--	--
Revenues:	--	--	--

III. ANALYSIS:

Under current law all certificated instructional and noninstructional personnel are evaluated and receive a copy of their evaluation at least 30 days before the last scheduled school day. In addition, a meeting is required between the evaluator and the certificated employee before the last scheduled school day.

AB 3878 creates a separate timeframe for this process for certificated noninstructional employees.

Under AB 3878 certificated noninstructional personnel employed on a 12 month basis would receive a copy of their evaluations no later than June 30 and a meeting between the evaluator and employee would occur prior to July 30.

The impact of AB 3878 is to schedule the existing evaluation workload over a broader span of time by staggering evaluation due dates allowing school districts to schedule workload to lessen the impact of annual evaluations.

Although AB 3878 provides that no reimbursement ~~shall~~ be made from the State-mandates Claims Fund, in the judgment of Department of Finance AB 3878 does not mandate a new program or higher level of service on local government and a general disclaimer would be more appropriate and is attached as a suggested amendment.

PREPARED	Date	REVIEWED	Date	APPROVED	Date
PP		Diane M. Cummins	4-21-86		4/22/86

E:S/0073E/4/(04-21-86)

Legislative Analyst
April 24, 1986

ANALYSIS OF ASSEMBLY BILL NO. 3878 (Chacon)

AB 3878

1985-86 Session

Fiscal Effect:

Cost: Mandated Local Program. No identifiable mandate. No state-reimbursable.

Revenue: None.

Analysis:

This bill amends provisions of existing law relating to required evaluations of certificated employees.

Existing law requires the governing board of each school district to evaluate and assess the competency of certificated employees and within 30 days before the last school day to (1) transmit a copy of the evaluation and assessment to the certificated employee, and (2) discuss the evaluation with the employee.

This bill specifies that for those certificated employees who are noninstructional and are employed on a 12-month basis (generally, school principals), the governing board shall (1) transmit a copy of the evaluation to the employee by June 30, and (2) discuss the evaluation with the employee by July 30 of the year in which the evaluation is made.

Fiscal Effect

Mandated Local Program. Our review indicates that this bill does not mandate any new duties on school district governing boards, but simply extends the date by which evaluations of certain certificated employees must be completed. Consequently, any costs associated with this bill would not be state-reimbursable.

33/s3

C

AB 3878 (Chacon)
4/26/86

ASSEMBLY EDUCATION COMMITTEE
REPUBLICAN ANALYSIS

AB 3878 (Chacon) -- CERTIFICATED NONINSTRUCTIONAL EMPLOYEES
Version: Original. Vice-Chairman: Chuck Bader
Recommendation: Support
Vote: Majority

Summary: This bill specifies that for those certificated employees who are noninstruction and are employed on a 12-month basis (generally, school principals), the governing board shall (1) transmit a copy of the evaluation to the employee by June 30, and (2) discuss the evaluation with the employee by July 30 of the year in which the evaluation is made. Fiscal effect: No costs. Department of Finance requests amendment disclaiming any reimburaable costs.

Supported by Opposed by Governor's position:

Comments: Existing law requires the governing board of each school district to evaluate and assess the competency of certificated employees and within 30 days before the last school day to (1) transmit a copy of the evaluation and assessment to the certificated employee, and (2) discuss the evaluation with the employee.

Assembly Republican Committee Vote
Education -- 4/8/86
(8-0) Ayes: Allen, Leonard, Bader
Noes:
N.V.:
Abs.: Bradley, McClintock
Consultant: Janet Jamieson/Stevenson

SENATE COMMITTEE ON EDUCATION

Staff Analysis of
AB 3878 (Chacon)
As Introduced February 21, 1986

Summary

This bill modifies the timelines for required evaluations of certificated, noninstructional employees employed on a 12-month basis.

Background

Current law requires school boards to evaluate the competency of all certificated employees. The law also requires that a copy of the evaluation be provided to the employee within 30 days before the last day of school and that the certificated employee meet with the evaluator to discuss the evaluation before the last day of school.

Analysis:

This bill:

1) Delays the evaluation deadline for certificated noninstructional employees who are employed on a 12 month basis (e.g. school principals, district superintendents, assistant superintendents, and other central district office personnel). The bill requires school boards to provide these employees with copies of their evaluations by June 30 of the year in which the evaluation is made.

2) Requires the certificated noninstructional employee and the evaluator to hold a meeting before July 30 to discuss the evaluation.

Comments

The San Diego Unified School District, the bill's sponsor, explains that the evaluation deadline in current law assumes that employees work on a ten month school year. Noninstructional certificated employees who work 12 months a year are often not finished with some of their important duties (such as assessing school site personnel) by the end of the school year and thus an evaluation at that time is premature.

Sponsor

San Diego Unified School District

KL:kw
5/28/86

REVISED

ANALYSIS OF ASSEMBLY BILL NO. 3878 (Chacon)

1985-86 Session

AB 3878 REVISED

Fiscal Effect:

Cost: Mandated Local Program. No identifiable mandate; not state-reimbursable.

Revenue: None.

Analysis:

This bill amends provisions of existing law relating to required evaluations of certificated employees.

Existing law requires the governing board of each school district to evaluate and assess the competency of certificated employees and within 30 days before the last school day to (1) transmit a copy of the evaluation and assessment to the certificated employee, and (2) discuss the evaluation with the employee.

This bill specifies that for those certificated employees who are noninstructional and are employed on a 12-month basis (generally, school principals), the governing board shall (1) transmit a copy of the evaluation to the employee by June 30, and (2) discuss the evaluation with the employee by July 30 of the year in which the evaluation is made.

AB 3078--cont'd

Fiscal Effect

Mandated Local Program. Our review indicates that this bill does not mandate any new duties on school district governing boards, but simply extends the date by which evaluations of certain certificated employees must be completed. Consequently, any costs associated with this bill would not be state-reimbursable.

33/s3

Legislative Analyst
April 24, 1986

ANALYSIS OF ASSEMBLY BILL NO. 3878 (Chacon)

1985-86 Session

Fiscal Effect:

Cost: Mandated Local Program. No identifiable mandate. No state-reimbursable.

Revenue: None.

Analysis:

This bill amends provisions of existing law relating to required evaluations of certificated employees.

Existing law requires the governing board of each school district to evaluate and assess the competency of certificated employees and within 30 days before the last school day to (1) transmit a copy of the evaluation and assessment to the certificated employee, and (2) discuss the evaluation with the employee.

This bill specifies that for those certificated employees who are noninstructional and are employed on a 12-month basis (generally, school principals), the governing board shall (1) transmit a copy of the evaluation to the employee by June 30, and (2) discuss the evaluation with the employee by July 30 of the year in which the evaluation is made.

Fiscal Effect

Mandated Local Program. Our review indicates that this bill does not mandate any new duties on school district governing boards, but simply extends the date by which evaluations of certain certificated employees must be completed. Consequently, any costs associated with this bill would not be state-reimbursable.

Supreme Court of California

WESTERN SECURITY BANK, N.A., Petitioner,
v.
THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent;
BEVERLY HILLS BUSINESS BANK et al., Real Parties in Interest. VISTA PLACE ASSOCIATES et al., Petitioners,
v.
THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; WESTERN SECURITY BANK,
N.A., et al., Real Parties in Interest.

No. S037504.

Apr 7, 1997.

SUMMARY

After a partnership went into default on a loan it had obtained from a bank, the bank and the partnership modified the terms of the loan, and the general partners obtained unconditional, irrevocable standby letters of credit in favor of the bank as additional collateral. When the partnership again went into default, the bank foreclosed nonjudicially on the real property securing the loan and then presented the letters of credit to the issuer so as to cover the unpaid deficiency. The issuer brought an action for declaratory relief, seeking a declaration that it was not obligated to accept or honor the bank's tender of the letters of credit or, alternatively, a declaration that, if it was required to honor the letters, the partners were obligated to reimburse the issuer. The trial court entered a judgment decreeing that the issuer was required to honor the letters of credit and that the issuer was not barred from severally seeking reimbursement from the partners. (Superior Court of Los Angeles County, No. BC031239, Ernest George Williams, Judge.) The Court of Appeal, Second Dist., Div. Three, No. B066488, reversed, concluding that, under Code Civ. Proc., § 580d, part of the antideficiency law, the issuer of a standby letter of credit, provided to a real property lender by a debtor as additional security, may decline to honor it after receiving notice that it is to be used to discharge a deficiency following the beneficiary-lender's nonjudicial foreclosure on real property. Thereafter, the Legislature enacted urgency legislation (Sen. Bill No. 1612), providing that an otherwise conforming draw on a letter of credit does not contravene the antideficiency laws and that those laws afford no basis for refusal to honor a draw (Code Civ. Proc., § 580d). After the Supreme Court granted review and returned the matter to the Court of Appeal for reconsideration in light of the urgency legislation, the Court of Appeal concluded the legislation constituted a substantial change in existing law and thus was prospective only and had no impact on the Court of Appeal's earlier conclusions regarding the parties' rights and obligations. *233

The Supreme Court reversed the judgment of the Court of Appeal and remanded. The court held that the Court of Appeal erred in concluding that the enactment of Sen. Bill No. 1612 had no effect on this case. The Legislature explicitly intended to abrogate the Court of Appeal's prior decision to clarify the parties' obligations when letters of credit support loans also secured by real property. The Court of Appeal mistook standby letters of credit for an attempt to evade the antideficiency and foreclosure laws by seeing them only as a form of guaranty, and also overlooked that the parties specifically intended the standby letters of credit to be additional security. When viewed as additional security for a note also secured by real property, a standby letter of credit does not conflict with the statutory prohibition of deficiency judgments. Further, the Legislature manifestly intended the respective obligations of the parties to a letter of credit transaction to remain unaffected by the antideficiency laws, whether those obligations arose before or after enactment of Sen. Bill No. 1612. Since the Legislature's action constituted a clarification of the state of the law before the Court of Appeal's decision, rather than a change in the law, the legislation had no impermissible retroactive consequences, and it governed this case. (Opinion by Chin, J., with George, C. J., Baxter, and Brown, JJ., concurring. Concurring and dissenting opinion by Werdegar, J. Concurring and dissenting opinion by Mosk, J., with Kennard, J., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1a, 1b, 1c) Letters of Credit § 10--Duties and Privileges of Issuer--Letters Presented to Cover Deficiency--Following Nonjudicial Foreclosure--

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Retroactivity of New Legislation.

In an action brought by the issuer of letters of credit against a bank that had loaned money to a partnership secured by real property, and against the partnership and its general partners, the Court of Appeal erred in concluding that the Legislature's postjudgment enactment of urgency legislation (Sen. Bill No. 1612), providing that an otherwise conforming draw on a letter of credit does not contravene the antideficiency laws and that those laws afford no basis for refusal to honor a draw (Code Civ. Proc., § 580.5), had no effect on a prior Court of Appeal holding in this case to the effect that, under Code Civ. Proc., § 580d, the issuer of a standby letter of credit, provided to a real property lender by a debtor as additional security, may decline to honor it after receiving notice that it is to be used to discharge a deficiency following the beneficiary-lender's nonjudicial foreclosure on real property. The partners obtained the letters *234 of credit as additional collateral for repayment of the loan and presented the letters for payment to the issuer after the bank foreclosed nonjudicially on the real property. The Legislature explicitly intended to abrogate the Court of Appeal's prior decision to clarify the parties' obligations when letters of credit support loans also secured by real property. The Court of Appeal mistook standby letters of credit for an attempt to evade the antideficiency and foreclosure laws by seeing them only as a form of guaranty, and also overlooked that the parties specifically intended the standby letters of credit to be additional security. When viewed as additional security for a note also secured by real property, a standby letter of credit does not conflict with the statutory prohibition of deficiency judgments. Further, the Legislature manifestly intended the respective obligations of the parties to a letter of credit transaction to remain unaffected by the antideficiency laws, whether those obligations arose before or after enactment of Sen. Bill No. 1612. Since the Legislature's action constituted a clarification of the state of the law before the Court of Appeal's decision, rather than a change in the law, the legislation had no impermissible retroactive consequences, and it governed this case.

[See 3 Witkin, Summary of Cal. Law (9th ed. 1987) Negotiable Instruments, § 11.]

(2) Statutes § 5--Operation and Effect--Retroactivity.

Statutes do not operate retrospectively unless the Legislature plainly intended them to do so. A statute has retrospective effect when it substantially changes the legal consequences of past events. A statute does not operate retrospectively simply because its application depends on facts or conditions existing before its enactment. When the Legislature clearly intends a statute to operate retrospectively, the courts are obliged to carry out that intent unless due process considerations prevent them from doing so.

(3) Statutes § 5--Operation and Effect--Retroactivity--Amendments-- Purpose--Change in Law or Clarification.

A statute that merely clarifies, rather than changes, existing law does not operate retrospectively even if applied to transactions predating its enactment. The courts assume that the Legislature amends a statute for a purpose, but that purpose need not necessarily be to change the law. The courts' consideration of the surrounding circumstances can indicate that the Legislature made material changes in statutory language in an effort only to clarify a statute's true meaning. Such a legislative act has no retrospective effect because the true meaning of the statute remains the *235 same. One such circumstance is when the Legislature promptly reacts to the emergence of a novel question of statutory interpretation. An amendment that in effect construes and clarifies a prior statute must be accepted as the legislative declaration of the meaning of the original act, where the amendment was adopted soon after the controversy arose concerning the proper interpretation of the statute. In such a case, the amendment may logically be regarded as a legislative interpretation of the original act-a formal change-rebutting the presumption of substantial change. Even so, a legislative declaration of an existing statute's meaning is neither binding nor conclusive in construing the statute. Ultimately, the interpretation of a statute is an exercise of the judicial power that the Constitution assigns to the courts.

(4) Statutes § 5--Operation and Effect--Retroactivity--Legislative Intent-- Change in Law or Clarification.

A subsequent expression of the Legislature as to the intent of a prior statute, although not binding on the court, may properly be used in determining the effect of a prior act. Moreover, even if the court does not accept the Legislature's assurance that an unmistakable change in the law is merely a clarification, the declaration of intent may still effectively reflect the Legislature's purpose to achieve a retrospective change. Whether a statute should apply retrospectively or only prospectively is,

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in the first instance, a policy question for the legislative body enacting the statute. Thus, where a statute provides that it clarifies or declares existing law, such a provision is indicative of a legislative intent that the amendment apply to all existing causes of action from the date of its enactment. In accordance with the general rules of statutory construction, the court must give effect to this intention unless there is some constitutional objection to it.

(5) Letters of Credit § 10--Duties and Privileges of Issuer--Independence Principle.
The liability of the issuer of a letter of credit to the letter's beneficiary is direct and independent of the underlying transaction between the beneficiary and the issuer's customer. Under the independence principle, a letter of credit is an independent obligation of the issuing bank rather than a form of guaranty or a surety obligation (Cal. U. Com. Code, § 5114, subd. (1)). Thus, the issuer of a letter of credit cannot refuse to pay based on extraneous defenses that might have been available to its customer. Absent fraud, the issuer must pay upon proper presentment, regardless of any defenses the customer may have against the beneficiary based in the underlying transaction.

(6) Letters of Credit § 10--Duties and Privileges of Issuer--Independence Principle--Effect of Draw on Letter of Credit.
A standby *236 letter of credit is a security device created at the request of the customer/debtor that is an obligation owed independently by the issuing bank to the beneficiary/creditor. A creditor that draws on a letter of credit does no more than call on all of the security pledged for the debt. When it does so, it does not violate the prohibition of deficiency judgments.

COUNSEL

Ervin, Cohen & Jessup, Allan B. Cooper, Steven A. Roseman and Garee T. Gasperian for Petitioner and Real Parties in Interest Western Security Bank, N.A.

William K. Wilburn as Amicus Curiae on behalf of Petitioner and Real Parties in Interest Western Security Bank, N.A.

Walker, Wright, Tyler & Ward, John M. Anglin and Robin C. Campbell for Petitioners Vista Place Associates et al.

R. Stevens Condie and Charles T. Collett as Amici Curiae on behalf of Petitioners Vista Place Associates et al.

No appearance for Respondent.

Saxon, Dean, Mason, Brewer & Kincannon, Lewis, D'Amato, Brisbois & Bisgaard, Arter & Hadden, Eric D. Dean, Steven J. Coté, Robert S. Robinson and Michael L. Coates for Real Parties in Interest Beverly Hills Business Bank.

Gibson, Dunn & Crutcher, Dennis B. Arnold, Hill, Wynne, Troop & Meisinger, Neil R. O'Hanlon, Cadwalader, Wickersham & Taft, Robert M. Eller, Joseph M. Malinowski, Kenneth G. McKenna, Michael A. Santoro, John B. McDermott, Kenneth G. McKenna, John C. Kirkland, Stroock & Stroock & Lavan, Julia B. Strickland, Bennett J. Yankowitz, Chauncey M. Swalwell, Brobeck, Phleger & Harrison, George A. Hisert, Jeffrey S. Turner, John Francis Hilson, G. Larry Engel, Frederick D. Holden, Jr., and Theodore W. Graham as Amici Curiae on behalf of Real Parties in Interest Beverly Hills Business Bank.

CHIN, J.

This case concerns the extent to which two disparate bodies of law interact when standby letters of credit are used as additional support for *237 loan obligations secured by real property. On one side we have California's complex web of foreclosure and antideficiency laws that circumscribe enforcement of obligations secured by interests in real property. On the other side is the letter of credit law's "independence principle," the unique characteristic of letters of credit essential to their commercial utility.

The antideficiency statute invoked in this case is Code of Civil Procedure section 580d. That section precludes a judgment for any loan balance left unpaid after the lender's nonjudicial foreclosure under a power of sale in a deed of trust or mortgage on real property. (See *Roseleaf Corp. v. Chierighino* (1963) 59 Cal.2d 35, 43-44 [27 Cal.Rptr. 873, 378 P.2d 97].) [FN1] The independence principle, in summary form, makes the letter of credit issuer's obligation to pay a draw conforming to the letter's terms completely separate from, and not contingent on, any underlying contract between the issuer's customer and the letter's beneficiary. (See, e.g., Cal. U. Com. Code, § 5114, subd. (1); *San Diego Gas & Electric Co. v. Bank*

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Leumi (1996) 42 Cal.App.4th 928, 933-934 [50 Cal.Rptr.2d 20].) [FN2]

FN1 In pertinent part, Code of Civil Procedure section 580d provides: "No judgment shall be rendered for any deficiency upon a note secured by a deed of trust or mortgage upon real property or an estate for years therein hereafter executed in any case in which the real property or estate for years therein has been sold by the mortgagee or trustee under power of sale contained in the mortgage or deed of trust."

FN2 In 1996, the Legislature completely revised division 5 of the California Uniform Commercial Code, which pertains to letters of credit. (Stats. 1996, ch. 176.) The enactment of chapter 176 repealed the former division 5 and added a new division 5. (Stats. 1996, ch. 176, § § 6, 7.) The new provisions apply to letters of credit issued after the statute's effective date. (Stats. 1996, ch. 176, § 14.) Letters of credit issued earlier are to be dealt with as though the repeal had not occurred. (Stats. 1996, ch. 176, § 15.) We have no occasion in this case to consider the provisions of the new division 5.
The Legislature (Stats. 1996, ch. 497, § 7) later amended a statutory reference found in California Uniform Commercial Code section 5114 as it existed before chapter 176 was enacted. This second legislative action might appear to restore the prior section 5114 from the repealed former division 5 and possibly leave two sections numbered 5114 in the new division 5. (See Cal. Const., art. IV, § 9; Gov. Code, § 9605.) We have no occasion in this case to address the meaning or effect of this seeming incongruity either.
All references to section 5114 in this opinion are to California Uniform Commercial Code section 5114 as it existed before the 1996 legislation.

The Court of Appeal perceived a conflict between the public policies behind Code of Civil Procedure section 580d and the independence principle under the facts of this case. Here, after nonjudicial foreclosure of the real property security for its loan left a deficiency, the lender attempted to draw on the standby letters of credit of which it was the beneficiary. Ordinarily, the issuer's payment on a letter of credit would require the borrower to reimburse the issuer. (See § 5114, subd. (3).) The Court of Appeal considered that this result indirectly imposed on the borrower the equivalent of a *238 prohibited deficiency judgment. The court concluded the situation amounted to a "fraud in the transaction" under section 5114, subdivision (2)(b), one of the limited circumstances justifying an issuer's refusal to honor its letter of credit.

The Legislature soon acted to express a clear, contrary intent. It passed Senate Bill No. 1612 (1993-1994 Reg. Sess.) (hereafter Senate Bill No. 1612) as an urgency measure specifically meant to abrogate the Court of Appeal's holding. (Stats. 1994, ch. 611, § § 5, 6.) In brief, the aspects of Senate Bill No. 1612 we address provided that an otherwise conforming draw on a letter of credit does not contravene the antideficiency laws and that those laws afford no basis for refusal to honor a draw. After the Legislature's action, we returned the case to the Court of Appeal for reconsideration in light of the statutory changes. On considering the point, the Court of Appeal concluded the Legislature's action was prospective only and had no impact on the court's earlier analysis of the parties' rights and obligations. Accordingly, the Court of Appeal reiterated its former conclusions.

We again granted review and now reverse. The Legislature's manifest intent was that Senate Bill No. 1612's provisions, with one exception not involved here, would apply to all existing loans secured by real property and supported by outstanding letters of credit. We conclude the Legislature's action constituted a clarification of the state of the law before the Court of Appeal's decision. The legislation therefore has no impermissible retroactive consequences, and we must give it the effect the Legislature intended.

I. Factual and Procedural Background

On October 10, 1984, Beverly Hills Savings and Loan Association, later known as Beverly Hills Business Bank (the Bank), loaned $3,250,000 to Vista Place Associates (Vista), a limited partnership, to finance the purchase of real property improved with a shopping center. Vista's general partners, Phillip F. Kennedy, Jr., John R. Bradley, and Peter

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M. Hillman (the Vista partners), each signed the promissory note. The loan transaction created a "purchase money mortgage," as it was secured by a "Deed of Trust and Assignment of Rents" as well as a letter of credit.

Vista later experienced financial difficulties, and the loan went into default. Vista asked the Bank to modify the loan's terms so Vista could continue operating the shopping center and repay the debt. The Bank and Vista agreed to a loan modification in February 1987, under which the three Vista partners each obtained an unconditional, irrevocable standby letter of *239 credit in favor of the Bank in the amount of $125,000, for a total of $375,000. These were delivered to the Bank as additional collateral security for repayment of the loan. Under the modification agreement, the Bank was entitled to draw on the letters of credit if Vista defaulted or failed to pay the loan in full at maturity.

Western Security Bank, N.A. (Western) issued the letters of credit at the Vista partners' request. Each partner agreed to reimburse Western if it ever had to honor the letters. Under the agreement, each Vista partner gave Western a $125,000 promissory note. [FN3]

FN3 The parties' arrangements reflected a common use of letters of credit. A letter of credit typically is an engagement by a financial institution (the issuer), made at the request of a customer (also referred to as the applicant or account party) to pay a specified sum of money to another person (the beneficiary) upon compliance with the conditions for payment stated in the letter of credit, i. e., presentation of the documents specified in the letter of credit. (See Gregora, *Letters of Credit in Real Property Finance Transactions* (Spring 1991) 9 Cal. Real Prop. J. 1, 1-2.)
A letter of credit transaction involves at least three parties and three separate and independent relationships: (1) the relationship between the issuer and the beneficiary created by the letter of credit; (2) the relationship between the customer and the beneficiary created by a contract or promissory note, with the letter of credit securing the customer's obligations to the beneficiary under the contract or note; and (3) the relationship between the customer and the issuer created by a separate contract under which the issuer agrees to issue the letter of credit for a fee and the customer agrees to reimburse the issuer for any amounts paid out under the letter of credit. (Gregora, *Letters of Credit in Real Property Finance Transactions*, *supra*, 9 Cal. Real Prop. J. at p. 2; San Diego Gas & Electric Co. v. Bank Leumi, supra, 42 Cal.App.4th at pp. 932-933; see *Voest-Alpine Intern. Corp. v. Chase Manhattan Bank* (2d Cir. 1983) 707 F.2d 680, 682; and *Colorado Nat. Bank, etc. v. Bd. of County Com'rs* (Colo. 1981) 634 P.2d 32, 36-38, for a discussion of the history and structure of letter of credit transactions.)
Letters of credit can function as payment mechanisms. For example, in sales transactions a letter of credit assures the seller of payment when parting with goods, while the conditions for payment specified in the letter of credit (often a third party's documentation, such as a bill of lading) assure the buyer the goods have been shipped before payment is made. (Gregora, *Letters of Credit in Real Property Finance Transactions*, *supra*, 9 Cal. Real Prop. J. at p. 3.) In the letter of credit's role as a payment mechanism, a payment demand occurs in the ordinary course of business and is consistent with full performance of the underlying obligations. (*Ibid.*)
The use of letters of credit has now expanded beyond that function, and they are employed in many other types of transactions in which one party requires assurances the other party will perform. (Gregora, *Letters of Credit in Real Property Finance Transactions*, *supra*, 9 Cal. Real Prop. J. at p. 3.) When used to support a debtor's obligations under a promissory note or other debt instrument, the so-called "standby" letter of credit typically provides that the issuer will pay the creditor when the creditor gives the issuer written certification that the debtor has failed to pay the amount due under the debtor's underlying obligation to the creditor. (*Ibid.*) Thus, a payment demand under a standby letter of credit indicates that there is a problem-either the customer is in financial difficulty, or the beneficiary and the customer are in a dispute. (*Ibid.*)

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In December 1990, the Bank declared Vista in default on the modified loan. The Bank recorded a notice of default on February 13, 1991, and began *240 nonjudicial foreclosure proceedings. (Civ. Code, § 2924.) It then filed an action against Vista seeking specific performance of the rents and profits provisions in the trust deed and appointment of a receiver.

On June 11, 1991, attorneys for the Bank and Vista signed a letter agreement settling the Bank's lawsuit. In that agreement, Vista promised it would "not take any legal action to prevent [the Bank's] drawing upon [the letters of credit] after the Trustee's Sale of the Vista Place Shopping Center, ... provided that the amount of the draw by [the Bank] does not exceed an amount equal to the difference between [Vista's] indebtedness and the successful bid of the Trustee's Sale." Vista promised as well not to take any draw-related legal action against the Bank after the Bank's draw on the letters of credit.

On June 13, 1991, the Bank concluded its nonjudicial foreclosure on the shopping center under the power of sale in its deed of trust. The Bank was the only bidder, and it purchased the property. The sale left an unpaid deficiency of $505,890.16.

That same day, the Bank delivered the three letters of credit and drafts to Western and demanded payment of their full amount, $375,000. The Bank never sought to recover the $505,890.16 deficiency from Vista or the Vista partners. About the time that Western received the Bank's draw demand, it also received a written notice from the Vista partners' attorney. The notice asserted that Code of Civil Procedure section 580d barred Western from seeking reimbursement from the Vista partners for any payment on the letters of credit, and that if Western paid, it did so at its own risk.

Western did not honor the Bank's demand for payment on the letters of credit. Instead, on June 24, 1991, Western filed this declaratory relief action against the Bank, as well as Vista and the Vista partners (collectively, the Vista defendants). Western's complaint sought: (1) a declaration that Western is not obligated to accept or honor the Bank's tender of the letters of credit; or, alternatively, (2) a declaration that, if Western must pay on the letters of credit, the Vista partners must reimburse Western according to the terms of their promissory notes.

The Vista defendants cross-complained against Western for cancellation of their promissory notes and for injunctive relief. In July 1991, the Bank filed a first amended cross-complaint, alleging Western wrongfully dishonored the letters of credit, and the Vista defendants breached the agreement not to take legal action to prevent the Bank's drawing on the letters of credit.

The Bank, Western, and the Vista defendants each sought summary judgment. After several hearings and discussions with counsel, which produced a stipulation on the key facts, the court issued its decision on January *241 23, 1992. By its minute order of that date, the court (1) denied the three motions for summary judgment, (2) severed the Vista defendants' cross- complaint against Western for cancellation of the promissory notes, (3) severed the Bank's amended cross-complaint against the Vista defendants for breach of the letter agreement, and (4) issued a tentative decision on the trial of Western's complaint for declaratory relief and the Bank's amended cross- complaint against Western for wrongful dishonor of the letters of credit.

The trial court signed and filed the judgment on March 26, 1992. The court decreed the Bank was entitled to recover $375,000 from Western, plus interest at 10 percent from June 13, 1991, the date of the Bank's demand, and costs of suit. The court further decreed Western could seek reimbursement from the Vista partners severally, and each Vista partner was obligated to reimburse Western, pursuant to the promissory notes in favor of Western, for its payment to the Bank. Western appealed, and the Vista defendants cross-appealed.

The Court of Appeal, after granting rehearing and accepting briefing by several amici curiae, issued an opinion reversing the trial court on December 21, 1993. In that opinion, the court concluded: "We hold that, under section 580d of the Code of Civil Procedure, an integral part of California's long-established antideficiency legislation, the issuer of a standby letter of credit, provided to a real property lender by a debtor as additional security, *may* decline to honor it after receiving notice that it is to be used to discharge a deficiency following the beneficiary-lender's *nonjudicial* foreclosure on real property. Such a use of standby letters of credit constitutes a 'defect not apparent on the face of the documents' within the meaning of California Uniform Commercial Code section 5114, subdivision (2)(b),

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and therefore such permissive dishonor does no offense to the ' independence principle.' " (Original italics, fn. omitted.)

In that first opinion, the Court of Appeal also solicited the Legislature's attention: "To the extent that this result will present problems for real estate lenders with respect to the way they now do business (as the Bank and several amici curiae have strongly suggested), it is a matter which should be addressed to the Legislature. We have been presented with two important but conflicting statutory policies. Our reconciliation of them in this case may not prove as satisfactory in another factual context. It is therefore a matter which should receive early legislative attention." (Fn. omitted.)

We granted review, and while the matter was pending, the Legislature passed Senate Bill No. 1612, an urgency statute that the Governor signed on *242 September 15, 1994. Senate Bill No. 1612 affected four statutes. Section 1 of the bill amended Civil Code section 2787 to state that a letter of credit is not a form of suretyship obligation. (Stats. 1994, ch. 611, § 1.) Section 2 of the bill added Code of Civil Procedure section 580.5, explicitly excluding letters of credit from the purview of the antideficiency laws. (Stats. 1994, ch. 611, § 2.) Section 3 of the bill added Code of Civil Procedure section 580.7, which declares unenforceable letters of credit issued to avoid defaults on purchase money mortgages for owner-occupied real property containing one to four residential units. (Stats. 1994, ch. 611, § 3.) Section 4 of the bill made "technical, nonsubstantive changes" to section 5114. (Stats. 1994, ch. 611, § 4; Legis. Counsel's Dig., Sen. Bill No. 1612 (1993-1994 Reg. Sess.).)

The Legislature made its purpose explicit: "It is the intent of the Legislature in enacting Sections 2 and 4 of this act to confirm the independent nature of the letter of credit engagement and to abrogate the holding [of the Court of Appeal in this case] .... [¶] The Legislature also intends to confirm the expectation of the parties to a contract that underlies a letter of credit, that the beneficiary will have available the value of the real estate collateral and the benefit of the letter of credit without regard to the order in which the beneficiary may resort to either." (Stats. 1994, ch. 611, § 5.) The same purpose was echoed in the bill's statement of the facts calling for an urgency statute: "In order to confirm and clarify the law applicable to obligations which are secured by real property or an estate for years therein and which also are supported by a letter of credit, it is necessary that this act take effect immediately." (Stats. 1994, ch. 611, § 6.)

After the Legislature enacted Senate Bill No. 1612, we requested the parties' views on its effect. On February 2, 1995, after considering the parties' responses, we transferred the case to the Court of Appeal with directions to vacate its decision and reconsider the cause in light of the Legislature's action.

On reconsideration, the Court of Appeal determined Senate Bill No. 1612 constituted a substantial change in existing law. Believing there was no clear evidence that the Legislature intended the statute to operate retrospectively, the Court of Appeal thought Senate Bill No. 1612 had only prospective application. Therefore, Senate Bill No. 1612 did not affect the Court of Appeal's prior conclusions on the parties' rights and obligations. The Court of Appeal filed its second opinion on September 29, 1995, mostly repeating its prior reasoning and conclusions. We granted the Bank's petition for review.

II. Discussion

(1a) As the Court of Appeal recognized, we first must determine the effect on this case of the Legislature's enactment of Senate Bill No. 1612. *243 (2) A basic canon of statutory interpretation is that statutes do not operate retrospectively unless the Legislature plainly intended them to do so. (*Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1207-1208 [246 Cal.Rptr. 629, 753 P.2d 585]; *Aetna Cas. & Surety Co. v. Ind. Acc. Com.* (1947) 30 Cal.2d 388, 393 [182 P.2d 159].) A statute has retrospective effect when it substantially changes the legal consequences of past events. (*Kizer v. Hanna* (1989) 48 Cal.3d 1, 7 [255 Cal.Rptr. 412, 767 P.2d 679].) A statute does not operate retrospectively simply because its application depends on facts or conditions existing before its enactment. (*Ibid.*) Of course, when the Legislature clearly intends a statute to operate retrospectively, we are obliged to carry out that intent unless due process considerations prevent us. (*In re Marriage of Bouquet* (1976) 16 Cal.3d 583, 587, 592 [128 Cal.Rptr. 427, 546 P.2d 1371].)

(3) A corollary to these rules is that a statute that merely *clarifies*, rather than changes, existing law does not operate retrospectively even if applied to transactions predating its enactment. We assume the Legislature amends a statute for a purpose, but that

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purpose need not necessarily be to change the law. (Cf. *Williams v. Garcetti* (1993) 5 Cal.4th 561, 568 [20 Cal.Rptr.2d 341, 853 P.2d 507].) Our consideration of the surrounding circumstances can indicate that the Legislature made material changes in statutory language in an effort only to clarify a statute's true meaning. (*Martin v. California Mut. B. & L. Assn.* (1941) 18 Cal.2d 478, 484 [116 P.2d 71]; *GTE Sprint Communications Corp. v. State Bd. of Equalization* (1991) 1 Cal.App.4th 827, 833 [2 Cal.Rptr.2d 441]; see *Balen v. Peralta Junior College Dist.* (1974) 11 Cal.3d 821, 828, fn. 8 [114 Cal.Rptr. 589, 523 P.2d 629].) Such a legislative act has no retrospective effect because the true meaning of the statute remains the same. (*Stockton Sav. & Loan Bank v. Massanet* (1941) 18 Cal.2d 200, 204 [114 P.2d 592]; *In re Marriage of Reuling* (1994) 23 Cal.App.4th 1428, 1440 [28 Cal.Rptr.2d 726]; *Tyler v. State of California* (1982) 134 Cal.App.3d 973, 976-977 [185 Cal.Rptr. 49].)

One such circumstance is when the Legislature promptly reacts to the emergence of a novel question of statutory interpretation: " 'An amendment which in effect construes and clarifies a prior statute must be accepted as the legislative declaration of the meaning of the original act, where the amendment was adopted soon after the controversy arose concerning the proper interpretation of the statute.... [¶] If the amendment was enacted soon after controversies arose as to the interpretation of the original act, it is logical to regard the amendment as a legislative interpretation of the original act-a formal change-rebutting the presumption of substantial change.' (1A Singer, Sutherland Statutory Construction (5th ed. 1993) § 22.31, p. *244, 279, fns. omitted.)" (*RN Review for Nurses, Inc. v. State of California* (1994) 23 Cal.App.4th 120, 125 [28 Cal.Rptr.2d 354].) [FN4]

FN4 The " 'presumption of substantial change' " mentioned in the quoted passage refers to the presumption that amendatory legislation accomplishing substantial change is intended to have only prospective effect. Some courts have thought changes categorized as merely formal or procedural present no problem of retrospective operation. However, as mentioned above, California has rejected this type of classification: "In truth, the distinction relates not so much to the form of the statute as to its effects. If substantial changes are made, even in a statute which might ordinarily be classified as procedural, the operation on existing rights would be retroactive because the legal effects of past events would be changed, and the statute will be construed to operate only in future unless the legislative intent to the contrary clearly appears." (*Aetna Cas. & Surety Co. v. Ind. Acc. Com., supra*, 30 Cal.2d at p. 394; cf. *Kizer v. Hanna, supra*, 48 Cal.3d at pp. 7-8.)

Even so, a legislative declaration of an existing statute's meaning is neither binding nor conclusive in construing the statute. Ultimately, the interpretation of a statute is an exercise of the judicial power the Constitution assigns to the courts. (*California Emp. etc. Com. v. Payne* (1947) 31 Cal.2d 210, 213 [187 P.2d 702]; *Bodinson Mfg. Co. v. California E. Com.* (1941) 17 Cal.2d 321, 326 [109 P.2d 935]; see *Del Costello v. State of California* (1982) 135 Cal.App.3d 887, 893, fn. 8 [185 Cal.Rptr. 582].) Indeed, there is little logic and some incongruity in the notion that one Legislature may speak authoritatively on the intent of an earlier Legislature's enactment when a gulf of decades separates the two bodies. (Cf. *Peralta Community College Dist. v. Fair Employment & Housing Com.* (1990) 52 Cal.3d 40, 51-52 [276 Cal.Rptr. 114, 801 P.2d 357].) Nevertheless, the Legislature's expressed views on the prior import of its statutes are entitled to due consideration, and we cannot disregard them.

(4) "[A] subsequent expression of the Legislature as to the intent of the prior statute, although not binding on the court, may properly be used in determining the effect of a prior act." (*California Emp. etc. Com. v. Payne, supra*, 31 Cal.2d at pp. 213-214.) Moreover, even if the court does not accept the Legislature's assurance that an unmistakable change in the law is merely a "clarification," the declaration of intent may still effectively reflect the Legislature's purpose to achieve a retrospective change. (*Id.* at p. 214.) Whether a statute should apply retrospectively or only prospectively is, in the first instance, a policy question for the legislative body enacting the statute. (*Evangelatos v. Superior Court, supra*, 44 Cal.3d at p. 1206.) Thus, where a statute provides that it clarifies or declares existing law, "[i]t is obvious that such a provision is indicative of a legislative intent that the amendment apply to all existing causes of action from the date of its enactment. In accordance with the general rules of statutory construction, we

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must give effect to this intention unless there is some constitutional objection thereto." (*California Emp. etc. Com. v. Payne, supra*, 31 Cal.2d at *245p. 214; cf. *City of Sacramento v. Public Employees' Retirement System* (1994) 22 Cal.App.4th 786, 798 [27 Cal.Rptr.2d 545]; *City of Redlands v. Sorensen* (1985) 176 Cal.App.3d 202, 211 [221 Cal.Rptr. 728].)

With respect to Senate Bill No. 1612, the Legislature made its intent plain. Section 5 of the bill states, in part: "It is the intent of the Legislature in enacting Sections 2 and 4 of this act [FN5] to confirm the independent nature of the letter of credit engagement and to abrogate the holding in [the Court of Appeal's earlier opinion in this case], that presentment of a draft under a letter of credit issued in connection with a real property secured loan following foreclosure violates Section 580d of the Code of Civil Procedure and constitutes a 'fraud ... or other defect not apparent on the face of the documents' under paragraph (b) of subdivision (2) of Section 5114 of the Commercial Code.... [¶] The Legislature also intends to confirm the expectation of the parties to a contract that underlies a letter of credit, that the beneficiary will have available the value of the real estate collateral and the benefit of the letter of credit without regard to the order in which the beneficiary may resort to either." (Stats. 1994, ch. 611, § 5.)

FN5 Section 2 of Senate Bill No. 1612 added Code of Civil Procedure section 580.5, which provides in pertinent part: "(b) With respect to an obligation which is secured by a mortgage or a deed of trust upon real property or an estate for years therein and which is also supported by a letter of credit, neither the presentment, receipt of payment, or enforcement of a draft or demand for payment under the letter of credit by the beneficiary of the letter of credit nor the honor or payment of, or the demand for reimbursement, receipt of reimbursement or enforcement of any contractual, statutory or other reimbursement obligation relating to, the letter of credit by the issuer of the letter of credit shall, whether done before or after the judicial or nonjudicial foreclosure of the mortgage or deed of trust or conveyance in lieu thereof, constitute any of the following: [¶] (1) An action within the meaning of subdivision (a) of Section 726, or a failure to comply with any other statutory or judicial requirement to proceed first against security. [¶] (2) A money judgment for a deficiency or a deficiency judgment within the meaning of Section 580a, 580b, or 580d, or subdivision (b) of Section 726, or the functional equivalent of any such judgment. [¶] (3) A violation of Section 580a, 580b, 580d, or 726." (Code Civ. Proc., § 580.5, subd. (b), as added by Stats. 1994, ch. 611, § 2.)

Section 4 of Senate Bill No. 1612 made certain technical, nonsubstantive changes to section 5114, which embodies the independence principle applicable to letter of credit payment obligations. (§ 5114, as amended by Stats. 1994, ch. 611, § 4.)

The Legislature's intent also was evident in its statement of the facts justifying enactment of Senate Bill No. 1612 as an urgency statute: "In order to confirm and clarify the law applicable to obligations which are secured by real property or an estate for years therein and which also are supported by a letter of credit, it is necessary that this act take effect immediately." (Stats. 1994, ch. 611, § 6.) The Legislature's unmistakable focus was the disruptive effect of the Court of Appeal's decision on the expectations of parties to transactions where a letter of credit was issued in connection with a loan secured by real property. By abrogating the Court of Appeal's decision, the *246 Legislature intended to protect those parties' expectations and restore certainty and stability to those transactions. If the Legislature acts promptly to correct a perceived problem with a judicial construction of a statute, the courts generally give the Legislature's action its intended effect. (See, e.g., *Escalante v. City of Hermosa Beach* (1987) 195 Cal.App.3d 1009, 1020 [241 Cal.Rptr. 199]; *City of Redlands v. Sorensen, supra*, 176 Cal.App.3d at pp. 211-212; *Tyler v. State of California, supra*, 134 Cal.App.3d at pp. 976-977; but see *Del Costello v. State of California, supra*, 135 Cal.App.3d at p. 893, fn. 8 [courts need not accept Legislature's interpretation of statute].) The plain import of Senate Bill No. 1612 is that the Legislature intended its provisions to apply immediately to existing loan transactions secured by real property and supported by outstanding letters of credit, including those in this case.

We next consider whether Senate Bill No. 1612 effected a change in the law, or instead represented a

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clarification of the state of the law before the Court of Appeal's decision. As mentioned earlier, Senate Bill No. 1612 amended two code sections (§ 5114, Civ. Code, § 2787) and added two sections to the Code of Civil Procedure (§ § 580.5, 580.7). The two code sections Senate Bill No. 1612 amended plainly made no substantive change in the law. The amendments to section 5114, which concerns the issuer's duty to honor a draft conforming to the letter of credit's terms, were "technical, nonsubstantive changes," as the Legislative Counsel's Digest correctly noted. (See Legis. Counsel's Dig., Sen. Bill No. 1612 (1993-1994 Reg. Sess.).)

In the other section amended, Civil Code section 2787, Senate Bill No. 1612 added a statement reflecting an established formal distinction: "A letter of credit is not a form of suretyship obligation." (Stats. 1994, ch. 611, § 1.) Civil Code section 2787 defines a surety or guarantor as "one who promises to answer for the debt, default, or miscarriage of another, or hypothecates property as security therefor." Generally, a surety's liability for an obligation is secondary to, and derivative of, the liability of the principal for that obligation. (See, e.g., Civ. Code, § 2806 et seq.)

(5) By contrast, the liability of the issuer of a letter of credit to the letter's beneficiary is direct and independent of the underlying transaction between the beneficiary and the issuer's customer. (See *San Diego Gas & Electric Co. v. Bank Leumi, supra*, 42 Cal.App.4th at pp. 933-934; *Paramount Export Co. v. Asia Trust Bank, Ltd.* (1987) 193 Cal.App.3d 1474, 1480 [238 Cal.Rptr. 920]; *Lumbermans Acceptance Co. v. Security Pacific Nat. Bank* (1978) 86 Cal.App.3d 175, 178 [150 Cal.Rptr. 69].) Thus, as the amendment to Civil Code section 2787 made clear, existing law viewed a *247 letter of credit as an independent obligation of the issuing bank rather than as a form of guaranty or a surety obligation. (See, e.g., Dolan, The Law of Letters of Credit: Commercial and Standby Credits (rev. ed. 1996) § 2.10[1], pp. 2-61 to 2-63 (Dolan, Letters of Credit); 3 White & Summers, Uniform Commercial Code (4th ed. 1995) Letters of Credit, § 26-2, pp. 112-117.) The issuer of a letter of credit cannot refuse to pay based on extraneous defenses that might have been available to its customer. (*San Diego Gas & Electric Co. v. Bank Leumi, supra*, 42 Cal.App.4th at p. 934.) Absent fraud, the issuer must pay upon proper presentment regardless of any defenses the customer may have against the beneficiary based in the underlying transaction. (*Ibid.*)

Senate Bill No. 1612's remaining statutory addition with which we are concerned, [FN6] Code of Civil Procedure section 580.5, specified that letter of credit transactions do not violate the antideficiency laws contained in Code of Civil Procedure sections 580a, 580b, 580d, or 726. (Code Civ. Proc., § 580.5, subd. (b)(3).) In particular, the new section specifies that a lender's resort to a letter of credit, and the issuer's concomitant right to reimbursement, do not constitute an "action" under Code of Civil Procedure section 726, or a failure to proceed first against security, regardless of whether they come before or after a foreclosure. (Code Civ. Proc., § 580.5, subd. (b)(1).) Similarly, letter of credit draws and reimbursements do not constitute deficiency judgments "or the functional equivalent of any such judgment." (Code Civ. Proc., § 580.5, subd. (b)(2).)

FN6 We do not address the effect of section 3 of Senate Bill No. 1612, which added section 580.7 to the Code of Civil Procedure. This section provides, in pertinent part: "(b) No letter of credit shall be enforceable by any party thereto in a loan transaction in which all of the following circumstances exist: [¶] (1) The customer is a natural person. [¶] (2) The letter of credit is issued to the beneficiary to avoid a default of the existing loan. [¶] (3) The existing loan is secured by a purchase money deed of trust or purchase money mortgage on real property containing one to four residential units, at least one of which is owned and occupied, or was intended at the time the existing loan was made, to be occupied by the customer. [¶] (4) *The letter of credit is issued after the effective date of this section.*" (Code Civ. Proc., § 580.7, subd. (b); italics added, as added by Stats. 1994, ch. 611, § 3.) The italicized language, not found in the other statutory changes made by Senate Bill No. 1612, suggests the Legislature intended section 580.7 to have prospective effect only. However, this case does not involve any interpretation of this section or its effect, and so we express no view on those matters.

The Court of Appeal saw Code of Civil Procedure section 580.5 as a change in the law, in large part, because of the analogy it employed to examine the

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use of standby letters of credit as additional support for loans also secured by real property. The Bank argued a standby letter of credit was the functional equivalent of cash collateral. The Court of Appeal disagreed, instead analogizing standby letters of credit to guaranties and emphasizing the similarities of purpose and function: "No matter how it may be regarded *248 by the beneficiary, a standby letter is certainly not cash or its equivalent from the perspective of the debtor; in reality, it represents his promise to provide *additional funds* in the event of his *future* default or deficiency, thus confirming its use not as a means of payment but rather as an instrument of guarantee." (Original italics.) The Court of Appeal relied on *Union Bank v. Gradsky* (1968) 265 Cal.App.2d 40 [71 Cal.Rptr. 64] (*Gradsky*) and *Commonwealth Mortgage Assurance Co. v. Superior Court* (1989) 211 Cal.App.3d 508 [259 Cal.Rptr. 425] (*Commonwealth Mortgage*).

Gradsky held that a creditor, after nonjudicial foreclosure of the real property security for a note, could not recover the note's unpaid balance from a guarantor. (*Gradsky, supra*, 265 Cal.App.2d at p. 41.) Significantly, the court did not find Code of Civil Procedure section 580d's prohibition of deficiency judgments barred the creditor's claim on the guarantor: "It is barred by applying the principles of estoppel. The estoppel is raised as a matter of law to prevent the creditor from recovering from the guarantor after the creditor has exercised an election of remedies which destroys the guarantor's subrogation rights against the principal debtor." (*Gradsky, supra*, 265 Cal.App.2d at p. 41.)

The court noted that the guarantor, after payment, ordinarily would be equitably subrogated to the rights and security formerly held by the creditor. (*Gradsky, supra*, 265 Cal.App.2d at pp. 44-45; cf. Civ. Code, § § 2848, 2849.) However, where the creditor first resorts to nonjudicial foreclosure, the guarantor could not acquire any subrogation rights from the creditor because under Code of Civil Procedure section 580d, the nonjudicial sale eliminated both the security and the possibility of a deficiency judgment against the debtor. (*Gradsky, supra*, 265 Cal.App.2d at p. 45.) Because the creditor has a duty not to impair the guarantor's remedies against the debtor, the court held the creditor is estopped from pursuing the guarantor after electing a remedy-nonjudicial foreclosure-that eliminated the security for the debt and curtailed the possibility of the guarantor's reimbursement from the debtor. (*Id.* at pp. 46-47.)

However, the rules applicable to surety relationships do not govern the relationships between the parties to a letter of credit transaction. (See Dolan, Letters of Credit, *supra*, § 2.10[1], pp. 2-62 to 2-63.) At the time of this case's transactions, a majority of courts did not grant subrogation rights to an issuer that honored a draw on a credit; the issuer satisfied its own primary obligation, not the debt of another. (*Tudor Dev. Group, Inc. v. U.S. Fid. & Guar. Co.* (3d Cir. 1992) 968 F.2d 357, 361-363; see 3 White & Summers, Uniform Commercial Code, *supra*, Letters of Credit, § 26-15, pp. 211- 212; but see Cal. U. Com. Code, § 5117; fn. 2, *ante*, at pp. 237-238.) Nor does the *249 beneficiary of a credit owe any obligations to the issuer; literal compliance with the letter of credit's terms for payment is all that is required. (Cf. *Paramount Export Co. v. Asia Trust Bank, Ltd., supra*, 193 Cal.App.3d at p. 1480; *Lumbermans Acceptance Co. v. Security Pacific Nat. Bank, supra*, 86 Cal.App.3d at p. 178.)

Gradsky contains additional language suggesting a much broader rule than its holding and analysis warranted. Going beyond the subrogation theory underlying its holding, the court observed: "If ... the guarantor ... can successfully assert an action in assumpsit against [the debtor] for reimbursement, the obvious result is to permit the recovery of a 'deficiency' judgment against the debtor following a nonjudicial sale of the security under a different label. It makes no difference to [the debtor's] purse whether the recovery is by the original creditor in a direct action following nonjudicial sale of the security, or whether the recovery is in an action by the guarantor for reimbursement of the same sum." (*Gradsky, supra*, 265 Cal.App.2d at pp. 45-46.) The court also said: "The Legislature clearly intended to protect the debtor from personal liability following a nonjudicial sale of the security. No liability, direct or indirect, should be imposed upon the debtor following a nonjudicial sale of the security. To permit a guarantor to recover reimbursement from the debtor would permit circumvention of the legislative purpose in enacting section 580d." (*Id.* at p. 46.) In view of the reasoning of the court's holding, these additional observations were unnecessary to the case's determination.

Commonwealth Mortgage followed *Gradsky* to hold a mortgage guaranty insurer could not enforce indemnity agreements to obtain reimbursement from the debtors for the insurer's payment to the lender after the lender's nonjudicial sale of its real property security. (*Commonwealth Mortgage, supra*, 211

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Cal.App.3d at p. 517.) The court said the mortgage guaranty insurance policy served the same purpose as the guaranty in *Gradsky*, and thus *Gradsky* would bar the insurer from being reimbursed under subrogation principles. (*Commonwealth Mortgage, supra*, 211 Cal.App.3d at p. 517.) The court found the substitution of indemnity agreements for subrogation rights did not distinguish the case from *Gradsky*. Relying on the rule that a principal obligor incurs no additional liability on a note by also being a guarantor of it, the court said the agreements added nothing to the debtors' existing liability. (*Commonwealth Mortgage, supra*, 211 Cal.App.3d at p. 517.) Thus, the court said the indemnity agreements could not be viewed as independent obligations. (*Ibid.*) Instead, the court concluded they were invalid attempts to have the debtors waive in advance the statutory prohibition against deficiency judgments. (*Ibid.*)

As did *Gradsky*, *Commonwealth Mortgage* also inveighed against subterfuges that thwart the purposes of Code of Civil Procedure section 580d. *250 (*Commonwealth Mortgage, supra*, 211 Cal.App.3d at pp. 515, 517.) "Although section 580d applies by its specific terms only to actions for 'any deficiency upon a note secured by a deed of trust' and not to actions based upon other obligations, the proscriptions of section 580d cannot be avoided through artifice [citation] .... In determining whether a particular recovery is precluded, we must consider whether the policy behind section 580d would be violated by such a recovery. [Citation.]" (*Commonwealth Mortgage, supra*, 211 Cal.App.3d at p. 515.) Thus, as did the *Gradsky* court, the *Commonwealth Mortgage* court augmented its opinion with concepts unnecessary to its determination of the case. [FN7]

FN7. The precedential value of such statements in *Commonwealth Mortgage* also is clouded by a factual enigma the court left unresolved. As the Court of Appeal recognized, the lender in that case purchased the real property security at the trustee's sale for a full credit bid, which ought to have satisfied the debt. (*Commonwealth Mortgage, supra*, 211 Cal.App.3d at p. 512, fn. 3.) Despite the apparent absence of any deficiency, the court deemed it unnecessary to decide whether a deficiency in fact remained before discussing the effect of Code of Civil Procedure section 580d's prohibition of deficiency judgments. (*Commonwealth Mortgage, supra*, 211 Cal.App.3d at p. 515.)

The Court of Appeal in this case extrapolated from the *Gradsky* and *Commonwealth Mortgage* precedents a rule that swept far beyond their origins in guaranty and suretyship relationships: "Not only is a *creditor* prevented from obtaining a deficiency judgment against the debtor, but no other person is permitted to obtain what would, in effect, amount to a deficiency judgment." (Original italics.) The Court of Appeal apparently concluded a transaction has such an effect if it "has the practical consequence of requiring the debtor to pay *additional money* on the debt *after* default or foreclosure." (Original italics.) "Thus, we preserve the principle, clearly established by *Gradsky* and *Commonwealth* [*Mortgage*], that a lender should not be able to utilize a device of any kind to avoid the limitations of section 580d; and we apply that principle here to standby letters of credit." However, as we have seen, neither *Gradsky* nor *Commonwealth Mortgage* established such a principle as a rule of law. Instead, their statements accentuated the courts' vigilance regarding attempted evasions of the antideficiency and foreclosure laws.

(1b) The Court of Appeal mistook standby letters of credit for such an attempt by seeing them only as a form of guaranty. The court analogized the standby letter of credit to a guaranty because of the perceived functional similarities. One consequence of that analogy was that the court applied to standby letters of credit a rule whose legal justifications originated in the subrogation rights owed to sureties. However, as discussed before, letters of credit-standby or otherwise-are not a form of suretyship, and the rights of the parties to these transactions are not governed by suretyship principles. *251 Further, suretyship involves no counterpart to the independence principle essential to letters of credit.

While analogies can improve our understanding of how and why letters of credit are useful, analogies cannot substitute for recognizing the letters' unique qualities. The authors of one leading treatise aptly summarized the point: "In short, a letter of credit is a letter of credit. As Bishop Butler once said, 'Everything is what it is and not another thing.' " (3 White & Summers, Uniform Commercial Code, *supra*, Letters of Credit, § 26-2, p. 117, fn. omitted.)

By focusing on analogies to guaranties, the Court of

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Appeal also overlooked that the parties in this case specifically intended the standby letters of credit to be additional security. [FN8] The parties' stipulated facts include that the original loan agreement was secured by a letter of credit, and that "Vista caused [the subsequent letters of credit] to be issued by Western as additional collateral security ...." The Court of Appeal found the letters of credit were not security interests in personal property under California Uniform Commercial Code section 9501, subdivision (4), as the Bank had argued. However, we need not determine whether a standby letter of credit comes within the scope of division 9 of the California Uniform Commercial Code. A letter of credit is sui generis as a means of securing or supporting performance of an obligation incurred in a separate transaction. Regardless of whether this idiosyncratic undertaking meets the qualifications for a security interest under the California Uniform Commercial Code, it nevertheless is a form of security for assuring another's performance.

FN8 To the extent that resort to analogy is appropriate for such a singular legal creation as the standby letter of credit, its closest relative would seem to be cash collateral. As one commentator noted: "In view of the relative positions of the beneficiary, the [customer], and the issuing bank, the standby letter of credit is more analogous to a cash deposit left with the beneficiary than it is to the traditional letter of credit or to the performance bond. Because the beneficiary generates all the documents necessary to obtain payment, he has the power to appropriate the funds represented by the standby letter of credit at any time.... [¶] Even though the standby letter of credit is functionally equivalent to a cash deposit, it differs from a cash deposit because the customer does not have to part with its own funds until payment is made and it is forced to reimburse the issuing bank. Because the cash-flow burden might otherwise be prohibitive, this is a great advantage to a party who enters into a large number of transactions simultaneously. Moreover, the beneficiary is satisfied; while it does not actually possess the funds, as it would if a cash deposit were used, it is protected by the credit of a financial institution." (Comment, *The Independence Rule in Standby Letters of Credit* (1985) 52 U. Chi. L.Rev. 218, 225-226, fns. omitted; see Dolan, Letters of Credit, *supra*, § 1.06, pp. 1-24 to 1-25, for a discussion of cases illustrating use of standby credits in lieu of cash, bonds, and other security.)

When viewed as additional security for a note also secured by real property, a standby letter of credit does not conflict with the statutory *252 prohibition of deficiency judgments. Code of Civil Procedure section 580d does not limit the security for notes given for the purchase of real property only to trust deeds; other security may be given as well. (*Freedland v. Greco* (1955) 45 Cal.2d 462, 466 [289 P.2d 463].) Creditors may resort to such other security in addition to nonjudicial foreclosure of the real property security. (*Ibid.*; *Hatch v. Security-First Nat. Bank* (1942) 19 Cal.2d 254, 260 [120 P.2d 869].) (6) A standby letter of credit is a security device created at the request of the customer/debtor that is an obligation owed independently by the issuing bank to the beneficiary/creditor. (See *San Diego Gas & Electric Co. v. Bank Leumi*, *supra*, 42 Cal.App.4th at pp. 933-934; *Lumbermans Acceptance Co. v. Security Pacific Nat. Bank*, *supra*, 86 Cal.App.3d at p. 178.) A creditor that draws on a letter of credit does no more than call on all the security pledged for the debt. When it does so, it does not violate the prohibition of deficiency judgments.

(1c) The Legislature plainly intended that the sections of Senate Bill No. 1612 we have addressed would apply to existing loan transactions supported by outstanding letters of credit. We conclude the Legislature's action did not effect a change in the law. Before the Legislature passed Senate Bill No. 1612, an issuer could not refuse to honor a conforming draw on a standby letter of credit-given as additional security for a real property loan-on the basis that the draw followed a nonjudicial sale of the real property security. The Court of Appeal created such a basis, but produced an unprecedented rule without solid legal underpinnings or any real connection to the actual language of the statutes involved.

Therefore, the aspects of Senate Bill No. 1612 we have discussed did not effect any change in the law, but simply clarified and confirmed the state of the law prior to the Court of Appeal's first opinion. Because the legislative action did not change the legal effect of past actions, Senate Bill No. 1612 does not act retrospectively; it governs this case. The Legislature concluded that Senate Bill No. 1612

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should be given immediate effect to confirm and clarify the law applicable to loans secured by real property and supported by letters of credit. This conclusion was reasonable, particularly in view of the uncertainties the financial community evidently faced after the Court of Appeal's decision. (See, e.g., Murray, What *Should I Do With This Letter of Credit?* (Cont.Ed.Bar 1994) 17 Real Prop. L. Rptr. 133, 138-140.)

In sum, the Court of Appeal erred in concluding the Legislature's enactment of Senate Bill No. 1612 had no effect on this case. The Legislature explicitly intended to abrogate the Court of Appeal's prior decision and make certain the parties' obligations when letters of credit supported loans also secured by real property. The Legislature manifestly intended the *253 respective obligations of the parties to a letter of credit transaction should remain unaffected by the antideficiency laws, whether those obligations arose before or after enactment of Senate Bill No. 1612. Accordingly, we conclude the judgment of the Court of Appeal should be reversed. [FN9]

FN9 Western belatedly claims it should not be liable for prejudgment interest on the amount of the letter of credit it dishonored. It argues it should not be "punished" for seeking a declaration of its rights in a novel and complex case. The Court of Appeal decided that "if it is ultimately determined that Western is liable to the Bank on the letters of credit then it must follow that it is liable for legal interest thereon from and after the day when its obligation to pay on the letters arose. (Civ. Code, § 3287, subd. (a).)" Western did not petition for review of this aspect of the Court of Appeal decision. In any event, Western's liability for prejudgment interest is clear. The award of this interest is not imposed for the sake of punishment. The award depends only on whether Western knew or could compute the amount the Bank was entitled to recover on the letters of credit. (*Fireman's Fund Ins. Co. v. Allstate Ins. Co.* (1991) 234 Cal.App.3d 1154, 1173 [286 Cal.Rptr. 146].) The Court of Appeal correctly assessed Western's liability for prejudgment interest.

Disposition

The judgment of the Court of Appeal is reversed, and the cause remanded for further proceedings consistent with this opinion.

George, C. J., Baxter, J., and Brown, J., concurred.

WERDEGAR, J.,

Concurring and Dissenting.-I concur in the majority's conclusion that California Uniform Commercial Code section 5114, subdivision (2)(b), does not excuse Western Security Bank, N.A. (Western), the issuer, from honoring its letter of credit upon demand for payment by Beverly Hills Business Bank (the Bank), the beneficiary. I would not, however, reach this conclusion under the majority's reasoning that Senate Bill No. 1612 (Stats. 1994, ch. 611) merely declared existing law and that, prior to the bill's enactment, the antideficiency law had no effect on letters of credit. Instead, I agree with Justice Mosk that section 5114 simply does not bear the interpretation that the use of a letter of credit to support an obligation secured by a mortgage or deed of trust constitutes "fraud in the transaction." (Cal. U. Com. Code, § 5114, subd. (2); see conc. & dis. opn. of Mosk, J., *post*, at pp. 262-263.) Thus, Western was obliged to honor the Bank's demand for payment.

The conclusion that the Bank may properly draw upon the letter of credit does not compel the further conclusion that the antideficiency law ultimately offers no protection to Vista Place Asssociates. This is illustrated by a comparison of the majority opinion and the separate opinion of Justice Mosk, which agree on the former point but disagree on the latter. In my view, the Bank's petition for review of a decision rejecting its claim (as *254 beneficiary) against Western (as issuer) under superseded law does not present an appropriate vehicle for broader pronouncements on the antideficiency law's effect on other claims and other parties. Because the Legislature in Senate Bill No. 1612 has articulated rules that will govern all future letters of credit, and because letters of credit typically expire after a finite period, the status of residual letters of credit issued before the bill's effective date will soon become an academic question. In contrast, whether the antideficiency law should as a general matter be expansively or narrowly construed remains of vital importance, as demonstrated by the interest in this case shown by amici curiae involved in the purchase

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and sale of real estate. Under these circumstances, the principle of judicial restraint counsels against the majority's sweeping declaration that the reach of the antideficiency law prior to Senate Bill No. 1612 was too narrow to affect the respective obligations of the parties to a letter of credit transaction.

Underlying the broad declaration just mentioned is the majority's erroneous conclusion that Senate Bill No. 1612 merely clarified existing law and, thus, may be applied to transactions entered into before the bill's operative date. Before that date, the antideficiency law did not distinguish between residential and nonresidential real estate transactions. Now, however, as amended by Senate Bill No. 1612, the antideficiency law does distinguish between residential and nonresidential real estate transactions. New Code of Civil Procedure section 580.7, which the bill added, makes a letter of credit unenforceable when issued to avoid the default of an existing loan and "[t]he existing loan is secured by a purchase money deed of trust or purchase money mortgage on real property containing one to four residential units, at least one of which is owned and occupied, or was intended at the time the existing loan was made, to be occupied by the customer." (*Id.*, subd. (b)(3).)

In light of this provision, we may conclude that letters of credit before Senate Bill No. 1612 either were enforceable in the specified residential real estate transactions but now are not, or were not enforceable in all other real estate transactions but now are. This case does not require us to choose between these possibilities. Either way, Senate Bill No. 1612 went beyond mere clarification to change the effective scope of the antideficiency law. To apply it retroactively would change the legal consequences of past acts. Under these circumstances, it is appropriate to apply the ordinary presumption that a legislative act operates prospectively, and inappropriate to apply to this case the new set of rules articulated in Senate Bill No. 1612.

MOSK, J.,

Concurring and Dissenting.-I agree with the majority that the issue before us is not whether Senate Bill No. 1612 (1993-1994 Reg. Sess.) (hereafter Senate Bill No. 1612) has retrospective application. It does not. *255 Rather, we must determine what the law was *before* Senate Bill No. 1612 was enacted to provide, in effect, a "standby letter of credit exception" to the antideficiency statutes.

I disagree with the majority that Senate Bill No. 1612 did not change prior law. In my view, far from merely "clarifying" the "true" meaning of prior law-as the majority implausibly assert-its numerous amendments and additions to the statutes reversed what the Court of Appeal aptly referred to as "the fifty years of consistent solicitude which California courts have given to the foreclosed purchase money mortgagee." [FN1]

FN1 Among other things, Senate Bill No. 1612 amended Civil Code section 2787, added Code of Civil Procedure sections 580.5 and 580.7, and amended California Uniform Commercial Code former section 5114. (See Stats. 1994, ch. 611, § § 1-6.) It appears, however, that our decision in this matter will have limited application. It will operate only when: (a) a lender obtained a standby letter of credit prior to September 15, 1994, the effective date of Senate Bill No. 1612, to support a transaction secured by a deed of trust against real property; (b) the creditor defaulted on the deed of trust; (c) the lender elected to foreclose on by way of trustee's sale rather than through judicial foreclosure; and (d) the lender thereafter demanded payment under the standby letter of credit. In view of the limited precedential value of this case, a better course would have been to dismiss review as improvidently granted.

As the majority concede, a legislative declaration of an existing statute's meaning is neither binding nor conclusive. "The Legislature has no authority to interpret a statute. That is a judicial task." (*Del Costello v. State of California* (1982) 135 Cal.App.3d 887, 893, fn. 8 [185 Cal.Rptr. 582]; see also *California Emp. etc. Com. v. Payne* (1947) 31 Cal.2d 210, 213 [187 P.2d 702]; *Bodinson Mfg. Co. v. California E. Com.* (1941) 17 Cal.2d 321, 326 [109 P.2d 935].) As the majority also concede, the legislative interpretation of prior law in this case is particularly unworthy of deference: Nothing in the previous legislative history of letter of credit statutes suggests an intent to create an exception to the antideficiency statutes. Indeed, it is apparently only recently that standby letters of credit have been used in real estate transactions.

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Accordingly, unlike the majority, I conclude that before Senate Bill No. 1612, standby letters of credit were not exempt from the antideficiency statutes precluding creditors from obtaining a deficiency judgment from a creditor following nonjudicial foreclosure on a real property loan.

I.

As the Court of Appeal emphasized, before Senate Bill No. 1612, the potential conflict between the letters of credit statutes and the antideficiency statutes posed a question of first impression, arising from the relatively recent innovation of the use of standby letters of credit as additional security *256 for real estate loans. Does the so-called "independence principle"- under which letters of credit stand separate and apart from the underlying transaction-constitute an exception to the antideficiency statutes that bar deficiency judgments after a nonjudicial foreclosure on real property?

The majority conclude that even before Senate Bill No. 1612, there was no restriction on the right of a creditor to demand payment on a standby letter of credit after a nonjudicial foreclosure on real property. They are wrong.

Under the so-called "independence principle," the issuer of a standby letter of credit "must honor a draft or demand for payment which complies with the terms of the relevant credit regardless of whether the goods or documents conform to the underlying contract for sale or other contract between the customer and the beneficiary." (Cal. U. Com. Code, former § 5114, subd. (1), as amended by Stats. 1994, ch. 611, § 4.) In turn, the issuer of a standby letter of credit "is entitled to immediate reimbursement of any payment made under the credit and to be put in effectively available funds not later than the day before maturity of any acceptance made under the credit." (*Id.*, subd. (3).) [FN2]

FN2 As the reference to "goods or documents" in the statute suggests, the drafters appear to have contemplated use of letters of credit in commercial financial transactions, not as additional security in real estate transactions.

A standby letter of credit specifically operates as a means of guaranteeing payment in the event of a future default. "A letter of credit is an engagement by an issuer (usually a bank) to a beneficiary, made at the request of a customer, which binds the bank to honor drafts up to the amount of the credit upon the beneficiary's compliance with certain conditions specified in the letter of credit. The customer is ultimately liable to reimburse the bank. The traditional function of the letter of credit is to finance an underlying customer's beneficiary contract for the sale of goods, directing the bank to pay the beneficiary for shipment. A different function is served by the ' standby' letter of credit, which directs the bank to pay the beneficiary not for his own performance but upon the customer's default, thereby serving as a guarantee device." (Note, "*Fraud in the Transaction": Enjoining Letters of Credit During the Iranian Revolution* (1980) 93 Harv. L.Rev. 992, 992-993, fns. omitted.)

Thus, in practical effect, a standby letter of credit constitutes a promise to provide additional funds in the event of a future default or deficiency. As such, prior to passage of Senate Bill No. 1612, it potentially came up against the restrictions of the antideficiency statutes barring a creditor from obtaining additional funds from a debtor after a nonjudicial foreclosure. Indeed, as *257 the parties concede, nothing in the applicable statutes or legislative history prior to the amendments and additions enacted by Senate Bill No. 1612 created any specific exception to the antideficiency statutes for standby letters of credit. Nor did anything in the applicable statutes or legislative history "imply" that the antideficiency statutes must yield to the so-called "independence principle," based on public policy or otherwise.

We have previously summarized the history and purpose of the antideficiency statutes as follows.

"Prior to 1933, a mortgagee of real property was required to exhaust his security before enforcing the debt or otherwise to waive all rights to his security [citations]. However, having resorted to the security, whether by judicial sale or private nonjudicial sale, the mortgagee could obtain a deficiency judgment against the mortgagor for the difference between the amount of the indebtedness and the amount realized from the sale. As a consequence during the great depression with its dearth of money and declining property values, a mortgagee was able to purchase the subject real property at the foreclosure sale at a depressed price far below its normal fair market

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value and thereafter to obtain a double recovery by holding the debtor for a large deficiency. [Citations.] In order to counteract this situation, California in 1933 enacted fair market value limitations applicable to both judicial foreclosure sales ([Code Civ. Proc.,] § 726) and private foreclosure sales ([*id.*,] § 580a) which limited the mortgagee's deficiency judgment after exhaustion of the security to the difference between the fair [market] value of the property at the time of the sale (irrespective of the amount actually realized at the sale) and the outstanding debt for which the property was security. Therefore, if, due to the depressed economic conditions, the property serving as security was sold for less than the fair [market] value as determined under section 726 or section 580a, the mortgagee could not recover the amount of that difference in this action for a deficiency judgment. [Citation.]

"In certain situations, however, the Legislature deemed even this partial deficiency too oppressive. Accordingly, in 1933 it enacted section 580b [citation] which barred deficiency judgments altogether on purchase money mortgages. 'Section 580b places the risk of inadequate security on the purchase money mortgagee. A vendor is thus discouraged from overvaluing the security. Precarious land promotion schemes are discouraged, for the security value of the land gives purchasers a clue as to its true market value. [Citation.] If inadequacy of security results, not from overvaluing, but from a decline in property values during a general or local depression, section 580b prevents the aggravation of the downturn that would result if defaulting *258 purchasers were burdened with large personal liability. Section 580b thus serves as a stabilizing factor in land sales.' [Citations.]

"Although both judicial foreclosure sales and private nonjudicial foreclosure sales provided for identical deficiency judgments in nonpurchase money situations subsequent to the 1933 enactment of the fair value limitations, one significant difference remained, namely property sold through judicial foreclosure was subject to the statutory right of redemption ([Code Civ. Proc.,] § 725a), while property sold by private foreclosure sale was not redeemable. By virtue of sections 725a and 701, the judgment debtor, his successor in interest or a junior lienor could redeem the property at any time during one year after the sale, frequently by tendering the sale price. The effect of this right of redemption was to remove any incentive on the part of the mortgagee to enter a low bid at the sale (since the property could be redeemed for that amount) and to encourage the making of a bid approximating the fair market value of the security. However, since real property purchased at a private foreclosure sale was not subject to redemption, the mortgagee by electing this remedy, could gain irredeemable title to the property by a bid substantially below the fair value and still collect a deficiency judgment for the difference between the fair value of the security and the outstanding indebtedness.

"In 1940 the Legislature placed the two remedies, judicial foreclosure sale and private nonjudicial foreclosure sale on a parity by enacting section 580d [citation]. Section 580d bars 'any deficiency judgment' following a private foreclosure sale. 'It seems clear ... that section 580d was enacted to put judicial enforcement on a parity with private enforcement. This result could be accomplished by giving the debtor a right to redeem after a sale under the power. The right to redeem, like proscription of a deficiency judgment, has the effect of making the security satisfy a realistic share of the debt. [Citation.] By choosing instead to bar a deficiency judgment after private sale, the Legislature achieved its purpose without denying the creditor his election of remedies. If the creditor wishes a deficiency judgment, his sale is subject to statutory redemption rights. If he wishes a sale resulting in nonredeemable title, he must forego the right to a deficiency judgment. In either case his debt is protected.' " (*Cornelison v. Kornbluth* (1975) 15 Cal.3d 590, 600-602 [125 Cal.Rptr. 557, 542 P.2d 981], fns. omitted.)

Over the several decades since their enactment, our courts have construed the antideficiency statutes liberally, rejecting attempts to circumvent the proscriptions against deficiency judgments after nonjudicial foreclosure. "It is well settled that the proscriptions of section 580d cannot be avoided through artifice ...." (*259 *Rettner v. Shepherd* (1991) 231 Cal.App.3d 943, 952 [282 Cal.Rptr. 687]; accord, *Freedland v. Greco* (1955) 45 Cal.2d 462, 468 [289 P.2d 463] [In construing the antideficiency statutes, " 'that construction is favored which would defeat subterfuges, expediencies, or evasions employed to continue the mischief sought to be remedied by the statute, or ... to accomplish by indirection what the statute forbids.' "]; *Simon v. Superior Court* (1992) 4 Cal.App.4th 63, 78 [5 Cal.Rptr.2d 428].)

Nor can the antideficiency protections be waived by the borrower at the time the loan was made. (See Civ.

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Code, § 2953 [such waiver "shall be void and of no effect"]; *Valinda Builders, Inc. v. Bissner* (1964) 230 Cal.App.2d 106, 112 [40 Cal.Rptr. 735] [The debtor's waiver agreement was "contrary to public policy, void and ineffectual for any purpose."].)

In this regard, as the Court of Appeal observed, two decisions are of particular relevance here: *Union Bank v. Gradsky* (1968) 265 Cal.App.2d 40 [71 Cal.Rptr. 64] (hereafter *Gradsky*), and *Commonwealth Mortgage Assurance Co. v. Superior Court* (1989) 211 Cal.App.3d 508 [259 Cal.Rptr. 425] (hereafter *Commonwealth*).

In *Gradsky*, the Court of Appeal held that Code of Civil Procedure section 580d operated to preclude a lender from collecting the unpaid balance of a promissory note from the guarantor after a nonjudicial foreclosure on the real property securing the debt. It concluded that if the guarantor could successfully assert an action against the borrower for reimbursement, "the obvious result is to permit the recovery of a 'deficiency' judgment against the [borrower] following a nonjudicial sale of the security under a different label." (*Gradsky, supra*, 265 Cal.App.2d at pp. 45-46.) "The Legislature clearly intended to protect the [borrower] from personal liability following a nonjudicial sale of the security. No liability, direct or indirect, should be imposed upon the [borrower] following a nonjudicial sale of the security. To permit a guarantor to recover reimbursement from the debtor would permit circumvention of the legislative purpose in enacting section 580d." (*Id.* at p. 46.)

In *Commonwealth*, borrowers purchased real property with a loan secured by promissory notes provided by a bank. At the bank's request, they obtained policies of mortgage guarantee insurance to secure payment on the promissory notes. They also signed indemnity agreements promising to reimburse the mortgage insurer for any funds it paid out under the policy. When the borrowers defaulted on the promissory notes, the bank foreclosed nonjudicially on the real property. It then collected on the mortgage insurance; the mortgage insurer then brought an action for reimbursement on the indemnity agreements. *260

The Court of Appeal in *Commonwealth* held that reimbursement was barred by Code of Civil Procedure section 580d. It rejected the argument that the indemnity agreements constituted separate and independent obligations: "The instant indemnity agreements add nothing to the liability [the borrowers] already incurred as principal obligors on the notes .... To splinter the transaction and view the indemnity agreements as separate and independent obligations ... is to thwart the purpose of section 580d by a subterfuge [citation], a result we cannot permit." (*Commonwealth, supra*, 211 Cal.App.3d at p. 517.)

The majority's attempt to distinguish *Gradsky* and *Commonwealth*, by characterizing them as grounded in subrogation law, is unpersuasive. Indeed, in *Commonwealth*, subrogation law was not directly in issue; the indemnity obligation provided a contract upon which to base collection. [FN3]

FN3 In any event, the analogy between standby letters of credit and guarantees is not as "forced" as the majority would suggest. As one commentator recently observed, "upon closer analysis, the borders between standby credits and contracts of guarantee are not so well settled as they may first appear." (McLaughlin, *Standby Letters of Credit and Guaranties: An Exercise in Cartography* (1993) 34 Wm. & Mary L.Rev. 1139, 1140; see also Alces, *An Essay on Independence, Interdependence, and the Suretyship Principle* (1993) 1993 U. Ill. L.Rev. 447 [rejecting distinction between letters of credit and "secondary obligations," i.e., guarantees and sureties].) Moreover, "courts have long recognized that, in a sense, issuers of credits 'must be regarded as sureties.' [Citation.] A seller of goods often insists on a commercial letter of credit because he is unsure of the buyer's ability to pay. The standby letter of credit arises out of situations in which the beneficiary wants to guard against the applicant's nonperformance. In both instances, the credit serves in the nature of a guaranty." Dolan, The Law of Letters of Credit: Commercial and Standby Credits (2d ed. 1991) § 2.10[1], pp. 2-61 to 2-62.)

The majority miss the point. As the Court of Appeal in this matter explained: "*Gradsky* and *Commonwealth* reflect the strong judicial concern about the efforts of secured real property lenders to circumvent section 580d by the use of financial transactions between debtors and third parties which involve post-nonjudicial foreclosure debt obligations

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for the borrowers. Their common and primary focus is on the lender's requirement that the debtor make arrangements with a third party to pay a portion or all of the mortgage debt remaining after a foreclosure, i.e., to pay the debtor's deficiency."

The Legislature, in enacting Senate Bill No. 1612, expressly abrogated the Court of Appeal decision in this matter and gave primacy to the so-called "independence principle" as against the antideficiency protections. Its additions and amendments to the statutes-lobbied for, and drafted by, the California Bankers Association-significantly altered prior law. Senate Bill No. 1612, therefore, should have prospective application only. *261

In their strained attempt to reach the conclusion that Senate Bill No. 1612 governs this case, the majority adopt the fiction that a standby letter of credit is an "idiosyncratic" form of "security" or the "functional equivalent" of cash collateral. They offer no sound support for such an approach. There is none. [FN4]

FN4 The principal "authority" cited by the majority for the proposition that standby letters of credit are the "functional equivalent" of cash collateral is a student law review note published over a decade ago-and apparently never cited in any case in California or elsewhere. (Comment, *The Independence Rule in Standby Letters of Credit* (1985) 52 U. Chi. L.Rev. 218.) Significantly, the note nowhere discusses the use of standby letters of credit in transactions involving purchase money mortgages or the potential conflict between the so-called "independence principle" and antideficiency statutes. Indeed, it assumes that "[t]hose who engage in standby letter of credit transactions are usually large corporate or governmental entities with access to high-quality counsel and are thus in a position to evaluate and respond to the risks involved." (*Id.* at p. 238.) Needless to say, that is often *not* the case in real property transactions, particularly those involving residential property. As a leading commentator observed: "the motivation of the parties to a real estate secured transaction is frequently other than purely commercial, and their relative bargaining power is often grossly disproportionate." (Hetland & Hansen, *The "Mixed Collateral" Amendments to California's Commercial Code-Covert Repeal of California's Real Property Foreclosure and Antideficiency Provisions or Exercise in Futility?* (1987) 75 Cal.L.Rev. 185, 188, fn. omitted.)

As the Court of Appeal observed, from the perspective of the debtor, a standby letter of credit is not cash or its equivalent. It is, instead, a promise to provide additional funds *in the event of future default or deficiency* and has the practical consequence of requiring the debtor to pay *additional* money on the debt *after* default or foreclosure. [FN5] Moreover, unlike cash, which can be pledged as collateral security only once, a standby letter of credit does not require a debtor to part with its own funds until payment is made and thus permits a borrower to use standby letters of credit in a large number of transactions separately. Cash collateral, by contrast, does not impose personal liability on the borrower following a trustee's sale and does not encourage speculative lending practices.

FN5 Although it appears to be uncommon, an issuer of a standby letter of credit may demand security from its customer in the form of cash collateral or personal property as a condition for issuing the letter of credit. In the event of a draw on the letter of credit, the issuer would then have recourse to the pledged security, up to the value of the draw, without requiring its customer to pay additional money. Whether a real estate lender's draw on a standby letter of credit backed by security, and not by a mere promise to pay, would fall within the mixed security rule is a difficult question that need not be addressed here.

As the Court of Appeal observed: "For us to conclude that such use of a standby letter of credit is the same as an increased cash investment (whether or not from borrowed funds) is to deny reality and to invite the very overvaluation and potential aggravation of an economic downturn which the antideficiency legislation was originally enacted to prevent." *262

II.

The Court of Appeal correctly concluded that, before

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Senate Bill No. 1612, there was no implied exception to the antideficiency statutes for letters of credit. It erred, however, in holding that Western Security Bank, N.A. (Western) could have refused to honor the letter of credit on the ground that the Beverly Hills Business Bank (Bank), in presenting the letters of credit after a nonjudicial foreclosure, worked an "implied" fraud on Vista Place Associates (Vista).

The Court of Appeal cited former California Uniform Commercial Code former section 5114, subdivision (2)(b), which provides that when there has been a notification from the customer of "fraud, forgery or other defect not apparent on the face of the documents," the issuer "may"-but is not obligated to-"honor the draft or demand for payment."(Cal. U. Com. Code, § 5114, subd. (2)(b) as amended by Stats. 1994, ch. 611, § 4.) [FN6] The statute is inapplicable under the present facts.

FN6 An issuer's obligations and rights are now governed by California Uniform Commercial Code section 5108, enacted in 1996 as part of Senate Bill No. 1599. (Stats. 1996, ch. 176, § 7.) The same legislation repealed section 5114, relating to the issuer's duty to honor a draft or demand for payment, as part of the repeal of division 5, Letters of Credit. (Stats. 1996, ch. 176, § 6.)

Western, presented with a demand for payment on a letter of credit, was limited to determining whether the documents presented by the beneficiary complied with the letter of credit-a purely ministerial task of comparing the documents presented against the description of the documents in the letter of credit. If the documents comply on their face, the issuer must honor the draw, regardless of disputes concerning the underlying transaction. (*Lumbermans Acceptance Co. v. Security Pacific Nat. Bank* (1978) 86 Cal.App.3d 175, 178 [150 Cal.Rptr. 69]; Cal. U. Com. Code, former § 5109, subd. (2) as added by Stats. 1963, ch. 819, § 1, p. 1934.) Thus, in this case, Western was not entitled to look beyond the documents presented by the Bank and refuse to honor the standby letter of credit based on a potential violation of the antideficiency statutes in the underlying transaction.

In my view, the concurring and dissenting opinion by Justice Kitching in the Court of Appeal correctly reconciled the policies behind standby letter of credit law and the antideficiency provisions of Code of Civil Procedure section 580d, as they existed *before* Senate Bill No. 1612. Thus, I would conclude that Western was obligated, under the so-called "independence principle," to honor the standby letter of credit presented by the Bank. None of the limited exceptions to that rule applied. Western was not, however, without recourse. It was entitled to seek reimbursement from Vista, pursuant *263 to former California Uniform Commercial Code former section 5114, subdivision (3) and its promissory notes. Vista, in turn, could seek disgorgement from the Bank, if it has not legally waived its protection under Code of Civil Procedure section 580d-an issue that is not before us and should be remanded to the trial court. As Justice Kitching's concurrence and dissent concluded, "[t]his procedure would retain certainty in the California letter of credit market while implementing the policies supporting section 580d."

Kennard, J., concurred. *264

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Western Sec. Bank, N.A. v. Superior Court (Beverly Hills Business Bank)

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THE PEOPLE, Plaintiff and Respondent,
v.
DERRICK LEON THOMAS, Defendant and Appellant.

No. S025251.

Supreme Court of California

Dec 14, 1992.

SUMMARY

A complaint charged defendant with robbery (Pen. Code, § 211), and alleged firearm use (Pen. Code, § 12022.5, subd. (a)) and probation ineligibility (Pen. Code, § 1203.06). Defendant negotiated a plea bargain, with the precise term of imprisonment conditioned on the result of his motion to strike the firearm use enhancement. The trial court denied the motion to strike without indicating whether or not it was exercising discretion under Pen. Code, § 1385 (dismissal of action in furtherance of justice). Pursuant to the terms of the plea bargain, the court sentenced defendant to a five-year term of imprisonment. (Superior Court of Santa Clara County, No. 136555, Jeremy D. Fogel, Judge.) The Court of Appeal, Sixth Dist., No. H007449, affirmed, concluding that the trial court lacked authority to entertain a motion under Pen. Code, § 1385, to strike a firearm use enhancement provided for by Pen. Code, § 12022.5.

The Supreme Court affirmed the judgment of the Court of Appeal, holding that the trial court did not err in denying the motion to strike. In amending Pen. Code, § 1170.1, subd. (h), in 1989, the Legislature deleted Pen. Code, § 12022.5, from the list of statutory enhancements that a trial court might, in its discretion, strike if sufficient "circumstances in mitigation" exist. The court held that, although the power to dismiss an "action" "in furtherance of justice" under Pen. Code, § 1385, includes the power to dismiss or strike an enhancement, the Legislature, in deleting reference to Pen. Code, § 12022.5, could not have intended to preserve a power to strike that enhancement under Pen. Code, § 1385. The court held that, at least in the context of striking firearm use enhancements, the "circumstances in mitigation" and "furtherance of justice" standards are essentially identical. (Opinion by Lucas, C. J., expressing the unanimous view of the court.)

HEADNOTES

Classified to California Digest of Official Reports

(1a, 1b) Criminal Law § 529.2--Judgment, Sentence, and Punishment-- Imprisonment--Sentence Enhancements--Firearm Use--Trial *207 Court's Power to Strike.

In a prosecution for robbery (Pen. Code, § 211), the trial court did not err in denying defendant's motion to strike a firearm use enhancement (Pen. Code, § 12022.5, subd. (a)). In amending Pen. Code, § 1170.1, subd. (h), in 1989, the Legislature deleted Pen. Code, § 12022.5, from the list of statutory enhancements that a trial court might, in its discretion, strike if sufficient "circumstances in mitigation" exist. Although the power to dismiss an "action" "in furtherance of justice" under Pen. Code, § 1385, includes the power to dismiss or strike an enhancement, the Legislature, in deleting reference to Pen. Code, § 12022.5, could not have intended to preserve a power to strike that enhancement under Pen. Code, § 1385. At least in the context of striking firearm use enhancements, the "circumstances in mitigation" and "furtherance of justice" standards are essentially identical.

[See **Cal.Jur.3d (Rev)**, Criminal Law, § 3410; 3 **Witkin & Epstein**, Cal. Criminal Law (2d ed. 1989) § 1502.]

(2) Statutes § 21--Construction--Legislative Intent.

The fundamental purpose of statutory construction is to ascertain the intent of the lawmakers so as to effectuate the purpose of the law. In order to determine this intent, a court begins by examining the language of the statute. But it is a settled principle of statutory interpretation that language of a statute should not be given a literal meaning if doing so would result in absurd consequences which the Legislature did not intend. Thus, the intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act.

(3) Statutes § 39--Construction--Giving Effect to Statute--Conformation of Parts.

A court does not construe statutes in isolation, but rather reads every statute with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness.

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COUNSEL

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Daniel E. Lungren, Attorney General, George Williamson, Chief Assistant Attorney General, Ronald A. Bass and John H. Sugiyama, Assistant Attorneys General, Martin S. Kaye, Laurence K. Sullivan, Herbert F. Wilkinson *208 and Ronald S. Matthias, Deputy Attorneys General, for Plaintiff and Respondent.

Michael R. Capizzi, District Attorney (Orange) and E. Thomas Dunn, Jr., Deputy District Attorney, as Amici Curiae on behalf of Plaintiff and Respondent.

LUCAS, C. J.

In 1989, the Legislature amended Penal Code section 1170.1, subdivision (h) (all further statutory references are to this code), by deleting section 12022.5 (firearm use enhancements) from the list of statutory enhancements that a trial court might, in its discretion, strike if sufficient "circumstances in mitigation" exist. The question arises whether trial courts nonetheless may continue to strike such firearm use enhancements "in furtherance of justice" under section 1385. Because we find clear legislative intent to withhold such authority, we conclude the Court of Appeal in the present case correctly ruled the trial court herein lacked such authority.

On January 7, 1990, defendant Derrick Leon Thomas (age 18) and his companion (age 17) robbed a store in Palo Alto. Defendant was holding a loaded .22- caliber gun borrowed from his companion, who had taken it from his mother without her knowledge. The robbers took and divided $160 in cash, fled on bicycles, and were arrested a few minutes later.

A complaint charged defendant with robbery (§ 211), and alleged a firearm use (§ 12022.5, subd. (a)) and probation ineligibility (§ 1203.06). Defendant negotiated a plea bargain, the precise term of imprisonment conditioned on the result of his motion to strike the firearm use enhancement. In support of his motion to strike, defendant submitted an evaluation of the interviewing counselor, who concluded that the robbery was an isolated and impulsive act not likely to be repeated by defendant. The People argued the trial court lacked authority to entertain the motion to strike. The court denied defendant's motion, without indicating whether or not it was exercising discretion under section 1385. Pursuant to the terms of defendant's plea bargain, he was then sentenced to a five-year term of imprisonment. Defendant appealed.

The Court of Appeal affirmed, concluding the trial court lacked authority to entertain a motion under section 1385 to strike a firearm use enhancement provided for by section 12022.5. As will appear, we agree. *209

1. *The applicable statutes*

Section 12022.5, subdivision (a), in pertinent part provides for an enhanced punishment of three, four or five years' imprisonment for "any person who personally uses a firearm in the commission or attempted commission of a felony ...."

Section 1170.1, subdivision (d), provides that when the court imposes a prison sentence for a felony (see generally § 1170), "the court shall also impose the additional terms provided" in 16 specified sections of the Penal Code and the Health and Safety Code, including section 12022.5, "unless the additional punishment therefor is stricken pursuant to [section 1170.1,] subdivision (h)."

Section 1170.1, subdivision (h), provides that "Notwithstanding any other provision of law, the court may strike the additional punishment for the enhancements provided" in 13 of the 16 enhancement sections set forth in section 1170.1, subdivision (d), "if it determines that there are circumstances in mitigation of the additional punishment. ..."

Until 1989, section 12022.5 was one of the sections listed in section 1170.1, subdivision (h). The Legislative Counsel's Digest comment concerning the proposal to delete reference to section 12022.5 explained the amendment as follows: "Existing law relating to sentencing authorizes a court to strike the additional enhancement involving the personal use of a firearm in the commission ... of a felony .... [¶] *This bill would delete that authorization.*" (Legis. Counsel's Dig., Assem. Bill No. 566 (1989-1990 Reg. Sess.), italics added.)

Finally, section 1385, subdivision (a), permits the sentencing authority "in furtherance of justice [to] order an action to be dismissed." In its 1989 amendment to section 1170.1, subdivision (h), the Legislature deleted reference to section 12022.5, but

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did not alter or refer to the language of section 1385.

2. *Discussion*

(1a) Defendant contends the trial court erred in denying his motion to strike the firearm use enhancement without exercising the court's "furtherance of justice" discretion under section 1385. As defendant observes, the power to dismiss an "action" under section 1385 includes the power to dismiss or strike an enhancement. (See *People v. Fritz* (1985) 40 Cal.3d 227, 229-230 [219 Cal.Rptr. 460, 707 P.2d 833]; *210*People v. Williams* (1981) 30 Cal.3d 470, 482-483 [179 Cal.Rptr., 637 P.2d 1029]; *People v. Burke* (1956) 47 Cal.2d 45, 50-51 [301 P.2d 241]; *People v. Dorsey* (1972) 28 Cal.App.3d 15, 18-20 [104 Cal.Rptr. 326]; cf. § 1385, subd. (b) [abrogating *Fritz*'s holding that section 1385 may be used to strike "prior serious felony" enhancements under section 667].)

The People, on the other hand, contend that by amending section 1170.1, subdivision (h), to delete the reference to section 12022.5, the Legislature expressed a clear intent to divest the courts of discretion to strike firearm use enhancements. The People suggest further that the Legislature's failure to likewise amend or refer to section 1385 was, at most, a drafting "oversight" of a kind to which we have previously referred. (See, e.g., *People v. Pieters* (1991) 52 Cal.3d 894, 900-901 [210 Cal.Rptr. 623, 694 P.2d 736]; *People v. Jackson* (1985) 37 Cal.3d 826, 837-838, and fn. 15 [276 Cal.Rptr. 918, 802 P.2d 420].)

(2) As we observed in *People v. Pieters, supra*, 52 Cal.3d at pages 898-899, "The fundamental purpose of statutory construction is to ascertain the intent of the lawmakers so as to effectuate the purpose of the law. [Citations.] In order to determine this intent, we begin by examining the language of the statute. [Citations.] But '[i]t is a settled principle of statutory interpretation that language of a statute should not be given a literal meaning if doing so would result in absurd consequences which the Legislature did not intend.' [Citations.] Thus, '[t]he intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act.' [Citation.] (3) Finally, we do not construe statutes in isolation, but rather read every statute 'with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness.' [Citation.]"

Defendant cites cases holding that, absent a clear legislative direction to the contrary, a trial court retains its authority under section 1385 to strike an enhancement. (See *People v. Fritz, supra*, 40 Cal.3d at pp. 229-230; *People v. Williams, supra*, 30 Cal.3d at pp. 482-483; *People v. Tanner* (1979) 24 Cal.3d 514, 518 [156 Cal.Rptr. 450, 596 P.2d 328]; see also *People v. Sutton* (1985) 163 Cal.App.3d 438, 445-446 [209 Cal.Rptr. 536] [recognizing authority under section 1385 to strike deadly weapon use enhancement under section 12022.3, despite failure of Legislature to include such enhancements in section 1170.1, subdivision (h)]; *People v. Price* (1984) 151 Cal.App.3d 803, 818-820 [199 Cal.Rptr. 99] [same].) *211

(1b) But it is not necessary that the Legislature expressly refer to section 1385 in order to preclude its operation. (See *People v. Rodriguez* (1986) 42 Cal.3d 1005, 1019 [232 Cal.Rptr. 132, 728 P.2d 202] [section 1385 may be held inapplicable "in the face of [a] more specific proscription on the court's power"]; *People v. Tanner, supra*, 24 Cal.3d at pp. 519-521 [specific language of section 1203.06 barring probation contained sufficient indicia of legislative intent to preclude judicial exercise of discretion under section 1385]; see also *People v. Dillon* (1983) 34 Cal.3d 441, 467 [194 Cal.Rptr. 390, 668 P.2d 697] [deletion of provision indicates legislative intent to change law].) As we stated in *People v. Williams, supra*, 30 Cal.3d at page 482, "Section 1385 permits dismissals in the interest of justice in any situation where the Legislature has not clearly evidenced a contrary intent."

What was the intent of the Legislature in deleting from section 1170.1, subdivision (h), the former reference to section 12022.5? As previously noted, the Legislative Counsel's comment indicated the amendment was intended to "delete" the trial courts' authorization to strike the additional enhancement involving the personal use of a firearm in the commission of a felony. Could the Legislature, in deleting reference to section 12022.5, nonetheless have intended to preserve a power to strike that enhancement under section 1385? We conclude otherwise, and a comparison of the respective standards for striking or dismissing enhancements under section 1170.1, subdivision (h), and section 1385, reinforces that conclusion.

Section 1170.1, subdivision (h), permits a court to strike the punishment for an enhancement "if it determines that there are circumstances in mitigation of the additional punishment ...." Section 1385, on the other hand, permits dismissal of actions (or

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enhancements) "in furtherance of justice." Are there significant differences between these standards which might have induced the Legislature to leave section 1385 in place as a vehicle for striking firearm use enhancements? It is quite difficult to conceive of any such differences.

The Judicial Council adopted extensive guidelines to assist in determining whether "circumstances in mitigation" exist to justify striking enhancements or reducing sentences to a lower term. (See Cal. Rules of Court, rule 423, and Advisory Com. Comment.) Rule 423 lists a variety of such "circumstances in mitigation," including facts relating to the crime (such as defendant's minor role or laudable motive in the offense, the small likelihood of its recurrence, the presence of duress or coercion by others, or a mistaken claim of right by the defendant), and facts relating to the defendant (including his *212 insignificant prior record, mental or physical condition reducing his culpability, or restitution or satisfactory performance on probation or parole). Rule 423's list of mitigating circumstances mirrors many of the considerations we have stated are appropriate in determining whether to dismiss an action under section 1385 in furtherance of justice. (See *People v. Superior Court (Howard)* (1968) 69 Cal.2d 491, 505 [72 Cal.Rptr. 330, 446 P.2d 138].)

Defendant suggests that the "furtherance of justice" standard is broader than the "circumstances in mitigation" standard, and would include consideration of matters extrinsic to the offense and the offender, such as protection of the public interest. (See *People v. Orin* (1975) 13 Cal.3d 937, 944 [120 Cal.Rptr. 65, 533 P.2d 193].) Although the public interest may well favor *enhancing* a defendant's sentence by reason of his firearm use, it would be quite rare when the public interest, but not "circumstances in mitigation," would justify *striking* such an enhancement. (Such cases seemingly would be limited to situations wherein the *People* seek to strike an enhancement to enable them to rely on the defendant's gun use as an aggravating sentencing factor.) In most cases, if the public interest favors such relief, that fact readily could be deemed a "circumstance in mitigation of the additional punishment." (See, e.g., *People v. Marsh* (1984) 36 Cal.3d 134, 145, fn. 8 [202 Cal.Rptr. 92, 679 P.2d 1033] [noting for purposes of remand that striking enhancements may be justified under section 1385 by number of "mitigating circumstances" in case].)

In short, we believe that, at least in the context of striking firearm use enhancements, the two standards are essentially identical. This conclusion supports the People's position that the Legislature's deletion of section 12022.5 was intended to divest the courts of their statutory authority to strike firearm use enhancements, whether such power be exercised under section 1170.1, subdivision (h), or under section 1385.

As previously stated, in determining the legislative intent underlying a new provision or amendment, we must consider the entire scheme of law of which it is a part. The 1989 amendment to section 1170.1, subdivision (h), was included in a bill (Assem. Bill No. 566 (1989-1990 Reg. Sess.), the "McClintock Firearms" bill) that contained a variety of measures *expanding or enhancing* criminal liability for unlawful firearm use or possession. These new measures included provisions (1) restricting plea bargaining when a defendant personally used a firearm, (2) elevating certain firearm use or possession offenses from misdemeanor/felony ("wobbler") status to felonies, and (3) increasing the term of imprisonment for personal use of a firearm during a felony, as well as (4) the subject provision deleting section 12022.5 *213 from section 1170.1, subdivision (h). (See Legis. Counsel's Dig., Assem. Bill No. 566 (1989- 1990 Reg. Sess.).)

In light of the fact that the subject provision is included in a "package" of provisions aimed at enhancing criminal liability for unlawful firearm use, we think it highly unlikely the Legislature intended nonetheless to preserve broad judicial authority under section 1385 to strike a firearm use enhancement "in furtherance of justice."

Defendant observes that prior to the adoption of the foregoing amendment, the Attorney General's Office had urged the Legislature to modify section 1385 to preclude a court from striking a firearm use enhancement in furtherance of justice. Evidently, the Legislature did not deem an amendment to section 1385 necessary in light of its deletion of the specific reference to section 12022.5 in section 1170.1, subdivision (h). This conclusion is supported by a synopsis of Assembly Bill No. 566 prepared by the Senate Committee on the Judiciary, which synopsis referred to the prior ability of courts to strike firearm use enhancements "in the interest of justice," and commented: "This bill would provide that the enhancements shall never be stricken."

Finally, the People observe that although section 1385 provides a broad, general power to dismiss "actions" in furtherance of justice, section 1170.1,

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subdivision (h), provides a *specific* power to strike specified enhancements. Under well-established rules of construction, any inconsistency between the two provisions would be resolved by applying the more specific provision (and any amendments thereto). (E.g., *People v. Tanner, supra,* 24 Cal.3d at p. 521.) Moreover, to accept defendant's argument and hold that section 1385 continues to afford a broad ("furtherance of justice") basis for striking an enhancement under section 12022.5 could effectively negate the 1989 amendment to section 1170.1, subdivision (h). The "furtherance of justice" standard of section 1385 seems broad enough to permit striking an enhancement where mitigating circumstances exist, yet the Legislature in passing the 1989 amendment clearly intended to preclude the exercise of such power. As we previously indicated, a statute should not be given a literal meaning if doing so would result in absurd consequences which the Legislature could not have intended. (See *People v. Tanner, supra,* 24 Cal.3d at pp. 518- 520 [construing mandatory language of section 1203.06 as precluding power to strike firearm use finding and grant probation].)

For all the foregoing reasons, we conclude the trial court had no discretion to strike the firearm use enhancement under section 12022.5, and properly *214 denied defendant's motion for such relief. The Court of Appeal's judgment is affirmed.

Mosk, J., Panelli, J., Kennard, J., Arabian, J., Baxter, J., and George, J., concurred.

Appellant's petition for a rehearing was denied January 28, 1993. *215

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C

WHITCOMB HOTEL, INC. (a Corporation) et al., Petitioners,
v.
CALIFORNIA EMPLOYMENT COMMISSION et al., Respondents; FERNANDO R. NIDOY et al., Interveners and Respondents.

S. F. No. 16854.

Supreme Court of California

Aug. 18, 1944.

HEADNOTES

(1) Statutes § 180(2)--Construction--Executive or Departmental Construction.
The construction of a statute by the officials charged with its administration must be given great weight, for their substantially contemporaneous expressions of opinion are highly relevant and material evidence of the probable general understanding of the times and of the opinions of men who probably were active in drafting the statute.

See 23 Cal.Jur. 776; 15 Am.Jur. 309.

(2) Statutes § 180(2)--Construction--Executive or Departmental Construction.
An administrative officer may not make a rule or regulation that alters or enlarges the terms of a legislative enactment.

(3) Statutes § 180(2)--Construction--Executive or Departmental Construction.
An erroneous administrative construction does not govern the interpretation of a statute, even though the statute is subsequently reenacted without change.

(4) Unemployment Relief--Disqualification--Refusal to Accept Suitable Employment.
The disqualification imposed on a claimant by Unemployment Insurance Act, § 56(b) (Stats. 1935, ch. 352, as amended; Deering's Gen. Laws, 1937, Act 8780d), for refusing without good cause to accept suitable employment when offered to him, or failing to apply for such employment when notified by the district public employment office, is an absolute disqualification that necessarily extends throughout the period of his unemployment entailed by his refusal to accept suitable employment, and is terminated only by his subsequent employment.

See 11 Cal.Jur. Ten-year Supp. (Pocket Part) "Unemployment Reserves and Social Security."

(5) Unemployment Relief--Disqualification--Refusal to Accept Suitable Employment.
One who refuses suitable employment without good cause is not involuntarily unemployed through no fault of his own. He has no claim to benefits either at the time of his refusal or at any subsequent time until he again brings himself within the Unemployment Insurance Act. *754

(6) Unemployment Relief--Disqualification--Refusal to Accept Suitable Employment.
Employment Commission Rule 56.1, which attempts to create a limitation as to the time a person may be disqualified for refusing to accept suitable employment, conflicts with Unemployment Insurance Act, § 56(b), and is void.

(7) Unemployment Relief--Powers of Employment Commission--Adoption of Rules.
The power given the Employment Commission by the Unemployment Insurance Act, § 90, to adopt rules and regulations is not a grant of legislative power, and in promulgating such rules the commission may not alter or amend the statute or enlarge or impair its scope.

(8) Unemployment Relief--Remedies of Employer--Mandamus.
Inasmuch as the Unemployment Insurance Act, § 67, provides that in certain cases payment of benefits shall be made irrespective of a subsequent appeal, the fact that such payment has been made does not deprive an employer of the issuance of a writ of mandamus to compel the vacation of an award of benefits when he is entitled to such relief.

SUMMARY

PROCEEDING in mandamus to compel the California Employment Commission to vacate an award of unemployment benefits and to refrain from charging petitioners' accounts with benefits paid. Writ granted.

COUNSEL

Brobeck, Phleger & Harrison, Gregory A. Harrison and Richard Ernst for Petitioners.

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Robert W. Kenny, Attorney General, John J. Dailey, Deputy Attorney General, Forrest M. Hill, Gladstein, Grossman, Margolis & Sawyer, Ben Margolis, William Murrish, Gladstein, Grossman, Sawyer & Edises, Aubrey Grossman and Richard Gladstein for Respondents.

Clarence E. Todd and Charles P. Scully as Amici Curiae on behalf of Respondents.

TRAYNOR, J.

In this proceeding the operators of the Whitcomb Hotel and of the St. Francis Hotel in San Francisco seek a writ of mandamus to compel the California Employment Commission to set aside its order granting unemployment insurance benefits to two of their former employees, Fernando R. Nidoy and Betty Anderson, corespondents in this action, and to restrain the commission from charging petitioners' accounts with benefits paid pursuant to *755 that order. Nidoy had been employed as a dishwasher at the Whitcomb Hotel, and Betty Anderson as a maid at the St. Francis Hotel. Both lost their employment but were subsequently offered reemployment in their usual occupations at the Whitcomb Hotel. These offers were made through the district public employment office and were in keeping with a policy adopted by the members of the Hotel Employers' Association of San Francisco, to which this hotel belonged, of offering available work to any former employees who recently lost their work in the member hotels. The object of this policy was to stabilize employment, improve working conditions, and minimize the members' unemployment insurance contributions. Both claimants refused to accept the proffered employment, whereupon the claims deputy of the commission ruled that they were disqualified for benefits under section 56(b) of the California Unemployment Insurance Act (Stats. 1935, ch. 352, as amended; Deering's Gen. Laws, 1937, Act 8780d), on the ground that they had refused to accept offers of suitable employment, but limited their disqualification to four weeks in accord with the commission's Rule 56.1. These decisions were affirmed by the Appeals Bureau of the commission. The commission, however, reversed the rulings and awarded claimants benefits for the full period of unemployment on the ground that under the collective bargaining contract in effect between the hotels and the unions, offers of employment could be made only through the union.

In its return to the writ, the commission concedes that it misinterpreted the collective bargaining contract, that the agreement did not require all offers of employment to be made through the union, and that the claimants are therefore subject to disqualification for refusing an offer of suitable employment without good cause. It alleges, however, that the maximum penalty for such refusal under the provisions of Rule 56.1, then in effect, was a four-week disqualification, and contends that it has on its own motion removed all charges against the employers for such period.

The sole issue on the merits of the case involves the validity of Rule 56.1, which limits to a specific period the disqualification imposed by section 56(b) of the act. Section 56 of the act, under which the claimants herein were admittedly disqualified, *756 provides that: "An individual is not eligible for benefits for unemployment, and no such benefit shall be payable to him under any of the following conditions: ... (b) If without good cause he has refused to accept suitable employment when offered to him, or failed to apply for suitable employment when notified by the District Public Employment Office." Rule 56.1, as adopted by the commission and in effect at the time here in question, restated the statute and in addition provided that: "In pursuance of its authority to promulgate rules and regulations for the administration of the Act, the Commission hereby provides that an individual shall be disqualified from receiving benefits if it finds that he has failed or refused, without good cause, either to apply for available, suitable work when so directed by a public employment office of the Department of Employment or to accept suitable work when offered by any employing unit or by any public employment office of said Department. Such disqualification shall continue for the week in which such failure or refusal occurred, and for not more than three weeks which immediately follow such week as determined by the Commission according to the circumstances in each case." The validity of this rule depends upon whether the commission was empowered to adopt it, and if so, whether the rule is reasonable.

The commission contends that in adopting Rule 56.1 it exercised the power given it by section 90 of the act to adopt "rules and regulations which to it seem necessary and suitable to carry out the provisions of this act" (2 Deering's Gen. Laws, 1937, Act 8780d, § 90(a)). In its view section 56(b) is ambiguous because it fails to specify a definite period of disqualification. The commission contends that a fixed period is essential to proper administration of the act and that its construction of the section should

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be given great weight by the court. It contends that in any event its interpretation of the act as embodied in Rule 56.1 received the approval of the Legislature in 1939 by the reenactment of section 56(b) without change after Rule 56.1 was already in effect.

(1) The construction of a statute by the officials charged with its administration must be given great weight, for their "substantially contemporaneous expressions of opinion are *757 highly relevant and material evidence of the probable general understanding of the times and of the opinions of men who probably were active in the drafting of the statute." (*White v. Winchester Country Club*, 315 U.S. 32, 41 [62 S.Ct. 425, 86 L.Ed. 619]; *Fawcus Machine Co. v. United States*, 282 U.S. 375, 378 [51 S.Ct. 144, 75 L.Ed. 397]; *Riley v. Thompson*, 193 Cal. 773, 778 [227 P. 772]; *County of Los Angeles v. Frisbie*, 19 Cal.2d 634, 643 [122 P.2d 526]; *County of Los Angeles v. Superior Court*, 17 Cal.2d 707, 712 [112 P.2d 10]; see, Griswold, *A Summary of the Regulations Problem*, 54 Harv.L.Rev. 398, 405; 27 Cal.L.Rev. 578; 23 Cal.Jur. 776.) When an administrative interpretation is of long standing and has remained uniform, it is likely that numerous transactions have been entered into in reliance thereon, and it could be invalidated only at the cost of major readjustments and extensive litigation. (*Helvering v. Griffiths*, 318 U.S. 371, 403 [63 S.Ct. 636, 87 L.Ed. 843]; *United States v. Hill*, 120 U.S. 169, 182 [7 S.Ct. 510, 30 L.Ed. 627]; see *County of Los Angeles v. Superior Court*, 17 Cal.2d 707, 712 [112 P.2d 10]; *Hoyt v. Board of Civil Service Commissioners*, 21 Cal.2d 399, 402 [132 P.2d 804].) Whatever the force of administrative construction, however, final responsibility for the interpretation of the law rests with the courts. "At most administrative practice is a weight in the scale, to be considered but not to be inevitably followed. ... While we are of course bound to weigh seriously such rulings, they are never conclusive." (*F. W. Woolworth Co. v. United States*, 91 F.2d 973, 976.) (2) An administrative officer may not make a rule or regulation that alters or enlarges the terms of a legislative enactment. (*California Drive-In Restaurant Assn. v. Clark*, 22 Cal.2d 287, 294 [140 P.2d 657, 147 A.L.R. 1028]; *Bodinson Mfg. Co. v. California Employment Com.*, 17 Cal.2d 321, 326 [109 P.2d 935]; *Boone v. Kingsbury*, 206 Cal. 148, 161 [273 P. 797]; *Bank of Italy v. Johnson*, 200 Cal. 1, 21 [251 P. 784]; *Hodge v. McCall*, 185 Cal. 330, 334 [197 P. 86]; *Manhattan General Equipment Co. v. Commissioner of Int. Rev.*, 297 U.S. 129 [56 S.Ct. 397, 80 L.Ed. 528]; *Montgomery v. Board of Administration*, 34 Cal.App.2d 514, 521 [93 P.2d 1046, 94 A.L.R. 610].) (3) Moreover, an erroneous administrative construction does not govern the interpretation of a statute, even though the statute is subsequently reenacted *758 without change. (*Biddle v. Commissioner of Internal Revenue*, 302 U.S. 573, 582 [58 S.Ct. 379, 82 L.Ed. 431]; *Houghton v. Payne*, 194 U.S. 88 [24 S.Ct. 590, 48 L.Ed. 888]; *Iselin v. United States*, 270 U.S. 245, 251 [46 S.Ct. 248, 70 L.Ed. 566]; *Louisville & N. R. Co. v. United States*, 282 U.S. 740, 757 [51 S.Ct. 297, 75 L.Ed. 672]; *F. W. Woolworth Co. v. United States*, 91 F.2d 973, 976; *Pacific Greyhound Lines v. Johnson*, 54 Cal.App.2d 297, 303 [129 P.2d 32]; see *Helvering v. Wilshire Oil Co.*, 308 U.S. 90, 100 [60 S.Ct. 18, 84 L.Ed. 101]; *Helvering v. Hallock*, 309 U.S. 106, 119 [60 S.Ct. 444, 84 L.Ed. 604, 125 A.L.R. 1368]; *Federal Comm. Com. v. Columbia Broadcasting System*, 311 U.S. 132, 137 [61 S.Ct. 152, 85 L.Ed. 87]; Feller, *Addendum to the Regulations Problem*, 54 Harv.L.Rev. 1311, and articles there cited.)

In the present case Rule 56.1 was first adopted by the commission in 1938. It was amended twice to make minor changes in language, and again in 1942 to extend the maximum period of disqualification to six weeks. The commission's construction of section 56(b) has thus been neither uniform nor of long standing. Moreover, the section is not ambiguous, nor does it fail to indicate the extent of the disqualification. (4) The disqualification imposed upon a claimant who without good cause "has refused to accept suitable employment when offered to him, or failed to apply for suitable employment when notified by the district public employment office" is an absolute disqualification that necessarily extends throughout the period of his unemployment entailed by his refusal to accept suitable employment, and is terminated only by his subsequent employment. (Accord: 5 C.C.H. Unemployment Insurance Service 35,100, par. 1965.04 [N.Y.App.Bd.Dec. 830-39, 5/27/39].) The Unemployment Insurance Act was expressly intended to establish a system of unemployment insurance to provide benefits for "persons unemployed through no fault of their own, and to reduce involuntary unemployment. ..." (Stats. 1939, ch. 564, § 2; Deering's Gen. Laws, 1939 Supp., Act 8780d, § 1.) The public policy of the State as thus declared by the Legislature was intended as a guide to the interpretation and application of the act. (*Ibid.*) (5) One who refuses suitable employment without good cause is not involuntarily unemployed through no fault of his own. He has no claim to benefits either at the time of his refusal or at any subsequent time until he again brings himself within *759 the provisions of the

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statute. (See 1 C.C.H. Unemployment Insurance Service 869, par. 1963.) Section 56(b) in excluding absolutely from benefits those who without good cause have demonstrated an unwillingness to work at suitable employment stands out in contrast to other sections of the act that impose limited disqualifications. Thus, section 56(a) disqualifies a person who leaves his work because of a trade dispute for the period during which he continues out of work by reason of the fact that the trade dispute is still in active progress in the establishment in which he was employed; and other sections at the time in question disqualified for a fixed number of weeks persons discharged for misconduct, persons who left their work voluntarily, and those who made wilful misstatements. (2 Deering's Gen. Laws, 1937, Act 8780(d), § § 56(a), 55, 58(e); see, also, Stats. 1939, ch. 674, § 14; Deering's Gen. Laws, 1939 Supp., Act 8780d, § 58.) Had the Legislature intended the disqualification imposed by section 56(b) to be similarly limited, it would have expressly so provided. (6) Rule 56.1, which attempts to create such a limitation by an administrative ruling, conflicts with the statute and is void. (*Hodge v. McCall, supra;* Manhattan General Equipment Co. v. Commissioner of Int. Rev., 297 U.S. 129, 134 [56 S.Ct. 397, 80 L.Ed. 528]; see *Bodinson Mfg. Co. v. California Employment Com.*, 17 Cal.2d 321, 326 [109 P.2d 935].) Even if the failure to limit the disqualification were an oversight on the part of the Legislature, the commission would have no power to remedy the omission. (7) The power given it to adopt rules and regulations (§ 90) is not a grant of legislative power (see 40 Columb. L. Rev. 252; cf. Deering's Gen. Laws, 1939 Supp., Act 8780(d), § 58(b)) and in promulgating such rules it may not alter or amend the statute or enlarge or impair its scope. (*Hodge v. McCall, supra;* Bank of Italy v. Johnson, 200 Cal. 1, 21 [251 P. 784]; *Manhattan General Equipment Co. v. Commissioner of Int. Rev., supra;* Koshland v. Helvering, 298 U.S. 441 [56 S.Ct. 767, 80 L.Ed. 1268, 105 A.L.R. 756]; *Iselin v. United States, supra.*) Since the commission was without power to adopt Rule 56.1, it is unnecessary to consider whether, if given such power, the provisions of the rule were reasonable.

The commission contends, however, that petitioners are not entitled to the writ because they have failed to exhaust *760 their administrative remedies under section 41.1. This contention was decided adversely in *Matson Terminals, Inc. v. California Employment Com., ante,* p. 695 [151 P.2d 202]. It contends further that since all the benefits herein involved have been paid, the only question is whether the charges made to the employers' accounts should be removed, and that since the employers will have the opportunity to protest these charges in other proceedings, they have an adequate remedy and there is therefore no need for the issuance of the writ in the present case. The propriety of the payment of benefits, however, is properly challenged by an employer in proceedings under section 67 and by a petition for a writ of mandamus from the determination of the commission in such proceedings. (See *Matson Terminals, Inc. v. California Employment Com., ante,* p. 695 [151 P.2d 202]; *W. R. Grace & Co. v. California Employment Com., ante,* p. 720 [151 P.2d 215].) An employer's remedy thereunder is distinct from that afforded by section 45.10 and 41.1, and the commission may not deprive him of it by the expedient of paying the benefits before the writ is obtained. (8) The statute itself provides that in certain cases payment shall be made irrespective of a subsequent appeal (§ 67) and such payment does not preclude issuance of the writ. (See *Bodinson Mfg. Co. v. California Emp. Com., supra,* at pp. 330-331; *Matson Terminals, Inc. v. California Emp. Com., supra.*)

Let a peremptory writ of mandamus issue ordering the California Employment Commission to set aside its order granting unemployment insurance benefits to the corespondents, and to refrain from charging petitioners' accounts with any benefits paid pursuant to that award.

Gibson, C. J., Shenk, J., Curtis, J., and Edmonds, J., concurred.

CARTER, J.

I concur in the conclusion reached in the majority opinion for the reason stated in my concurring opinion in *Mark Hopkins, Inc. v. California Emp. Co.*, this day filed, *ante,* p. 752 [151 P.2d 233].

Schauer, J., concurred.

Intervener's petition for a rehearing was denied September 13, 1944. Carter, J., and Schauer, J., voted for a rehearing. *761

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Whitcomb Hotel v. California Employment Commission

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C

In re RUDY L., a Person Coming under the Juvenile Court Law. THE PEOPLE, Plaintiff and Respondent,
v.
RUDY L., Defendant and Appellant.

No. B079446.

Court of Appeal, Second District, Division 1, California.

Oct 27, 1994.

SUMMARY

The trial court entered an order declaring a minor to be a ward of the court (Welf. & Inst. Code, § 602), based on his commission of vandalism in violation of Pen. Code, § 594. (Superior Court of Los Angeles County, No. FJ08122, Gary Bounds, Temporary Judge. [FN*])

FN* Pursuant to California Constitution, article VI, section 21.

The Court of Appeal affirmed. It held that the trial court did not err in finding the minor had committed vandalism and in declaring him a ward of the court, despite his assertion that lack of permission is an element of vandalism, and that the People failed to prove he had no permission to spray paint on a building. While defendant's appeal was pending, Pen. Code, § 594, subd. (a), was amended to provide that, with respect to public real property, "it shall be a permissive inference that the person neither owned the property nor had the permission of the owner to deface, damage, or destroy the property." However, nothing in the statute's language, either before or after it was amended, specifically makes lack of permission an element of vandalism. Moreover, the legislative history fails to show a legislative understanding that lack of permission is an element of the offense, nor does it show an intent to change the law and make it an element. Although construing the statute in a manner that does not make lack of permission an element renders the phrase "nor had the permission of the owner" surplusage, an undesirable result, it is consistent with legislative intent as expressed in the statute's language (Code Civ. Proc., § 1859). (Opinion by Spencer, P. J., with Ortega and Vogel (Miriam A.), JJ., concurring.)

HEADNOTES

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(1a, 1b) Malicious Mischief § 3--Malicious Injury to Property Vandalism--Lack of Permission as Element of Offense.
The trial court did *1008 not err in finding a minor had committed vandalism (Pen. Code, § 594), and in declaring him a ward of the court, despite his assertion that lack of permission is an element of vandalism, and that the People failed to prove he had no permission to spray paint on a building. While defendant's appeal was pending, Pen. Code, § 594, subd. (a), was amended to provide that with respect to public real property, "it shall be a permissive inference that the person neither owned the property nor had the permission of the owner to deface, damage, or destroy the property." However, nothing in the statute's language, either before or after it was amended, specifically makes lack of permission an element of vandalism. Moreover, the legislative history fails to show a legislative understanding that lack of permission is an element of the offense, nor does it show an intent to change the law and make it an element. Although construing the statute in a manner that does not make lack of permission an element renders the phrase "nor had the permission of the owner" surplusage, an undesirable result, it is consistent with legislative intent as expressed in the statute's language (Code Civ. Proc., § 1859).

[See 2 Witkin & Epstein, Cal. Criminal Law (2d ed. 1988) § § 678, 684.]

(2) Statutes § 20--Construction--Judicial Function--Construction of Statute as Written.
It is against all settled rules of statutory construction that courts should write into a statute, by implication, express requirements that the Legislature itself has not seen fit to place in the statute. The court must follow the language used in a statute and give it its plain meaning, even if it appears probable that a different object was in the mind of the Legislature.

COUNSEL

Tibor I. Toczauer, under appointment by the Court of Appeal, for Defendant and Appellant.

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Daniel E. Lungren, Attorney General, George Williamson, Chief Assistant Attorney General, Carol Wendelin Pollack, Assistant Attorney General, John R. Gorey and Alene M. Games, Deputy Attorneys General, for Plaintiff and Respondent. *1009

SPENCER, P. J.

Introduction

Appellant Rudy L. appeals from an order declaring him to be a ward of the court pursuant to Welfare and Institutions Code section 602 based on his commission of vandalism in violation of Penal Code section 594.

Statement of Facts

On the afternoon of April 29, 1993, appellant spray-painted the letter "A" on the wall of an empty building located at 5327 East Beverly Boulevard. Neither appellant nor his mother owned the building.

Contention

(1a) Appellant contends the petition erroneously was sustained, in that the elements of the crime he was found to have committed were not proven--lack of permission is an element of vandalism, and the People failed to prove he had no permission to paint on the building wall. For the reasons set forth below, we disagree.

Discussion

At the time appellant spray-painted the building wall and the adjudication hearing was held, Penal Code section 594, subdivision (a) (hereinafter section 594(a)), provided: "Every person who maliciously (1) defaces with paint or any other liquid, (2) damages or (3) destroys any real or personal property not his or her own, ... is guilty of vandalism." Appellant's counsel argued appellant should not be found to have committed vandalism and the petition should not be sustained, in that lack of permission is an element of vandalism and the People failed to prove appellant lacked permission to spray- paint the building wall. The court concluded, based on the language of the statute, lack of permission was not an element of the offense but, rather, permission was a defense. It thereafter found appellant had committed the offense and sustained the petition.

While appellant's appeal was pending, section 594(a) was amended. (Stats. 1993, ch. 605, § 4.) It now provides: "Every person who maliciously commits any of the following acts with respect to any real or personal property not his or her own, ... is guilty of vandalism: [¶] (1) Sprays, *1010 scratches, writes on, or otherwise defaces. [¶] (2) Damages. [¶] (3) Destroys. [¶] Whenever a person violates paragraph (1) with respect to real property belonging to any public entity, ... it shall be a permissive inference that the person neither owned the property nor had the permission of the owner to deface, damage, or destroy the property."

Appellant argues the provision as to the permissive inference makes it clear the Legislature considered lack of permission to be an element of vandalism. Since the prosecution failed to prove this element, appellant is entitled to reversal of the adjudication; double jeopardy protection bars retrial of the case.

In the People's view, the Legislature's failure to specify that lack of permission is an element of the offense means it is not and never has been an element, the permissive inference language notwithstanding. Therefore, the prosecution did not fail to prove its case. However, if the court concludes lack of permission is an element of the offense, then the element was added as a result of the 1993 amendment to section 594(a). If so, and the amendment is applied retroactively to appellant's case, double jeopardy protection does not apply and the People should be allowed to retry the case.

Where a statute is ambiguous, it requires construction by the court. Here, the amended statute is ambiguous. The permissive inference language allows an inference an actor had no permission to deface government property, but the language of the statute does not specify that lack of permission is an element of the offense, making it unclear whether or not it is an element. Thus, construction of the statute is necessary.

A statute is to be construed so as to give effect to the intention of the Legislature. (Code Civ. Proc., § 1859; *Landrum v. Superior Court* (1981) 30 Cal.3d 1, 12 [177 Cal.Rptr. 325, 634 P.2d 352].) To do so, " '[t]he court turns first to the words [of the statute] themselves for the answer.' [Citation.]" (*Moyer v. Workmen's Comp. Appeals Bd.* (1973) 10 Cal.3d 222, 230 [110 Cal.Rptr. 144, 514 P.2d 1224].) The statutory language used is to be given its usual, ordinary meaning and, where possible, significance should be given to every word and phrase. (*Id.* at p. 230.) As stated in Code of Civil Procedure section

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1858, "... where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all." Accordingly, a construction which renders some words surplusage should be avoided. (*California Mfrs. Assn. v. Public Utilities Com.* (1979) 24 Cal.3d 836, 844 [157 Cal.Rptr. 676, 598 P.2d 836].) Moreover, "[w]ords must be construed in context, and statutes must be harmonized, both internally and with each other, to the extent possible. [Citations.]" (*Ibid.*) *1011

Additionally, in construing a statute, the duty of the court "is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted." (Code Civ. Proc., § 1858.) (2) "It is ... against all settled rules of statutory construction that courts should write into a statute by implication express requirements which the Legislature itself has not seen fit to place in the statute." (*People v. White* (1954) 122 Cal.App.2d 551, 554 [265 P.2d 115]; see *Estate of Tkachuk* (1977) 73 Cal.App.3d 14, 18 [139 Cal.Rptr. 55].) The court must follow the language used in a statute and give it its plain meaning, " ' "even if it appears probable that a different object was in the mind of the legislature." ' " (*People v. Weidert* (1985) 39 Cal.3d 836, 843 [218 Cal.Rptr. 57, 705 P.2d 380].)

(1b) It is clear that in neither version of section 594(a) did the Legislature specify that lack of permission was an element of the offense of vandalism. Moreover, had the Legislature intended to make lack of permission an element it easily could have done so. In other criminal statutes, it has specifically stated that lack of permission or consent is an element of the offense. (See, e.g., Pen. Code, § 211 ["Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and *against his will*, accomplished by means of force or fear." (Italics added.)]; *id.*, § 261, subd. (a)(2) ["Rape is an act of sexual intercourse accomplished with a person not the spouse of the perpetrator ... [w]here it is accomplished *against a person's will* by means of force, violence, duress, menace, or fear ...." (Italics added.)]; *id.*, § 596 ["Every person who, *without the consent of the owner*, wilfully administers poison to any animal, the property of another, ... is guilty of a misdemeanor." (Italics added.)].)

As stated above, a statute is to be interpreted according to the words used, and the court is not to insert provisions omitted by the Legislature. (Code Civ. Proc., § 1858; *People v. White, supra*, 122 Cal.App.2d at p. 554.) Additionally, a statute should be interpreted in the context of the whole system of law of which it is a part. (*People v. Comingore* (1977) 20 Cal.3d 142, 147 [141 Cal.Rptr. 542, 570 P.2d 723].) Thus, if a statute "referring to one subject contains a critical word or phrase, omission of that word or phrase from a similar statute on the same subject generally shows a different legislative intent." (*Craven v. Crout* (1985) 163 Cal.App.3d 779, 783 [209 Cal.Rptr. 649]; accord, *Estate of Reeves* (1991) 233 Cal.App.3d 651, 657 [284 Cal.Rptr. 650].) The omission of language in either version of section 594(a) making lack of permission an element of the offense, when such language has been inserted in other criminal statutes to make lack of permission or consent an element of the offenses, is indicative of a legislative intent not to make lack of permission an element of vandalism. *1012

The permissive inference language suggests that the Legislature had in mind the notion that lack of permission was an element of the offense. But, as stated above, the court must follow the language used in a statute and give it its plain meaning, " ' "even if it appears probable that a different object was in the mind of the legislature." ' " (*People v. Weidert, supra*, 39 Cal.3d at p. 843.)

On the other hand, a construction of section 594(a) which does not include lack of permission as an element of the offense renders the phrase "nor had the permission of the owner" surplusage. If lack of permission is not an element of the offense, an inference that the actor lacked permission is unnecessary. Whether or not such an inference existed, the actor still could prove permission-and thus lack of malice-as a defense. Such a construction would violate the principles that a statute should be construed so as to give effect to all provisions, and words used therein should not be rendered mere surplusage. (Code Civ. Proc., § 1858; *California Mfrs. Assn. v. Public Utilities Com., supra*, 24 Cal.3d at p. 844.)

In addition to the rules of statutory construction, a valuable aid in ascertaining legislative intent may be the legislative history of a statute. (*California Mfrs. Assn. v. Public Utilities Com., supra*, 24 Cal.3d at p. 844.) The amendment to section 594(a) was proposed as part of Assembly Bill No. 1179, 1993-1994 Regular Session (Assembly Bill No. 1179). According to a report prepared for hearing by the Assembly Committee on Public Safety on May 4, 1993, the purpose of the bill was "to elevate the sentences for vandalism for persons who have a prior

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conviction where a term of imprisonment was served. If an individual knows he or she can get away with vandalism, they are going to continue to do it. Graffiti and vandalism generate public outrage," and "[t]he cost of graffiti removal is tremendous." More than that, the blight caused by graffiti "affects all communities" and causes "[t]urf wars" and gang violence, which can lead to murder. "When it comes to vandalism with a prior conviction, we need to look beyond the dollar value the tag caused and wake-up and recognize its link to gang violence, drug trafficking and all the associated social ills that affect neglected communities." The report defines vandalism in the language of section 594(a), and it mentions nothing about the question of permission.

The proposed amendment of section 594(a) was part of the amendment of Assembly Bill No. 1179 on May 17. The report prepared for the Assembly Committee on Ways and Means hearing on June 2, following amendment of the bill on May 17, refers to Assembly Bill No. 1179 as the "1993 California Graffiti Omnibus Bill" and notes the purpose of the bill is to "enhance the punishment for graffiti." It mentions nothing about the proposed amendment to section 594(a) or the issue of permission. *1013

The Senate Committee on Judiciary report for its July 13 hearing notes: "This bill would expand the definition of vandalism by replacing 'defaces with paint or any other liquid' with 'sprays, scratches, writes on, or otherwise defaces.' [¶] This bill would also provide a permissive inference that the person neither owned the property nor had the permission of the owner to deface, damage, or destroy any real property owned by a governmental entity." However, the report does not further discuss the inference or the issue of permission. The same is true of the Senate Rules Committee report for its August 25 hearing, which followed the Senate's August 17 amendments to Assembly Bill No. 1179.

The Senate amended the bill again on September 7, then the bill was returned to the Assembly, which concurred in the amendments. The digest prepared for the Assembly vote again mentions the permissive inference but does not explain or discuss it. Neither does the Legislative Counsel's Digest prepared on Assembly Bill No. 1179.

As the foregoing shows, there is nothing in the legislative history of the amendment to section 594(a) to demonstrate a clear legislative understanding that lack of permission was an element of vandalism or an intent to change the law to make lack of permission an element of vandalism; the issue simply appears not to have been raised or discussed. This omission supports an inference, though not necessarily a strong one, the Legislature did not consider lack of permission to be an element of the offense or intend to change the law to make it an element. (*Committee of Seven Thousand v. Superior Court* (1988) 45 Cal.3d 491, 508 [247 Cal.Rptr. 362, 754 P.2d 70].)

To summarize, there is nothing in the language of section 594(a), either before or after amendment, which specifically makes lack of permission an element of vandalism. There is nothing in the legislative history of the amendment which clearly demonstrates a legislative understanding that lack of permission was an element of the offense, although such an understanding could be inferred from the reference to permission in the permissive inference provision. Neither does the legislative history show an intent to change the law and make it an element. However, construing the statute in a manner which does not make lack of permission an element would render the phrase "nor had the permission of the owner" surplusage.

On balance, we hold the better construction of section 594(a) is that it does not now and did not before amendment make lack of permission an element of vandalism. While this construction does render some of the language in the amended statute surplusage, an undesirable result (*California Mfrs. Assn. v. Public Utilities Com., supra*, 24 Cal.3d at p. 844), it is *1014 consistent with legislative intent as expressed in the language of the statute. (Code Civ. Proc., § 1859; *Landrum v. Superior Court, supra*, 30 Cal.3d at p. 12; *Moyer v. Workmen's Comp. Appeals Bd., supra*, 10 Cal.3d at p. 230.)

Thus, the trial court did not err in finding appellant had committed vandalism and in sustaining the petition; lack of permission was not an element of the offense. The amendment of section 594(a) did not make it an element, so retroactive application of the amended statute would not benefit appellant. Therefore, we need not consider the issues of retroactivity and retrial.

The order is affirmed.

Ortega, J., and Vogel (Miriam A.), J., concurred. *1015

Cal.App.2.Dist.,1994.

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In re Rudy L.

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C

THE PEOPLE, Plaintiff and Respondent,
v.
ROBERT MICHAEL GALAMBOS, JR., Defendant and Appellant.

No. C032873.

Court of Appeal, Third District, California.

Dec. 26, 2002.

[Opinion certified for partial publication. [FN*]]

FN* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of part IV of the Discussion.

SUMMARY

Defendant, charged with marijuana cultivation (Health & Saf. Code, § 11358), claimed to be cultivating marijuana for himself and a cannabis buyers' cooperative for his own and others' medical use. Following a preliminary hearing, the trial court refused to extend the immunity afforded by Proposition 215 (limited immunity from prosecution for the cultivation or possession of marijuana by either a patient or a patient's primary caretaker), to cover defendant's cultivation of marijuana for the cooperative and disallowed his common law defense of medical necessity. A jury convicted him of marijuana cultivation. (Superior Court of Calaveras County, No. F1831, John E. Martin, Judge.)

The Court of Appeal affirmed. The court held that judicial recognition of the broader and different immunity afforded by a medical necessity defense, which would not require a physician's recommendation, would excuse crimes other than the cultivation or possession of marijuana, and would extend beyond patients and their primary caretakers, should not be engrafted onto a statutory scheme that embodies a policy determination inconsistent with the defense. The court also held that the limited immunity afforded under Proposition 215 to patients and primary caregivers should not be extended to those who supply marijuana to them. The voter-approved statute (Health & Saf. Code, § 11362.5, subd. (d)) carefully delimits the proffered immunity to patients and their primary caregivers. Neither the language of the proposition nor its ballot materials suggest any intent to extend its protections to those who do not qualify thereunder but who purport to supply marijuana to those who do. The court further held that the trial court did not abuse its discretion when it held a preliminary hearing to determine the admissibility of defendant's proposed defenses. (Opinion by Kolkey, J., with Blease, Acting P. J., and Hull, J., concurring.) *1148

HEADNOTES

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(1a, 1b) Criminal Law § 17.5--Defenses--Necessity--Preliminary Hearing to Determine Sufficiency of Evidence--Medical use of Marijuana.
In a prosecution for cultivation of marijuana, the trial court did not abuse its discretion in holding a preliminary hearing under Evid. Code, § 402, to determine whether there was sufficient evidence to allow the presentation of the affirmative defenses of necessity and the medical use of marijuana immunity in Health & Saf. Code, § 11362.5, subd. (a) (Prop. 215). The existence of facts constituting an element of a defense literally falls within the statutory definition of "preliminary fact" because the admissibility of the evidence comprising the entire defense depends on it. At least where the defense is novel and raises questions whether there is sufficient evidence to sustain each element of the proffered defense, as here, such a hearing is justified so that otherwise irrelevant and confusing matter is not placed before the jury.

(2) Criminal Law § 17.5--Defenses--Necessity--Preliminary Hearing to Determine Sufficiency of Evidence--Medical use of Marijuana--Self-incrimination.
In a prosecution for cultivation of marijuana, the trial court did not abuse its discretion in holding a preliminary hearing under Evid. Code, § 402, to determine whether there was sufficient evidence to allow the presentation of the affirmative defenses of necessity and the medical use of marijuana immunity in Health & Saf. Code, § 11362.5, subd. (a) (Prop. 215). Any U.S. Const., 5th Amend., concerns arising from the premature presentation of defendant's proposed testimony could have been obviated by a procedure that defendant chose not to invoke: Where an offer of proof of a defendant's testimony is required, a defendant is entitled to the use of an in

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camera proceeding in which the court also seals the record for appellate review. This procedure prevents the premature disclosure of the defendant's evidence and thus safeguards the privilege against self-incrimination.

(3) Criminal Law § 17.5--Defenses--Necessity--Prerequisites.
To justify an instruction on the defense of necessity, a defendant must present evidence sufficient to establish that he or she violated the law (1) to prevent a significant and imminent evil, (2) with no reasonable legal alternative, (3) without creating a greater danger than the one avoided, (4) with a good faith belief that the criminal act was necessary to prevent the greater harm, (5) with such belief being objectively reasonable, and (6) under circumstances in which he or she did not substantially contribute to the emergency. *1149

(4a, 4b, 4c, 4d) Drugs and Narcotics § 4--Offenses--Cultivation of Marijuana--Necessity Defense--Medical Use--Immunity Statute.
In a prosecution for cultivation of marijuana, an affirmative defense of medical necessity was incompatible with the medical use of marijuana immunity in Health & Saf. Code, § 11362.5, subd. (a) (Prop. 215), which grants a limited immunity from prosecution for the cultivation or possession of marijuana by either a patient or patient's primary caregiver who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician. Judicial recognition of the broader and different immunity afforded by a medical necessity defense- which would not require a physician's recommendation, would extend beyond a patient or caregiver, and could excuse crimes other than cultivation or possession-would break faith with the voters' adoption of a narrow legislative exception to criminal drug prohibitions in the form of Proposition 215. Under any conception of legal necessity, the defense cannot succeed when the Legislature itself has made a determination of values.

(5) Criminal Law § 17.5--Defenses--Necessity--Nature of Defense.
Necessity does not negate any element of the crime, but represents a public policy decision not to punish such an individual despite proof of the crime.

(6a, 6b) Statutes § 45--Construction--Presumptions--Exceptions-- Expressio Unius Est Exclusio Alterius.
The principle of statutory construction, *expressio unius est exclusio alterius*, provides that where exceptions to a general rule are specified by statute, other exceptions are not to be implied or presumed, absent a discernible and contrary legislative intent.

(7a, 7b) Statutes § 43.5--Construction--Aids--Initiative--Ballot Materials.
To the extent that there are any ambiguities in the statutory language of the medical marijuana immunity proposition (Prop. 215) so as to imply its compatibility with a common law defense, it is appropriate to consider indicia of the voters' intent other than the language of the provision itself. Such indicia include the analysis and arguments contained in the official ballot pamphlet.

(8a, 8b, 8c, 8d) Drugs and Narcotics § 15--Offenses--Sufficiency of Evidence--Medical Necessity Defense.
In a prosecution for cultivation of marijuana, even if an affirmative defense of medical necessity was allowable, defendant's offer of proof was insufficient to support the *1150 defense. The offer of proof failed to address whether the patients whom he sought to supply faced an imminent peril, or, at a minimum, a threat in the immediate future of physical suffering, owing to a lack of marijuana if defendant did not supply it. Also, defendant had legal alternatives; they were just not convenient ones for him. But the necessity defense requires a reasonable legal alternative, not a convenient one. Moreover, defendant was unaware whether his marijuana cultivation was necessary for the supply of marijuana for cooperative members, his stated beneficiaries, at the time he began it, and thus he could not have had an objectively reasonable belief that his yet-to-be harvested crop was genuinely necessary to prevent a significant and immediate peril to needy patients.

(9) Appellate Review § 160--Affirmance--Theory.
A ruling or decision, itself correct in law, will not be disturbed on appeal merely because given for a wrong reason. If right upon any theory of the law applicable to the case, it must be sustained regardless of the considerations that may have moved the trial court to its conclusion.

(10a, 10b) Criminal Law § 17.5--Defenses--Duress and Necessity.
A defendant is not entitled to a claim of duress or necessity unless and until he or she demonstrates that, given the imminence of the threat, violation of the law was the only reasonable alternative. The uniform requirement of California authority discussing the necessity defense is that the situation presented to the defendant be of an emergency nature, that there be

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threatened physical harm, and that there be no legal alternative course of action available. Under any definition of the duress and necessity defenses one principle remains constant: if there was a reasonable, legal alternative to violating the law, a chance both to refuse to do the criminal act and also to avoid threatened harm, the defenses will fail.

(11) Criminal Law § 17.5--Defenses--Medical Necessity.
To support a medical necessity defense, a defendant must have an objectively reasonable belief that his criminal conduct was necessary. It is not enough that the defendant believes that his or her behavior possibly may be conducive to ameliorating certain evils; he or she must believe it is necessary to avoid the evils.

(12a, 12b, 12c) Drugs and Narcotics § 4--Offenses--Cultivation-- Medical Use Immunity--Who is Primary Caregiver.
A defendant charged with cultivation of marijuana did not qualify as a primary caregiver under the medical marijuana immunity statute (§ 11362.5, subd. (e)) *1151 (Prop. 215), which defines primary caretaker as "the individual designated by the person exempted under this section who has consistently assumed responsibility for the housing, health, or safety of that person." The definition does not include persons who provide medicinal marijuana to patients and/or their caregivers. The statutory language limits the patient's access to marijuana to that which is personally cultivated by the patient or the patient's primary caregiver on behalf of the patient. If the drafters of the initiative wanted to legalize the sale of small amounts of marijuana for approved medical purposes, they could have easily done so.

[See 2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 93; West's Key Number Digest, Controlled Substances 51.]

(13) Drugs and Narcotics § 4--Offenses--Cultivation--Medical Use Immunity-- Who Is Primary Caregiver--Burden of Proof.
In a prosecution for cultivation of marijuana, the trial court erred in instructing the jury, pursuant to a modified version of CALJIC No. 12.24.1, that defendant had the burden of proving by a preponderance of the evidence all of the facts necessary to establish his medical marijuana defense (Prop. 215). Rather, defendant's burden was merely to raise a reasonable doubt as to his guilt based on his defense. However, the error was harmless because defendant could not be deemed a primary caregiver and thus could not come under the proposition's exception for primary caregivers. Further, he could not establish an exception for cultivation as a patient, as he did not have a physician's recommendation or approval until after his arrest and was growing (by his own admission) more marijuana than was needed for his personal medical needs.

COUNSEL

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William G. Panzer for Defendant and Appellant.

KOLKEY, J.

Proposition 215, also known as the Compassionate Use Act of 1996, grants a limited immunity from prosecution for the cultivation or *1152 possession of marijuana by either a patient or a patient's primary caretaker, "who possesses or cultivates [the] marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician." (Health & Saf. Code, § 11362.5, subd. (d).) [FN1] Defendant Robert Michael Galambos, Jr., claimed to be cultivating marijuana for himself and a cannabis buyers' cooperative for his own and others' medical use. Following a preliminary hearing, the trial court refused to extend the immunity afforded by Proposition 215 to cover defendant's cultivation of marijuana for the cooperative and disallowed his common law defense of medical necessity. A jury convicted him of marijuana cultivation (§ 11358).

FN1 Unless otherwise designated, all statutory references are to the Health and Safety Code.

This appeal requires us to decide whether the limited statutory immunity afforded under Proposition 215 is compatible with the common law defense of medical necessity or, alternatively, the broader construction of the proposition advocated by the defendant.

We conclude that judicial recognition of the broader

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and different immunity afforded by a medical necessity defense-which would not require a physician's recommendation, would excuse crimes other than the cultivation or possession of marijuana, and would extend the immunity beyond patients and their primary caretakers-would break faith with the California electorate in light of their adoption of the more narrow legislative exception to our criminal drug laws expressed by Proposition 215. An unexpressed common law defense should not be engrafted onto a statutory scheme that embodies an inconsistent policy determination.

We also reject defendant's claim that the limited immunity afforded under Proposition 215 to patients and primary caregivers should be extended to those who supply marijuana to them. The voter-approved statute carefully delimits the proffered immunity to patients and their primary caregivers. (§ 11362.5, subd. (d).) Neither the language of the proposition nor its ballot materials suggest any intent to extend its protections to those who do not qualify thereunder but who purport to supply marijuana to those who do. To the contrary, the proponents' ballot arguments reveal a delicate tightrope walk designed to induce voter approval, which we would upset were we to stretch the proposition's limited immunity to cover that which its language does not.

We also conclude that the trial court did not abuse its discretion when it held a preliminary hearing to determine the admissibility of defendant's proposed defenses.

Finally, in the unpublished portion of our decision, we reject defendant's claims that Proposition 215 did not give him fair notice that his actions were unlawful. *1153

Factual and Procedural Background

I. *The Underlying Facts*

A. *Defendant's Marijuana Cultivation*

Since 1991, defendant has been eating and smoking marijuana, which he claims is effective for relieving a variety of symptoms caused by an earlier automobile accident.

In 1996, defendant began growing marijuana on his mother's property in Calaveras County to help himself and others with their health problems. Although defendant lost 80 percent of his first crop, he harvested approximately seven pounds in the fall of 1996.

In 1996, defendant became involved in fundraising efforts for Proposition 215, which California voters approved at the November 5, 1996 General Election, thereby enacting section 11362.5, which became effective the next day. [FN2] After the proposition passed, defendant unsuccessfully sought a recommendation for medical marijuana use from physicians in his area. He did not obtain a recommendation, however, until after his arrest in this case. *1154

FN2 Section 11362.5 provides:

"(a) This section shall be known and may be cited as the Compassionate Use Act of 1996.

"(b)(1) The people of the State of California hereby find and declare that the purposes of the Compassionate Use Act of 1996 are as follows:

"(A) To ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who has determined that the person's health would benefit from the use of marijuana in the treatment of cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief.

"(B) To ensure that patients and their primary caregivers who obtain and use marijuana for medical purposes upon the recommendation of a physician are not subject to criminal prosecution or sanction.

"(C) To encourage the federal and state governments to implement a plan to provide for the safe and affordable distribution of marijuana to all patients in medical need of marijuana.

"(2) Nothing in this section shall be construed to supersede legislation prohibiting persons from engaging in conduct that endangers others, nor to condone the diversion of marijuana for nonmedical purposes.

"(c) Notwithstanding any other provision of law, no physician in this state shall be punished, or denied any right or privilege, for having recommended marijuana to a patient for medical purposes.

"(d) Section 11357, relating to the possession of marijuana, and Section 11358, relating to the cultivation of marijuana, shall not apply to a patient, or to a patient's

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> primary caregiver, who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician.
> "(e) For the purposes of this section, 'primary caregiver' means the individual designated by the person exempted under this section who has consistently assumed responsibility for the housing, health, or safety of that person."

The Oakland Cannabis Buyers' Cooperative (the Oakland Cooperative or the Cooperative) was one of a number of organizations that distributed marijuana for medical purposes. The club's membership was 200 in the beginning of 1997 but increased to 1,500 by the end of 1997. The Cooperative obtained marijuana from several hundred growers.

In May 1997, defendant began growing a second marijuana crop. In June 1997, he contacted the Oakland Cooperative. The parties executed a certificate by which they agreed that all the marijuana that defendant grew would be designated for the Cooperative for medical use. To cover his expenses, defendant wanted-but did not have an opportunity to discuss-compensation for the marijuana that he would supply. This objective became moot, however, when the marijuana that defendant initially brought to the Cooperative in 1997 was rejected as too moldy.

B. *Discovery of Defendant's Marijuana Cultivation.*

In an aerial overflight in June 1997, Calaveras County Sheriff's Deputy Eddie Ballard detected a marijuana cultivation site at a 40-acre rural property. After several visits to the site for further observation and after sighting defendant on one occasion, Ballard obtained a search warrant that he and other officers served on defendant at the site the following month, arresting him at the same time.

One of the officers, Calaveras County Sheriff's Lieutenant Brian Walker, counted 382 marijuana plants growing in two gardens, one containing smaller plants in greenhouses and the other larger plants in both the ground and in garbage sacks. At various places around the site, Walker also found six and one-half pounds of dried marijuana in half-pound baggies deposited in buckets, as well as marijuana seeds in bags. Finally, Walker found in a nearby shed evidence of defendant's involvement in the marijuana cultivation. This included defendant's wallet, which contained an identification card, a business card for a "cannabis consultant," and a handwritten note calculating grams and pounds of marijuana.

II. *The Legal Proceedings*

Defendant was charged with marijuana cultivation (§ 11358) in count I and possession of marijuana for sale (§ 11359) in count II.

Defendant raised two affirmative defenses: the common law defense of medical necessity and the limited immunity afforded under Proposition 215.

But the People moved in limine to exclude both defenses, requesting a preliminary hearing to determine whether the evidence was sufficient to present such defenses to the jury. *1155

Over defendant's objections, the trial court granted the request for a hearing under Evidence Code section 402, subdivision (b), [FN3] stating that "because of the novelty of the defenses in this case ... a 402 hearing ... is necessary to avoid the prejudicial effect upon jurors ... of actually hearing evidence if it is going to be ultimately excluded by the court." Defense counsel proceeded by an offer of proof, seeking to demonstrate an evidentiary foundation for the defenses.

> FN3 Evidence Code section 402 provides in relevant part:
> "(a) When the existence of a preliminary fact is disputed, its existence or nonexistence shall be determined as provided in this article.
> "(b) The court may hear and determine the question of the admissibility of evidence out of the presence or hearing of the jury ...."

The court disallowed the common law defense of medical necessity, ruling that defendant had failed to make a sufficient showing of the elements of such a defense. But the trial court did grant defendant's request to instruct the jury on the limited immunity available under Proposition 215. Nonetheless, the court limited that defense to defendant's cultivation and possession of marijuana for his personal medical use and declined to extend the defense to the cultivation of marijuana for the Oakland Cooperative, finding that Proposition 215 did not support defendant's assertion that he was the "primary caregiver" of the Cooperative's members and thus

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eligible for the exemption under the proposition. The court ultimately instructed the jury on the statutory defense afforded by Proposition 215 by using CALJIC No. 12.24.1, rather than defendant's proposed instruction.

Separately, the trial court denied defendant's motion to dismiss the charges based on the due process clause of the Fourteenth Amendment, which motion contended that defendant had been "deprived [of] fair notice as to what constitute[d] illegal activity" under section 11362.5. The court later refused defendant's proposed jury instruction regarding the absence of such notice.

Ultimately, the jury convicted defendant of marijuana cultivation (§ 11358), but deadlocked on the second count of possession for sale (§ 11359). The People then filed an amended information, adding a third count of possession of more than 28.5 grams of marijuana (§ 11357, subd. (c)), to which defendant pleaded guilty in exchange for a dismissal of the deadlocked count. The court granted defendant five years' probation on terms and conditions that included nine months in the county jail.

On appeal, defendant contends that:

(1) The court erred by holding a preliminary hearing to determine the admissibility of the evidence for defendant's proposed defenses; *1156

(2) It erred by finding that defendant failed to proffer sufficient evidence to warrant a jury instruction for his defense of medical necessity;

(3) It improperly failed to extend Proposition 215 to exempt from prosecution those who supply medicinal cannabis to patients and caretakers; and

(4) It erroneously refused to instruct the jury that the defendant must be acquitted if Proposition 215 failed to give him fair notice as to what constituted illegal conduct.

Discussion

I. *Evidence Code Section 402 Hearing*

Defendant first argues that "[t]he trial court erred in its ruling ordering an evidentiary hearing under Evidence Code [section] 402 to review [defendant's] affirmative defenses." Defendant contends that the hearing "forc [ed] him to prematurely disclose his affirmative defenses" and that "[w]hether enough evidence ha[d] been produced ... to merit either a necessity instruction or a medical use instruction, should only [have] be[en] addressed and assessed in the course of a trial proceeding."

In fact, defendant was not forced to prematurely disclose his affirmative defenses. Instead, at the trial readiness conference, defense counsel volunteered defendant's intention to rely on the defenses of common law necessity and Proposition 215. (1a) Thus, the only issue is whether it was error for the trial court to hold a preliminary hearing to determine whether there was sufficient evidence to allow the presentation of those previously disclosed defenses.

Evidence Code section 402 provides a procedure for the trial court to determine outside the presence of the jury whether there is sufficient evidence to sustain a finding of a preliminary fact, upon which the admission of other evidence depends. However, a "preliminary fact" is broadly defined as "a fact upon the existence or nonexistence of which depends the admissibility or inadmissibility of evidence." (Evid. Code, § 400.) And "[t]he phrase 'the admissibility or inadmissibility of evidence' includes the qualification or disqualification of a person to be a witness and the existence or nonexistence of a privilege." (*Ibid.*) Accordingly, the existence of facts constituting an element of a defense literally falls within the definition of "preliminary fact" because the admissibility of the evidence comprising the entire defense depends on it.

Admittedly, determining the existence of an element of a defense, upon which depends the admission of the evidence comprising the entire defense, *1157 is not the most common use of a hearing under Evidence Code section 402. The procedure is more commonly used to determine, for instance, the existence of a privilege, the qualification of a witness, the admissibility of a confession, or the authenticity of a writing. (Evid. Code, § § 400, 402, subd. (b), 403, subd. (a)(2), (3).) But use of such a procedure to determine the existence of a defense is not qualitatively different from its use to determine the existence of a privilege, which is specifically identified as a proper use. In one case, the hearing determines whether all of the elements of the relevant privilege can be made out before the evidence protected by the privilege is either excluded or admitted. In the other case, the hearing determines whether all of the elements of a relevant defense can be made out before the evidence of that defense is either excluded or admitted. The primary difference is that successfully making out the elements of the privilege excludes the evidence, whereas successfully

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making out the elements of the defense admits it. [FN4] But in both cases, the admissibility of the proffered evidence depends upon the sufficiency of the evidence to sustain a finding of each element of the privilege or defense. (See Evid. Code, § 403, subd. (a)(1).) And in both cases, the purpose of the preliminary hearing is to avoid the prejudice associated with the introduction of inadmissible evidence.

FN4 There is admittedly a more subtle difference. In the case of a privilege, the court will determine the *existence* of the preliminary fact (Evid. Code, § 405), whereas in the case of a relevant defense, the court only finds that there is *sufficient evidence to sustain a finding* of the existence of the preliminary fact (Evid. Code, § 403). But the procedure for holding preliminary hearings expressly recognizes and authorizes this distinction depending upon the right of the jury to make the ultimate finding of the existence of the preliminary fact.

The right to subject defenses to the gatekeeping procedure under Evidence Code section 402 is also demonstrated by the procedure's express reference to its use for determining whether the evidence is relevant. Evidence Code section 403, subdivision (a)(1), provides in relevant part that "the proffered evidence is inadmissible unless the court finds that there is evidence sufficient to sustain a finding of the existence of the preliminary fact, when: [¶] (1) The relevance of the proffered evidence depends on the existence of the preliminary fact ...." In this case, the relevance of the proffered defenses depends upon the existence of facts sufficient to establish the defenses' elements.

However, we need not determine whether the trial court can properly exercise its discretion to subject *any* defense to a hearing under Evidence Code section 402. We conclude that at least where the defense is novel and raises questions whether there is sufficient evidence to sustain each element of the proffered defense as here such a hearing is justified so that otherwise irrelevant and confusing matter is not placed before the jury. Often *1158 novel, necessity defenses in particular risk the presentation of otherwise irrelevant and confusing evidence to the jury if the defense cannot be established. And it is the novelty of the defense that raises the prospect that the defendant might fail to establish its elements, and in such a case, that very novelty would also allow the jury to hear irrelevant evidence that would confuse the issues.

It is thus no coincidence that a preliminary hearing, or similar procedure, has often been invoked to determine the admissibility of the common law defense of necessity. (See, e.g., *People v. Trippet* (1997) 56 Cal.App.4th 1532, 1538-1540 [66 Cal.Rptr.2d 559] (*Trippet*) [upholding the trial court's ruling rejecting the medical marijuana necessity defense at an Evid. Code § 402 proceeding]; *People v. Patrick* (1981) 126 Cal.App.3d 952, 960 [179 Cal.Rptr. 276] [trial court concluded that defendant's offer of proof for a necessity defense failed to demonstrate a sufficient emergency to justify a jury instruction]; *People v. Slack* (1989) 210 Cal.App.3d 937, 939-940 [258 Cal.Rptr. 702] [trial court properly refused to instruct on a necessity defense based on defendant's offer of proof]; *In re Eichorn* (1998) 69 Cal.App.4th 382, 390 [81 Cal.Rptr.2d 535] [offer of proof sufficient to present necessity defense]; see also *People v. Werber* (1971) 19 Cal.App.3d 598, 607-610 [97 Cal.Rptr. 150] [offer of proof of defense of religious use of marijuana is a more expedient method for considering the defense than allowing evidence of defendant's use of marijuana as a religious practice and then striking the evidence as insufficient to establish the defense].)

Moreover, the California Supreme Court has recommended the use of the procedure under Evidence Code section 402 for novel matters. In *People v. Bledsoe* (1984) 36 Cal.3d 236, 245, footnote 6 [203 Cal.Rptr. 450, 681 P.2d 291], the defendant argued that the trial court erred by refusing to hold a preliminary hearing on the admissibility of evidence of rape trauma syndrome. The Supreme Court held that the admission of the evidence was nonprejudicial error, but that "in view of the novelty of the proposed evidence and the advantages a[n Evidence Code] section 402 hearing affords for providing the parties an opportunity to make a full record on the issue ... it might have been preferable for the court to have proceeded with such a preliminary hearing out of the jury's presence ...." (*Ibid.*; see also *McCleery v. City of Bakersfield* (1985) 170 Cal.App.3d 1059, 1074-1075 & fns. 11 & 12 [216 Cal.Rptr. 852].)

Accordingly, we can see a benefit, and no prejudice, in initially determining at a preliminary hearing whether to allow evidence of a novel defense, rather than awaiting testimony at trial that might prove to be both irrelevant and confusing. In this case, the court,

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the prosecutor, *and* defense counsel all *1159 agreed that the application of defendant's common law and statutory defenses to a *supplier* of marijuana to a buyers' club was novel.

(2) Defendant nonetheless maintains that the procedure under Evidence Code section 402 violated his constitutional rights to due process and against compelled testimony by "essentially forcing a defendant into a deposition before these issues have been presented to a trier of fact." But defendant does not develop this argument with citations and analysis and thus has waived it. (*People v. Turner* (1994) 8 Cal.4th 137, 214, fn. 19 [32 Cal.Rptr.2d 762, 878 P.2d 521].)

In any event, any Fifth Amendment concerns arising from the premature presentation of defendant's proposed testimony-which issue we need not decide today-could have been obviated by a procedure that defendant chose not to invoke: Where an offer of proof of a defendant's testimony is required, the California Supreme Court has endorsed the use of an in camera proceeding in which the court also seals the record for appellate review. This procedure prevents the premature disclosure of the defendant's evidence and thus safeguards the privilege against self-incrimination. (See *People v. Collins* (1986) 42 Cal.3d 378, 393-394 [228 Cal.Rptr. 899, 722 P.2d 173]; *People v. Superior Court (Barrett)* (2000) 80 Cal.App.4th 1305, 1320-1321 [96 Cal.Rptr.2d 264] [trial court correctly allowed defendant to present relevancy theories of evidence at in camera hearing to protect against self- incrimination]; *Shleffar v. Superior Court* (1986) 178 Cal.App.3d 937, 945, fn. 8 [223 Cal.Rptr. 907] [any possibility that the offer of proof by defendant "might violate defendant's privilege against self-incrimination can be obviated through the conducting of an in[] camera hearing"].)

(1b) We conclude that the trial court's decision to hold a preliminary hearing to determine the sufficiency of defendant's evidence for his proposed defenses was not an abuse of discretion.

II. *The Medical Necessity Defense*

Defendant claims that the court's refusal to allow his common law defense of medical necessity was error.

We conclude that not only was defendant's proffered evidence insufficient to make out a medical necessity defense, but the limited immunity afforded under Proposition 215 is incompatible with a common law defense of medical necessity. *1160

A. *The Applicability of a Medical Necessity Defense*

(3) "To justify an instruction on the defense of necessity, a defendant must present evidence sufficient to establish that [he] violated the law (1) to prevent a significant and imminent evil, (2) with no reasonable legal alternative, (3) without creating a greater danger than the one avoided, (4) with a good faith belief that the criminal act was necessary to prevent the greater harm, (5) with such belief being objectively reasonable, and (6) under circumstances in which [he] did not substantially contribute to the emergency. [Citations.]" (*People v. Kearns* (1997) 55 Cal.App.4th 1128, 1135 [64 Cal.Rptr.2d 654].)

(4a) In contrast, Proposition 215 grants a limited immunity from prosecution for the cultivation or possession of marijuana by either a patient or a patient's primary caregiver "who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician." (§ 11362.5, subd. (d); see *People v. Mower* (2002) 28 Cal.4th 457 [122 Cal.Rptr.2d 326, 49 P.3d 1067].) Judicial recognition of the broader and different immunity afforded by a medical necessity defense-which would not require a physician's recommendation, would extend beyond a patient or caregiver, and could excuse crimes other than cultivation or possession-would break faith with the voters' adoption of a narrow legislative exception to our criminal drug prohibitions in the form of Proposition 215.

"Under any conception of legal necessity, one principle is clear: The defense cannot succeed when the legislature itself has made a 'determination of values.' [Citation.]" (*United States v. Oakland Cannabis Buyers' Cooperative* (2001) 532 U.S. 483, 491 [121 S.Ct. 1711, 1718, 149 L.Ed.2d 722, 732] (*Oakland Cannabis Buyers' Cooperative*).) Thus, in *Oakland Cannabis Buyers' Cooperative*, the United States Supreme Court rejected a medical necessity exception to the prohibitions against the manufacture and distribution of marijuana under the federal Controlled Substances Act because such a defense was at odds with the terms of the act, even though the act did not explicitly abrogate that defense: "The statute expressly contemplates that many drugs have a useful and legitimate medical purpose and are necessary to maintain the health and general welfare of the American people,' [citation], but it includes no exception at all for any medical use of marijuana. Unwilling to view this omission as an accident, and

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unable in any event to override a legislative determination manifest in a statute, we reject the ... argument [in favor of medical necessity]. [Fn. omitted.]" (*Oakland Cannabis Buyers' Cooperative, supra*, 532 U.S. at p. 493 [121 S.Ct. at p. 1719, 149 L.Ed.2d at p. 733].) *1161

Similarly, here, although Proposition 215 establishes a narrow exception to our drug laws for the medical use of marijuana, it does so only for a patient or a patient's primary caregiver, only for the crimes of possession or cultivation of marijuana, and only upon a physician's recommendation or approval. (See *People v. Rigo* (1999) 69 Cal.App.4th 409, 414 [81 Cal.Rptr.2d 624] [postarrest medical approval insufficient to allow application of Prop. 215].) To grant defendant a broader medical necessity defense would eliminate the voters' decision to limit the immunity to only certain crimes, to only a particular class of persons (patients and their primary caretakers), and to only those patients who had a physician's approval for personal medical use. Such a common law defense would, in the words of the United States Supreme Court in *Oakland Cannabis Buyers' Cooperative, supra*, 532 U.S. at page 491 [121 S.Ct. at page 1718, 149 L.Ed.2d at page 732], be at odds with the voters' " 'determination of values' " and would override their legislative determination by affording a broader defense unconstrained by the various conditions and limitations that they adopted in the proposition.

Our conclusion is further bolstered by both the nature of the necessity defense, the rules of statutory construction, and the ballot arguments supporting adoption of the proposition. (5) First, "[n]ecessity does not negate any element of the crime, but represents a public policy decision not to punish such an individual despite proof of the crime." (*People v. Heath* (1989) 207 Cal.App.3d 892, 901 [255 Cal.Rptr. 120].) (4b) Proposition 215 represents a public policy decision. But it is one that is different and inconsistent with a medical necessity defense. The elements of the two public policies are in conflict. An unexpressed public policy should not be engrafted onto statutory language that expresses an inconsistent public policy.

Second, the language of Proposition 215, as illuminated by the application of the principle of statutory construction, *expressio unius est exclusio alterius*, precludes our expansion of the limited immunity afforded by the proposition. (6a) Under that canon of statutory construction, "where exceptions to a general rule are specified by statute, other exceptions are not to be implied or presumed," absent "a discernible and contrary legislative intent." (*Wildlife Alive v. Chickering* (1976) 18 Cal.3d 190, 195 [132 Cal.Rptr. 377, 553 P.2d 537]; see 2A Singer, Statutes and Statutory Construction (6th ed. 2000) Intrinsic Aids § 47:23, p. 314.) (4c) Application of that rule to this case prevents our judicially engrafting a common law defense that would undo the limitations and conditions placed by the voters on the immunity afforded under Proposition 215. *1162

(7a)(See fn. 5.), (4d) Third, that the voters believed that the narrow and conditional immunity that they adopted in Proposition 215 was not compatible with a broader exemption allowed by a medical necessity defense is further demonstrated by the ballot materials for the proposition. [FN5] In their ballot arguments, the initiative's proponents argued: "Proposition 215 would also protect patients from criminal penalties for marijuana, but ONLY if they have a doctor's recommendation for its use." (Ballot Pamp., Gen. Elec. (Nov. 5, 1996) argument in favor of Prop. 215, p. 60 (hereinafter the Ballot Pamphlet).) And they argued that the proposition "only allows marijuana to be grown for a patient's personal use. Police officers can still arrest anyone who grows too much [marijuana], or tries to sell it." (*Id.*, rebuttal to argument against Prop. 215, p. 61.) Thus, voters understood that California's authorization of immunity from prosecution was dependent upon a physician's recommendation and did not imply any protections for drug sales.

> FN5 To the extent that there are any ambiguities in the statutory language of the proposition so as to imply its compatibility with a common law defense, " 'it is appropriate to consider indicia of the voters' intent other than the language of the provision itself. [Citation.]' [Citation.] Such indicia include the analysis and arguments contained in the official ballot pamphlet. [Citations.]" (*Legislature v. Eu* (1991) 54 Cal.3d 492, 504 [286 Cal.Rptr. 283, 816 P.2d 1309].)

Accordingly, we conclude that a medical necessity defense is inconsistent with the more limited statutory exception established by Proposition 215, which affords only a limited immunity to prosecution for the cultivation or possession of marijuana. [FN6]

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FN6 We are not confronted with the issue, and thus do not express any opinion, whether the medical necessity defense could be invoked under state law in the event that Proposition 215 was no longer operative.

B. *Sufficiency of the Showing of Medical Necessity*

(8a) Even if a medical necessity defense was allowable, defendant's offer of proof was insufficient to support such a defense here.

(9) For purposes of determining whether the trial court properly refused defendant's medical-necessity instruction, we need not adopt the trial court's reasons because " ' "a ruling or decision, itself correct in law, will not be disturbed on appeal merely because given for a wrong reason. If right upon any theory of the law applicable to the case, it must be sustained regardless of the considerations which may have moved the trial court to its conclusion. " [Citation.]' [Citation.]" (*People v. Zapien* (1993) 4 Cal.4th 929, 976 [17 Cal.Rptr.2d 122, 846 P.2d 704].)

1. *Significant and Imminent Evil*

(10a) First, "[t]here must be a showing of imminence of peril before the defense of necessity is applicable. A defendant is 'not entitled to a claim of *1163 duress or necessity unless and until he demonstrates that, given the imminence of the threat, violation of [the law] was the only reasonable alternative.' *U[nited] S[tates] v. Bailey* (1980) 444 U.S. 394, 411 [62 L.Ed.2d 575, 591, 100 S.Ct. 624]. The uniform requirement of California authority discussing the necessity defense is that the situation presented to the defendant be of an emergency nature, that there be threatened physical harm, and that there was no legal alternative course of action available." (*People v. Weber* (1984) 162 Cal.App.3d Supp. 1, 5; *People v. Heath, supra*, 207 Cal.App.3d at p. 901 [same]; *People v. Patrick, supra*, 126 Cal.App.3d at p. 960 ["a well-established central element [of the necessity defense] involves the emergency nature of the situation, i.e., the imminence of the greater harm which the illegal act seeks to prevent"].) [FN7]

FN7 "Some formulations of the necessity defense specifically include an ' imminence' requirement. [Citation.] In others, the immediacy of the danger becomes a factor in assessing the reasonableness of the actor's belief regarding the magnitude of the 'greater harm' he seeks to prevent. [Citation.]" (*People v. Patrick, supra*, 126 Cal.App.3d 952, 960, fn. 6.) Other California courts draw a distinction between an "imminent threat" as a requirement for a duress defense and a "threat in the immediate future" applicable to a necessity defense. (See, e.g., *People v. Heath, supra*, 207 Cal.App.3d at p. 901; *People v. Beach* (1987) 194 Cal.App.3d 955, 973 [240 Cal.Rptr. 501].) In any event, there must be some immediacy.

(8b) Defendant's offer of proof fell far short of showing an imminent threat of harm. As described by defense counsel, "the significant evil is that there are persons who are suffering from a number of infirmities and/or diseases some of which are AIDS, HIV, cancer, glaucoma, anorexia, spasticity, and arthritis ...." But defendant's offer of proof had to address whether the patients whom he sought to supply faced an "imminent" peril, or at a minimum, a threat in the "immediate future" of physical suffering, owing to a lack of marijuana if defendant did not supply it. Defendant's offer of proof did not identify any person, or even any well-defined group, whose present lack of marijuana under the terms of Proposition 215 raised the immediate prospect of suffering if defendant did not come to their aid.

Defense counsel did argue (in addressing another element of the defense) that statistics and expert testimony would show that there is a "fatal sparsity" of marijuana in urban areas where most medical marijuana users supposedly live and where cultivation is purportedly difficult. But statistics cannot substitute for the lack of evidence that defendant and others faced an emergency situation. Such statistics fail to show immediacy, only eventuality.

2. *No Reasonable Legal Alternative*

The trial court held that defendant failed to offer sufficient evidence that he had no adequate legal alternative to violating the law. It noted that *1164 Proposition 215 afforded a way to provide medical marijuana to patients under specified conditions.

Defendant claims that "it is not a reasonable legal alternative to say that [patients] can grow [marijuana] at home or [that] caregivers ... can grow it because the statistics that we will present is they just can't do it, and ... some of them are to[o] infirm[]

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to do it ...."

(10b) However, " '[u]nder any definition of [the duress and necessity] defenses one principle remains constant: if there was a reasonable, *legal* alternative to violating the law, "a chance both to refuse to do the criminal act and also to avoid threatened harm," the defenses will fail. [Citation.]' " (*Trippet, supra,* 56 Cal.App.4th at p. 1539, italics added, quoting *United States v. Bailey, supra,* 444 U.S. at p. 410 [100 S.Ct. at p. 635].)

(8c) Defendant acknowledges that "the marijuana was intended for his own personal medical use and that of the cooperative member patients," but he failed to have a physician's approval or recommendation before his arrest; thus, he had-but did not take advantage of-a legal alternative for himself. As for others, he could have attempted to qualify as a primary caregiver for particular individuals whom he wanted to help, but failed to qualify himself for this legal alternative. In short, defendant had legal alternatives; they were just not convenient ones for him. But the necessity defense only requires a reasonable legal alternative, not a convenient one.

3. *Objectively Reasonable Belief*

(11) To support a medical necessity defense, a defendant must also have an "objectively reasonable" belief that his criminal conduct was necessary. "It is not enough that the actor believes that his behavior possibly may be conducive to ameliorating certain evils; he must believe it is 'necessary' to avoid the evils." (Model Pen. Code & Commentaries, com. to § 3.02, p. 12.)

(8d) But defendant had not even contacted the Oakland Cooperative when he began cultivating his marijuana crop in 1996 and again in May 1997. He was thus unaware whether his marijuana cultivation was necessary for the supply of marijuana for Cooperative members at the time he began it. Under these circumstances, defendant could not have had an objectively reasonable belief that his yet-to-be harvested 1997 crop was genuinely necessary to prevent a significant and immediate peril to needy patients.

Hence, even if a medical necessity defense was available, defendant's offer of proof was woefully insufficient. *1165

III. *Section 11362.5 Defense*

As noted, Proposition 215 affords a limited immunity from prosecution for the cultivation and possession of marijuana to "a patient, or to a patient's primary caregiver, who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician." (§ 11362.5, subd. (d).)

(12a) Defendant did not qualify as a primary caregiver under this statute. Proposition 215 defines primary caretaker as "the individual designated by the person exempted under this section who has consistently assumed responsibility for the housing, health, or safety of that person." (§ 11362.5, subd. (e).)

Instead, defendant sought a jury instruction that marijuana could be legally provided under Proposition 215 to patients "through [the patients'] ... cooperatives or dispensaries."

The trial court instructed that "[a] person is not guilty of unlawful possession or cultivation of marijuana when the acts of the defendant or a primary caregiver are authorized by the law for compassionate use," but rejected defendant's extension of the statute. [FN8]

FN8 The instruction given by the court, based on former CALJIC No. 12.24.1 (1998 new) (6th ed. 1996), provided: "A person is not guilty of unlawful possession or cultivation of marijuana when the acts of the defendant or a primary caregiver are authorized by the law for compassionate use. [¶] A primary caregiver means the individual designated by the person exempted who is consistently assigned the responsibility for the housing, health or safety of that person. The defendant has the burden of proving by a preponderance of evidence all of the facts necessary to establish the element[s] of this defense of namely one, a physician recommended or approved orally [or] in writing the defendant's personal use of marijuana, two, the amount of marijuana possessed or cultivated was reasonably related to the defendant's then current medical needs." (In 1999, CALJIC No. 12.24.1 was modified "to allow the jury to determine whether the use ... was medically appropriate." (Use Note to CALJIC No. 12.24.1 (1999 rev.)

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(6th ed. 1996) p. 15.)
In contrast, defendant's proposed medical use instruction stated: "The defendant is not guilty of the possession or cultivation of marijuana if he has established by burden of proof to a preponderance of the evidence that his possession and cultivation of marijuana was for use by seriously ill Californians who have received recommendations by a physician for use of marijuana as medicine in the treatment of cancer, anorexia, AIDS, chronic pain, spasicity [*sic*], glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief. [¶] Marijuana may be provided to such users through a 'primary caregiver' who consistently assumes responsibility for the housing, health or safety of the users above-specified, *or through users' buyers' cooperatives or dispensaries.*" (Italics added.)

Defendant argues that "the protection afforded to patients and caregivers in [section] 11362.5 necessarily implies exceptions ... other than those *1166 expressly enumerated in [section] 11362.5, including protection for those who *provide* medicinal cannabis to patients and/or caregivers." (Italics added.)

Various permutations of defendant's contention have been rejected in *People v. Young* (2001) 92 Cal.App.4th 229, 237 [111 Cal.Rptr.2d 726] (*Young*), *Trippet, supra,* 56 Cal.App.4th at pages 1545-1551, and *People ex rel. Lungren v. Peron* (1997) 59 Cal.App.4th 1383, 1390-1395 [70 Cal.Rptr.2d 20] (*Peron*).

In *Young,* we ruled that Proposition 215 "does not provide a defense to the transportation of marijuana in the circumstances presented [t]here" since "[t]he statute on its face exempts only possession and cultivation from criminal sanctions for qualifying patients." (*Young, supra,* 92 Cal.App.4th at p. 237.) There, the defendant was transporting 4.74 ounces of marijuana in his car under the purported auspices of a physician's recommendation for use of cannabis. (*Id.* at p. 232.)

In *Trippet,* the Court of Appeal ruled that the "symmetry between legal principle and evidence of the voters' intent compels the conclusion that, as a general matter, Proposition 215 does not exempt the transportation of marijuana allegedly used or to be used for medical purposes from prosecution ...." (*Trippet, supra,* 56 Cal.App.4th at p. 1550.) [FN9]

FN9 The court in *Trippet* suggested that a section 11362.5 defense might be available to a patient or a primary caregiver who transported marijuana "reasonably related to the patient's current medical needs" (*Trippet, supra,* 56 Cal.App.4th at p. 1551), lest, for instance, a patient's primary caregiver be guilty of a crime for "carrying otherwise legally cultivated and possessed marijuana down a hallway to the patient's room" (*id.* at p. 1550). We need not reach that issue in this case since defendant admits that most of his cultivation was not done in his capacity as a caregiver or patient.

In *Peron,* the Court of Appeal held that parties operating a commercial enterprise selling or otherwise furnishing marijuana to patients did not qualify as primary caregivers under Proposition 215 simply by obtaining from the purchaser a designation as such: "The statutory language limits the patient's access to marijuana to that which is personally cultivated by the patient or the patient's primary caregiver on behalf of the patient. If the drafters of the initiative wanted to legalize the sale of small amounts of marijuana for approved medical purposes, they could have easily done so. [Citation.] The fact that they did not, and the reasons advanced in the ballot pamphlet in support of the initiative, indicated with certainty that its drafters were aware of both state and federal law prohibiting such sales and were attempting to avoid a conflict therewith." (*Peron, supra,* 59 Cal.App.4th at p. 1394.) *1167

Based on these cases and the language of the initiative and the ballot materials, we reject defendant's claim that Proposition 215 can be construed to imply an exception for furnishing marijuana to a marijuana buyers' cooperative.

(6b) First, engrafting an additional implied exception onto a statute that establishes a carefully delineated exception would run afoul of the previously noted rule of statutory construction, *expressio unius est exclusio alterius:* "Under the familiar rule of construction, *expressio unius est exclusio alterius,* where exceptions to a general rule are specified by statute, other exceptions are not to be implied or presumed," absent "a discernible and contrary legislative intent." (*Wildlife Alive v. Chickering,*

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supra, 18 Cal.3d at p. 195; accord, *Andrus v. Glover Construction Co.* (1980) 446 U.S. 608, 616-617 [100 S.Ct. 1905, 1910-1911, 64 L.Ed.2d 548, 557].) (12b) No contrary legislative intent is discernible in the language of Proposition 215, which sets forth only two classes of persons qualified for the exception: patients and their primary caregivers, not suppliers to marijuana buyers' cooperatives. As the Court of Appeal therefore concluded in *Trippet*: "We may not infer exceptions to our criminal laws when legislation spells out the chosen exceptions with such precision and specificity. [Citations.]" (*Trippet, supra*, 56 Cal.App.4th at p. 1550; *Peron, supra*, 59 Cal.App.4th at pp. 1392, 1394.)

Second, the findings and declared purposes of the proposition expressly assert that its purposes are "[t]o ensure that patients and their primary caregivers who obtain and use marijuana for medical purposes upon the recommendation of a physician are not subject to criminal prosecution or sanction" (§ 11362.5, subd. (b)(1)(B)) and "[t]o encourage the federal and state governments to implement a plan to provide for the safe and affordable distribution of marijuana to all patients in medical need of marijuana" (§ 11362.5, subd. (b)(1)(C)). This reaffirms the proposition's intent to protect patients and primary caregivers, not private suppliers. Otherwise, there would be no reason to omit any reference to private suppliers from the initiative's protections, nor any reason to encourage only the federal and state governments to implement a plan to distribute marijuana.

Third, *Trippet* and *Peron* observe that the Ballot Pamphlet for Proposition 215 confirmed the intent of the voters not to legalize any activity beyond the possession and cultivation of marijuana for personal medical use. (*Trippet, supra*, 56 Cal.App.4th at pp. 1545-1546; *Peron, supra*, 59 Cal.App.4th at pp. 1393-1395.) (7b) If there is any claimed ambiguity in the statutory language, we may consider indicia of the voters' intent, which includes the analysis and arguments contained in the official ballot pamphlet. " (*1168*Peron, supra*, 59 Cal.App.4th at p. 1393; accord, *Legislature v. Eu, supra*, 54 Cal.3d at p. 504.) (12c) And in this case, proponents of the measure argued in the Ballot Pamphlet that it only allows possession and cultivation for personal use, not sales: "Proposition 215 allows patients to cultivate their own marijuana simply because federal laws prevent the sale of marijuana, and a state initiative cannot overrule those laws." (Ballot Pamp., *supra*, argument in favor of Prop. 215, p. 60.) As the court in *Peron, supra*, 59 Cal.App.4th at page 1393, footnote 6, pointed out, although this may be a misleading statement of federal law, it nonetheless illuminates the proposition's intent to only permit under limited circumstances cultivation and possession, not sales. Indeed, the ballot materials make clear that the proposition was narrowly drafted to avoid the creation of loopholes for drug dealers: In the rebuttal to the argument by opponents that Proposition 215 would "provide new legal loopholes for drug dealers to avoid arrest and prosecution" (Ballot Pamp., *supra*, argument against Prop. 215, p. 61), the initiative's proponents responded that it "only allows marijuana to be grown for a patient's personal use. Police officers can still arrest anyone who grows too much, or tries to sell it." (*Id.*, rebuttal to argument against Prop. 215, p. 61.) And "in his neutral analysis of the proposition ..., the Legislative Analyst stated that the proposed law 'does not change other legal prohibitions on marijuana ....' [Citation.]" (*Trippet, supra*, 56 Cal.App.4th at p. 1546; *Peron, supra*, 59 Cal.App.4th at pp. 1393-1394.) Accordingly, the ballot materials demonstrate that voters did not intend to extend the immunity to those who distribute marijuana to primary caretakers.

Defendant suggests that Proposition 215 must be interpreted to allow some " manufacture and distribution of marijuana for medicinal purposes" lest the operation of the statutory immunity be made impractical. But the ballot materials show that Proposition 215 was narrowly drafted to make it acceptable to voters and to avoid undue conflict with federal law. As a court, we must respect the compromises and choices made in the legislative and initiative process, not substitute our judgment of what would constitute a more effective measure. As noted in *Peron, supra*, 59 Cal.App.4th at pages 1394-1395, by permitting sales to further medical use of marijuana, "we would initiate a decriminalization of sales of and traffic in marijuana in this state. Whether that concept has merit is not a decision for the judiciary. It is one the Legislature or the people by initiative are free to make. Proposition 215, in enacting section 11362.5, did not do so."

Accordingly, we agree with *Trippet* and *Peron* that there is no support whatsoever for the argument that section 11362.5 impliedly authorized trafficking in marijuana for medical use-the result that defendant seeks here. *Trippet* in fact condemned the notion that section 11362.5 opened the *1169 door for a private medical marijuana distribution system, despite the statute's patent design to the contrary: "We ... have no hesitation in declining appellant's rather candid invitation to interpret the statute as a sort of 'open sesame' regarding the possession, transportation and

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sale of marijuana in this state. To hold as she effectively urges would be tantamount to suggesting that the proposition's drafters and proponents were cynically trying to 'put one over' on the voters and that the latter were not perceptive enough to discern as much." (*Trippet, supra*, 56 Cal.App.4th at p. 1546, fn. omitted.)

Hence, defendant's argument for extending the express exception created by Proposition 215 flies in the face of the precise language of the proposition, the rules of statutory construction, and the ballot arguments. (13)(See fn. 10.) The trial court did not err in refusing to give defendant's instruction. [FN10]

FN10 In light of the California Supreme Court's recent decision in *People v. Mower, supra*, 28 Cal.4th 457, the trial court, however, did err in instructing the jury pursuant to a modified version of CALJIC No. 12.24.1 that the defendant had the burden of proving by a preponderance of the evidence all of the facts necessary to establish his defense. In accordance with *Mower*, defendant's burden was merely to raise a reasonable doubt as to his guilt based on his defense. However, the error was harmless because defendant could not be deemed a primary caregiver in this case, and thus could not come under the proposition's exception for primary caregivers. Further, he could not make out an exception for cultivation as a patient: He did not have a physician's recommendation or approval until after his arrest and was growing (by his own admission) more marijuana than necessary for his personal medical needs.

IV. *Fair Notice* [FN*]

FN* See footnote, *ante*, page 1147.

. . . . . .

Disposition

The judgment is affirmed.

Blease, Acting P. J., and Hull, J., concurred. *1170

Cal.App.3.Dist.,2002.

THE PEOPLE, Plaintiff and Respondent, v. ROBERT MICHAEL GALAMBOS, JR., Defendant and Appellant.

END OF DOCUMENT

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H

HAL R. MILLER, JR., Plaintiff and Appellant,
v.
CHICO UNIFIED SCHOOL DISTRICT BOARD OF EDUCATION, Defendant and Respondent

S.F. No. 23937.

Supreme Court of California

July 27, 1979.

SUMMARY

In a mandamus proceeding by the principal of a junior high school seeking reinstatement to that post following his reassignment to a teaching position, the trial court sustained defendant school district's demurrer to the petition. The petition alleged that the board violated Ed. Code, § 44031, providing that school district employees must be given notice of, and opportunity to comment upon, derogatory information in their personnel files which may serve as a basis for affecting the status of their employment, by failing to give him notice of the existence of confidential memoranda, from the associate superintendent of schools, and by denying him an opportunity to review and comment on that derogatory information prior to his reassignment. The complaint further alleged that the school board had disregarded the requirements of Ed. Code, § 44664, providing a method for frequent evaluation and assessment of certified employees, including notification in writing in the event of an employee's unsatisfactory performance, by failing to notify him in writing of an unsatisfactory performance on his part and by neglecting to assist his improvement before reassigning him. Although the trial court found that the board failed to comply with both statutes, the court concluded that compliance was not a prerequisite to reassigning an administrator to a teaching position. (Superior Court of Butte County, No. 61650, Reginald M. Watt, Judge.)

The Supreme Court reversed and remanded to the trial court to determine whether the improper use of the derogatory material in plaintiff's personnel file was a crucial element in the board's decision. The court held that the school board substantially fulfilled the evaluation and counseling requirements of Ed. Code, § 44664, and thus the trial court properly rejected plaintiff's claim under that statute. However, the *704 court held that the trial court erred in denying plaintiff's claim under Ed. Code, § 44031. The court held that pursuant to that statute a school administrator must be permitted to review and comment on derogatory written material compiled and maintained by a school district, even though the material has not been properly placed in his personnel file. Also, the court held that a school board cannot avoid the requirements of the statute by putting derogatory written material in another file not designated as a personnel file. (Opinion by Tobriner, J., with Bird, C. J., Mosk, Richardson, Manuel and Newman, JJ., concurring. Separate dissenting opinion by Clark, J.)

HEADNOTES

Classified to California Digest of Official Reports

(1a, 1b) Schools § 34--Teachers and Other Employees--Assignments; Transfers--Reassignment of Administrator--Use of Derogatory Memoranda Not Placed in Personnel File.

A school board's failure to enter derogatory memoranda in a principal's personnel file prior to reassigning him to a teaching position violated his rights under Ed. Code, § 44031, giving employees the right to review and comment on derogatory material which might serve as a basis for affecting their employment status. A school district may not avoid the requirements of the statute by putting derogatory written material in another file not designated as a personnel file and by such a process of labeling prevent the administrator from reviewing and commenting on allegations directed against him.

[See Cal.Jur.2d, Schools, § 472; Am.Jur.2d, Schools, § 158.]

(2) Schools § 22--Teachers and Other Employees--Right of Employee to Review Personnel File.

In enacting Ed. Code, § 44031, giving school district employees the right to comment on derogatory information in their personnel files which might serve as a basis for affecting their status of employment, the Legislature intended to minimize the risk of employment decisions that were arbitrary or prejudicial. Unless the school district fairly notifies the employee of such derogatory material within a reasonable time of ascertaining it, so that the employee may gather pertinent information in his or her defense, the district may not fairly rely on the material in reaching any decision affecting the employee's employment status. *705

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(3) Schools § 34--Teachers and Other Employees--Assignments; Transfers--Use of Derogatory Memoranda Not Placed in Personnel File--Prejudice.
The fact that a former school principal could have presented oral or written rebuttal, to derogatory material not placed in his personnel file, at any time after he received notice from the school board that he was being reassigned as a teacher, did not allieviate any prejudice to him for the failure of the school board to include the derogatory material in his file prior to his reassignment, as required by Ed. Code, § 44031. There was a possibility that the derogatory material had become so stale that the principal would effectively be prevented from refuting any charges while particular incidents were still fresh in the minds of the relevant witnesses. Furthermore, the school board's decision to reassign him was not a preliminary, tentative decision, but rather was a final decision.

(4) Schools § 34--Teachers and Other Employees--Assignment; Transfers-- Evaluation and Assessment of Performance.
A school board substantially complied with Ed. Code, § 44664, providing for evaluation and assessment of the performance of each certified employee on a continuing basis, before reassigning a school principal to a teaching position. The board had promulgated performance guidelines for its personnel, and had evaluated the principal in light of those guidelines. Also, the board informed him of the results of all such evaluations and suggested to him ways to improve his performance.

(5) Schools § 40--Teachers and Other Employees--Suspension or Dismissal-- Evaluation and Assessment of Performance--Opportunity of Employee to Review Personnel File--Purpose of Legislation.
The obvious objective of the Legislature in enacting Ed. Code, 44031, giving school district employees the opportunity to comment on derogatory information in their personnel files, and Ed. Code, § 44031, giving school of district employees the opportunity to mance of each certified employee on a continuing basis, is to protect the individual employee against arbitrary action by his employer in order to preserve the individual's rights against their improper severance. The individual would be helpless against the employer's wrongful reassignment of him to an inferior position unless he had the opportunity to know, and if possible, to counter the reasons for it. *706

COUNSEL

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Daniel V. Blackstock, County Counsel, and Marianne Heenan, Deputy County Counsel, for Defendant and Respondent.

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TOBRINER, J.

On February 27, 1976, defendant Chico Unified School District Board of Education, notified plaintiff Hal R. Miller, Jr., principal of Bidwell Junior High School, of his reassignment to a teaching position for the following school year. Plaintiff has instituted the present mandamus proceeding, seeking reinstatement to his post as principal on the ground that the school board's action fails because it does not comply with sections 44031 and 44664 of the Education Code. (Former § § 13001.5, 13489.) [FN1]

FN1 Unless otherwise indicated, all statutory references are to the Education Code.

Under section 44031, school district employees must be given notice of, and opportunity to comment upon, derogatory information in their personnel files "which may serve as a basis for affecting the status of their employment." Section 44664 provides a method for frequent "evaluation and assessment" of certificated employees, and mandates the "employing authority" to notify an employee in writing in the event of the employee's unsatisfactory performance. The trial court below found that the school board had not met the requirements of sections 44031 and 44664 before reassigning plaintiff. Nevertheless, the court held that compliance with either provision "is not a prerequisite to reassignment of a principal to a

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*707 teaching position within a school district," and hence denied plaintiff's petition for mandate to compel his reinstatement.

We conclude that the trial court correctly rejected plaintiff's claim under section 44664, although, unlike the trial court, we reach that conclusion on the ground that the school board substantially fulfilled the evaluation and counseling requirements of that provision. We additionally hold, however, that the trial court erred in its treatment of plaintiff's contention under section 44031. As we explain, pursuant to that section a school administrator must be permitted to review and comment on derogatory written material compiled and maintained by a school district even though the material has not been properly placed in his personnel file. A school board cannot avoid the requirements of section 44031 by putting derogatory written material in another file not designated "personnel file" and by such a process of labelling prevent the administrator from reviewing and commenting upon allegations directed against him.

Moreover, in order to enforce the mandate of section 44031, we construe the provision to prohibit a school board from basing any employment decision on its analysis of derogatory information *unless* the board has notified the employee of such derogatory information and has afforded him an opportunity to comment upon it. In the instant case, the school board apparently did improperly consider some such derogatory information in reaching its decision to reassign plaintiff. Because the trial court did not decide whether the improper material was a crucial element in the board's decision, we remand the case to the trial court for that determination.

1. *The underlying facts.*

Plaintiff has been an employee of defendant school board since 1948. In 1958, the school board promoted plaintiff to principal of Bidwell Junior High School. Plaintiff holds general elementary, general secondary, and general administrative credentials.

Pursuant to procedures that the school board adopted in 1973, [illegible] formally evaluated annually; as the school board's published "Certified Evaluation Handbook" states, section 44664 prescribes "legal details" of the evaluation process. Associate Superintendent Don A. Cloud evaluated plaintiff in June 1973, and the school board entered the resulting uniformly favorable "certificated *708 personnel evaluation report," [FN2] signed by Cloud and by plaintiff, in plaintiff's personnel file.

FN2 Dr. Cloud's comments as evaluator include, inter alia: "I am aware of the favorable results of the ... testing program. ... I sense that at Bidwell School [the attitude that the school staff holds toward the students] is a positive force. ... We appreciate your contribution to the Stull Team. ... Good luck in your development of a more functional design [for support services]."

During the following school year, the board solicited comments from the Bidwell staff regarding various aspects of Bidwell school management; the board placed a compilation of the mostly critical returns in plaintiff's personnel file. [FN3] [illegible] the 1973-1974 school year the school board conducted plaintiff's second evaluation and placed the report in plaintiff's personnel file. While including several suggestions for improvement on plaintiff's part, the report generally approved plaintiff's performance. [FN4]

FN3 Among the criticisms collected are: "Too much evaluation of minor physical details of the classroom rather than teaching effectiveness'; " Maybe too much time spent away from school on committees."

FN4 The report notes: "We share your good feelings about the ... test results. ... We suggest: [¶] 1. that you personally become more involved in curriculum matters, ... [¶] 2. Work with your leadership team and the staff to develop strategies for a better 2-way communications system. ... We have appreciated your working with us this year."

In April 1975 the school board established a "Timetable for Evaluating Leadership Function at Bidwell Junior High School." The timetable, a copy of which was placed in plaintiff's personnel file, noted that the " Superintendent's recommendation for 1976/77 school year" would be submitted to the board by February 1976. An attached memorandum from Dr. Cloud to plaintiff described recent "concerns" focused on "the leadership that is being

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exercised at Bidwell," and enumerated various "major areas ... which need to be improved. " [FN5]

FN5 Dr. Cloud pointed out plaintiff's "Need to assist newer teachers in establishing a wholesome learning climate in the classroom"; "Need to provide inspired leadership that challenges people to do their best"; "Need to spend more time in the district rather than at outside conferences."

Plaintiff's most recent evaluation report, compiled in June 1975 for the 1974-1975 school year, noted "Hal's friendly and sincere attitude as he has worked with us through the years," but referred to specific criticisms previously documented to emphasize "that improvement is needed at the principalship level. " During the first half of the 1975-1976 school year, plaintiff's supervisors frequently conferred with plaintiff and exchanged a *709 series of memoranda with him monitoring, among other things, plaintiff's direction of school curriculum, management of school budget, and selection of Bidwell staff.

On February 27, 1976, the school board notified plaintiff by letter of his reassignment to a teaching position to commence July 1, 1976. [FN6] The school board enclosed a copy of a December 23, 1975, memorandum from Dr. Cloud to Superintendent Robert J. Jeffries recommending plaintiff's reassignment, a statement of 14 reasons for the reassignment, [FN7] "together with an attachment which fully documents the reasons and is listed as Exhibit A. " Plaintiff's current dispute with the school board centers on certain of the documents in exhibit A: although exhibit A contained plaintiff's past evaluation reports and other items culled from plaintiff's personnel file, it also disclosed to plaintiff for the first time 20 confidential memoranda by Dr. Cloud criticizing plaintiff's conduct as principal (the Cloud memoranda).

FN6 According to plaintiff's declaration, the reassignment represents "a significant decrease in ... compensation [and in] status of employment and job responsibilities."

FN7 In the statement of reasons the superintendent asserts, for example, that "Mr. Miller has not, to the degree expected, worked to help the individual teacher improve his/her teaching skills"; "Mr. Miller has not, to the degree expected, dealt with discipline problems on a consistent, well-defined basis."

On March 1, Dr. Cloud sent plaintiff a memorandum inviting plaintiff's cooperation in the continuing evaluation process, but plaintiff refused on advice of counsel. Plaintiff accepted the board's invitation, however, for a hearing "for the purpose of determining whether [plaintiff was] accorded due process. ... " At the hearing on April 27, 1976, plaintiff and his attorney responded to the information contained in exhibit A. On May 20, 1976, the board unanimously decided that plaintiff had not been denied due process "by the manner in which [plaintiff] was notified of the Board's decision to reassign [him] from [his] present position as Principal of Bidwell Junior High School to a teaching position in the Chico Unified School District for the 1976-77 school year."

On June 18, 1976, plaintiff filed a petition for writ of mandate to compel the school board to rescind his reassignment. Plaintiff alleged that the board had violated section 44031 by failing to give him notice of the existence of the confidential memoranda contained in exhibit A, and by denying him an opportunity to review and comment upon that derogatory information. Plaintiff further claimed that the school board had disregarded the requirements of section 44664 by failing to notify him in *710 writing of any unsatisfactory performance on his part and by neglecting to assist his improvement before reassigning him. On these bases plaintiff sought immediate restoration to his post as principal. [FN8]

FN8 As a separate cause of action plaintiff alleged that the school board's failure to comply with the statutory requirements deprived him of " rights guaranteed to him as a citizen of the United States of America pursuant to Amendment IV of the United States Constitution and Amendment XIV of the United States Constitution." On June 27, 1977, plaintiff requested dismissal of this cause of action with prejudice; the trial court accordingly entered its dismissal the following day. Plaintiff has not appealed the trial court's dismissal.

On June 23, 1976, the trial court issued an order to

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show cause and a temporary restraining order enjoining the school board from reassigning plaintiff. On July 7, 1976, the board demurred to plaintiff's petition; as an affirmative defense the board alleged that "reassignment of a principal to a classroom teaching position does not require compliance with either Education Code § [44031] or Education Code § [44664]." In any case, the board pointed out, it had not violated section 44031 inasmuch as the Cloud memoranda contained in exhibit A "are not in ... plaintiff's file, and never were entered or placed in said file, and [¶] ... describe counseling contacts made by Associate Superintendent Don Cloud, pursuant to directives issued by the Board of Education and the Superintendent of the Chico Unified School District. ... [P]laintiff participated in each of said contacts and could have presented his own oral or written rebuttal to said attachments at any time after he received Exhibit 'A' on February 27, 1976." As for section 44664, the school board contended that it had met evaluation requirements for the 1972-1973, 1973-1974, and 1974-1975 school years; "[f]or the 1975-1976 school year, a Stull Act evaluation was not completed because ... plaintiff refused to participate therein. ..."

The trial court made detailed findings of fact to support its final judgment. The court found that a substantial portion of the material contained in exhibit A, including information of a derogatory nature, had not been placed in plaintiff's personnel file, nor had plaintiff been given notice or an opportunity to review or comment upon the material "prior to [its] being used by the District as a basis for affecting the status of [plaintiff's] employment in reassigning [plaintiff] from Principal to a teaching position." Plaintiff was thereby "deprived of his right, as to such documents, to enter and have attached to such derogat[or]y statements his own comments." Nor was plaintiff notified in writing that he was not performing his duties in a satisfactory manner: although the school board discussed plaintiff's 1975 evaluation report with plaintiff, "that document *711 did not state [plaintiff] was not performing his duties in a satisfactory manner."

While the trial court accordingly found that the board failed to comply with sections 44031 and 44664, the court concluded that compliance "is not a prerequisite to reassigning an administrator to a teaching position," dissolved the temporary restraining order, and ordered judgment for the board.

(1a) 2. *The school board's failure to enter the Cloud memoranda in plaintiff's personnel file prior to reassigning plaintiff to a teaching position violated plaintiff's rights under section 44031 to review and comment upon derogatory materials which might serve as a basis for affecting plaintiff's employment status. We remand the case to the trial court for a determination as to whether any such violation prejudiced plaintiff.*

The record reveals that in recommending plaintiff's reassignment to a teaching position, Associate Superintendent Cloud prepared some 20 confidential memoranda for the school board's use. According to the declaration of Dr. Cloud's secretary, "On or about December 23, 1975 Dr. Cloud dictated, from his personal notes and calendar, a summary of various meetings, contacts, occurrences, and events [which took place between March 7 and December 3, 1975,] involving Mr. Hal R. Miller, Jr. [¶] Immediately thereafter, I transcribed said summary on separate sheets of paper, with each sheet bearing the date on which the meeting, contact, occurrence or event took place; said sheets were numbered as Attachments 11 through 30. I then compiled said Attachments 11 through 30 into 'Exhibit A' together with Attachments 1 through 10." Attachments 1 through 10 comprised the documents already contained in plaintiff's personnel file; Dr. Cloud submitted these documents and his freshly transcribed memoranda to Superintendent Jeffries in support of the recommendation that plaintiff be reassigned. As the school board admits, the Cloud memoranda - attachments 11 through 30 of exhibit A - have never been entered in plaintiff's personnel file.

Substantial evidence supports the trial court's finding that the documents constituting attachments 11 through 30 contain information directly or implicitly derogatory of plaintiff. A memorandum dated November 6, 1975, for example, criticizes plaintiff's procedure for recommending substitute teachers; another expressed Dr. Cloud's "amazement" at plaintiff's "feeling that socio- economic status had very *712 little, if anything, to do with scores attained on standardized tests." The remaining memoranda reflect similar reservations about plaintiff's performance or repeat criticisms of plaintiff allegedly voiced by third parties.

Plaintiff contends that prior to February 27, 1976, when the board notified him of his reassignment, he was unaware of the "contents, existence, or substance" of these memoranda; because the board

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(1b) Defendants have violated plaintiff's rights under section 44031 in precisely the described fashion. After becoming aware of some deficiencies in plaintiff's performance, Associate Superintendent Cloud began a program of frequent consultation with plaintiff directed toward a recommendation concerning plaintiff's continued employment for the 1976-1977 school year. Dr. Cloud kept notes incidental to his program of supervision and eventually transcribed these notes for presentation as formal support for his final recommendation of reassignment. As the trial court found, "The District had ample time to place each of the *714 Attachments 11 through 30 in [plaintiff's] personnel file sufficiently in advance of his notice of reassignment to afford [plaintiff] a reasonable opportunity to review and comment thereon prior to his notice of reassignment." Nevertheless, the board received Dr. Cloud's confidential memoranda without first allowing plaintiff the opportunity to correct any inaccurate derogatory information contained therein. [FN12]

FN12 Plaintiff persuasively urges that affording him an opportunity to rebut would not have been a meaningless gesture. Plaintiff illustrates his contention by referring to attachment 18, a memorandum recording a conversation between plaintiff and Cloud concerning a parent's threats to a Bidwell staff member. According to Cloud's memorandum, "I [Cloud] asked Mr. Miller why he didn't apply Education Code Section 13560, which would have protected his instructor. Mr. Miller's reply to me was 'Would you like to do it?'"
In refutation of Cloud's implicit criticism, plaintiff points out that because the parent's threats were at best "nonimmediate" and "vague," application of section 13560 (now § 44812) under the circumstances would have been "on its face ridiculous." The statute provides criminal sanctions for a parent who "insults or abuses" a teacher in the presence of other school personnel. As plaintiff declares, "I did not invoke said section because I felt at the time, and still feel, that because said section provides for criminal penalties, it would have had a tremendously chilling effect on parents feeling free to discuss problems with school administrators. I felt then, and feel now, that to have invoked said section under such circumstances would have been a serious judgmental error and would have potentially exposed the District to unwarranted liability. Had I been aware of said derogatory memo at the time that it was compiled I would have written a complete and detailed response, along the lines of the foregoing, to the school district to be included with the derogatory memo."

Having concluded that the school board violated plaintiff's rights under section 44031, we must determine whether that violation warrants plaintiff's reinstatement to his post as principal. We have decided, because the present record is unclear, to remand the case to the trial court for a determination as to whether the board's action was prejudicial.

Declarations by individual members of the school board suggest that the board may have relied on the Cloud memoranda in reaching the decision to reassign plaintiff. As one member declared, "the materials in Exhibit 'A,' and the Superintendent's recommendation convinced me that the action of replacing [plaintiff] as principal was and is in the best interest of the Bidwell service area." At the same time, however, the members declare that the Cloud memoranda were not *necessary* to their decision, and that other adequate factors influenced the decision to demote plaintiff. Thus the same member of the board explained, "On April 27, 1976, Mr. Miller and Mr. Harry Marsh, his attorney, appeared before the Board. The offer of proof by Mr. Marsh in behalf of Mr. Miller did not carry sufficient evidence to indicate that a modification to any decision should be forthcoming. Mr. Marsh expressed concern about *715 items 11 through 30. ... *My decision would have been the same had those particular attachments not been presented.*" (Italics added.)

Referring to this and other similar declarations the trial court below found, "with all due respect to the members of the School Board - these are self-serving statements after the fact, and do not meet the question as to whether [items 11 through 30 in exhibit A] were, in fact, considered before the decision to [reassign]." As we have explained heretofore in other contexts, however, the correct inquiry focuses not merely on whether the school board considered the Cloud memoranda in deciding to reassign plaintiff, but on whether *but for* the memoranda the board would not have reassigned him. (See *Beldaris v. Board of Education* (1972) 6 Cal.3d 575, 592-594

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[100 Cal.Rptr. 16, 493 P.2d 480]; *Bonham* v. *McConnell* (1955) 45 Cal.2d 304 [288 P.2d 502]; see also *Mt. Healthy City Board of Ed. v. Doyle* (1977) 429 U.S. 274, 283-287 [50 L.Ed.2d 471, 481-484, 97 S.Ct. 568]; *Byrd* v. *Savage* (1963) 219 Cal.App.2d 396 [32 Cal.Rptr. 881].) (3)(See fn. 13.) Inasmuch as we cannot determine on the present record whether the board would have reached the same decision as to plaintiff's demotion even in the absence of the Cloud memoranda, we reverse the present judgment and remand the case for further proceedings. [FN13] *716

FN13 The school board contends that plaintiff may not claim prejudice inasmuch as he "could have presented his own oral or written rebuttal to [the Cloud memoranda] at any time after he received Exhibit 'A' on February 27, 1976." The school board's contention assumes, first, that the notification on February 27 was timely. We cannot ignore the possibility, however, that the Cloud memoranda contained information so stale that plaintiff was effectively prevented from refuting any charges while particular incidents were still fresh in the minds of relevant witnesses.
Moreover, the school board's contention would be more persuasive had the school board's decision to reassign plaintiff been a preliminary, tentative one, such that notice of the derogatory information on February 27 would have afforded plaintiff a reasonable and realistic opportunity to present material in rebuttal. The record reveals, however, that Superintendent Jeffries recommended plaintiff's reassignment to the board on February 25, 1976, and that the board voted in executive session that day to adopt the superintendent's recommendation. The board's letter of February 27 informs plaintiff of the fait accompli of his change in status. Despite the fact that the board gratuitously offered plaintiff the opportunity of a hearing, the board limited the scope of the hearing to the "purpose of determining whether [plaintiff was] accorded due process in this matter." The board itself concedes that there was no "evidentiary hearing with witnesses called"; since the board appears to have precluded plaintiff from rebutting the merits of the Cloud memoranda, we reject the board's contention. (Cf. *Cole v. Los Angeles Community College Dist.* (1977) 68 Cal.App.3d 785, 794 [137 Cal.Rptr. 588], in which the court held that section 44031 does not apply to such "routine record, speaking for itself," as an employee's "time cards"; the court affirmed the trial court's finding that defendant's failure to include plaintiff's time cards in plaintiff's personnel file "'did not prevent [plaintiff] from obtaining a fair hearing by the Personnel Commission of the charges against him.'")

On remand, the trial court should determine whether absent the Cloud memoranda, the board would have reassigned plaintiff. If the court determines that the board would have reassigned plaintiff in any case, it should deny plaintiff's petition for reinstatement. If the court determines that the Cloud memoranda played a crucial role in the board's decision to reassign plaintiff, it should issue a writ of mandate requiring the board to reinstate plaintiff as principal, without prejudice to any future reassignment based on proper considerations. Finally, if the court cannot determine *whether or not* the Cloud memoranda played a crucial role in the board's decision of reassignment, the court should order the board to reconsider its decision of reassignment without reference to the Cloud memoranda. [FN14]

FN14 In light of this disposition we do not consider plaintiff's claim that defendants' actions in violation of section 44031 have deprived him of his common law right of fair procedure (*Ezekial* v. *Winkley* (1977) 20 Cal.3d 267 [142 Cal.Rptr. 418, 572 P.2d 32]) and of his constitutional right to privacy (Cal. Const., art. I, § 1).

(4) 3. *Defendant school board substantially complied with section 44664 before reassigning plaintiff to a teaching position.*

Plaintiff seeks reinstatement to his position as principal on a second ground: plaintiff alleges that the school board's failure to comply with the requirements of section 44664 invalidates his reassignment to a teaching post. Section 44664, a provision of the Stull Act (former § § 13485-13490, now § § 44660-44665), provides: "Evaluation and assessment of the performance of each certificated employee shall be made on a continuing basis, at

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least once each school year for probationary personnel, and at least every other year for personnel with permanent status. The evaluation shall include recommendations, if necessary, as to areas of improvement in the performance of the employee. In the event an employee is not performing his duties in a satisfactory manner according to the standards prescribed by the governing board, the employing authority shall notify the employee in writing of such fact and describe such unsatisfactory performance. The employing authority shall thereafter confer with the employee making specific recommendations as to areas of improvement in the employee's performance and endeavor to assist him in such performance. " [FN15]

FN15 Section 44664 also allows school districts at their discretion to exclude hourly and temporary hourly certificated employees, and substitute teachers, from the provisions of the section.

The trial court in the present case found that the school board violated section 44664 by neglecting to notify plaintiff in writing that he was not *717 performing his duties in a satisfactory manner, and by failing " thereafter [to] confer with [plaintiff]." The [redacted]

The school board's guidelines provide fo[redacted] Although plaintiff received generally satisfactory evaluations in 1973 and 1974, the board's evaluation report in 1974 contains suggestions for specific areas of improvement. The board's establishment of a "timetable" in April 1975 for assessment of plaintiff's performance evidences an increased scrutiny of plaintiff that year; Associate Superintendent Cloud notified plaintiff at that point that plaintiff was the subject of concern, and repeated suggestions for improvement.

P[redacted] plainly notified plaintiff "in writing" of any unsatisfactory conduct on his part, and in addition provided a forum for plaintiff's supervisors to make "specific recommendations as to areas of improvement in the employee's performance and endeavor to assist him in such performance." Plaintiff's signature on the report indicates that he was informed of the results of this evaluation. Although the board scheduled an evaluation for the 1975-1976 school year, plaintiff refused to participate. Throughout the year, however, plaintiff's supervisors had contacted him frequently concerning his difficulties; after at least two meetings Associate Superintendent Cloud provided plaintiff with memoranda listing methods of improvement. Thus plaintiff knew of the board's close attention to his performance and of specific ways in which he could alleviate their concerns. Under these circumstances we reject the trial court's finding of noncompliance and its overly restrictive interpretation of the requirements of section 44664. [FN16] *718

FN16 In view of our conclusion we do not reach plaintiff's contention that noncompliance with the terms of the Stull Act voids a school district's reassignment of an administrator. (But see *Grant v. Adams* (1977) 69 Cal.App.3d 127 [137 Cal.Rptr. 834]; *Anaclerio v. Skinner* (1976) 64 Cal.App.3d 194 [134 Cal.Rptr. 303]; *Vick v. Board of Education* (1976) 61 Cal.App.3d 657 [132 Cal.Rptr. 506].) We note, nonetheless, that the statute governing removal and transfer of administrators effective at the time of plaintiff's reassignment made no reference to Stull Act evaluations. (See § 44896, former § 13314.7.) A subsequent amendment mandates that an evaluation be completed "not more than 60 days prior to the giving of the notice of the transfer" in any case involving transfer for "incompetency." (Stats. 1977, ch. 973, § 1.) The Legislature has unsuccessfully attempted a further amendment to provide for the completion of a Stull Act evaluation "not more than 60 days and not less than 30 days prior to the giving of the notice" of transfer on any grounds. (Assem. Bill No. 2433 (1977-1978 Reg. Sess.) vetoed by the Governor on Aug. 25, 1978, 2 Assem. Final Hist. (1977-1978 Reg. Sess.) p. 1418.)

[redacted] purpose of sections 44031 [redacted] and to apply those sections to the relevant facts. (5) The obvious

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objective of the Legislature was to protect the individual employee, in this case, the principal of a high school, against arbitrary action by the institution, here the school board, in order to preserve the individual's rights against their improper severance. The individual would be helpless against the institution's wrongful reassigning him to an inferior position unless he had the opportunity to know, and if possible, to counter the reasons for it. At the same time if the trial court in the present case should find that the board in any event, even in the absence of unproven accusations against the principal's conduct, would still have reassigned him, for its own good reasons, the principal cannot justly complain.

The judgment is reversed and the cause is remanded to the trial court for further proceedings in conformity with this opinion.

Bird, C. J., Mosk, J., Richardson, J., Manuel, J., and Newman, J., concurred.

CLARK, J.

I dissent.

First, Education Code section 44031 [FN1] applies only to materials placed in the personnel file - not to an unfiled superintendent's report. Second, even assuming the section is applicable to the superintendent's report, nothing in section 44031 mandates, or even suggests, the quasi-adversary *719 administrative transfer procedure established by the majority. [FN2] Section 44031 in the plainest terms deals with inspection of school employees' personnel files and rebuttal of derogatory information therein. It does not purport to govern administrative transfer proceedings or to establish evidentiary rules for the use of file information. Third, even assuming that the section is applicable to the superintendent's report and that the section establishes an evidentiary rule governing use of file information, applicable principles of judicial review require affirmance of the judgment denying mandate.

FN1 Section 44031 provides: "Materials in personnel files of employees which may serve as a basis for affecting the status of their employment are to be made available for the inspection of the person involved. [¶] Such material is not to include ratings, reports or records which were obtained prior to the employment of the person involved, were prepared by identifiable examination committee members, or were obtained in connection with a promotional examination. [¶] Every employee shall have the right to inspect such materials upon request, provided that the request is made at a time when such person is not actually required to render services to the employing district. [¶] Information of a derogatory nature, except material mentioned in the second paragraph of this section, shall not be entered or filed unless and until the employee is given notice and an opportunity to review and comment thereon. An employee shall have the right to enter, and have attached to any such derogatory statement, his own comments thereon. Such review shall take place during normal business hours, and the employee shall be released from duty for this purpose without salary reduction."

FN2 "Unless the school district notifies the employee of such derogatory material within a reasonable time of ascertaining the material, so that the employee may gather pertinent information in his defense, the district may not fairly rely on the material in reaching any decision affecting the employee's employment status." (*Ante*, p. 713, fn. omitted.)

I

Permitting rebuttal of personnel file information, section 44031 contains no language requiring the inclusion of any information in the file. Had the Legislature intended that certain information, derogatory or laudatory, was to be included in the files, the Legislature could have easily so provided. It did not. The section should accordingly be interpreted as applying only to information placed in the file. Such interpretation is reflected by the exceptions in the section. Those exceptions do not merely authorize withholding of information but prohibit inclusion of the excepted information.

The majority's construction of the section mandates a costly paperwork explosion, impairing the administration of our school system and education of our children. Construing the section as requiring inclusion in the file of all derogatory information

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"within a reasonable time of ascertaining the material " (see fn. 2), means that superintendents must prepare a written report of each meeting with an administrator and of each criticism or suggestion made so that the administrator may rebut the report before it is filed. [FN3] Superintendents also must record their critical observations of school programs, classroom visits, and public complaints they receive, for those also may influence a later demotion decision. Because the section also applies to teachers, the superintendent and the administrators must compile similar records for each teacher. The time *720 needed to satisfy this requirement represents an impossible burden for the superintendent, administrators, and teachers. Further, it becomes patently unreasonable in light of the fact that little of such material ever will be used. In these days of school district austerity, the paperwork explosion can only mean unjustified expense and impairment of administration and teaching in our schools.

> FN3 At the time the information must be put in the file the superintendent and the administrators do not know whether it will become relevant at some later date. Because of this and because the district board is entitled to all available information in determining whether to order transfer, all potentially relevant information must be included in the dossier. The breadth of the paperwork explosion is apparent.

In support of their statutory interpretation, the majority cite the need to prevent preservation of stale, unrebutted information in files. Yet, once filed pursuant to the majority rule, derogatory information becomes a permanent part of an administrator's file and may not be removed until the individual's retirement or termination. (58 Ops.Cal.Atty.Gen. 422, 424 (1975).) It thus encourages the career-long accumulation of all derogatory information written at any time about an individual. The purposelessness of this requirement is apparent, given the rarity with which such information actually will be used and the statutory restriction against using information relating to a matter more than four years old in a termination proceeding. (Ed. Code, § 44944, subd. (a).)

I would conclude that section 44031 does not require the inclusion of any material in the personnel file but provides only for rebuttal of material placed in the file.

II

The majority's construction of section 44031 in reality tends to convert it into a rule of evidence. Section 44031 merely provides for rebuttal of information in personnel files. However, providing that a demotion is invalidated by consideration of unanswered nonfile material - such as the instant internal memoranda - establishes an evidentiary requirement.

Such requirement is at odds with the long established rule that a school board possesses absolute discretion to return administrators to teaching positions for reasons the board deems sufficient. (*Board of Education v. Swan* (1953) 41 Cal.2d 546, 555-556 [261 P.2d 261]; *Grant v. Adams* (1977) 69 Cal.App.3d 127, 132, 137-138 [137 Cal.Rptr. 834]; *Anaclerio v. Skinner* (1976) 64 Cal.App.3d 194, 197 [134 Cal.Rptr. 303]; *Barton v. Governing Board* (1976) 60 Cal.App.3d 476, 479 [131 Cal.Rptr. 455]; *Hentschke v. Sink* (1973) 34 Cal.App.3d 19, 22-23 [109 Cal.Rptr. 549]; Note, *Due Process for Public School Administrators?* (1978) 9 Pacific L.J. 921, 933, 939; Reutter & Hamilton, The Law of Public Education (2d ed. 1976) at *721 p. 424; 78 C.J.S., Schools and School Districts, § 205, p. 1101; see *Barthuli v. Board of Trustees* (1977) 19 Cal.3d 717, 721 [139 Cal.Rptr. 627, 566 P.2d 261], cert. den., 434 U.S. 1040 [54 L.Ed.2d 790, 98 S.Ct. 21]; *Thompson v. Modesto City High School Dist.* (1977) 19 Cal.3d 620, 624 [139 Cal.Rptr. 603, 566 P.2d 237]; *Bogacki v. Board of Supervisors* (1971) 5 Cal.3d 771, 781-783 [97 Cal.Rptr. 657, 489 P.2d 537]; *Holbrook v. Board of Education* (1951) 37 Cal.2d 316, 334 [231 P.2d 853]; *Griffin v. Los Angeles etc. Sch. Dist.* (1942) 53 Cal.App.2d 350, 352 [127 P.2d 939]; Piele, The Yearbook of School Law 1978 at pp. 77-79.) Only proper notice and, if requested, a statement of reasons are required. (Ed. Code, § 44896; *Barton v. Governing Board, supra*, 60 Cal.App.3d at p. 479.)

The reasons supporting this principle were stated in *Hentschke v. Sink, supra*, 34 Cal.App.3d 19: "[A] second or third level administrator bears to his superiors a relationship of the most intimate nature, requiring complete trust by the top administrators in the judgment and cooperative nature of the subordinate. The loss of that trust is not a matter susceptible of proof such as is involved in the cases where a classroom teacher is dismissed or demoted for objective acts of misconduct. To introduce into the administrative structure the elements of discharge for 'cause' and of formal hearing would be to make effective school administration impossible. The

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statutes do not require that." (34 Cal.App.3d at p. 23.)

Even as established, there is a patchwork quality to the requirement of rebuttal of derogatory information about an administrator. It appears to affect demotion decisions based upon written reports to school boards, but not those based on oral recommendations or those initiated by board members themselves on the basis of their own knowledge.

Most important in this connection are the three exceptions in the statute. Section 44031 *prohibits* inspection or rebuttal of "ratings, reports, or records (1) which were obtained prior to the employment of the person involved, (2) were prepared by identifiable examination committee members, or (3) were obtained in connection with a promotional examination." Those materials are obviously crucial to promotion, demotion, or other employment determinations, and it would be unreasonable to conclude that because the employee may not rebut them, the board may not consider them. These provisions show that the inspection and rebuttal right is not a limitation upon the matters available for board consideration. *722

III

Even assuming arguendo the instant school board partially based its demotion decision on procedurally deficient information, the majority's use of a "but for" standard of review [FN4] is unsupported. Such a standard is appropriate in only two instances - where cause must be shown to support a personnel decision, or where the decision allegedly was based on the employee's exercise of a constitutional right. (See *Bogacki v. Board of Supervisors* (1971) 5 Cal.3d 771, 782-783 [97 Cal.Rptr. 657, 489 P.2d 537].) The majority opinion bears this out, relying solely upon such cases to support its "but for" standard. (Ante, p. 715, citing *Bekiaris v. Board of Education* (1972) 6 Cal.3d 575 [100 Cal.Rptr. 16, 493 P.2d 480] (infringement of constitutional rights alleged); *Bonham v. McConnell, supra*, 45 Cal.2d 304 (requirement of cause);

> FN4 "As we have explained heretofore in other contexts, however, the correct inquiry focuses not merely on whether the school board considered the Cloud memoranda in deciding to reassign plaintiff, but on whether but for the memoranda the board would not have reassigned him. (See *Bekiaris v. Board of Education* (1972) 6 Cal.3d 575, 592-594 [100 Cal.Rptr. 16, 493 P.2d 480]; *Bonham v. McConnell* (1955) 45 Cal.2d 304 [288 P.2d 502]; see also *Mt. Healthy City Board of Ed. v. Doyle* (1977) 429 U.S. 274, 283-287 [50 L.Ed.2d 471, 481-484, 97 S.Ct. 568]; *Byrd v. Savage* (1963) 219 Cal.App.2d 396 [32 Cal.Rptr. 881].)" (*Ante*, p. 715.) *Mt. Healthy City Board of Ed. v. Doyle, supra*, 429 U.S. 274 (infringement of constitutional rights alleged); *Byrd v. Savage, supra*, 219 Cal.App.2d 396 (requirement of cause).)

The present case, however, involves neither a required showing of cause (see *Board of Education v. Swan*, supra, 41 Cal.2d 546, 555-556, and other authorities cited supra) nor any allegation the demotion was retaliation for plaintiff's exercise of a constitutional right. Instead, the correct standard of review is that applied where an employee serves in a position at the pleasure of the employer.

The standard was stated in *Bogacki v. Board of Supervisors, supra*, 5 Cal.3d 771, 783: "A public employee serving at the pleasure of the appointing authority ... is by the terms of his employment subject to removal without judicially cognizable good cause. ... 'Considerations of comity and administrative efficiency counsel the courts to refrain from any attempt to substitute their own judgment for that of the responsible officials.' [Citation.] Only when such a public employee can show that his employment has been unjustifiably conditioned on the waiver of his constitutional rights will the courts intervene and give relief." (5 Cal.3d at p. 783; see *Rosenfield v. Malcolm* (1967) 65 Cal.2d 559, 562-563 [55 Cal.Rptr. 505, 421 P.2d 697]; *Abel v. Cory* (1977) 71 Cal.App.3d 589, 595 [139 Cal.Rptr. 555].) *723

Bogacki is particularly relevant. In that case, all the reasons cited by the employer for removing plaintiff were found to be erroneous. The reasons thus were disregarded by the court. We held that because plaintiff served at the pleasure of the employing authority - similar to the instant plaintiff's administrative assignment - the fact that the resulting record failed to establish a specific cause for dismissal did not invalidate the dismissal. "This would be tantamount to saying that a public agency cannot employ persons subject to removal at its pleasure, for if judicially cognizable good cause is requisite to removal in all cases there can be no wholly subjective power of removal in the agency. [¶] Such is not the law in California, nor has it ever been." (*Bogacki v. Board of Supervisors, supra*, 5

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Cal.3d at pp. 782-783 (fn. omitted).)

In the present case, of course, the board of education was not required to consider or prove judicially cognizable cause to demote plaintiff. The majority nevertheless hold the matter must be remanded because the board voluntarily considered both valid causes [FN5] and others that are procedurally deficient for lack of rebuttal opportunity. The defect in this procedure, the majority assert, is that, given the opportunity, plaintiff may be able to successfully counter the unrebutted reasons.

FN5 In notifying plaintiff of his demotion, the school board provided a list of 14 reasons and attached supporting documentation consisting of a memorandum written by associate superintendent Don A. Cloud. The Cloud memorandum listed 30 separate items relating to plaintiff's performance, including reports, evaluations, and memoranda. Plaintiff contends the board erred by considering items 11 to 30 attached to the Cloud memorandum because plaintiff had not provided rebuttal to them. Items 1 to 10, however, appear to be conceded as procedurally valid, and their use is not challenged. Those items include such causes as plaintiff's inadequate implementation of suggestions for providing reading and math labs, using criterion-referenced tests, reducing certain pupil-teacher ratios, and delineating job responsibilities of staff members (item 1); a need for better communication with his subordinates (item 2); a need to give subordinates more time to contribute suggestions, excessive attention to minor classroom physical details rather than teaching effectiveness, a need to support staff in correcting student behavior problems, a need for greater involvement with students and student groups (item 3); a need to direct improvements in his school's curriculum, a need to convince educators and the community of the effectiveness of his school's student discipline, a need to be more sensitive to the needs of parents and staff, devoting too much time to conferences outside the school district, relying too much on his staff for decision making (item 5), and a lack of a well- defined school curriculum design, particularly in basic subject areas (item 7).

However, even assuming that was done and those reasons were shown to be nonexistent and were disregarded, the additional concededly valid reasons still remain to support the school board's decision. We must remember this is not a case of alleged retaliation for exercise of a constitutional privilege but, even under the majority rule, only one in *724 which *some* of the board's reasons *may* be invalid. To concede everything plaintiff alleges is to grant only that he could successfully counter the unrebutted reasons. Those reasons having been rebutted, however, valid cause concededly still exists in the record supporting the board, even though no cause at all need be shown. Such basis of support for the decision far exceeds that found adequate in Bogacki. [FN6]

FN6 The "but for" test applied here would be inappropriate even in the case of an employing authority whose decisions must be supported by evidence. Where such an authority's supporting reasons are found to be partially invalid, the proper remedy is to remand to the employing authority for reconsideration of its decision. (*Shepherd v. State Personnel Board* (1957) 48 Cal.2d 41, 51 [307 P.2d 4]; *Bonham v. McConnell, supra*, 45 Cal.2d 304, 306; *Wingfield v. Fielder* (1972) 29 Cal.App.3d 209, 223 [105 Cal.Rptr. 619]; *Doyle v. Board of Barber Examiners* (1966) 244 Cal.App.2d 521, 526 [53 Cal.Rptr. 420]; 2 Cal.Jur.3d, Administrative Law, § 301, at p. 574.)

For excellent reason, communities and their school boards are granted great discretion in selecting those who lead their schools. It is unwise to erect procedural barriers to the exercise of that discretion, particularly where, as here, an administrator has been afforded ample notice of deficiencies, counseling, and remediation. To do so, I believe, is to elevate procedure above the welfare of pupils.

I would affirm the judgment. *725

Cal.,1979.

Miller v. Chico Unified School Dist., Bd. of Ed.

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C

CERTIFICATED EMPLOYEES COUNCIL OF THE MONTEREY PENINSULA UNIFIED SCHOOL DISTRICT et al., Plaintiffs and Appellants,
v.
MONTEREY PENINSULA UNIFIED SCHOOL DISTRICT, Defendant and Respondent

Civ. No. 33156.

Court of Appeal, First District, Division 2, California.

October 4, 1974.

SUMMARY

In proceedings initiated by teachers' organizations seeking a writ of mandate and an injunction against a school district, the trial court concluded, contrary to plaintiffs' contentions, that the requirement of the Winton Act (Ed. Code, § 13080 et seq.) that public school employers "meet and confer" with teacher organizations with regard to employer-employee relations, is not applicable to the development and adoption of the teacher evaluation and assessment guidelines referred to in the Stull Act (Ed. Code, § 13485 et seq.). On the basis of this conclusion, defendants were denied the relief which they sought. (Superior Court of Monterey County, No. M 5800, Stanley K. Lawson, Judge.)

The Court of Appeal reversed with directions to the trial court to grant the petition for a writ of mandate and to issue an injunction to restrain the school district from applying its guidelines until it has complied with the "meet and confer" requirements of the Winton Act. Applying the rule requiring the various sections of a code bearing on the same subject to be read together, the appellate court reasoned that Ed. Code, § 13486, a part of the Stull Act, providing that in the development and adoption of the teacher evaluation and assessment guidelines referred to in that act, the governing school board is to avail itself of the advice of certificated instructional personnel, establishes a mandatory minimum requirement for teacher participation in the development and adoption of the guidelines. Accordingly, it was held that the "meet and confer" requirement of the Winton *329 Act applies to the development and adoption of the Stull Act guidelines. (Opinion by Taylor, P. J., with Rouse, J., and Bray, J., [FN*] concurring.)

FN* Retired Presiding Justice of the Court of Appeal sitting under assignment by the Chairman of the Judicial Council.

HEADNOTES

Classified to California Digest of Official Reports

(1) Statutes § 164(3)--Construction and Interpretation--General and Particular Provisions.
The rules that a later statute supersedes an earlier one and that specific language in a statute supersedes general language in another do not apply unless the language of the two enactments cannot be harmonized.

[See Cal.Jur.2d, Statutes, § 119; Am.Jur.2d, Statutes, § 257.]

(2) Statutes § 194--Construction and Interpretation--Construction of Codes as a Whole--Education Code.
Sections of the Education Code bearing on the same subject must be read and construed together where possible.

(3) Schools § 51(1)--Administrative Officers--Trustees and Boards--Advice From Personnel.
Ed. Code, § 13486, a part of the Stull Act (Ed. Code, § 13485 et seq.), providing that in the development and adoption of the teacher evaluation and assessment guidelines contemplated by that act, the governing school board shall avail itself of the advice of the certificated instructional personnel, sets up a mandatory minimum requirement for teacher participation in the development and adoption of such guidelines.

(4) Schools § 81--Teachers and Other Employees--Right to Meet and Confer With Administrators.
The establishment of standards of expected student progress referred to in Ed. Code, § 13487, subd. (a), a part of the Stull Act (Ed. Code, § 13485 et seq.), is within the "meet and confer" requirement of the Winton Act (Ed. Code, § 13080 et seq.), as falling within educational objectives and the determination of courses and curricula.

(5) Schools § 81--Teachers and Other Employees--Right to Meet and Confer With Administrators.
The assessment of certificated personnel *330 competence referred to in Ed. Code, § 13487, subd.

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(b), a part of the Stull Act (Ed. Code, § 13485 et seq.), is, to the extent of the criteria for assessment, subject to the "meet and confer" requirement of the Winton Act (Ed. Code, § 13080 et seq.).

(6) Schools § 81--Teachers and Other Employees--Right to Meet and Confer With Administrators.
The assessment of "other duties," referred to in Ed. Code, § 13487, subd. (c), a part of the Stull Act (Ed. Code, § 13485 et seq.), is, with respect to aspects such as salary, hours of extra duty, type of extra duty, and place of employment, subject to the "meet and confer" requirement of the Winton Act (Ed. Code, § 13080 et seq.).

(7) Schools § 81--Teachers and Other Employees--Right to Meet and Confer With Administrators.
The establishment of procedures and techniques for ascertaining that certificated employees are maintaining proper control and preserving a suitable learning environment referred to in Ed. Code, § 13487, subd. (d), a part of the Stull Act (Ed. Code, § 13485 et seq.), is subject to the "meet and confer" requirement of the Winton Act (Ed. Code, § 13080 et seq.).

(8) Schools § 81--Teachers and Other Employees--Right to Meet and Confer With Administrators.
The requirement of the Winton Act (Ed. Code, § 13080 et seq.) that public school employers "meet and confer" with teacher organizations with regard to, among other things, employer-employee relations, is applicable to the development and adoption of the teacher evaluation and assessment guidelines contemplated by the Stull Act (Ed. Code, § 13485 et seq.).

(9) Schools § 105(1)--Teachers and Other Employees--Mandamus--Estoppel.
A school district could not sustain its contention that teachers' organizations were estopped to assert in mandamus proceedings that development and adoption of the teacher evaluation and assessment guidelines contemplated by the Stull Act (Ed. Code, § 13080 et seq.), were subject to the "meet and confer" requirement of the Winton Act (Ed. Code, § 13080 et seq.) as a result of the organizations' alleged failure to make a request to "meet and confer" until after adoption of the guidelines, where it appeared that long before such adoption, the district was aware of the teachers' desire to "meet and confer" prior to final adoption. *331

COUNSEL

Stewart & Steiner and W. K. Stewart for Plaintiffs and Appellants.

Peter T. Galiano and Richard C. Anthony as Amici Curiae on behalf of Plaintiffs and Appellants.

William H. Stoffers, County Counsel, and Paul R. De Lay, Deputy County Counsel, for Defendant and Respondent.

TAYLOR, P. J.

This is an appeal by two Monterey teacher organizations [FN1] and one of their officers [FN2] (teachers) from a judgment denying their petition for a writ of mandate and a preliminary injunction against the Monterey Peninsula Unified School District (district). The matter presents a question of first impression: whether the development and adoption of teacher evaluation and assessment guidelines pursuant to Education Code sections 13485-13488 (hereafter Stull Act) by the district is subject to the "meet and confer" process required by Education Code sections 13080-13090 (hereafter Winton Act). [FN3]

FN1 The Certificated Employees Council of the Monterey Peninsula Unified School District (hereafter MCEC) and the Monterey Bay Teachers Association of the Monterey Peninsula Unified School District (hereafter MBTA).

FN2 Sam Alley, a certificated employee (teacher) of defendant school district, is chairman of the MCEC and president of the MBTA.

FN3 All code citations are to the Education Code unless otherwise noted.

Preliminarily, we set forth the pertinent provisions of each act to facilitate an understanding of the questions presented.

The Stull Act (Stats. 1971, ch. 361, § 40, operative Sept. 1, 1972), consistent with its legislative purpose of establishing a uniform system of evaluation and assessment of the performance of certificated

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personnel (§ 13485), requires the governing board of each school district to develop and adopt for this purpose specific guidelines that shall include but shall not necessarily be limited in content to certain specified elements. (§ 13487.)

Section 13486 provides: "In the development and adoption of these guidelines and procedures, *the governing board shall avail itself of the advice of the certificated instructional* personnel in the district's organization *332 of certificated personnel." (Italics supplied.) The remaining relevant portions of the Stull Act will be set forth as needed.

The Winton Act (Stats. 1965, ch. 2041, § 2, as amended), so far as pertinent, requires that public school employers "shall meet and confer with *representatives of certificated* and classified *employee organizations* [FN[4]] *upon request with regard to all matters relating to employment conditions and employer-employee relations*, and *in addition, shall meet and confer with representatives of employee organizations* representing certificated employees upon request *with regard to procedures relating to the definition of educational objectives, the determination of* the content of courses and curricula, the selection of *textbooks, and other aspects of the instructional program* to the extent such matters are within the discretion of the public school employer or governing board under the law." (§ 13085; italics supplied.)

> FN4] Section 13085 also provides that in districts with more than one teacher organization, the employer meets and confers with representatives of all the organizations through a certificated employee council (CEC) consisting of not more than nine nor less than five members appointed by the respective teacher organizations in numbers proportionate to the membership.

Under this *meet and confer* requirement, the public school employer and the representatives of the employee organizations "have the mutual obligation to exchange freely information, opinions, and proposals; and to make and consider recommendations under orderly procedures in a conscientious effort to reach agreement by written resolution, regulation, or policy of the governing board effectuating such recommendations" (§ 13081).

The basic facts, as found by the trial court, are as follows: Pursuant to section 13486 of the Stull Act, the district established the Certificated Personnel Evaluation Committee to develop its guidelines. This committee, comprised of eight teachers and seven administrators, met 22 times between November 1, 1971, and June 19, 1972, and was responsible for the guidelines adopted by the district on August 14, 1972. At the time of adoption, the district formally stated that the guidelines were "interim" in nature and that certain portions would be "subject to 'meeting and conferring' under the Winton Act ... upon request by petitioners." No "meet and confer" meetings had taken place, either before or after the adoption of the guidelines on August 14, 1972. The teachers made a request to "meet and confer" on August 14, but have not done so subsequently, although at all times the district has been ready and willing to do *333 so. The court then concluded that the district was not required to "meet and confer" on the Stull guidelines with the teachers pursuant to the Winton Act and entered its judgment denying the relief requested.

On appeal, the teachers maintain that the Stull guidelines adopted by the district are invalid as the district failed to "meet and confer" with the MCEC [FN5] prior to August 14, 1972, as required by the Winton Act.

> FN5 As the teachers in the district were represented by two organizations, the MBTA and the American Federation of Teachers, pursuant to section 13085 of the Winton Act, meet and confer negotiations with the school district were conducted through the MCEC.

We turn first to the teachers' contention that the trial court erred in concluding that the Legislature did not intend to make the Stull guidelines subject to the Winton Act "meet and confer" requirements. The court indicated that section 13486 of the Stull Act provides its own procedure for giving teachers a voice in the development and adoption of the guidelines and that this requirement was satisfied by the district's utilization of the Certificated Personnel Evaluation Committee. The court reasoned that the section 13486 requirement for "advice of the certificated instructional personnel" would be meaningless if the Winton "meet and confer" provisions of section 13085 were applicable. (1) The court then followed the well- established rules of

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statutory construction that the later and more specific language of section 13486 superseded the earlier and more general language of sections 13080-13085. [FN6]

FN6 While recognizing that they are not controlling, the teachers have called our attention to three contrary superior court decisions on a substantially similar question in this district, that have apparently not been appealed (California Teachers Association, et al. v. San Mateo City School District, Superior Court, San Mateo County, No. 173401; Alameda Federation of Teachers, et al. v. Alameda Unified School District, Superior Court, Alameda County, No. 430072; San Leandro Federation of Teachers, et al. v. San Leandro Unified School District, et al., Alameda County Superior Court, No. 429668).

However, these rules do not apply unless the language of two statutory enactments cannot be harmonized. (2) The basic rule is that sections of the Education Code bearing on the same subject must be read and construed together where possible (*Brown v. Bozeman*, 138 Cal.App. 133 [32 P.2d 168]; see *County of Placer v. Aetna Cas. etc. Co.*, 50 Cal.2d 182, 188-189 [323 P.2d 753]).

(3) Applying this rule, we interpret the Stull "advice" requirement of section 13486 as a mandatory minimum requirement for teacher participation in the development and adoption of the teacher evaluation and *334 assessment guidelines. Without this "advice" requirement, it would be possible for the guidelines to be developed and adopted without the participation of the affected employees as the Winton Act does not *require* a school employer to meet and confer on an issue unless *requested* to do so by the appropriate teacher organization representative. Thus, the "advice" requirement of Stull's section 13486 is not meaningless and is readily harmonized with the "meet and confer" requirement of Winton's section 13085.

Our conclusion is in accord with that provided by the legislative counsel to Senator Albert S. Rodda, a coauthor of the Stull Act. By a letter dated June 12, 1972, the legislative counsel stated that "In our opinion the certificated employee evaluation and assessment guidelines and procedures which are required to be adopted by school district governing boards ... are matters upon which the governing board would, *upon request* [by the appropriate employee organization] be *required* by the Winton Act to meet and confer" (italics partially added). Obviously the Legislature thought it *mandatory* that the school employer avail itself of the advice of the teachers within the "district's organization of certificated personnel." (§ 13486.) While the Stull Act in section 13486 provides its own procedures for giving teachers a voice in the development and adoption of the guidelines, this is in *addition to*, not to the exclusion of the meet and confer process. [FN7] The Winton Act, in accordance with its express purpose, strengthens the mandatory Stull requirement by providing for additional teacher participation at the teacher's request.

FN7 The district argues that if so, it has satisfied the spirit if not the letter of the Winton meet and confer requirement by permitting the teachers to appoint 10 of the 17 members of the Certificated Personnel Evaluation Committee that developed its Stull guidelines. While this action was commendable, it does not, as the district admits, satisfy the strict requirements of the Winton Act.

The teachers next contend that the trial court erred in concluding that the Stull guidelines regulate tenure and are, therefore, exempt from the "meet and confer" requirements of the Winton Act. The first paragraph of section 13080 reads as follows: "It is the purpose of this article to promote the improvement of personnel management and employer-employee relations within the public school systems in the State of California by providing a uniform basis for recognizing the right of public school employees to join organizations of their own choice and be represented by such organizations in their professional and employment relationships with public school employers and to afford certificated employees a voice in the formulation of educational policy. *Nothing* contained *herein shall be* deemed to *supersede* other provisions of this code and *the rules and regulations of public *335 schoolemployers* which *establish and regulate tenure* or a merit or civil service system or which provide for other methods of administering employer-employee relations. *This article is intended, instead, to strengthen tenure, merit, civil service and other methods of administering employer-employee relations through the establishment of uniform and*

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orderly methods of communication between employees and the public school employers by which they are employed." (Italics supplied.)

The court relied on the second sentence of the first paragraph for its conclusion. However, reading the entire first paragraph with the second sentence in its proper context, it is apparent that the Legislature expressly intended tenure regulations to be subject to the "meet and confer" requirement. The "meet and confer" process was not intended to replace or "supersede" rules and regulations which establish and regulate tenure or other methods of administering employer-employee relations (*Torrance Education Assn. v. Board of Education*, 21 Cal.App.3d 589 [98 Cal.Rptr. 639]), but was intended to *strengthen* those rules and regulations by establishing orderly and uniform methods of communication between teachers and administrators. While we have found no cases interpreting section 13080 of the Winton Act, *Los Angeles County Firefighters Local 1014 v. City of Monrovia*, 24 Cal.App.3d 289 [101 Cal.Rptr. 78], interpreted substantially identical language in the Meyers-Milias-Brown Act (Gov. Code, § § 3500-3501), which amended and expanded the George Brown Act (Gov. Code, § § 3500-3509, effective Sept. 15, 1961), the Government Code counterpart of the Winton Act, and a source of the Winton Act (see *Berkeley Teachers Assn. v. Board of Education*, 254 Cal.App.2d 660, 663-664 [62 Cal.Rptr. 515]).

Government Code section 3500 (Stats. 1961, ch. 1964, § 1; amended Stats. 1968, ch. 1390, § 1, operative Jan. 1, 1969), so far as pertinent, then provided: "It is the purpose of this chapter to promote full communication between public employers and their employees by providing a reasonable method of resolving disputes regarding wages, hours, and other terms and conditions of employment between public employers and public employee organizations. It is also the purpose of this chapter to promote the improvement of personnel management and employer-employee relations within the various public agencies in the State of California by providing a uniform basis for recognizing the right of public employees to join organizations of their own choice and be represented by such organizations in their employment relationships with public agencies. *Nothing* contained *herein shall be deemed to supersede* the provisions of existing state *336 law and the charters, ordinances, and rules of local public agencies which establish and regulate a merit or civil service system or which provide for other methods of administering employer-employee relations. *This chapter is intended*, instead, *to strengthen* merit, civil service and other methods of administering employer-employee relations through the establishment of *uniform and orderly methods of communication* between employees and the public agencies by which they are employed." (Italics added.)

In the *Monrovia* case, the city, like the district here, contended that "supersede" language created a specific exemption. In rejecting this contention, the court said at 295: "It appears from our examination of the entire act that the Legislature intended by it to set forth reasonable, proper and necessary principles which public agencies must follow in their rules and regulations for administering their employer-employee relations, including therein specific provisions for the right of public employees, as individuals and as members of organizations of their own choice, to negotiate on equal footing with other employees and employee organizations, without discrimination; that the Legislature did not intend thereby to preempt the field of public employer-employee relations except where public agencies do not provide reasonable 'methods of administering employer-employee relations through ... uniform and orderly methods of communication between employees and the public agencies by which they are employed' (§ 3500) ..."

Nor do we think that the Stull Act is exclusively a tenure regulation. As indicated above, in Stull, "intent of the Legislature [was] to establish a uniform system of evaluation and assessment of the performance of certificated personnel" by requiring "the development and adoption by each school district of objective evaluation and assessment guidelines" (§ 13485). Stull does not require that school districts use the guidelines for determining tenure nor does it require any other consequence. While many school districts will undoubtedly utilize the evaluation and assessment guidelines in making determinations of tenure, in and of itself this fact does not make them tenure regulations. Even assuming that the Stull guidelines were intended to regulate tenure, Winton does not exclude tenure regulations from its "meet and confer" requirements.

Nor can we agree with the trial court's conclusion that the Stull guidelines are beyond the scope of the Winton Act as they do not involve (1) employment conditions and employer-employee relations, or (2) the other items specified by section 13085, including the definition of *educational objectives*. *337

As to the first point, section 13488 (set forth below)

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[FN8] of Stull expressly provides that the assessment made pursuant to the guidelines shall be reduced to writing and a copy transmitted to the *affected employee who has the right to initiate a written response. The response becomes a permanent attachment of the employee's personnel file.* Before the end of the school year, the employee and the evaluator are to meet to discuss the evaluation. Pursuant to section 13489 (set forth below), [FN9] the evaluation includes recommendations for improvement. It is difficult to imagine a matter more directly related to *employer-employee relations* and working conditions than the evaluation made pursuant to the guidelines that becomes a permanent attachment of the employee's personnel file and the recommendations for improvement that are used to evaluate subsequent performance. The district, in fact, concedes this relationship.

FN8 Section 13488: "Evaluation and assessment made pursuant to this article shall be reduced to writing and a copy thereof shall be transmitted to the certificated employee not later than 60 days before the end of each school year in which the evaluation takes place. The certificated employee shall have the right to initiate a written reaction or response to the evaluation. Such response shall become a permanent attachment to the employee's personnel file. Before the end of the school year, a meeting shall be held between the certificated personnel and the evaluator to discuss the evaluation."

FN9 Section 13489: "Evaluation and assessment of the performance of each certificated employee shall be made on a continuing basis, at least once each school year for probationary personnel, and at least every other year for personnel with permanent status. The evaluation shall include recommendations, if necessary, as to areas of improvement in the performance of the employee. In the event an employee is not performing his duties in a satisfactory manner according to the standards prescribed by the governing board, the employing authority shall notify the employee in writing of such fact and describe such unsatisfactory performance. The employing authority shall thereafter confer with the employee making specific recommendations as to areas of improvement in the employee's performance and endeavor to assist him in such performance.
"Hourly and temporary hourly certificated employees, other than those employed in adult education classes who are excluded by the provisions of Section 13485, and substitute teachers may be excluded from the provisions of this section at the discretion of the governing board."

As to the second point concerning the definition of educational objectives, the determination of course and curricular content and the selection of textbooks, all specified in Winton's section 13085 as subject to "meet and confer," we note the advice given to the district by its own counsel on August 7, 1972, indicated the relationship between these items and the four mandatory elements of the Stull guidelines of section 13487, quoted below. [FN10] *338

FN10 "(a) The establishment of standards of expected student progress in each area of study and of techniques for the assessment of that progress.
"(b) Assessment of certificated personnel competence as it relates to the established standards.
"(c) Assessment of other duties normally required to be performed by certificated employees as an adjunct to their regular assignments.
"(d) The establishment of procedures and techniques for ascertaining that the certificated employee is maintaining proper control and is preserving a suitable learning environment."

(4-7) The county counsel concluded that the four elements of 13487 were within the scope of the Winton Act to the following extent: (a) The establishment of standards of expected student progress. This is in the purview of the *meet and confer* requirement since it falls within educational objectives and the determination of courses and curricula; (b) The assessment of certificated personnel competence. While assessment of employee personnel is a management function and not a proper subject for *meet and confer*, the *criteria* for assessment is a proper meet and confer item; (c) The assessment of other duties. Again, assessment

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itself is a management function, but aspects such as salary, hours of extra duty, type of extra duty, place of employment, etc., are proper meet and confer items; (d) Establishing of procedures and techniques for ascertaining that the certificated employee is maintaining proper control and preserving a suitable learning environment. These are procedural matters properly subject to the meet and confer requirement.

We find the above analysis persuasive and adopt it here. Our conclusion that the Stull guidelines are within the scope of the "meet and confer" requirement of section 13085 is consistent with the language indicating that the four mandatory elements set forth in section 13487 are non-exclusive. Hence, other specific areas mentioned in section 13085 covered by the Winton Act might be included in the guidelines. (8) Accordingly, we conclude that the Winton "meet and confer" requirement is applicable as such to the development and adoption of Stull guidelines by the district. As indicated above, no contrary legislative intent appears in the Stull Act.

(9) Finally, we turn to the district's contention that in any event, the teachers were estopped from asserting that the development and adoption of the Stull guidelines were subject to the requirement of the Winton Act, as they never made a request to meet and confer until the guidelines were adopted on August 14, 1972, and subsequently refused to do so. The district erroneously urges that the trial court found that the teachers made no meet and confer requests prior to August 14. The precise language of the court's finding is that the teachers made "a request ... *on or about August 14*" (italics added) and made no request subsequently. Thus, the *339 court made no finding to the effect that there were no prior requests, nor could it. The uncontroverted evidence in the record indicates that in January of 1972, MCEC orally indicated an intention to meet and confer on the Stull guidelines. On April 5, and again on June 8, MCEC asked the district for a completion date on the Stull document in order to meet and confer on the guidelines. The June 8 request stated that MCEC "would be demanding to meet and confer on it and ... believed it to be a negotiable document." After the district indicated that there was some question as to whether the Stull guidelines were subject to meet and confer requirements, MCEC asked the district to obtain an opinion from the county counsel. [FN11]

FN11 As indicated above, the county counsel rendered an opinion on August 7, 1972, concluding that portions of the Stull guidelines *were subject to the meet and confer requirement of the Winton Act.*

On August 1 when MCEC again asked the district to meet and confer on the guidelines, MCEC was told to meet with the Certificated Personnel Evaluation Committee instead. MCEC rejected this suggestion on grounds that the only appropriate procedure under the Winton Act was direct negotiation with the district's representative. While MCEC may never have made a formal written demand to meet and confer on the Stull guidelines, the district had sufficient notice by MCEC's repeated requests. In addition, the district's representative testified that he knew MCEC wanted to meet and confer on the Stull guidelines *after* they were in completed form and *before* they were adopted. We conclude that the "request" requirement of the Winton Act (§ 13085) was satisfied by MCEC long before the guidelines were adopted on August 14, 1972.

Even if a request to meet and confer had not been made until August 14, the teachers would not be estopped to object to the district's adoption of the guidelines. Assuming arguendo that Stull required adoption of guidelines within a reasonable time of its September 1, 1972 effective date (as the trial court concluded below), that left at least 17 days for the district to meet and confer with MCEC. In the event no agreement was reached in that time, the district could have adopted whatever evaluation guidelines it desired since, under the Winton Act, the final decision on an issue rests with the district. Nor can we agree that Stull required adoption of the guidelines by September 1, 1972. Stull contains no specific requirement and there is no apparent reason why the Legislature would do so, for the act provides that evaluations and assessments of performance need be made only once a year for probationary personnel and only once every *340 other year for personnel with permanent status (§ 13489). Thus, the district would not need to make use of the guidelines until about six months [FN12] into the 1972-1973 school year.

FN12 Section 13443 provides that dismissal notice must be given to probationary teachers no later than March 15 of the school year; section 13443.6, pertaining to principals, no later than March 1. These dates are jurisdictional and mandatory (*Ward v. Fremont Unified Sch. Dist.*, 276 Cal.App.2d 313, 322 [80 Cal.Rptr. 815]).

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The judgment is reversed, with directions to the trial court to grant the teachers' petition for a writ of mandate and issue an injunction to restrain the district from applying its guidelines until it has complied with the *meet and confer* requirements of Winton.

Rouse, J., and Bray, J., [FN*]

FN* Retired Presiding Justice of the Court of Appeal sitting under assignment by the Chairman of the Judicial Council.

A petition for a hearing was denied November 1, 1974, and respondent's petition for a hearing by the Supreme Court was denied December 11, 1974.

Cal.App.1 Dist.,1974.

Certificated Emp. Council of Monterey Peninsula Unified School Dist. v. Monterey Peninsula Unified School Dist.

END OF DOCUMENT

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Mailing List

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