

MINUTES

COMMISSION ON STATE MANDATES

980 Ninth Street, Second Floor Conference Center

Sacramento, California

May 31, 2007

Present: Member Michael Genest, Chairperson
Director of the Department of Finance
Member Francisco Lujano, Vice Chairperson
Representative of the State Treasurer
Member Richard Chivaro
Representative of the State Controller
Member John Fillmore
Representative of the Director of the Office of Planning and Research
Member J. Steven Worthley
County Supervisor
Member Sarah Olsen
Public Member
Member Paul Glaab
City Council Member

CALL TO ORDER AND ROLL CALL

Chairperson Genest called the meeting to order at 10:11 a.m.

APPROVAL OF MINUTES

Item 1 March 29, 2007

Member Fillmore made a motion to adopt the March 29, 2007 hearing minutes. With a second by Member Olsen, the motion carried 6-0. Member Glaab abstained.

Item 2 April 16, 2007

Member Worthley made a motion to adopt the April 16, 2007 hearing minutes. With a second by Member Lujano, the motion carried unanimously.

PROPOSED CONSENT CALENDAR

HEARINGS AND DECISIONS ON CLAIMS, PURSUANT TO CALIFORNIA CODE OF REGULATIONS, TITLE 2, CHAPTER 2.5, ARTICLE 7 (Gov. Code, §§ 17551 and 17559)
(action)

DISMISSAL OF WITHDRAWN TEST CLAIM

Item 5 *Medically Indigent Adults*, 01-TC-26
Health and Safety Code Sections 1442 & 1442.5
Welfare and Institutions Code Sections 11150, 14005, 14005.4, 14005.10, 14005.16, 14006, 14011, 14016, 14124.89, 14132, 14133.3, 16700, 16703, 16704, 16708 & 16717, and Uncodified § 8.3,
Statutes 1982, Chapters 328 (AB 799) and 1594 (SB 2012)
County of San Bernardino, Claimant

INFORMATIONAL HEARING PURSUANT TO CALIFORNIA CODE OF REGULATIONS,
TITLE 2, CHAPTER 2.5, ARTICLE 8 (action)

ADOPTION OF STATEWIDE COST ESTIMATES

- Item 15 *High School Exit Examination*, 00-TC-06
Education Code Sections 60850, 60851, 60853, and 60855
Statutes 1999x, Chapter 1 (SBx1 2); Statutes 1999, Chapter 135
(AB 584), California Code of Regulations, Title 5, Sections 1200-1225
(regulations effective July 20, 2001 [Register 01, No. 25],
regulations effective May 1, 2003 [Register 03, No. 18])
Trinity Union High School District, Claimant
- Item 17 *Agency Fee Arrangements*, 00-TC-17; 01-TC-14
Government Code Sections 3543, 3546, and 3546.3
Statutes 1980, Chapter 816 (SB 2030); Statutes 2000, Chapter 893
(SB 1960);
Statutes 2001, Chapter 805 (SB 614)
California Code of Regulations, Title 8, Sections 34030 and 34055
Clovis Unified School District, Claimant

Member Chivaro made a motion to adopt items 5, 15, and 17 on the consent calendar. With a second by Member Olsen, the items were unanimously adopted.

**APPEAL OF EXECUTIVE DIRECTOR DECISIONS PURSUANT TO CALIFORNIA
CODE OF REGULATIONS, TITLE 2, SECTION 1181, SUBDIVISION (c)**

- Item 4 Staff Report

There were no appeals to consider.

**HEARINGS AND DECISIONS ON TEST CLAIMS, PURSUANT TO CALIFORNIA
CODE OF REGULATIONS, TITLE 2, CHAPTER 2.5, ARTICLE 7 (Gov. Code, §§ 17551
and 17559) (action)**

Paula Higashi, Executive Director, swore in the parties and witnesses participating in the hearing of the test claim items.

TEST CLAIMS

- Item 6 *California Youth Authority: Sliding Scale for Charges*, 02-TC-01
Welfare and Institutions Code Sections 912, 912.1, and 912.5
Statutes 1996, Chapter 6 (SB 681); Statutes 1998, Chapter 632 (SB 2055)
County of San Bernardino, Claimant

Deborah Borzelleri, Senior Commission Counsel presented this item. She stated that the test claim addresses increased fees paid by counties to the state for the least serious juvenile offenders, categories 5 through 7 that are committed to the California Youth Authority, which is now the Division of Juvenile Justice. However, staff is referring to the agency as the Youth Authority, because that was the name of the agency when the test claim was filed. Ms. Borzelleri stated that no state law requires the counties or juvenile courts to commit category 5 through 7 juvenile offenders to the Youth Authority. The juvenile court's decision for such placement is based on recommendations from the county probation department.

Ms. Borzelleri noted that the probation department's recommendation takes into consideration available treatment options within the county, and there are other options to Youth Authority placement, including local programs, and state funding is available for those programs. Because the sliding scale costs for Youth Authority commitments result only from an underlying local discretionary decision to place juveniles with the Youth Authority, staff finds the test claim statutes does not mandate a new program or higher level of service in an existing program within the meaning of Article XIII B, section 6. Therefore, staff recommends the Commission adopt the analysis to deny the claim.

Parties were represented as follows: Bonnie Ter Keurst and Charles Abajian, representing the County of San Bernardino; Carla Castaneda and Susan Geanacou with Department of Finance, Mike Hanretty and Lisa Goodwill with Department of Corrections and Rehabilitation.

Ms. Ter Keurst indicated that the state has substantially increased the costs to counties for using the Youth Authority program. The intent of the sliding scale fee structure, as stated in the Senate floor analysis for SB 2055, was to provide a monetary disincentive for sending low-level juvenile offenders to the Youth Authority. Ms. Ter Keurst asked Mr. Abajian to provide background information.

Mr. Abajian stated that when a minor fails several juvenile programs, either by going AWOL or by committing a new violation, it's incumbent upon the probation department to protect the community by recommending placement with the Youth Authority.

Ms. Ter Keurst stated that the County did not dispute the fact that there are various types of funding for correction and rehabilitation within the state, and that San Bernardino County has used this funding. However, she disputed the staff finding that there is no evidence to show why the county cannot avail itself of state funding to establish a local juvenile treatment program.

Ms. Ter Keurst asserted that this statement is outside the scope of the test claim.

Ms. Ter Keurst also identified discretion as the final issue. She discussed her earlier request to postpone this item because the county has a claim on an alleged discretionary cost being heard in superior court in September. She argued that there is no discretion on the county's part because the county does not make the placement decision, and she noted inconsistencies in the staff analysis regarding whether the discretion to place a juvenile offender lies with the court, probation department or county.

Ms. Ter Keurst stated that the court's role is to use their discretion to make a determination that is right and equitable under all circumstances, and the county's mandate, under state law, is to fund whatever decision the court makes.

Ms. Castaneda stated that the Department of Finance had no objections to the staff analysis. She acknowledged that there is some discretion on the part of counties and the courts are taking into consideration other programs available when making placement decisions. Ms. Castaneda stated that it is the county that determines the capacity of their own local programs, and the county that is recommending Youth Authority placement because their own facilities are full or not appropriate.

Chairperson Genest asked if that meant it's in the county's discretion to provide for placement for whatever is necessary within the county. Ms. Castaneda agreed.

Mr. Hanretty stated he was here to answer questions about the sliding scale statutes as they pertain to the Division of Juvenile Justice (DJJ) and to express support for the staff analysis. He also introduced Lisa Goodwill, DJJ's business manager to assist with any questions.

Member Glaab stated that he was troubled with the word "discretion." If the court requires placement with the Youth Authority, where is the discretion?

Ms. Borzelleri responded that the court makes the order based on a broad variety of factors, including available placement options. She stated that the claimant asserts that those counties that do not have county facilities generally order Youth Authority placement as the only appropriate and available option. So ultimately, the court order is based on all of these factors, including the county's recommendation.

Camille Shelton, Chief Counsel, clarified that the issue before the Commission is whether the state has mandated the placement of a child in the Youth Authority.

Chairperson Genest stated that the issue is not whether or not the juvenile court mandated the placement. Ms. Shelton agreed. Member Genest asked Corrections staff to cite counties that have a relatively low rate of Youth Authority placement. Mr. Hanretty and Ms Goodwill did not have that information available, but offered to provide it to Mr. Genest in the future. He did note that Los Angeles County is going to have more of a local infrastructure as compared to Tulare County.

Ms. Borzelleri noted that the staff analysis includes information from the Legislative Analyst's Office that supports the idea that there is variation among counties.

Ms. Ter Keurst cited the committee analysis of the test claim statute, which said the sliding scale was meant to be a disincentive for counties to place with the Youth Authority. Ms. Ter Keurst reiterated that San Bernardino County makes every attempt to make placement in other programs before placing with the Youth Authority.

Chairperson Genest stated that there are two options with an incentive or disincentive. One is to provide an incentive and the other is to mandate that you do it. He stated that in this case, incentive is the opposite of mandate, and bolsters the arguments made in the staff analysis.

Member Worthley stated that the matter of discretion is critical and that when a probation department makes a recommendation it is only advisory. It is the ultimate decision of the judge, who is a state employee, to determine whether or not a child is placed in the Youth Authority. That means there is no discretion on the part of the county. The discretion is on the part of the judge who is a state employee. He also stated that any reduction in the number of kids being placed with the Youth Authority is a reflection of the county's attempts to find alternatives. Mr. Worthley stated that therefore, this test claim was a reimbursable mandate.

Ms. Ter Keurst added that a judge takes into account the district attorney's position and the recommendation of the child's counsel.

Member Fillmore asked if there was any information regarding how often a judge accepts a county's recommendation, particularly how often judges accept county recommendations not to place with the Youth authority. He stated that this information would provide the Commission with much more clear data regarding the discretionary issue.

Member Worthley responded that a probation department may formulate its recommendations based upon previous actions of the judge. Therefore, data regarding placement recommendations may not truly reflect information about county recommendations.

Ms. Shelton stated that this is a difficult issue, but the way the Constitution is drafted, it exempts any mandate of the court from the spending limit. There is no reimbursement required when there is a court mandate. And here, staff found no court mandate because the statute increased the fees and did not touch the judge or court's authority to issue a sentence. So if there is no discretion

because the court directed the placement, there would be no reimbursement allowed under the Constitution.

Member Genest added that the Chief Justice of the Supreme Court would probably not agree that a judge is a state employee, but rather a separate branch of government.

Mr. Abajian stated that the County is very reluctant to send children to the Youth Authority. He provided an example of a juvenile offender who escaped from five local juvenile programs before committing another offense and being committed to the Youth Authority.

Chairperson Genest responded that the preexisting obligation to deal with that child's behavior was in effect long before there was anything in the Constitution about a mandate.

Mr. Worthley quoted portions of the staff analysis, and reiterated his belief regarding discretion.

Ms. Shelton responded that there is no state law to send the juvenile to the Youth Authority. There is no state-mandated requirement for the judge to send that juvenile to a certain location.

Chairperson Genest concluded by stating that this year's budget proposes to gradually stop the placement of juveniles with the Youth Authority. Chairperson Genest asked if there was a motion.

Member Olsen made a motion to adopt the staff recommendation to deny the test claim, which was seconded by Member Fillmore. The motion carried 5-2, with Members Glaab and Worthley voting "no."

Item 7 Proposed Statement of Decision
California Youth Authority: Sliding Scale for Charges, 02-TC-01
See Item 6

Deborah Borzelleri, Senior Commission Counsel presented this item. She stated that the sole issue before the Commission was whether the proposed Statement of Decision accurately reflected the Commission's decision on the *California Youth Authority: Sliding Scale for Charges* test claim. Staff recommended that the Commission adopt the proposed Statement of Decision. Ms. Borzelleri noted that minor changes, including those that reflect the hearing testimony and vote count, will be included in the final Statement of Decision.

Member Olsen made a motion to adopt the staff recommendation, which was seconded by Member Chivaro. The motion carried 5-2, with Members Glaab and Worthley voting "no."

Item 8 *Training Requirements for Instructors and Academy Staff, 02-TC-03*
California Code of Regulations, Title 11, Sections 1001, 1052, 1053,
1055, 1070, 1071, and 1082 (Register 2001, No. 29)
County of Sacramento, Claimant

Ms. Borzelleri, Senior Commission Counsel presented this item. She stated the test claim addresses regulations adopted by the Commission on Peace Officer Standards and Training or POST that require specified training for certain POST instructors and key staff of POST training academies. It does not address the requirement imposed on individual peace officers to receive basic POST training.

Staff finds that the regulations established requirements that flow from a discretionary decision by the local agency to participate in POST and a discretionary decision to provide POST-certified training or establish a POST training academy. Therefore, the test claim regulations do not impose the state-mandated program on local agencies within the meaning of Article XIII B,

section 6. Staff recommends the Commission adopt the revised staff analysis and deny the test claim.

Parties were represented as follows: Nancy Gust representing the County of Sacramento; Deputy Cheryl MacCoun and Deputy Gail Wilczynski representing the Sacramento County Sheriff's Department; Juliana Gmur representing the County of Sacramento; Carla Castaneda and Susan Geanacou with Department of Finance; Allan Burdick representing the CSAC SB 90 Service; and Bryon Gustafson and Alan Deal, representing POST.

Ms Gmur stated that she would be continuing the discussion on "discretion." There are two cases on the issue of discretionary or voluntary decisions. The initial decision is *City of Merced*. In the *Merced* case, the issue was the city acquiring property through eminent domain. The court held that there was no mandate because the city made the discretionary decision to proceed by eminent domain, rather than purchasing the property outright. In the recent *Department of Finance* case, often referred to as the *Kern High School District* case, the court held that it was discretionary on the part of the school district to participate in review of school site councils, and thus the downstream effects of a voluntary decision negates the existence of a mandate. This brings up the question of practical compulsion. When the courts talk about legal compulsion and voluntary decisions, they raise the issue of the ability to divest yourself of participation. And that is the key issue here, because with POST, one cannot completely divest themselves. How does a county not participate in POST, when its own officers have to participate? There are no court decisions that would give us any clear rule.

Chairperson Genest asked when the statute was enacted that agencies may only hire POST-certified police officers.

Chief Legal Counsel Camille Shelton responded that it was before 1975. There was a test claim filed on this statute years ago and the claim was denied because it was a mandate on the individual to receive POST training, rather than a mandate on the employer.

Chairperson Genest clarified that when there is statute imposed by the state prior to the enactment of SB 90 in the 1970s, then it is not a mandate. Ms. Shelton agreed, and stated that that is not the issue. Chairperson Genest agreed that wasn't the issue, but stated that Ms. Gmur is arguing that they are compelled by the practical effect of this statute, and he argued that the existence of this requirement has nothing to do with the reimbursable mandate, so practical compulsion is not relevant.

Member Worthley asked if there is anything that prevents a local agency from requiring that these requirements be met by going to classes outside of the agency. He stated that he is an attorney, and if he went to work for the district attorney he would be required to pass the Bar Examination before he could practice law, and this was his responsibility, not the county's responsibility.

Deputy Wilczynski responded that there is a difference, because unlike an attorney, she cannot be a peace officer on her own. She has to be connected to a department.

Mr. Worthley substituted school teachers in the example and stated that their credentials are of no value to them except for working for school systems, and the point is teachers have to pay for those costs themselves. And the fact that we have historically done it differently in police work doesn't impose a mandate.

Deputy Wilczynski stated that she sees it differently. She cannot just decide to take training. Under 832, the training doesn't occur until you belong to an agency, and the agency has the

mandate to ensure that their officers meet POST standards. The mandate is on the agency and the agency's instructors.

Deputy MacCoun stated that the officers do have to attend an academy somewhere and it's not cost-effective for the county to provide training on its own.

Chairperson Genest added that the mandate is not a new or higher level of service because it existed before there were mandate provisions in the Constitution.

Ms. Gmur reiterated that the Commission must decide today on practical compulsion. There is no statutory compulsion so either it's legal or practical compulsion. The Commission must listen to the testimony today and the guidance provided by the courts and decide if the sheriffs are in a position where they must comply with POST, not because there is a written and legal mandate, but because there is practical compulsion.

Deputy Wilczynski compared a 20-year FBI employee with no POST certificate versus a person with no law enforcement experience but who has a certificate, and indicated that the sheriff could only hire the person with a POST certificate, and therefore it's clear that POST is mandated.

Member Lujano stated that that is not the issue before the Commission today.

Deputy Wilczynski added that during the last Commission hearing, the Commission found that because POST participation is voluntary, a county could leave POST, and that is not practical.

Ms. Geanacou added that there are two discretionary decisions that a jurisdiction makes in analyzing the test claim. One is whether or not initially to participate in POST. The second, and the focus of this test claim, is if they elect to participate in POST, whether they choose to offer Post-certified training in-house with their own trainers. And that is the issue today.

Ms. Geanacou reiterated Finance's position to support the staff analysis and urged the Commission to adopt the staff recommendation.

Member Fillmore stated that these are circular arguments. First we say that it's within Sacramento County's discretion whether or not to offer Post instruction and we deny it to Sacramento. Then a community college district decides to offer the training because the counties are not, and it's not reimbursable because it's discretionary. A county could decide to provide the training. At some point, somebody has to offer the training.

Ms. Shelton clarified that these are regulations issued by POST requiring that the trainers of continuing education courses for POST members be trained. While the arguments here seemed to be focused on basic training, it is only small part of this process. She suggested that the POST representatives be allowed to assist on this issue.

Deputy MacCoun stated that when POST changed its requirements for the academy instructors, it resulted in significant more training for the instructors.

Bryon Gustafson with POST stated that if this were a mandate, everyone would be required to do it. But, it's discretionary because only limited number of POST clients must meet the requirements. Only 44 counties have a basic academy, and perhaps 300 or 400 of 600 agencies provide their own certified training. So we can see that there is a choice.

Deputy MacCoun agreed that colleges can provide the training, but they also have to hire instructors using POST requirements. Looking at what's going on in California, no one can really argue that there isn't practical compulsion.

Ms. Shelton responded that practical compulsion has been held by the courts to be very narrow. There have to be no alternatives. But the consequence also has to be there, and the consequence must be certain and severe. There is no evidence in the record or in the law of any consequence for an agency to not participate in POST or provide any POST training.

Member Glaab stated that he is not insensitive to training costs, but he thinks staff has done a great job of outlining the fact that there is discretion. He stated that he understands the practical compulsion argument, but he is moved to support the staff recommendation, because there is discretion.

Member Worthley stated that no one could deny he is a strong local government supporter, but because there are alternatives, there is no practical compulsion that would be needed in order for the Commission to support the claim.

Member Olsen made a motion to adopt the staff recommendation to deny the test claim. With a second by Member Glaab, the motion carried unanimously.

Item 9 Proposed Statement of Decision
Training Requirements for Instructors and Academy Staff, 02-TC-03
See Item 8

Deborah Borzelleri, Senior Commission Counsel presented this item. She stated that the sole issue before the Commission was whether the proposed Statement of Decision accurately reflected the Commission's decision on the *Training Requirements for Instructors and Academy Staff* test claim. Staff recommended that the Commission adopt the proposed Statement of Decision. Ms. Borzelleri noted that minor changes, including those that reflect the hearing testimony and vote count, will be included in the final Statement of Decision.

Member Worthley made a motion to adopt the staff recommendation, which was seconded by Member Fillmore. The motion carried unanimously.

Item 10 *Peace Officer Instructor Training, 02-TC-26*
California Code of Regulations, Title 11:Section 1082 (Register 2002, No. 35); Sections 1001, 1052, 1053, 1055, 1070, and 1071 (Register 2001, No. 29); Section 1056 (Register 2001, No. 4); and Section 1058 (Register 91, No. 50)

Deborah Borzelleri presented this item. She stated that this test claim addresses the same POST regulations from the previous item that require specified training of certain POST instructors and key staff of POST training academies. Staff recommends that the Commission adopt the staff recommendation to deny this test claim.

Parties were represented as follows: Keith Petersen representing San Bernardino Community College District; Susan Geanacou with Department of Finance; and Alan Deal and Bryon Gustafson with POST.

Mr. Petersen stated that this claim, while similar to the previous claim, was filed as a curriculum item by a community college district, and therefore, the legal analysis provided by staff is inapplicable. Curriculum is not controlled by the state. The Chancellor's office does not impose any curriculum on community colleges. Therefore to require as a threshold that the curriculum be mandated is illogical. There are no court cases which apply the practical compulsion test to curriculum matters. The California courts, in *Long Beach* held that the public school system, including community colleges, is a program under Article XIII B, section of the State

Constitution. Mr. Petersen also cited a *San Diego Unified School District* case, and said that the court held that state mandates cannot burden or impact local decisions or local choice on curriculum. The public school system is not required to absorb new state mandates as they affect the local choice and the local curriculum. Therefore, Mr. Petersen concluded, staff's court case analysis is incorrect and the claim should be reanalyzed under the *Long Beach* and *San Diego* cases.

Ms. Shelton responded that *Long Beach* applies only to K-12 districts so it is not relevant here. In addition, the courts have discussed a practical compulsion for state mandates in general. Yes, the facts under each of the two cases staff brought forward have not dealt with curriculum. But the way the court phrased the standard for funding a state-mandated program applies to all state-mandated cases under the interpretation of Article XIII B, section 6, so it's not limited to the facts of those two particular cases.

Ms. Borzelleri added that there is also an underlying decision to provide that curriculum.

Mr. Petersen stated that all community college curriculum is discretionary by law. So how do you go to a practical compulsion test if all of your curriculum, your entire program under the Constitution is discretionary?

Bryon Gustafson stated that a college can offer any curriculum it wants. But the curriculum is required if they choose it to be POST-certified. There are many community colleges and four-year colleges that do not POST certify. Sacramento State does offer POST-certified courses. Cal State Monterey Bay does not. Ms. Geanacou echoed Mr. Gustafson's arguments.

Mr. Petersen argued offering curriculum is absolutely discretionary as to the institution. And that is constitutionally correct. So you cannot use a compulsion test on something that's absolutely discretionary because you never get to the mandate issue.

Ms. Shelton responded that she understood his argument. In court, the judge has asked whether, for example, the City of Elk Grove is entitled to mandate reimbursement when the decision to create the City of Elk Grove was voluntarily made by the People and that's the same thing Mr. Petersen is saying. Even though there is a voluntary decision, there is still a mandate.

Member Worthley stated that he saw a distinction between the previous claim and this claim. In the previous claim, we looked at police departments and said their primary responsibility is law enforcement not training. But here, the primary purpose of community colleges is teaching and training. And, when they exercise their purpose of existence, which is to offer a course that is POST-certified, we're now saying, because you weren't compelled to teach that class, we're going to treat it as discretionary on your part.

Ms. Shelton responded that Mr. Petersen cited the *Graduation Requirements* case and that case is distinguishable from this case because the statute there did mandate a particular course on high schools. Here, we don't impose any mandated curriculum for the community college. They are not required to provide any POST training at all.

Member Fillmore posed a hypothetical question. He asked staff if the state said that if a community college decides to teach remedial English, the school must have additional instructor training, would we consider that to be a reimbursable mandate?

Ms. Shelton stated that she did not know how to answer that question because we've never had a claim before the Commission regarding curriculum. Staff would need to research the issue.

Mr. Petersen responded yes to Member Fillmore's question. The community college district decides what programs they elect to offer. And the decision whether remedial English is more important than POST is up to the community colleges.

Member Genest offered a different hypothetical question. Community colleges could offer a licensed vocational nursing program, but not offer chemistry courses, despite the fact that the nursing students would not pass the state licensing requirements if they hadn't taken chemistry. Nevertheless, the community colleges have the discretion to offer an incomplete program. Would you consider the state licensing for the licensed nursing program to impose a mandate on community colleges because they require people to understand chemistry?

Mr. Petersen responded that a licensed nursing program that did not meet the state requirements would probably not be approved by the Board of Governors.

Mr. Genest agreed, but stated that he did not believe there was a mandate under his hypothetical, and the test claim is also not mandate.

Mr. Petersen stated that you have to get past that point. Curriculum is discretionary, but that is not the issue. The issue is an imposed mandate on the faculty who instruct the curriculum – that's the distinction.

Member Lujano moved to adopt the staff recommendation. With a second by Member Chivaro, the staff recommendation to deny this test claim was adopted by a vote of 4-3, with Members Fillmore, Glaab and Worthley voting "no."

Item 11 Proposed Statement of Decision
Peace Officer Instructor Training, 02-TC-26
See Item 10

Ms. Borzelleri, Senior Commission Counsel, presented this item. She stated that the sole issue before the Commission was whether the proposed Statement of Decision accurately reflected the Commission's decision on the test claim. Staff recommended that the Commission adopt the proposed Statement of Decision and that the Commission allow minor changes, including the hearing testimony and vote count, will be included in the final Statement of Decision.

Member Olsen made a motion to adopt the proposed Statement of Decision. With a second by Member Chivaro, the motion carried 5-2, with Members Glaab and Worthley voting no.

[At this time, the Commission took a short recess and Member Glaab left the meeting.]

Item 12 *Worker's Compensation Disability Benefits for Government Employees,*
00-TC-20; 02-TC-02
Labor Code Section 4850
Statutes 2000, Chapters 920 (AB 1883) & 929 (SB 2081); Statutes 1999,
Chapters 270 (AB 224) & 970 (AB 1387);
Statutes 1989, Chapter 1464 (SB 1172); Statutes 1977, Chapter 981
(SB 989)
County of Los Angeles, Claimant
San Diego Unified School District, Co-Claimant

Deborah Borzelleri, Senior Commission Counsel presented this item. This test claim addresses statutes that expand the applicability of Labor Code section 4850, which entitles specified local safety officers to a leave of absence without loss of salary for up to one year when disabled in the course of employment, which is a worker's compensation benefit. Staff finds that consistent

with mandate case law, the test claim statutes do not provide an enhanced service to the public, and do not impose a reimbursable state-mandated program. There are appellate and Supreme Court cases that clearly and consistently hold that additional cost for increased employee benefits, in the absence of an increase in the level of governmental services provided to the public do not impose a new program or higher level of service in an existing program. The Commission is bound by this case law. Staff recommends the Commission adopt the revised final staff analysis and supplemental staff analysis to deny this test claim.

Parties were represented as follows: Art Palkowitz representing San Diego Unified School District; Leonard Kaye and Alex Rossi representing the County of Los Angeles; Carla Castaneda and Donna Ferebee with Department of Finance.

Mr. Kaye stated that the test claim seeks reimbursement for new benefits afforded airport, harbor and other special classes of public safety personnel. The earlier staff analysis found that the test claim legislation constitutes a new program, is unique to local governments, and does not apply generally to all residents and entities of the state. Mr. Kaye agreed with these findings. The staff analysis also finds that the test claim legislation does not result in enhanced services to the public. Mr. Kaye disagreed with that finding and related this claim to a similar claim, *Threats Against Peace Officers*, which the Commission found to be a mandate. Mr. Kaye presented case law on a previous Commission decision that providing health and various other benefits to family members of law enforcement officers is a type of compensation.

Mr. Rossi explained the portion of the compensation that would be reimbursable, and described how the compensation program is administered and offered to answer questions.

Mr. Palkowitz stated that the test claim legislation does provide an enhanced service to the public and cited an Attorney General opinion to support his argument.

Ms. Castaneda concurred with the staff analysis.

In response to Chairperson Genest's request to respond to Mr. Palkowitz, Ms. Ferebee stated that Finance would not dispute that peace officers perform important duties for the public, but that does not provide the legal basis for finding that increased benefits equal enhancement.

Chairperson Genest stated that the argument was that people are less reluctant to put themselves on the line if they know they won't lose their livelihood.

Chief Legal Counsel Shelton discussed case authority that the Commission is required to comply with. In the *City of Richmond* case, the statute did increase benefits for survivors of peace officers killed in the line of duty, and the court held that anytime the statute increases the salary benefits, worker's compensation benefits, or other retirement benefits of the employee, it does not provide a service to the public and is not reimbursable.

Mr. Kaye argued that the *City of Richmond* case was broadly construed and dealt with many aspects of worker's compensation for many organizations.

Ms. Shelton disagreed and quoted from the *Richmond* case. Mr. Kaye stated that this case was not on point, and cited the existing mandate regarding firefighter clothing and equipment, stating that counties had been reimbursed for this program.

Member Fillmore stated the differences between the firefighter protective clothing program that assists them in doing their job and the test claim legislation that will make them more passionate about doing their job.

Mr. Kaye stated that both programs provide an employee benefit.

Ms. Borzelleri cited the recent *San Diego Unified School District* case, where the court held that such benefits may generate a higher quality of local safety officer and thereby, in an indirect sense, provide the public with a higher level of service. This does not necessarily establish that the law constitutes an increased or higher level of the resulting service to the public under Article XIII B.

Member Fillmore moved to adopt the staff recommendation to deny this test claim. With a second by Member Olsen, the staff recommendation was adopted by a vote of 5-1, with Member Worthley voting "no."

Item 13 Proposed Statement of Decision
Worker's Compensation Disability Benefits for Government Employees,
00-TC-20; 02-TC-02
See Item 12

Ms. Borzelleri presented this item. The sole issue before the Commission was whether the proposed Statement of Decision accurately reflected the Commission's decision on the test claim. Staff recommended that the Commission adopt the proposed Statement of Decision. Minor changes, including those that reflect the hearing testimony and vote count, will be included in the final Statement of Decision.

Member Olsen made a motion to adopt the staff recommendation. With a second by Member Chivaro, the motion carried unanimously.

INFORMATIONAL HEARING PURSUANT TO CALIFORNIA CODE OF REGULATIONS, TITLE 2, CHAPTER 2.5, ARTICLE 8 (action)

ADOPTION OF PROPOSED PARAMETERS AND GUIDELINES

Item 14 *Post Conviction: DNA Court Proceedings*, 00-TC-21, 01-TC-08
Penal Code Sections 1405 and 1417.9
Statutes 2000, Chapter 821 (SB 1342); Statutes 2001, Chapter 943
(SB 83)
County of Los Angeles, Claimant

Nancy Patton, Assistant Executive Director, presented this item. Ms. Patton stated that the Commission previously found that activities related to post conviction remedies for convicted felons to obtain DNA testing and retention of biological material are reimbursable. In these proposed parameters and guidelines, staff included only those activities that are either consistent with the Statement of Decision or are justified in the record to be the most reasonable methods of complying with the mandate. Staff recommended that the Commission adopt the proposed parameters and guidelines.

Parties were represented as follows: Leonard Kaye representing the County of Los Angeles, Allan Burdick representing the CSAC SB 90 Service, and Carla Castaneda, Tom Dithridge, and Donna Ferebee with Department of Finance.

Mr. Kaye stated that the fundamental activities were included in the parameters and guidelines, and most importantly, the Attorney General's Task Force Report on this issue was included as part of the parameters and guidelines. Mr. Kaye noted that they did not propose a reasonable reimbursement methodology for this program.

Chairperson Genest questioned why a reasonable reimbursement methodology could not be agreed upon.

Ms. Castaneda responded that Finance staff would support a reasonable reimbursement methodology, but that existing statutory requirements make it difficult to meet. She noted that the proposed mandate reform legislation would make it easier to adopt a methodology.

Chairperson Genest, Mr. Kaye and Ms. Castaneda discussed the reform legislation and how it would help the process.

Chairperson Genest asked if there were objections to entering the Attorney General's report into the record.

Executive Director Higashi and Ms. Patton stated that it had been included.

Chairperson Genest repeated his concern about not adopting a reimbursement methodology, and asked if the Commission should adopt the staff analysis or wait until a methodology could be adopted.

Ms. Higashi stated that if the Commission adopts the parameters and guidelines today, they are providing guidance to the parties regarding the reimbursable activities. She discussed the possibility of delaying release of the parameters and guidelines to give parties time to discuss a methodology.

Tom Dithridge, Department of Finance suggested that the Commission could adopt the parameters and guidelines in concept, with final adoption pending agreement on a methodology.

Mr. Kaye stated that attempts have already been made to develop a reimbursement methodology. Therefore, he recommended that the Commission adopt the parameters and guidelines today, and the parties would pledge to continue to work on the methodology and return within 120 days of issuance of the claiming instructions with a proposal.

Allan Burdick proposed that the parameters and guidelines be continued to the December hearing.

Mr. Kaye stated that it was important to begin reimbursement for these urgent matters.

Mr. Burdick pointed out, and Ms. Higashi agreed that if this matter was postponed to December, funding for the program would be delayed until the 2008-2009 fiscal year.

Member Worthley moved approval of the parameters and guidelines. With a second by Member Chivaro, the motion carried unanimously.

ADOPTION OF PROPOSED STATEWIDE COST ESTIMATE

- Item 16 *The Stull Act*, 98-TC-25
Education Code Sections 44660-44665 (Former Ed. Code, §§ 13485-13490)
Statutes 1983, Chapter 498 (SB 813)
Statutes 1999, Chapter 4 (SB 412)
Denair Unified School District and Grant Joint Union High School District, Claimants

Nancy Patton, Assistant Executive Director presented this item. The Commission approved *The Stull Act* test claim for specified activities related to evaluation and assessment of the performance of certificated personnel within each school district. Staff reviewed the claims data

for this program submitted by the claimants and compiled by the State Controller's Office. The proposed statewide cost estimate includes 11 fiscal years for a total of \$182,828,898. This averages to more than \$16.6 million annually in costs for the state. Staff recommended the Commission adopt the proposed statewide cost estimate.

Parties were represented as follows: Art Palkowitz representing San Diego Unified School District, and Donna Ferebee with Department of Finance.

Mr. Palkowitz stated his concerns that the staff analysis does not show a relationship to the number of teachers evaluated. He provided information to explain why claims varied widely among school districts, based on the number of teachers that needed to be evaluated and the evaluation process. And, he indicated that this disparity is also being driven by collective bargaining agreements. Some school districts, including San Diego Unified District, have minimum one-hour evaluations based on collective bargaining agreements. In contrast, Los Angeles Unified School District completed a study that determined the length of the evaluations to be between 30 and 60 minutes.

Mr. Palkowitz also commented on the reimbursement claim forms and suggested that the forms be revised to clarify that the program pertains to evaluations of mandated educational programs, and to clarify how training is reimbursed.

Ms. Ferebee stated that Finance filed written comments on May 10, 2007, and had no further comments.

Chairperson Genest asked for clarification on the claims used to develop the statewide cost estimate.

Ms. Patton explained that frequently Department of Finance points out and our assumptions recognize that statewide cost estimates may be high because we use unaudited reimbursement claims to develop the estimate.

Ms. Higashi further explained that once the estimate is adopted, it is reported to the Legislature, and if the Controller's Office reports that the claiming data is different at another point in time, the Legislature can adjust the funding.

Member Chivaro moved to adopt the statewide cost estimate. With a second by Member Fillmore, the motion carried unanimously.

PROPOSED 2008 MEETING AND HEARING CALENDAR (action)

Item 18 Adoption of 2008 Meeting and Hearing Calendar

Ms. Patton presented this item and recommended adoption of the hearing calendar as presented.

Member Worthley asked if there were conflicts with the proposed calendar.

Ms. Patton explained that the November hearing would be held in December to avoid conflict with the CSAC annual conference.

Member Lujano moved approval. With a second by Member Chivaro, the motion carried unanimously.

STAFF REPORTS

Item 19 Updates and Positions on Pending Mandate Reform Legislation

Nancy Patton, Assistant Executive Director, presented this item. She stated that at the April hearing, staff recommended that the Commission support a combination of mandate reform provisions proposed by both the Legislative Analyst's Office and Department of Finance, including technical amendments that would ensure the proposed alternate procedures can coexist with the existing mandates process. This combined proposal was included in AB 1222, and is pending in the Senate. Ms. Patton reported that Department of Finance continues to convene working group meetings to develop consensus language.

Chief Legal Counsel's Report (info)

Item 20 Recent Decisions, Litigation Calendar

Ms. Shelton noted that the County of Los Angeles dismissed their lawsuit challenging the *Animal Adoption* mandate.

PUBLIC COMMENT

There was no public comment.

CLOSED EXECUTIVE SESSION PURSUANT TO GOVERNMENT CODE SECTIONS 11126 and 17526 (action)

PENDING LITIGATION

To confer with and receive advice from legal counsel, for consideration and action, as necessary and appropriate, upon the following matters pursuant to Government Code section 11126, subdivision (e)(1):

1. *State of California, Department of Finance v. Commission on State Mandates, et al.*, Sacramento Superior Court Case No. 03CS01069, CSM Case No. 03-L-01, consolidated with *County of Los Angeles v. Commission on State Mandates, et al.*, Los Angeles Superior Court Case No. BS087959, transferred to Sacramento Superior Court, Case No. 05CS00865, CSM Case No. 03-L-11 [*Animal Adoption*]
2. *State of California, Department of Finance v. Commission on State Mandates, et al.*, Sacramento Superior Court Case No. 03CS01432, CSM Case No. 03-L-02 [*Behavioral Intervention Plans*]
3. *County of Los Angeles, et al. v. Commission on State Mandates, et al.*, Second District Court of Appeal [Los Angeles] Case Number B183981, CSM Case No. 04-L-03, (Los Angeles Superior Court Nos. BS089769, BS089785) [*Transit Trash Receptacles, et al./Waste Discharge Requirements*]
4. *County of San Bernardino v. Commission on State Mandates, et al.*, Los Angeles County Superior Court, Case No. BS106052; San Bernardino County Superior Court, Case No. SCVSS 138622 [*Standardized Emergency Management Systems (SEMs)*]
5. *California School Boards Association, Education Legal Alliance; County of Fresno; City of Newport Beach; Sweetwater Union High School District and County of Los Angeles v. Stat of California, Commission on State Mandates and*

Steve Westly, in his capacity as State Controller, Sacramento County Superior Court, Case No. 06CS01335; [AB 138; Open Meetings Act, Brown Act Reform, Mandate Reimbursement Process I and II; and School Accountability Report Cards (SARC) I and II]

6. *Department of Finance v. Commission on State Mandates, Sacramento County Superior Court, Case No. 07CS00079, CSM 06-L-02, [Peace Officer Procedural Bill of Rights]*
7. *Department of Finance and California Integrated Waste Management Board v. Commission on State Mandates, Santa Monica Community College District, and Lake Tahoe Community College District, Sacramento County Superior Court, Case No. 07CS00355, CSM 06-L-03 [Integrated Waste Management]*
8. *San Diego Unified School District v. Commission on State Mandates and California Department of Finance, San Diego County Superior Court, Case No. 37-2007-00064077-CU-PT-CTL, CSM 06-04 [Emergency Procedures: Earthquake Procedures and Disasters]*

To confer with and receive advice from legal counsel, for consideration and action, as necessary and appropriate, upon the following matter pursuant to Government Code section 11126, subdivision (e)(2):

- Based on existing facts and circumstances, there is a specific matter which presents a significant exposure to litigation against the Commission on State Mandates, its members and/or staff (Gov. Code, § 11126, subd. (e)(2)(B)(i).)

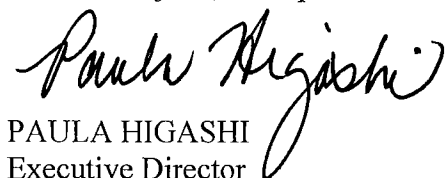
Hearing no further comments, Chairperson Genest adjourned into closed executive session pursuant to Government Code section 11126, subdivision (e), to confer with and receive advice from legal counsel for consideration and action, as necessary and appropriate, upon the pending litigation listed on the published notice and agenda.

REPORT FROM CLOSED EXECUTIVE SESSION

Chairperson Genest reported that the Commission met in closed executive session pursuant to Government Code section 11126, subdivision (e), to confer with and receive advice from legal counsel for consideration and action, as necessary and appropriate, upon the pending litigation listed on the published notice and agenda.

ADJOURNMENT

Hearing no further business, and with a motion by Member Worthley and second by Member Lujano, Chairperson Genest adjourned the meeting at 12:39 p.m.


PAULA HIGASHI
Executive Director

ORIGINAL

PUBLIC HEARING

COMMISSION ON STATE MANDATES

--oOo--

TIME: 10:11 a.m.

DATE: Thursday, May 31, 2007

PLACE: 980 Ninth Street, Second Floor
Sacramento, California

--oOo--

REPORTER'S TRANSCRIPT OF PROCEEDINGS

--oOo--

Reported by:

Carole W. Browne

California Certified Shorthand Reporter #7351

Daniel P. Feldhaus, C.S.R., Inc.

Certified Shorthand Reporters

8414 Yermo Way ♦ Sacramento, CA 95828

Telephone 916.682.9482 ♦ Fax 916.688.0723

FeldhausDepo@aol.com

A P P E A R A N C E S

COMMISSIONERS PRESENT

MICHAEL GENEST
(Commission Chair)
Director, State Department of Finance

PAUL GLAAB
City Council Member
City of Laguna Niguel

FRANCISCO LUJANO
Representative for PHILIP ANGELIDES
State Treasurer

RICHARD CHIVARO
Representative for JOHN CHIANG
State Controller

J. STEVEN WORTHLEY
Supervisor and Chairman of the Board
County of Tulare

SARAH OLSEN
Public Member

JOHN FILLMORE
Representative for Cynthia Bryant
Director, Office of Planning & Research

---o0o---

A P P E A R A N C E S

COMMISSION STAFF PRESENT

PAULA HIGASHI
Executive Director
CAMILLE SHELTON
Chief Legal Counsel

DEBORAH BORZELLERI
Senior Commission Counsel

ERIC FELLER
Commission Counsel

NANCY PATTON
Assistant Executive Director

---o0o---

PUBLIC TESTIMONY

Appearing Re Item 6:

BONNIE TER KEURST, Manager, Reimbursable Projects
County of San Bernardino

CHARLES S. ABAJIAN, Supervising Probation Officer
County of San Bernardino

MICHAEL HANRETTY, Staff Counsel
Department of Corrections and Rehabilitation

SUSAN S. GEANACOU, Senior Staff Attorney
Department of Finance

CARLA CASTANEDA, Principal Program Budget Analyst
Department of Finance

Appearing Re Item 8:

JULIANA GMUR, Counsel
County of Sacramento

A P P E A R A N C E S

PUBLIC TESTIMONY

Appearing Re Item 8:

NANCY GUST
Sacramento County Sheriff's Department

DEPUTY CHERYL MACCOUN
Sacramento County Sheriff's Department

DEPUTY GAIL WILCZYNSKI
Sacramento County Sheriff's Department

ALAN BURDICK
CSAC SB90 Service

BRYON GUSTAFSON
Commission on POST

ALAN DEAL
Commission on POST

SUSAN S. GEANACOU, Senior Staff Attorney
Department of Finance

CARLA CASTANEDA, Principal Program Budget Analyst
Department of Finance

Appearing Re Item 10:

KEITH PETERSEN, President
SixTen and Associates

ALAN DEAL
Commission on POST

BRYAN GUSTAFSON
Commission on POST

SUSAN S. GEANACOU, Senior Staff Attorney
Department of Finance

CARLA CASTANEDA, Principal Program Budget Analyst
Department of Finance

A P P E A R A N C E S

PUBLIC TESTIMONY

Appearing Re Item 12:

ARTHUR M. PALKOWITZ, Director, Resource Development
San Diego Unified School District

LEONARD KAYE, Counsel, CPA
County of Los Angeles

ALEX ROSSI
County of Los Angeles, Chief Administrative Office

DONNA FEREBEE, Staff Counsel
Department of Finance

CARLA CASTANEDA, Principal Program Budget Analyst
Department of Finance

Appearing Re Item 14:

LEONARD KAYE, Counsel, CPA
County of Los Angeles

DONNA FEREBEE, Staff Counsel
Department of Finance

CARLA CASTANEDA, Principal Program Budget Analyst
Department of Finance

THOMAS DITHRIDGE, Program Budget Manager
Department of Finance

Appearing Re Item 16:

ARTHUR M. PALKOWITZ, Director, Resource Development
San Diego Unified School District

DONNA FEREBEE, Staff Counsel
Department of Finance

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Commission on State Mandates – May 31, 2007

1 BE IT REMEMBERED that on Thursday, May 31,
2 2007, commencing at the hour of 10:11 a.m., thereof, at
3 980 Ninth Street, Second Floor Conference Center,
4 Sacramento, California, before me, CAROLE W. BROWNE,
5 CSR 7351, the following proceedings were held:

6 ---o0o---

7 CHAIRMAN GENEST: We'll call this meeting to
8 order. Paula, can you call the roll?

9 MS. HIGASHI: Mr. Chivaro?

10 MEMBER CHIVARO: Present.

11 MS. HIGASHI: Mr. Fillmore?

12 MEMBER FILLMORE: Present.

13 MS. HIGASHI: Mr. Glaab?

14 MEMBER GLAAB: Present.

15 MS. HIGASHI: Mr. Lujano?

16 MEMBER LUJANO: Here.

17 MS. HIGASHI: Ms. Olsen?

18 MEMBER OLSEN: Here.

19 MS. HIGASHI: Mr. Worthley?

20 MEMBER WORTHLEY: Here.

21 MS. HIGASHI: And Mr. Genest?

22 CHAIRMAN GENEST: Here.

23 MS. HIGASHI: The first item is approval of the
24 minutes of March 29th.

25 CHAIRMAN GENEST: Are there any objections?

Commission on State Mandates - May 31, 2007

1 Someone move?

2 MEMBER GLAAB: Mr. Chairman, I'll be abstaining
3 due to my absence at that time. Thank you.

4 CHAIRMAN GENEST: Anybody else? Is there a
5 motion?

6 MEMBER FILLMORE: Move approval.

7 MEMBER OLSEN: Second.

8 CHAIRMAN GENEST: No objection? They're
9 adopted.

10 MS. HIGASHI: The next item, item 2, minutes of
11 the April 16th meeting.

12 CHAIRMAN GENEST: Any objections to those?

13 MEMBER WORTHLEY: Move approval, Mr. Chairman.

14 MEMBER LUJANO: Second.

15 CHAIRMAN GENEST: They're adopted. Third item.

16 MS. HIGASHI: The third item is the proposed
17 consent calendar. You have that item before you. It's
18 on the yellow sheet of paper. There are three items on
19 the consent calendar. Item 5, dismissal of a withdrawn
20 test claim on medically indigent adults and adoption of
21 two statewide cost estimates, high school exit
22 examination, item 15, and item 17, agency fee
23 arrangements.

24 CHAIRMAN GENEST: Any objections to adopting the
25 consent calendar? No? Do I have a motion?

Commission on State Mandates - May 31, 2007

1 MEMBER CHIVARO: I'll move.

2 MEMBER OLSEN: Second.

3 CHAIRMAN GENEST: Without objection, the consent
4 calendar is adopted.

5 MS. HIGASHI: There were no items under
6 number 5.

7 Number 4, and this brings us to the hearing
8 portion of our meeting. Will all of the parties and
9 witnesses who intend to testify at the table on the test
10 claim item 6, 7, 8, 9, 10, 11, 12 and 13 please rise?
11 And also item -- yeah, that's right.

12 Do you solemnly swear or affirm that the
13 testimony which you are about to give is true and correct
14 based upon your personal knowledge, information, or
15 belief?

16 (A chorus of "I do's" was heard.)

17 MS. HIGASHI: Thank you very much.

18 Our first test claim, item 6, is on California
19 Youth Authority sliding scale for charges. This item
20 will be presented by Junior Commission Counsel Deborah
21 Borzelleri.

22 MS. BORZELLERI: Thank you.

23 This test claim addresses increased fees paid by
24 counties to the state for the least serious juvenile
25 offenders, categories 5 through 7, that are committed to

1 the California Youth Authority, which is now the Division
2 of Juvenile Justice, but we used Youth Authority because
3 the test claim was filed when it was the Youth Authority.

4 No state law requires the counties or juvenile
5 courts to commit category 5 through 7 juvenile offenders
6 to the Youth Authority, and the juvenile courts' decision
7 for such placements is based on recommendations from the
8 county probation department.

9 The probation department's recommendation takes
10 into consideration available treatment options within the
11 county. There are other options to Youth Authority
12 placement, including local juvenile treatment programs,
13 and state funding is available for those programs.

14 Because the additional sliding scale costs for
15 Youth Authority commitments result only from an
16 underlying local discretionary decision to place those
17 juveniles with the Youth Authority, staff finds the test
18 claim statutes do not mandate a new program or higher
19 level of service in an existing program within the
20 meaning of Article XIII-B, Section 6. Therefore, staff
21 recommends the Commission adopt the analysis to deny the
22 claim. Parties please state your name.

23 MS. TER KEURST: I'm Bonnie Ter Keurst, County
24 of San Bernardino.

25 MR. ABAJIAN: Charles Abajian, County of

1 San Bernardino.

2 MS. CASTANEDA: Carla Castaneda, Department of
3 Finance.

4 MS. GEANACOU: Susan Geanacou, Department of
5 Finance.

6 CHAIRMAN GENEST: Who's first? We have one more
7 out in the audience.

8 MR. HANRETTY: I'm Mike Hanretty, Department of
9 Corrections and Rehabilitation. I didn't see room up
10 there, so I wasn't sure what to do.

11 MS. SHELTON: Why don't you come up?

12 MS. TER KEURST: Good morning.

13 The test claim before you this morning,
14 California Youth Authority Sliding Scale for Charges,
15 would seem relatively straightforward.

16 The state has substantially increased the costs
17 to counties for making use of the California Youth
18 Authority program. They, being the state, have, in fact,
19 transferred those costs to local agencies, and the intent
20 of creating the fee structure as stated in the Senate
21 floor analysis for SB 2055 was to provide a monetary
22 disincentive for sending low-level juvenile offenders to
23 the California Youth Authority, which is CYA.

24 However, the conclusion by staff is that the
25 costs to result from an underlying discretionary decision

1 by the local agency to place those juveniles within CYA,
2 and I've asked Chuck to be here today to give you a
3 little bit of the history on the process that we use in
4 our county.

5 MR. ABAJIAN: When a minor has been placed in --

6 CHAIRMAN GENEST: Please be sure to state your
7 name each time.

8 MR. ABAJIAN: Charles Abajian, aka Chuck.

9 When a minor has been placed in several juvenile
10 programs and fails to adjust, either through going AWOL
11 or by committing a new law violation, it's our position
12 that it's incumbent upon the probation department to
13 protect the community by making a recommendation for the
14 California Youth Authority.

15 As the Commission is aware, category 5 crimes
16 include robbery offenses and assaults with a deadly
17 weapon. Category 6 includes residential burglary. Thus,
18 the probation department for the safety of the community
19 must recommend California Youth Authority. As I stated,
20 these minors have failed numerous placements, either by
21 going AWOL or committing new offenses.

22 CHAIRMAN GENEST: Thank you. Who's next?

23 MS. TER KEURST: I'll continue on, if I may.

24 In reading through the final analysis, I had
25 difficulty in deciding how to present this claim, because

1 the Commission staff and the county are on different
2 sides of this issue, and yet we both use the same
3 arguments and the same cases but with a different end
4 result. At issue is, are the costs .

5 In reading through the final analysis, I believe
6 that there were a couple other issues addressed fairly
7 significantly in the analysis that tend to cloud the
8 issue. The first, on page 6, there's a discussion of
9 dollar resources provided by legislature.

10 As a county, we don't dispute the fact that
11 there are various fundings for correction and
12 rehabilitation within the state. We also do not dispute
13 the fact that it's a very costly part of our government
14 and the state government's responsibility.

15 However, the funding sources listed do not
16 address the ongoing mandated cost for the CYA sliding
17 scale fees.

18 The \$32 million that's mentioned is a one-time
19 distribution, and, as specifically stated in the
20 legislation, was not intended to establish a precedence
21 for future funding.

22 The juvenile challenge grants are distributed on
23 a competitive basis for establishing multi-agency
24 juvenile justice coordinating councils to respond to
25 crime and for reducing the rate of juvenile crime,

1 especially violent juvenile crime as opposed to the
2 low-level offender that we're discussing this morning.

3 And the ROPP that is mentioned, the Repeat
4 Offender Prevention Program, was the fund program
5 developed targeting youth who display behavior that may
6 lead to delinquency and recidivism.

7 Our county did also benefit from the
8 \$100 million that was mentioned in 1998. It was used for
9 two detention facilities, as is my understanding was the
10 intention of that funding.

11 On page 17 the statement is made that we the
12 county have not provided evidence to show why we cannot
13 avail ourselves of state funding to establish and
14 maintain local juvenile treatment programs.

15 I believe that statement to be outside the scope
16 of this claim. In fact, it's kind of a large assumption
17 given the largeness of corrections and rehabilitation.
18 There's nothing in the staff analysis that indicates we
19 have -- there's been remiss on our county's part for
20 using funding.

21 The other piece of that is that any offsetting
22 revenue is generally discussed in addressing the
23 parameters and guidelines.

24 There was also considerable discussion devoted
25 to a second issue. The costs associated with commitment

1 of a juvenile to the CYA result from a juvenile court
2 mandate within the meaning of Article XIII-B, Section 9,
3 Subdivision B.

4 On February 13th, a draft staff analysis was
5 issued denying the claim on that particular finding.

6 On April 10, a revised staff analysis was issued
7 clarifying and correcting that position, and we agree
8 with that correction.

9 That leaves the issue of discretion. In
10 response to the revised staff analysis, because it dealt
11 specifically with discretion, I requested a postponement
12 for the Commission's hearing of this claim.

13 For purposes of this record today,
14 San Bernardino has a claim that will be heard in court on
15 September 12, Los Angeles Superior Court, on the issue of
16 discretionary cost.

17 We have a fundamental difference of what is a
18 discretionary cost to the local agency in this test
19 claim, and our position is that the juvenile court makes
20 the placement and the state of California charges the
21 local agency for the juvenile court's placement. That is
22 the process. The county does not make that decision.

23 Looking at the analysis, there are some
24 conflicting statements as I see them. Page 1,
25 paragraph 2, it cites the juvenile court's decision for

1 such placements. In the conclusion, on the same page, it
2 refers to the underlying discretionary decision by the
3 local agencies.

4 Page 3, paragraph 2, it refers to individuals
5 can be committed to the CYA by either the juvenile court
6 or on remand by the criminal court or returned to CYA by
7 the youthful offender parole board.

8 Page 4, paragraph 1, the judge, taking into
9 account the recommendation of the probation department,
10 decides whether to make the offender a ward of the court
11 and ultimately determines the appropriate placement and
12 treatment.

13 Page 8, paragraph 1, statutes merely increase
14 the charges to local agencies for discretionary
15 placements. But on the same page statutes do not
16 eliminate a juvenile court's discretion to choose other
17 dispositions.

18 Page 13, paragraph 3, the increased cost flow
19 from initial discretionary decisions by counties, but in
20 paragraph 4, although the decision to commit a juvenile
21 offender to CYA is ultimately made by the juvenile court,
22 that decision is based on a variety of factors.

23 Do we have a discretion to our recommendation?
24 The answer is yes, with limitations.

25 Does that recommendation have to be taken? The

1 answer is no.

2 But within that context, I think we need to go
3 back and look at what discretion is.

4 In the content of this analysis it would appear
5 that the discretion means that the counties can just pick
6 or choose based on cost.

7 But if you look at a legal definition for
8 discretion as applies to public officers, it's the action
9 taken in light of reason as applied to all the facts and
10 with view to rights of all parties to action while having
11 regard for what is right and equitable under all
12 circumstances and law.

13 Taking that one step further, on page 3 of the
14 analysis, the juvenile court law establishes the
15 California juvenile court within the Superior Court in
16 each county. Its purpose is to provide for the
17 protection and safety of the public and each minor under
18 the jurisdiction of the juvenile court and to preserve
19 and strengthen the minor's family ties whenever possible,
20 removing the minor from the custody of his or her parents
21 only when necessary for his or her welfare or for the
22 safety and protection of the public.

23 The court's role is to use their discretion to
24 make a determination that is right and equitable under
25 all circumstances and law. The county's mandate, on the

1 other hand, is from the state, and that is to fund
2 whatever decision the court makes.

3 With that, we're open for questions.

4 CHAIRMAN GENEST: Any questions of these
5 witnesses from the Commission? Let's go to the --

6 MS. HIGASHI: Department of Finance or
7 Corrections.

8 MS. CASTANEDA: Carla Castaneda, Department of
9 Finance.

10 We have no objections with the current staff
11 analysis. We concur that there is some discretion on the
12 part of the counties, and the courts are taking into
13 consideration the other programs available when they're
14 making their decision. We also --

15 CHAIRMAN GENEST: Can you explain why that's
16 relevant?

17 MS. CASTANEDA: They could have juvenile halls
18 or juvenile camps, a program that's run by the county,
19 and they're taking -- and the capacity of that is
20 determined by the county. But they're looking to see if
21 they have room there, if they have room in another
22 program, and if the county is recommending that they go
23 to Youth Authority because these facilities are not
24 appropriate.

25 CHAIRMAN GENEST: So you're saying that the

1 county's discretion is to provide for placement of
2 whatever is necessary within the county?

3 MS. CASTANEDA: Mm-hmm.

4 CHAIRMAN GENEST: And the state to some degree
5 funds that?

6 MS. CASTANEDA: Yes.

7 CHAIRMAN GENEST: Any other questions?
8 Corrections?

9 MR. HANRETTY: My name is Mike Hanretty. I'm
10 staff counsel for Department of Corrections and
11 Rehabilitation.

12 July 2005, as was explained earlier, the
13 California Youth Authority was brought under the
14 department and renamed the Division of Juvenile Justice,
15 so just to clarify that for the record.

16 I'm here primarily to answer any questions the
17 Commission might have about the sliding scale statutes as
18 they pertain to DJJ and express our support for the staff
19 analysis on the issue.

20 To that end I've brought Lisa Goodwill, DJJ's
21 business manager of juvenile facilities, to assist me if
22 I need to go there with anything real factual.

23 Our legal comments are set forth in the
24 August 15, 2002 letter to the Commission which was
25 drafted for then CYA by the Attorney General's Office.

1 I will not recount the legal arguments here
2 today except to note that the staff analysis effectively
3 adopts the argument that the county has a choice whether
4 or not to send juveniles to DJJ and thus is not mandated
5 to do so. Without a mandate, the county's test claim
6 should fail.

7 In conclusion, I again echo the department's
8 support for the findings of the Commission staff
9 analysis, and we encourage the Commission to adopt the
10 proposed statement of decision regarding the juvenile
11 scale test claim.

12 CHAIRMAN GENEST: Any members of the Commission
13 want to speak or ask questions on this?

14 MEMBER GLAAB: Yes. Mr. Chairman and Members, I
15 just am a little troubled with the word "discretion." If
16 the courts act, as testimony we've heard here today, that
17 they're mandated to go to the CYA, is that discretion?

18 I mean, I'm a little troubled by that, because
19 if the courts apply it and there's no discretion -- do I
20 understand that correctly? Maybe I'm asking the counsel.

21 MS. BORZELLERI: Actually, the court actually
22 makes the order, but it is our understanding that that
23 order is based on a very broad variety of factors, not
24 the least of which is what placement options are
25 available.

1 In fact, the claimant made a claim here that
2 said judges in those counties that do not have adequate
3 and available placement within the county generally order
4 CYA as the only appropriate and available option.

5 This is especially critical when a county has
6 limited funds and has not been able to construct or
7 operate its own institution for these youth.

8 So ultimately the court order is that they
9 commit the juvenile, but that order is based on all the
10 factors, including the county's recommendations.

11 MS. SHELTON: And let me just clarify that the
12 issue before the Commission is whether the state has
13 mandated the placement of the child in CYA.

14 CHAIRMAN GENEST: Not whether or not the
15 juvenile court has done so.

16 MS. SHELTON: Correct.

17 CHAIRMAN GENEST: But still on that point, the
18 Department of Corrections, as I understand it, there are
19 counties who have a high rate of placement and there are
20 counties who have a low rate of placement at the -- what
21 used to be called Youth Authority.

22 As I also understand it, that has a lot to do
23 with the kind of facilities available in the particular
24 county.

25 Is that true? Can you cite counties that have a

1 relatively low rate of placement in the Youth Authority?

2 MR. HANRETTY: I cannot personally do that,
3 Mr. Chairman.

4 Lisa, do you have that information?

5 MS. GOODWILL: I don't.

6 MR. HANRETTY: I'm sorry. I can find out and
7 let you know.

8 CHAIRMAN GENEST: Is it, in fact, true that
9 there is a large variance among counties?

10 MR. HANRETTY: My understanding is based on
11 obviously the volume, I think, of how many youths that
12 county processes. For instance, Los Angeles County is
13 going to have more of an infrastructure around that, as
14 opposed to Tulare County that doesn't. So you've got,
15 based on kind of the volume that a county sees, an
16 infrastructure built up around that.

17 MS. BORZELLERI: We also have information from
18 the legislative analysts' office, and we've cited quite a
19 bit of information from the reports that they've done.

20 CHAIRMAN GENEST: Which supports the idea that
21 there is variation among counties.

22 MS. BORZELLERI: Yes. There's variation.

23 And with the adoption of the sliding scale fees,
24 there has actually been a reduction of the commitments of
25 those low-level offenders, which shows, in fact,

1 discretion in the counties.

2 CHAIRMAN GENEST: And that brings me to a point.

3 I noticed in your testimony you used the word
4 "incentive," that the sliding scale fee was denied as an
5 incentive -- or disincentive.

6 MS. TER KEURST: That came out of the verbiage
7 in SB 2055 where it said specifically the sliding scale
8 was meant to be a disincentive and, in effect, encourage
9 the counties to use other facilities.

10 Now, there's been -- over the course of the last
11 few years, there has been funding, and there are attempts
12 by counties -- and Chuck, again, can probably address
13 this a little better than I can -- where we're -- we're
14 trying all kinds of programs. But that doesn't negate
15 the fact that CYA was established as this facility with a
16 specific purpose and goal in mind.

17 And when attempts as a county fail in all these
18 other areas, our responsibility as a county and the
19 responsibility of the probation department, who know the
20 person involved, is to recommend something that will
21 protect that child as well as protect the public as well.

22 So, I mean, I think we're getting mixed up here
23 with what -- when we're talking about the cost for CYA,
24 yes, there's a whole lot of stuff going on with CYA. You
25 can pull several articles out of the papers right now

1 where the Governor is trying to deal with rehabilitation
2 and correction, and the California youth facilities
3 definitely have had problems over the years.

4 Our county's position -- and, again, Chuck can
5 address this if you have more questions -- but our
6 county's position is we make every attempt not to put
7 them in California Youth Authority, not because of the
8 cost, because it's a lockup. It isn't a ranch. It isn't
9 a foster-home-type setup that you want to just put a kid
10 in. It's a lockup facility and it's used as a last
11 resort in our case, so . . .

12 CHAIRMAN GENEST: My interest in the word
13 "incentive" or "disincentive" is that if I imagine that I
14 want you to do something, I think I have two options.
15 One is to give you an incentive and the other, if I have
16 the power, is to mandate you to do it. And I think in
17 this case "incentive" is the opposite of a mandate. It
18 kind of bolsters the staff analysis.

19 In any event, are there any other questions?

20 MEMBER WORTHLEY: Yeah, I would like to say
21 something.

22 I think that this matter of discretion is
23 critical, because even in our staff's analysis,
24 especially the revised analysis, it really centers on
25 this issue of discretion.

1 The question is, when a probation department
2 makes a recommendation, it is advisory only. It is the
3 ultimate decision of the judge, who is a state employee,
4 who determines whether or not this child is going to be
5 placed in CYA.

6 In my mind, that means there is no discretion on
7 the part of the county. It is discretionary on the part
8 of the judge. The judge is not a county employee. He's
9 a state employee.

10 So to me it's very clear. There is no
11 discretion on the part of the county. The county, again,
12 the report and recommendation of the probation person is
13 advisory upon the court. The court makes the final
14 decision. That decision is not discretionary with the
15 county. It is discretionary with the judge. In my mind,
16 it's very clear there is no discretion on the part of the
17 county.

18 And to the extent there has been a reduction in
19 the number of students or kids going to CYA, that is a
20 reflection of the fact that yes, the county is trying to
21 find alternatives, and the recommendations are, from the
22 probation department, that they recommend to the judge
23 that they not be sent to CYA.

24 That doesn't mean people still don't get sent.
25 And they're sent based upon the decision made by the

1 court. I don't see discretion on the part of the county.
2 I see it being a mandated act. Once the court rules,
3 there is no discretion by the county.

4 So in my mind that's a critical act in this
5 decision-making process for us to consider. If there's
6 no discretion on the part of the county, then this would
7 be found to be a mandate that would reimbursable.

8 MS. TER KEURST: I would also add that a judge
9 takes into account the district attorney's position, and
10 the child himself is represented by counsel, and that
11 person makes a recommendation to the judge as well.

12 MEMBER FILLMORE: I would like to know if we
13 have any data that suggests how often a judge accepts a
14 county's recommendation, particularly if we have any data
15 that shows how often a judge accepts a county's
16 recommendation not to place a juvenile in CYA.

17 I think that would provide us with much more
18 clear data on whether or not this is an issue of county
19 discretion or if it's really a situation where quite
20 often counties recommend local remedies and the judge
21 overrules them and puts them in CYA.

22 MEMBER WORTHLEY: If I might respond to that, I
23 believe that what happens is that if you are a probation
24 officer and you know your judge, if your judge has a
25 propensity to send students to -- children to CYA, you

1 will then, in a sense, formulate your opinion based upon
2 the action of that judge.

3 So just because you may find a situation where a
4 recommendation would be to send the student or the child
5 to CYA, it may be on the basis of the history of that
6 judge in sentencing people.

7 So it's not necessarily a reflection of -- in
8 other words, the probation person will recognize that I
9 recommended that the person not be sent to CYA, the judge
10 did it anyway in these similar circumstances; therefore,
11 why should I recommend something different?

12 I don't think that's really relevant to the
13 discussion here. Really the issue in my mind is that
14 when the judge makes a decision, the discretion is out of
15 the hands of the county. And that really was the whole
16 issue here to me. It circles around that determination
17 of discretion.

18 MS. SHELTON: Can I just respond a little bit to
19 that?

20 We've had a lot of these discussions in our
21 office, and certainly we think it's a difficult issue.
22 We did talk about that. But the way the constitution is
23 drafted, it exempts any mandate of the court from the
24 spending limit. So there's no reimbursement even
25 required when there is a court mandate. And here we

1 found there not to be a court mandate, because the
2 statute increased the fees and it didn't touch the
3 judge's or the court's authority to issue a sentence.

4 So if you're saying that there's no discretion
5 because the court directed the placement, there wouldn't
6 be any reimbursement allowed anyway under Article XIII-B.

7 CHAIRMAN GENEST: Furthermore, I think the
8 Chief Justice would not agree with the characterization
9 that a judge is a state employee, although I guess in
10 some technical sense they are, but they're certainly a
11 separate branch of the government.

12 MS. SHELTON: Right.

13 CHAIRMAN GENEST: They're no more a state
14 employee than a legislator.

15 MS. SHELTON: Right. They do get their salaries
16 from the state budget, but . . .

17 MR. ABAJIAN: If I can comment briefly?

18 San Bernardino County is very reluctant to send
19 minors to the California Youth Authority. But I wanted
20 to give the Commission an idea. Here's an example of the
21 type of youth who goes there. We feel compelled to send
22 them there for the safety of the community.

23 This boy was placed at Trinity Group Home in
24 Apple Valley. He was removed. We're not sure why. He
25 was placed at a program called CTC, Children's

1 Therapeutic Community. He went AWOL two months later.
2 He was then placed at a practice program at ACTS. He
3 went AWOL the following month. When he was apprehended,
4 he was then placed at a program called Highlander. He
5 went AWOL the same day he was placed there. He was then
6 placed at a program called Mid Valley. And we use
7 programs throughout the state. He went AWOL the same
8 day. He was then arrested the following month on new
9 charges of attempted robbery and was sent to the Youth
10 Authority.

11 CHAIRMAN GENEST: Was that individual -- I
12 almost said "prosecuted." That's the wrong term.

13 Was the action involving him done under
14 Welfare & Institutions Code Section 600?

15 MR. ABAJIAN: 602.

16 CHAIRMAN GENEST: 602?

17 MR. ABAJIAN: Yeah.

18 CHAIRMAN GENEST: Do you know when that was
19 adopted?

20 MR. ABAJIAN: I'm not sure.

21 CHAIRMAN GENEST: Do you think it was before
22 1972? I think it was quite a bit before 19 -- so the
23 pre-existing obligation to deal with whatever the
24 ramifications are for that child's behavior long before
25 there was anything in the constitution about a mandate

1 was on the county, not on the state.

2 Subsequently, the state, on a volitional,
3 voluntary basis, started accepting children into the
4 Youth Authority.

5 I don't believe there's any requirement for the
6 state to do that. I think that's the fundamental
7 underpinning of the staff analysis.

8 MEMBER WORTHLEY: Mr. Chairman, I would like to
9 respond to a comment made by our staff -- or counsel.

10 Looking at page 12 of the staff analysis, on the
11 next-to-the-last paragraph, last full paragraph, and I'll
12 just read it:

13 "Thus, in applying the federal mandate exclusive
14 to Section 9, the court in the city of Sacramento focused
15 on which entity was exercising discretion to cause the
16 increased cost. Here the test claim statutes have
17 increased the cost the county must pay the state for
18 housing juvenile offenders who happen to be committed to
19 CYA. The juvenile court is exercising its discretion in
20 making the commitment, but has no discretion with regard
21 to how much such a commitment cost the counties.

22 Consequently, it is the state rather than juvenile court
23 that has exercised its discretion in increasing the cost
24 for juveniles committed to CYA."

25 MS. SHELTON: Correct.

1 MEMBER WORTHLEY: That is counter to what you
2 just said.

3 MS. SHELTON: No. That is one element to
4 mandated reimbursement, that there are increased costs.
5 And the courts have been consistently clear that just
6 because you have increased cost doesn't mean that
7 reimbursement is required. You still have to have a
8 state-mandated program. The program has to constitute a
9 new program or higher level of service, and there has to
10 be increased cost.

11 MEMBER WORTHLEY: I'm using this paragraph to
12 talk about the issue of discretion, because your
13 indication was that if the court exercises the
14 discretion, resulting in the increased cost, then that is
15 not a thing for which the county would be reimbursed.

16 This says that the increased cost is not at the
17 discretion of the court. It's at the discretion of the
18 state. The state decreed the increased cost.

19 When the judge exercised discretion to send the
20 child to the CYA, the increased cost is caused by the
21 state. It is not caused by the court. Therefore, it is
22 not a discretionary act which results in increased cost.
23 It is the state that mandated that when it sent the child
24 there, this is what the cost would be.

25 MS. SHELTON: Except that there's no state law

1 requiring the court to send the child to CYA. There's no
2 state-mandated requirement for the judge to send that
3 child to a certain location.

4 CHAIRMAN GENEST: And the requirement to deal
5 with delinquents or whatever we call them now is in
6 Welfare & Institutions Code 600 and related statutes
7 which were adopted many years before mandate provisions
8 of the constitution or the court SB 90.

9 So the underlying responsibility is on the
10 county. And the fact that the state accepts some county
11 responsibilities by charging a fee for that is all
12 volitional on the part of the state. We wouldn't have to
13 do it.

14 In fact, this administration's proposal in this
15 year's budget is to gradually get completely out of the
16 business of taking these placements at all at the state.
17 And our theory behind that is that we have no -- we have
18 no obligation whatsoever to take these children and that
19 they are better served at the county level.

20 I don't know if -- I mean, we can talk about
21 this for a long time. Are there other opinions that need
22 to come out? Are we ready for a motion? I would
23 entertain a motion to adopt the staff's recommendation.

24 MEMBER OLSEN: So moved.

25 CHAIRMAN GENEST: Is there a second?

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1 MEMBER FILLMORE: Second.

2 CHAIRMAN GENEST: Let's call a roll call.

3 MS. HIGASHI: Mr. Chivaro?

4 MR. CHIVARO: Yes.

5 MS. HIGASHI: Mr. Fillmore?

6 MEMBER FILLMORE: Yes.

7 MS. HIGASHI: Mr. Glaab?

8 MEMBER GLAAB: No.

9 MS. HIGASHI: Mr. Lujano?

10 MEMBER LUJANO: Yes.

11 MS. HIGASHI: Ms. Olsen?

12 MEMBER OLSEN: Yes.

13 MS. HIGASHI: Mr. Worthley?

14 MEMBER WORTHLEY: No.

15 MS. HIGASHI: Mr. Genest?

16 CHAIRMAN GENEST: Yes.

17 MS. HIGASHI: Motion carries.

18 Item 7, Proposed Statement of Decision.

19 MS. BORZELLERI: The only issue before the

20 Commission on this item, item 7, is whether the statement

21 of decision accurately reflects the Commission's decision

22 on the previous item. Staff will make minor changes to

23 the final statement of decision to reflect witnesses'

24 testimony and the vote count.

25 CHAIRMAN GENEST: Do we have a motion?

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1 MEMBER OLSEN: Move adoption.
2 MR. CHIVARO: Second.
3 CHAIRMAN GENEST: Roll call.
4 MS. HIGASHI: Mr. Chivaro?
5 MR. CHIVARO: Yes.
6 MS. HIGASHI: Mr. Fillmore?
7 MEMBER FILLMORE: Yes.
8 MS. HIGASHI: Mr. Glaab?
9 MEMBER GLAAB: No.
10 MS. HIGASHI: Mr. Lujano?
11 MEMBER LUJANO: Yes.
12 MS. HIGASHI: Ms. Olsen?
13 MEMBER OLSEN: Yes.
14 MS. HIGASHI: Mr. Worthley?
15 MEMBER WORTHLEY: No.
16 MS. HIGASHI: Mr. Genest?
17 CHAIRMAN GENEST: Yes.
18 MS. HIGASHI: Motion carries.
19 CHAIRMAN GENEST: That brings us to . . .
20 MS. HIGASHI: Item 8 is the test claim on
21 training requirements for instructors and academy staff.
22 Ms. Borzelleri will also present this item.
23 MS. BORZELLERI: Thank you.
24 This test claim addresses regulations adopted by
25 the Commission on Peace Officer Standards and Training,

1 or POST, that required specified training for certain
2 POST instructors and key staff of POST training
3 academies. It does not address the requirement imposed
4 on individual peace officers to receive basic POST
5 training.

6 Staff finds that the regulations established
7 requirements that flow from a discretionary decision by
8 the local agency to participate in POST and a
9 discretionary decision to provide POST-certified training
10 or establish a POST training academy.

11 Staff further finds that local agencies have
12 alternatives to providing POST-certified training or
13 establishing a POST training academy. Therefore, the
14 test claim regulations do not impose the state-mandated
15 program on local agencies within the meaning of
16 Article XIII-B, Section 6. Staff recommends the
17 Commission adopt the revised final staff analysis and
18 deny the test claim.

19 CHAIRMAN GENEST: I think we're going to start
20 with Ms. Guest, County of Sacramento.

21 MS. GUEST: Nancy Guest, Sacramento County
22 Sheriff's Department.

23 CHAIRMAN GENEST: May we have everyone state
24 their names, please?

25 DEPUTY MACCOUN: Deputy Cheryl Maccoun,

1 Sacramento County Sheriff's Office.

2 MS. GUEST: Nancy Guest, Sacramento Sheriff's
3 Department.

4 DEPUTY WILCZYNSKI: Deputy Gail Wilczynski,
5 Sacramento County Sheriff's Office.

6 MS. GMUR: Juliana Gmur on behalf of the County
7 of Sacramento.

8 MS. CASTANEDA: Carla Castaneda, Department of
9 Finance.

10 MS. GEANACOU: Susan Geanacou, Department of
11 Finance.

12 MR. BURDICK: Allan Burdick on behalf of the
13 CSAC SB 90 Service. I've got a chair here for the
14 representative from POST.

15 MR. GUSTAFSON: Bryon Gustafson, Commission on
16 POST.

17 MR. DEAL: Alan Deal, Commission on Peace
18 Officer Standards and Training.

19 CHAIRMAN GENEST: Okay.

20 MS. GMUR: Juliana Gmur on behalf of the County
21 of Sacramento.

22 Good morning, Commissioners.

23 Today we bring before you a new issue, actually.
24 It's a discretion. I hate to continue the discussion,
25 but this is going to be continuing debate because of what

1 the courts have laid forth for you. So let's take a
2 minute. I know that we've had this matter before this
3 Commission back in March. We've had a lot of testimony
4 on it. So let's take a minute right now and take a look
5 at the direction the courts have provided.

6 There are two cases on the issue of discretion
7 or voluntary decisions. The initial decision, as you may
8 all be very familiar, is the City of Merced. In the City
9 of Merced case the question was whether the City -- the
10 City wanted to acquire property. The issue of discretion
11 at that time was how the City went about it.

12 The City went about it through eminent domain.
13 That brought them into a statute that talked about cost
14 on eminent domain, and the court held that when they made
15 that discretionary decision to proceed by eminent domain
16 rather than, say, purchase it outright, then that brought
17 downstream effects, and those downstream effects, because
18 of the discretionary decision, were not mandated.

19 That decision was reaffirmed along with some
20 other additional instruction. The Department of Finance
21 case most recently brought to us by the Supreme Court
22 often referred to as the Kern High School District case.

23 In that case -- that's the school site council's
24 case -- and in that case there were a number of school
25 site councils that were up for review. And the majority

1 of them, the court found it was discretionary on the
2 school district to participate in those school -- in
3 those things. This was -- if you had school site
4 councils, then you had to comply with the Brown Act.
5 That was the issue.

6 So in looking at the school site council case,
7 we have kind of a split of analysis. For those school
8 site councils that were deemed entirely voluntary, did
9 not have to participate, then they went out on the City
10 of Merced rule. That is, that they -- again, it was the
11 downstream effects of a voluntary decision negates the
12 existence of the mandate. But there was one that
13 arguably the court said perhaps they did not have that
14 option. And so it brings up the question of practical
15 compulsion, because legal compulsion is quite clear.
16 That's the mandate. The law says you must do something
17 and it is indeed a mandate. But it brings up the issue
18 of practical compulsion. And in this case I think that's
19 kind of where we are, is looking at practical compulsion.

20 Now, when the courts talk about legal compulsion
21 and they talk about voluntary decisions, one of the
22 questions that the court raised was the issue of your
23 ability to divest yourself of participation. And I think
24 that's a key issue here, because with the POST, one
25 cannot completely divest themselves.

1 Now, the staff pointed to the dichotomy involved
2 between the participation of the agency and the
3 participation of the individual. But even there the line
4 is blurred, because the agencies cannot hire individuals,
5 by law, that have not completed the POST training. So
6 although the agency's participation may, in the sight of
7 the staff, cross the line and be strictly voluntary,
8 their hiring practices are still controlled by mandate.

9 So we've got this position where we've got
10 practical compulsion. You cannot entirely divest
11 yourself. I sat down and looked, and I think that you've
12 got testimony both from the transcript at the last
13 hearing and I've seen other pleadings that have come in.
14 How does one not participate in POST when one's own
15 officers have to participate?

16 And I think that by having -- by trying to draw
17 that line between the agency is completely separate from
18 the officers, it's really made up of the officers, then
19 how do you have individuals within the agency compelled
20 to participate in something when the agency itself is not
21 compelled?

22 And I think that that is going to be something
23 that this Commission is going to have to wrangle with.
24 There is really nothing out there the courts have
25 provided that would give us any clear or bright-line

1 rule.

2 This is -- some things that come before the
3 Commission are actually rather cut and dried. This one,
4 unfortunately, is not. So I --

5 CHAIRMAN GENEST: Can I ask a couple of
6 questions before you continue?

7 MS. GMUR: Yes.

8 CHAIRMAN GENEST: I don't want to lose track of
9 this.

10 MS. GMUR: Please.

11 CHAIRMAN GENEST: Can you tell us when the
12 requirement that agencies can only hire POST -- or
13 certified police officers, when that was put into state
14 law?

15 MS. GMUR: You know, I don't know, but it's
16 Penal Code Section 832. And I don't have my history on
17 that as to when that was passed.

18 MS. SHELTON: I think it is before '75. There
19 were amendments to that section and the test claim was
20 filed years ago with the Commission asking for
21 reimbursement for the POST basic training for
22 individuals, and that claim was denied because it was a
23 mandate on the individual and there was no requirement
24 for the employer to provide that training.

25 CHAIRMAN GENEST: So the amendment to the

1 underlying requirement did not have to do with the basic
2 requirement that you can only employ POST-certified or
3 certified police officers?

4 MS. SHELTON: No. That's been the law for a
5 long time. I don't have the exact date, though.

6 CHAIRMAN GENEST: So when there is a mandate
7 imposed by the state and that mandate was imposed prior
8 to the enactment of either SB 90 in 1972 or something
9 like that or to the enactment of the mandate provision of
10 the constitution, then it is not a mandate for that
11 purpose. Is that correct?

12 MS. SHELTON: That's correct.

13 CHAIRMAN GENEST: I think that's the fundamental
14 principle that it may not create a --

15 MS. SHELTON: But that's not the issue. We're
16 not talking about reimbursement to pay the salaries of
17 the people being trained. We're talking about potential
18 reimbursement of --

19 CHAIRMAN GENEST: No, but her argument is that
20 they are compelled by practical -- the practical effect
21 of this requirement, and I would say that the existence
22 of this requirement has nothing to do with the
23 reimbursable mandate, so that practical compulsion is not
24 relevant, in my opinion.

25 MEMBER WORTHLEY: Mr. Chairman, may I ask a

1 question?

2 Is there anything that prevents a local agency
3 from simply requiring that these requirements be met by
4 going to classes outside of the agency?

5 MS. GMUR: You know, I don't know about that.

6 MEMBER WORTHLEY: Let me just give you an
7 example.

8 I mean, it's not uncommon -- I mean, I'm an
9 attorney. If I went to work for the district attorney's
10 office, I would have to pass the Bar examination before I
11 could practice law in the courts.

12 That's my responsibility. It's not the county's
13 responsibility. They don't have to pay for my education
14 or my -- if I have to continue my continuing education,
15 that's my responsibility. It's not on the county.

16 Now, in this case it seems that we have
17 historically a situation where the municipalities and the
18 counties have provided a service or they paid for the
19 service to be provided.

20 My question is, what prevents the cities or the
21 counties from simply saying to the police officer you
22 have to meet these standards? It's your responsibility
23 to go out and meet them. Is there anything that prevents
24 them from doing that?

25 MS. GMUR: Okay. One minor thing. Actually,

1 there's really no correlation between the attorney -- I
2 know you're trying to draw the correlation between what
3 we do as attorneys and what the peace officers do. But
4 what we do as attorneys is separate and apart because we
5 have a license to practice law. And what we do with
6 regard to that license to practice law, they don't have
7 the license --

8 DEPUTY WILCZYNSKI: I can't be a peace officer
9 by myself. I have to be connected to a department.

10 MEMBER WORTHLEY: Well, let's use school
11 teachers. School teachers have responsibilities of
12 maintaining -- they have to go back to classes to
13 maintain their credential. Their credentials are of no
14 value to them except for working for school systems.

15 But the point, again, is that they have to pay
16 for those costs themselves. It's not paid for by the
17 school system.

18 And so my basic question still remains, what is
19 it that prevents a public agency from simply putting the
20 burden back on the employee to go out and get the
21 training that is needed to meet the requirements set
22 forth by the state?

23 DEPUTY WILCZYNSKI: I think the problem with
24 that is that employees don't have the funding or the
25 ability to put themselves -- I know you can put yourself

1 through an academy. There's no obligation that you be
2 attached to a specific agency to put yourself through the
3 academy. But the quality of the people that go through
4 that program on their own is very, very low. And
5 agencies statewide right now are having real problems
6 recruiting people to go to academies that they pay them
7 to go to. So the people that are going into the
8 academies and paying their own way through are much lower
9 caliber and they're not generally -- at least in our
10 experience -- passing the background investigation.

11 DEPUTY MACCOUN: Also, I'm not sure that's the
12 issue of our appeal today. It isn't whether or not the
13 training can be paid for by the officer. It is the
14 obligation that the agency has to have people meeting
15 that standard and the instructors. It's the instructors
16 that we have to have that --

17 MEMBER WORTHLEY: But as I understand it, the
18 argument is, they have to meet these standards in order
19 to be employed by the agencies. That's true. That's
20 true of other organizations, like school teachers, as an
21 example. They have to meet those standards, too. But
22 it's not the agency that pays for it. It's the employee
23 that pays for it.

24 And the fact that we have historically done it
25 differently in police work doesn't, in my mind, make a

1 mandate. It just means that's been our practice.

2 DEPUTY WILCZYNSKI: You know, I just feel
3 differently. I think that Cheryl here is on to something
4 as well. Probably the reason it has been done
5 differently is because of the uniqueness of our job in
6 what we do and the standards by which we are held.

7 Again, I cannot just go out and decide I'm going
8 to take training. Okay. Now I'm blessed with 832. That
9 portion of it doesn't occur until you belong to an
10 agency, and the agency does have the mandate to ensure
11 that their officers meet your standards of POST. And,
12 again, for this test case, it -- as also do our
13 instructors. The mandate is also on the agency.
14 We are -- they are not allowed to employ us without this.
15 You have a mandate on both, really.

16 DEPUTY MACCOUN: They do have to attend an
17 academy somewhere.

18 DEPUTY WILCZYNSKI: Yeah. That was the other
19 piece of this.

20 DEPUTY MACCOUN: It's not cost-effective for us
21 to provide our own.

22 DEPUTY WILCZYNSKI: That's right.

23 CHAIRMAN GENEST: But the mandate is not a new
24 or higher level of service because it existed before
25 there was a mandate provision of the statute or the

1 constitution. All we're talking about here is the cost
2 of complying with the mandate has increased. And it's
3 a -- since it's not a mandate subject to SB 90 or the
4 constitution, it's not reimbursable. So, I mean, I don't
5 see the -- I don't even see the argument.

6 MS. GMUR: 832 pre-existed. But that's not
7 what's at issue here. That is the argument for the
8 practical compulsion.

9 No, this was written on a separate bill. It was
10 done -- it's been accepted by this Commission as being
11 within your jurisdiction and provided within the
12 statutes. It is not outside of the scope of what can be
13 considered by this Commission. So no, that's not the
14 case.

15 CHAIRMAN GENEST: Well, so the practical
16 compulsion argument is not relevant?

17 MS. GMUR: No, the practical compulsion argument
18 is relevant. That's what this Commission must decide
19 today, because that is the issue that's pending before
20 this Commission is, is there or is there not a practical
21 compulsion. Because we are clear on the fact that there
22 is no statutory compulsion. There's either a legal
23 compulsion or there's practical compulsion. And
24 that's -- there's no legal compulsion. If there were,
25 I'd have a statute in front of you and I'd say it's a

1 mandate and you'd probably agree. That's not the case.

2 So we're looking -- this is no longer a legal
3 analysis so much as it is a factual analysis. This
4 Commission must look at the testimony and the -- well,
5 the testimony that's being provided today, the guidance
6 that's been provided by the courts, and decide, are the
7 counties, the sheriff's people, are they in a position
8 where they must comply with POST, not because there is a
9 written and legal mandate but because there is practical
10 compulsion.

11 The Supreme Court has recognized that practical
12 compulsion can exist. In the Department of Finance case,
13 they did not find it in that case, but they said it can
14 exist. And the question is, does it exist here today.

15 DEPUTY WILCZYNSKI: I'd like to add to that.
16 The way I believe it does, again, the example I brought
17 to the Commission at the last hearing was how do you
18 reconcile the fact that an agent with the bureau that has
19 20 years of experience and all the education and training
20 that comes with that position, compare the skills, the
21 education, and the quality of a law enforcement officer,
22 that 20-, 25-year FBI person who may not be picked up by
23 my chief to become a sheriff's deputy, compared to
24 someone who passed a six-month POST-certified academy but
25 has zero experience or education in law enforcement

1 beyond that six months.

2 So you have this completely green, inexperienced
3 employee, but by gosh, he's been through a POST-certified
4 academy and he can be hired tomorrow by my chief. This
5 other person has very similar training and has all the
6 experience and education that goes with that with years
7 of law enforcement but absolutely cannot be picked up by
8 my chief as a deputy unless he goes through a
9 POST-certified academy. Not even allowed to do an
10 equivalency match-up of testing. That's how I feel it's
11 mandated.

12 MEMBER LUJANO: But that's not the issue before
13 us.

14 DEPUTY MACCOUN: It still has to be put on by
15 somebody.

16 MEMBER LUJANO: The law says you need to be
17 POST-certified. And that's not what's before us right
18 now.

19 DEPUTY WILCZYNSKI: My understanding, it was
20 twofold out of last time, which was, number one, the
21 training -- you guys were saying the training is not
22 mandated. You, as County of Sacramento, could just fall
23 out of POST. And that's not practical. I think that's
24 what she's coming, really, back to.

25 And the second part is, in fact, to be a peace

1 officer in California you have to meet that mandated
2 training.

3 MEMBER LUJANO: So the individual needs to have
4 the POST training but the agency doesn't?

5 DEPUTY WILCZYNSKI: Can't hire you without it.

6 MEMBER LUJANO: The agency doesn't have to
7 provide it?

8 DEPUTY WILCZYNSKI: Somebody does. Somebody has
9 to provide it.

10 MEMBER LUJANO: Somebody does. But the issue
11 here is that you want to -- that there's a mandate to the
12 agency to provide the training?

13 DEPUTY WILCZYNSKI: No. The mandate is that
14 the -- like we said last time. It may not be mandated
15 that Sacramento County Sheriff's Department has to
16 provide the training, but someone somewhere has to
17 provide it, and that's because it is mandated training.

18 DEPUTY MACCOUN: And what is the most
19 cost-effective thing for the taxpayers.

20 MEMBER LUJANO: You have to ask the general
21 counsel.

22 DEPUTY WILCZYNSKI: And, logically, every one of
23 our people have to go through it, including our
24 instructors.

25 MS. GEANACOU: Could I add something? This is

1 Susan Geanacou, Department of Finance.

2 As the Commission staff analysis points out,
3 there are two discretionary decisions that a jurisdiction
4 makes in analyzing this test claim. One is whether or
5 not initially to participate in POST. The second, which
6 is essentially the focus of this test claim, is whether
7 to -- if they elect to participate in POST, whether they
8 then choose to offer POST-certified training in-house at
9 their own facilities, with their own trainers. And
10 that's the scope of the test claim today.

11 And there's a lot of testimony in the record,
12 written and, I believe, verbal, from prior proceedings,
13 that there are many ways in which a jurisdiction that
14 chooses to be POST-certified may discharge a training
15 requirement, if they have one, which does not include
16 providing it themselves.

17 So I would, as staff of Department of Finance,
18 recommend that you approve the staff analysis because it
19 is, indeed, discretionary on the part of the
20 jurisdictions to offer this training in-house.

21 MEMBER FILLMORE: It seems to me that that's
22 almost a circular argument, that we would say it's not --
23 it's within Sacramento County's discretion as to whether
24 or not they will offer POST-academy type instruction so
25 we're going to deny it to Sacramento County, and then if

1 a community college comes in and says, okay, well,
2 because all of the counties have decided that they're no
3 longer going to offer this, we have to offer it now, but
4 we're going to say, well, no, it's really in your
5 discretion because technically the counties could decide
6 to do it as well. How do we reconcile that, that at some
7 point in time somebody has to offer the POST training?

8 DEPUTY WILCZYNSKI: Because it's mandated.

9 MS. SHELTON: Can I clarify that? These are
10 regulations issued by POST. They're not only dealing
11 with basic training. They also are -- you know, the
12 regulations require that the trainers of continuing
13 education courses for members of POST have to be trained
14 as well.

15 So the argument seems to be focused only on
16 basic training, and that's a very small portion of this
17 claim. I mean, you do need to discuss it, but the other
18 portion is for the continuing education claims of the
19 trainers. And those historically, in the past, the
20 Commission has denied, because there's no requirement in
21 law for these agencies to be members of POST.

22 With regard to the basic academy, many local
23 agencies, counties, offer -- some offer basic training
24 for their employees, but many do not. And we do have two
25 members of POST here that are wanting to provide

1 testimony that may be able to help you on that issue.

2 But community colleges provide that training for
3 a fee for the student. You have some of the county
4 employees -- or employers wanting to provide that
5 training. So there are many options available to provide
6 the basic training to individuals who want to become
7 peace officers.

8 DEPUTY MACCOUN: Well, and part of what happened
9 was --

10 MS. HIGASHI: Could I just ask for all witnesses
11 who wish to speak, put up your hand and wait until the
12 Chair recognizes you, please? And state your names for
13 the record before you begin to speak.

14 CHAIRMAN GENEST: All right. Go ahead.

15 DEPUTY MACCOUN: Cheryl Maccoun.

16 What started this whole thing going was POST
17 changed its requirements for the instructors that are
18 allowed to teach in the academies. There were new
19 requirements placed on who was allowed to deliver the
20 instruction to the recruits in the classroom.

21 There was a lot of hoops that we had to jump
22 through, a lot of training that had to be provided to the
23 instructor student, so to speak, you know, the ones that
24 were going to be providing the recruits training, a lot
25 of files that needed to be built and procedures that

1 needed to be maintained.

2 And there's a standardized curriculum right
3 now -- correct, Bryon? -- that is required for
4 instructors who are going to teach in the academies to
5 complete in order to be certified to teach in the
6 academy.

7 CHAIRMAN GENEST: Let's hear from POST now.

8 MR. GUSTAFSON: Bryon Gustafson, Commission on
9 POST.

10 The discussion is -- is going all over the
11 place. And if it were a mandate, everyone would have to
12 do it. But it's discretionary, because only a limited
13 number of our clients, and those who aren't even our
14 clients, so when we discuss community colleges, there's
15 no mandate that they be a part of our system. They're
16 not required to.

17 And then the other thing that I was wanting to
18 point out is that we have a private sector that provides
19 much of our training. So while it may be cost-effective
20 for Sacramento County to do it, it doesn't constitute a
21 mandate.

22 And so when we have 58 counties, and only 44 of
23 them have a basic academy, and when we have 600-plus
24 agencies, and perhaps 300 or 400 of them provide their
25 own certified training, we can see that there's a choice,

1 because those who choose not to do that training are
2 still part of our system and they aren't in violation of
3 any regulation.

4 So, for example, I work for an agency that did
5 not provide any POST-certified training, and it was our
6 option to visit larger agencies or other institutions
7 that did that. And there are certainly costs involved.
8 But it's a choice on whether or not you want to do it.

9 So yes, somebody has to provide the training,
10 but there isn't a state mandate that people in the POST
11 system all provide the training.

12 CHAIRMAN GENEST: One more and then let's try
13 to --

14 DEPUTY MACCOUN: Okay. I have a couple of quick
15 questions for Bryon.

16 CHAIRMAN GENEST: Well, why don't you ask the
17 questions to the Commission.

18 DEPUTY MACCOUN: Okay. I believe that it's true
19 that yes, colleges can provide the training, but they
20 also have to hire their instructors under the POST
21 mandates or the POST requirements. The instructors have
22 to fulfill those POST requirements.

23 Additionally, POST has the authority over these
24 community colleges and these other things to de-certify
25 them. They have de-certified at least, that I'm aware

1 of, two college academy programs because they were not
2 fulfilling the POST requirements.

3 CHAIRMAN GENEST: Okay. Do we have other people
4 that have not yet spoken?

5 MR. BURDICK: Mr. Chairman and Members of the
6 Commission, Allan Burdick on behalf of the California
7 State Association of Counties SB 90 Service.

8 A couple things. I'd like to get us back to the
9 fact that we're talking -- this issue centers around the
10 whole question of practical compulsion.

11 I think, you know, this is a -- this is a very
12 major issue, I think, in terms of -- if the Commission
13 does not feel that there's practical compulsion as
14 relates to POST mandates, then, you know, I don't think
15 practical compulsion probably plays a role in any
16 program.

17 I think if you ask just about any local official
18 and law enforcement agency whether or not you have to
19 meet those additional requirements that POST regulations
20 cause, I think they'd tell you practically they have no
21 alternative.

22 And one other thing I wanted to clarify a little
23 bit, because we have a new member today, who we're very
24 pleased to have, from OPR, I think, and Mr. Genest, on
25 the issue that, you know, I think we're getting confused

1 about, as Camille was trying to point out, that it
2 doesn't matter when the mandate -- initial mandate was
3 created, whether it was pre '75 or not. It's whether or
4 not there's an increased level of service afterwards.

5 And that's the argument we're making is that
6 these regulations come downstream after that initialing
7 and require something.

8 So it's kind of like if they said originally you
9 have to have a POST -- you have to have somebody join
10 POST and they have to have a bachelor's degree, that
11 level, and then later on they decide, oh, you're going to
12 have to have a master's degree and you have to meet these
13 requirements, and then the question gets back, can you
14 charge the officer? Do they have that responsibility to
15 pay for it or does the local agency?

16 And I think if you look at what's going on in
17 California, I don't think anybody can really argue that,
18 I mean, straight-faced, there isn't a practical
19 compulsion that you have to belong, you have to meet
20 those POST requirements, that if you did not, the
21 consequences, I think, would be severe.

22 So, you know, I think we need to get back to
23 that issue. And I think this is a major issue. While
24 this is a smaller test claim piece of it, this is coming
25 back to this Commission with an issue that was discussed

1 by a prior Commission, many years ago, which local
2 agencies believe was wrong, and bring it back and want
3 to -- you know, I think this is an opportunity again to
4 deal with this issue of practical compulsion. And that,
5 I think, underlies a number of cases that we've had. And
6 I'd hope that we'd just put a focus on that.

7 CHAIRMAN GENEST: Let's hear from our counsel on
8 that.

9 MS. SHELTON: Practical compulsion has been held
10 to be very narrow. There has to be yes/no alternatives.
11 But the consequence also has to be there, and the
12 consequence has to be certain and severe.

13 The only example we have of that was in the
14 City of Sacramento case where federal law said that if
15 you did not comply with the unemployment statute, then --
16 or unemployment insurance statute, then you would have
17 double taxation for every single one of your employers in
18 California.

19 That consequence was certain because it was
20 listed in statute as a consequence. We have no evidence
21 in the record or in the law of any consequence for an
22 agency to not participate in POST or to not provide any
23 POST training.

24 CHAIRMAN GENEST: Okay. I think we've heard
25 enough, personally. There's been a lot of discussion,

1 and there's a big record here. And this is the second or
2 what -- second hearing? Third hearing?

3 Are there comments from the Commission?

4 MEMBER GLAAB: Yes. Mr. Chairman and Members,
5 I'm not insensitive to the cost for training. It
6 certainly is a big issue up and down the state, certainly
7 the country in the post 9/11 environment, so I'm very
8 sensitive to those costs.

9 However, I do know -- and I think staff has done
10 a great job in outlining the fact that there is
11 discretion.

12 And I understand the practical compulsion, and
13 the people -- the agencies have decided they're going to
14 go with the state POST certification, but there still
15 remains that discretion.

16 And I am not moved to deny the -- to support --
17 I am moved to support the staff recommendation, because
18 there is discretion, and I think that there are a number
19 of police departments and sheriff's agencies that do not
20 participate in the POST program, and it is discretion.

21 And I appreciate the POST representative
22 mentioned that private sector is, in fact, responding to
23 this new environment that we're all in, and there are
24 available courses that individuals can take on their own
25 and move forward. So I will be supporting the staff

1 recommendation. Thank you.

2 MEMBER WORTHLEY: Mr. Chairman, I don't think
3 anybody will deny that I'm probably a strong supporter of
4 local government, but I am also compelled that -- I don't
5 find the practical compulsion.

6 I think what we have here is a historic approach
7 that's been used, but that doesn't make it -- that
8 doesn't mean there's no other alternatives.

9 Agencies have done this. They don't have to do
10 it. There's other ways of doing it. I mean, as I say,
11 we have many other situations where employees who have to
12 meet certain standards are responsible for themselves to
13 meet those standards. They have to pay for their own
14 education.

15 It becomes a matter of negotiation with
16 employees. In other words, if the county wants to
17 provide services, they can -- they can negotiate that as
18 far as their -- part of their compensation package.

19 I don't see that there's a practical compulsion
20 where they have no alternative. There are alternatives.

21 They made a determination at one point in time.
22 Those agencies who chose to do their own training made a
23 determination it was more cost-effective to do that than
24 send their people to the POST academy or some other
25 institution.

1 That was a financial decision that they made,
2 but it was not one that they had to make. They didn't
3 have any -- it wasn't like they had no alternative. They
4 do have an alternative.

5 As they look at these things coming down the
6 road, they may just determine it's not cost-effective to
7 do that. It makes more sense to do something different.
8 Turn it over to the private sector. They'll go someplace
9 else.

10 Anyway, I just am not -- I don't see where
11 there's an actual -- no alternative for the -- for the
12 agencies, and therefore, I don't find the practical
13 compulsion which we'd have to find in order to deny
14 the -- or to support the claim.

15 CHAIRMAN GENEST: Other comments? Let's have a
16 motion to --

17 MEMBER OLSEN: I'll move adoption.

18 MEMBER GLAAB: Second.

19 CHAIRMAN GENEST: Let's have a roll call.

20 MS. HIGASHI: Mr. Fillmore?

21 MEMBER FILLMORE: Yes.

22 MS. HIGASHI: Mr. Glaab?

23 MEMBER GLAAB: Yes.

24 MS. HIGASHI: Mr. Lujano?

25 MEMBER LUJANO: Yes.

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MS. HIGASHI: Ms. Olsen?

MEMBER OLSEN: Yes.

MS. HIGASHI: Mr. Worthley?

MEMBER WORTHLEY: Yes.

MS. HIGASHI: Mr. Chivaro?

MR. CHIVARO: Yes.

MS. HIGASHI: Mr. Genest?

CHAIRMAN GENEST: Yes.

MS. HIGASHI: Motion carried.

CHAIRMAN GENEST: Statement of decision on the next item.

MS. HIGASHI: Item 9 is the proposed statement of decision.

MS. BORZELLERI: The only issue before the Commission on this item is whether the statement of decision accurately reflects the Commission's decision on the previous item. Staff will make minor changes to the final statement of decision to reflect the witnesses' testimony and the vote count.

CHAIRMAN GENEST: Do we have a motion?

MEMBER WORTHLEY: So move.

MEMBER FILLMORE: Second.

CHAIRMAN GENEST: Without objection, that's adopted. Let's go to . . .

MS. HIGASHI: Item 10. And Ms. Borzelleri will

1 also present this item.

2 MS. BORZELLERI: This test claim addresses the
3 same regulations from the previous items that were
4 adopted by POST that require specified training of
5 certain POST instructors and key staff of POST training
6 academies.

7 Staff makes the same recommendation as it did on
8 the last, which is to deny the test claim. Staff
9 recommends the Commission adopt the analysis and deny the
10 claim.

11 CHAIRMAN GENEST: We should hear from
12 Mr. Petersen, I guess. Right?

13 MR. PETERSEN: Yes. Keith Petersen representing
14 the test claimant. Should we do introductions?

15 CHAIRMAN GENEST: Okay.

16 MR. DEAL: Alan Deal representing the Commission
17 on Peace Officer Standards and Training.

18 MS. GEANACOU: Susan Geanacou, Department of
19 Finance.

20 MR. GUSTAFSON: Bryan Gustafson, Commission on
21 POST.

22 CHAIRMAN GENEST: The floor is yours.

23 MR. PETERSEN: Thank you. Good morning. This
24 test claim involves the same legal issues as the one
25 we've heard for the past four months. And today it's

1 filed by a community college as a curriculum item.
2 Therefore, the legal analysis provided by staff is
3 inapplicable and illogical.

4 Curriculum is not controlled by the state. The
5 Chancellor's Office does not mandate any curriculum at
6 the community colleges. Therefore, to require as a
7 threshold matter that the curriculum be mandated is
8 illogical.

9 There are no court cases, to my recollection,
10 which apply the practical compulsion test or the
11 compulsion test, strict compulsion, to curriculum
12 matters. The Kern case cited was not a curriculum
13 matter. The City of Merced is a county office case. It
14 has nothing to do with curriculum.

15 The California courts, about 22 years ago, in
16 the case of Long Beach, said that the public school
17 system is a program under the definition of the state
18 constitution for XIII-B, Section 6 purposes and the
19 community colleges are part of the public school system
20 by statute.

21 There is no court analysis for curriculum.
22 There is some court information in their decisions on
23 curriculum matters. We had a court case decided in
24 December of 2004. It was a San Diego Unified case on
25 graduation requirements. And the judge in that case said

1 that state mandates can't burden or impact local
2 decision, local choice on curriculum. The public school
3 system is not required to absorb new state mandates as
4 they affect the local choice and the local curriculum.

5 So the staff's court case analysis is
6 inappropriate and this case should be reanalyzed under
7 the Long Beach and the San Diego case.

8 CHAIRMAN GENEST: Well, let's get the response
9 to that.

10 MS. BORZELLERI: Well, we haven't heard this
11 argument.

12 MS. SHELTON: Let me respond.

13 MS. BORZELLERI: Thank you, Camille.

14 MS. SHELTON: The Long Beach case did hold up.
15 Education was a governmental function that qualified for
16 reimbursement under Article XIII-B, Section 6. But that
17 case dealt with K-12 statutes. And before the court
18 there were no community college districts. So the
19 finding is relative only to K-12, number one.

20 Number two, the courts have discussed a
21 practical compulsion idea for state mandates in general.
22 Yes, the facts under each of the two cases that have been
23 brought forward under the practical compulsion analysis
24 have not dealt with curriculum. But the way the court
25 has phrased the standard for funding a state-mandated

1 program applies to all state-mandated cases under the
2 interpretation of Article XIII-B, Section 6, so it's not
3 limited to the facts of those two particular cases.

4 MS. BORZELLERI: I think, in addition, we really
5 do have an underlying decision. I mean, I know you're
6 trying to argue that it's not.

7 MR. PETERSEN: The Bud case?

8 MS. BORZELLERI: No. The underlying decision to
9 provide that curriculum.

10 MR. PETERSEN: I'm sorry. You lost me.

11 MEMBER WORTHLEY: You're treating it as
12 discretionary. The decision by the community college to
13 offer this course is discretionary. Therefore, there
14 would be no --

15 MR. PETERSEN: All community college curriculum
16 is discretionary by law. So how do you go to a
17 compulsion -- or practical compulsion test if all of your
18 curriculum, all of your program under the constitution is
19 discretionary?

20 CHAIRMAN GENEST: I don't understand that. That
21 sounds like a -- so we obviously -- if it wasn't
22 mandated, we didn't have the authority to mandate it.

23 MR. PETERSEN: No, that's not true. The state
24 provides general support for the public school system,
25 which includes community colleges. Community colleges

1 are eligible for mandated reimbursement when the state
2 passes a mandate on the community college, and they did.
3 In fact, there are requirements for continuing education
4 for the faculty in the POST program.

5 CHAIRMAN GENEST: So you're -- well, I'm not
6 following that. Let's continue. Let me go down my list
7 here. Mr. Gustafson.

8 MR. GUSTAFSON: Bryan Gustafson, Commission on
9 POST.

10 The curriculum that is required is required if
11 someone chooses to certify this training as POST
12 training. The college can offer any curriculum it wants.
13 It only has to offer our curriculum if it wants our
14 certification. And there's certainly no mandate. There
15 are many community colleges that don't. There are many
16 four-year colleges that don't. Sacramento State does
17 offer POST-certified courses. Cal State Monterey Bay
18 does not. There are choices and it's entirely voluntary.

19 CHAIRMAN GENEST: Ms. Geanacou.

20 MS. GEANACOU: I would echo what Mr. Gustafson
21 just said. And to the extent this goes beyond just a
22 curriculum issue, and I'm not sure that the claimant
23 intends it to.

24 To the extent it's provided on community
25 colleges for purposes of allowing their own peace

1 officers to meet POST standards, I'll just remind the
2 Commission that community college districts are not
3 required to form police departments under the Education
4 Code. The particular section is 72330.

5 MR. PETERSEN: That's a red herring. These are
6 instructional programs.

7 CHAIRMAN GENEST: Which are not required to
8 provide --

9 MR. PETERSEN: Community colleges are not
10 required to provide any instruction other than ones they
11 choose to provide.

12 CHAIRMAN GENEST: That's where I'm getting
13 confused. If they're not requiring you to do something,
14 how are we mandating it?

15 MR. PETERSEN: Well, this Commission approved
16 the enrollment fee collection mandate last year. And as
17 a mandate to collect enrollment fees from students who
18 are attending courses they're not required by law.

19 I mean, it's -- you've got to get past that
20 hurdle that curriculum is not controlled by the state,
21 but the state is layering on mandates for the curriculum
22 that is chosen by the local colleges.

23 CHAIRMAN GENEST: But there is no requirement to
24 conform to the POST . . .

25 MEMBER WORTHLEY: There is if you offer a class.

1 MR. PETERSEN: If they offer the class, the
2 faculty has to be --

3 CHAIRMAN GENEST: That's not POST certified.

4 MR. PETERSEN: That's not the issue. I mean,
5 K-12 curriculum is partially controlled by the state. I
6 mean, that's not -- I think constitutionally, as a matter
7 of case law, that's not relevant to curriculum issues.

8 Curriculum is the program, which is the subject
9 of -- curriculum is a local choice, absolutely, in
10 community college. And it's partially local choice in
11 K-12. So you can apply a practical compulsion test to
12 whether they offer that class.

13 MS. BORZELLERI: We're not arguing with you
14 practical compulsion. I mean, you're --

15 MR. PETERSEN: Sure. You have Kern and Merced.

16 MS. BORZELLERI: No. We're saying it's an
17 underlying voluntary decision to do something that is
18 actually required. There's no legal compulsion here.
19 And we don't even get to a practical compulsion.

20 MR. PETERSEN: Okay. Well, you've lost me
21 again.

22 MS. BORZELLERI: If we use your argument, the
23 basis for your argument is that there's no underlying
24 discretionary decision.

25 MR. PETERSEN: No. My argument is, offering

1 curriculum is absolutely discretionary as to the
2 institution. And that's constitutionally correct. So
3 you can't use a compulsion test on something that's
4 absolutely discretionary, because you never get to the
5 mandate issue.

6 MS. BORZELLERI: But . . .

7 MS. SHELTON: I understand what he's saying,
8 believe it or not.

9 MR. PETERSEN: We've got one now.

10 MS. SHELTON: No, we've had these discussions in
11 court where the court will say, well, you know, the city
12 of Elk Grove, the state did not mandate the existence of
13 the city of Elk Grove. That was a voluntary decision on
14 the part of the local entities to create the city of
15 Elk Grove, so why are they entitled to mandate
16 reimbursement?

17 And that's sort of the same thing that
18 Mr. Petersen is saying is that you have an underlying
19 voluntary decision.

20 And it is always a debate in our office and a
21 debate in each one of these cases, how far back do you go
22 to find that initial triggering event? What is the
23 initial triggering event? Is it when the entity first
24 exists or was it -- you know, what -- how are we defining
25 a program?

1 MEMBER WORTHLEY: Mr. Chairman, if I might look
2 at this -- I'm sorry. I didn't mean to cut you off.

3 MS. SHELTON: No, go right ahead.

4 MEMBER WORTHLEY: Well, I was just going to say,
5 if you look at just our previous case, we don't look at
6 the police department and say your primary responsibility
7 is training. No. We look at the police department and
8 say your primary responsibility is law enforcement.

9 When we look at public education, what's the
10 primary responsibility of public education? It's
11 education and training. That is their job. That's what
12 they're there for.

13 To use this argument that because it's not
14 mandated, then you could say, well, there's no need for
15 community colleges. They don't have to offer a class.

16 Well, that doesn't make sense. I mean, if we're
17 going to have community colleges and we're going to fund
18 community colleges, then they're there for the purpose of
19 training and education.

20 Now, they can elect to choose which courses they
21 want to offer, but I just see a distinction here between
22 the previous case of discretion and here.

23 Here the purpose of a community college is
24 teaching and training. That's why they exist. And here,
25 when they go to exercise their purpose of existence,

1 which is to offer a course which would be POST certified,
2 we're now saying, oh, but because you weren't compelled
3 to teach that class, you're not going to be able to --
4 we're not going to treat it as a legal compulsion, as
5 discretionary on your part. I just think -- I see that
6 as very distinct.

7 MS. SHELTON: Okay. And it's an argument. All
8 I'm saying is, you know, Mr. Petersen referred to the
9 lawsuit, the 2004 lawsuit filed by San Diego Unified
10 School District and the graduation requirements case.

11 That case is factually distinguished from this
12 case because the statute there did mandate a particular
13 course on high schools.

14 Here you don't have -- and the judge was very
15 concerned -- we went around and around a couple of
16 briefings on that, on what was mandated by state law.
17 And we were talking about mandated curriculum.

18 And the judge did say that if we were talking
19 about curriculum that was within their discretion, it
20 would be a completely different issue.

21 Here, this is a completely different issue where
22 we don't have any mandated curriculum for the community
23 college. They're not required to provide any POST
24 training at all.

25 MEMBER WORTHLEY: But we want them to.

1 MS. SHELTON: I know. I know.

2 MEMBER WORTHLEY: I mean, we want them to do
3 that. I mean, that's the purpose. If we're going to
4 tell the -- if we're going to tell the public agencies
5 now, oh, you don't have to provide this, they can go
6 someplace else to take it. Oh, but don't try these
7 community colleges, because they're not going to be able
8 to do it anymore because of POST requirements that are
9 put upon them.

10 To me it just doesn't -- it's a disingenuous
11 argument. They're in the business of educating. This is
12 an educational issue. It's a mandate by the state that
13 if you're going to teach this class, you have to do these
14 things.

15 In my mind there's a distinction made here. I
16 don't see -- I agree with him. If it's all
17 discretionary, then you can't use the compulsion
18 argument, but it's still a mandate. If they're going to
19 teach the class, they're mandated to make these changes.
20 And, therefore, they should be compensated for it.

21 MEMBER FILLMORE: A question for staff. Maybe
22 you can't answer hypotheticals. But hypothetically, if
23 the state said that if a community college decides to
24 teach remedial English, you have to have additional
25 instructor training, would we consider that to be a

1 reimbursable mandate? Because my understanding is
2 community colleges aren't required to teach English, yet
3 I think most -- maybe -- I'm assuming most people here
4 would assume that we expect community colleges to teach
5 English. So is the question here whether or not POST is
6 critical to the mission of the community colleges?

7 MS. SHELTON: I don't know how to answer your
8 question.

9 MR. PETERSEN: Oh, I do.

10 MS. SHELTON: I'm sure you do. We have never
11 had a claim, that I'm aware of, come before the
12 Commission dealing specifically with curriculum. I know
13 Mr. Petersen talked about the enrollment fee test claim.

14 MR. PETERSEN: But that's not curriculum.

15 MS. SHELTON: Which is not curriculum. Correct.
16 So, you know, we've never had that case. And I don't
17 want to answer it today, because I would have to look
18 into it and research it a lot more.

19 CHAIRMAN GENEST: Mr. Petersen, any response?

20 MR. PETERSEN: Yes. To the member, the way the
21 Ed Code is set up, the community college district, upon
22 information and belief, decides what programs they want
23 to offer based on local need and other issues.

24 And as to whether remedial English is more
25 important than POST, that's not a decision for anybody

1 except the community college. Certainly not us here
2 today.

3 Each course is selected by each community
4 college. The associate program, the course content is
5 monitored and reviewed by the Board of Governors to meet
6 certain standards, but the Board of Governors does not --
7 and I know this because I have 30 other test claims
8 pending before the Commission, and half of them are on
9 Board of Governors issues. Board of Governors does not
10 mandate remedial English. It does not mandate POST. It
11 mandates nothing for the colleges. So I'm back to
12 my original --

13 CHAIRMAN GENEST: Let me try a different
14 hypothetical. You have licensed vocational nurse courses
15 in many community colleges. You're not required to have
16 them, but you do have them, I assume.

17 MR. PETERSEN: I don't work in the community
18 college. I believe there are LVN courses, yes.

19 CHAIRMAN GENEST: Okay. So if the community
20 colleges choose to do that, they don't have to teach,
21 let's say, chemistry. They can have an LVN training
22 program that doesn't teach chemistry. Their LVNs would
23 never pass the state licensing requirements if they
24 hadn't taken chemistry. But you still have the
25 discretion to do it.

1 Do you -- would you consider the state licensing
2 for LVNs to impose a mandate on community colleges
3 because they require people to understand chemistry?

4 MR. PETERSEN: I would suggest that an LVN
5 program that didn't meet the LVN requirements probably
6 wouldn't be approved by the Board of Governors.

7 CHAIRMAN GENEST: That's probably true. But the
8 point is, I don't think that's a mandate and I don't see
9 how this is a mandate if you don't have to teach the
10 course but you could choose to teach the course and teach
11 it without POST certification. It may not be a course
12 that anyone would choose to take, but that's not the
13 issue.

14 MR. PETERSEN: That's why earlier, Mr. Genest, I
15 suggested you have to get past that point. Curriculum is
16 discretionary, and you can't use the gun that they pull,
17 and that is the triggering of whether it was passed or it
18 wasn't passed. That gun's not even in the room.

19 CHAIRMAN GENEST: I guess that's where my
20 confusion is.

21 MR. PETERSEN: That's the part you have to get
22 past.

23 CHAIRMAN GENEST: You keep urging me to not --
24 to recognize that curriculum is discretionary, and yet
25 you say we have imposed a mandate on your curriculum. I

1 can't make those two things fit in the --

2 MR. PETERSEN: An imposed mandate on the faculty
3 who instruct that curriculum.

4 CHAIRMAN GENEST: Well, okay.

5 MR. PETERSEN: That's the distinction.

6 CHAIRMAN GENEST: We're getting into the angels
7 on a pin here, so --

8 MR. PETERSEN: I'm sorry. Isn't that what we do
9 here, sir?

10 CHAIRMAN GENEST: Let's not do it for any longer
11 than we have to here.

12 Do we have any other comments or questions from
13 the Commissioners? Do we have a motion? I would
14 entertain a motion to --

15 MEMBER LUJANO: I'll make a motion to approve.

16 CHAIRMAN GENEST: Okay. Second?

17 MR. CHIVARO: I'll second.

18 CHAIRMAN GENEST: Can we have a roll call on
19 that?

20 MS. HIGASHI: I just wanted to clarify. This is
21 a motion to approve the staff recommendation?

22 CHAIRMAN GENEST: The staff recommendation.

23 Yes.

24 MS. HIGASHI: Mr. Glaab?

25 MEMBER GLAAB: No.

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1 MS. HIGASHI: Mr. Lujano?

2 MEMBER LUJANO: Yes.

3 MS. HIGASHI: Ms. Olsen?

4 MEMBER OLSEN: Yes.

5 MS. HIGASHI: Mr. Worthley?

6 MEMBER WORTHLEY: No.

7 MS. HIGASHI: Mr. Chivaro?

8 MR. CHIVARO: Yes.

9 MS. HIGASHI: Mr. Fillmore?

10 MEMBER FILLMORE: No.

11 MS. HIGASHI: And Mr. Genest?

12 CHAIRMAN GENEST: Yes.

13 MS. HIGASHI: Motion carries.

14 Item 11, Ms. Borzelleri, Proposed Statement of
15 Decision.

16 MS. BORZELLERI: The only issue before the
17 Commission on this item, the statement of decision,
18 actually -- accurately reflects the Commission's decision
19 on the previous item. Staff will make minor changes to
20 the final statement of decision but reflecting witnesses'
21 testimony and vote count.

22 CHAIRMAN GENEST: Do we have a motion to adopt?

23 MEMBER OLSEN: So move.

24 MR. CHIVARO: Second.

25 CHAIRMAN GENEST: Roll call.

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1 MS. HIGASHI: Mr. Glaab?
2 MEMBER GLAAB: No.
3 MS. HIGASHI: Mr. Lujano?
4 MEMBER LUJANO: Yes.
5 MS. HIGASHI: Ms. Olsen?
6 MEMBER OLSEN: Yes.
7 MS. HIGASHI: Mr. Worthley?
8 MEMBER WORTHLEY: No.
9 MS. HIGASHI: Mr. Chivaro?
10 MR. CHIVARO: Yes.
11 MS. HIGASHI: Mr. Fillmore?
12 MEMBER FILLMORE: Yes.
13 MS. HIGASHI: Mr. Genest?
14 CHAIRMAN GENEST: Yes.
15 MS. HIGASHI: Motion carries.
16 CHAIRMAN GENEST: So where does that leave us?
17 MS. HIGASHI: It leaves us at item 12. If you'd
18 like, we can take a five-minute break.
19 CHAIRMAN GENEST: You read our minds. Very
20 good. Let's take a five-minute break.
21 (Recess taken, 11:31 to 11:38 a.m.)
22 MS. HIGASHI: We're on item 12. Ms. Borzelleri
23 will present this item as well.
24 MS. BORZELLERI: Thank you. This test claim
25 addresses statutes that expanded the applicability of

1 Labor Code Section 4850, which entitles specified local
2 safety officers to a leave of absence without loss of
3 salary for up to one year when disabled in the course of
4 employment, which is a workers' compensation benefit.

5 Staff finds that consistent with state mandate
6 case law. The test claim statutes do not provide an
7 enhanced service to the public and, therefore, do not
8 impose a reimbursable state-mandated program.

9 The county continues to argue that the increased
10 benefits for local safety officers do provide an enhanced
11 service to the public. They brought in additional
12 documentation. However, with regard to state mandates,
13 the California Appellate and Supreme Court cases have
14 clearly and consistently held that additional cost for
15 increased employee benefits, in the absence of some
16 increase in the actual level of quality of governmental
17 services provided to the public, do not constitute an
18 enhanced service to the public and, therefore, do not
19 impose a new program or higher level of service in an
20 existing program. The Commission is bound by this case
21 law.

22 Staff, therefore, recommends the Commission
23 adopt the revised final staff analysis and supplemental
24 staff analysis and deny this test claim.

25 On May 29th, the county submitted a late filing

1 with additional comments which were addressed in a
2 supplemental staff analysis. Those comments and the
3 supplemental analysis were sent to interested parties and
4 are available on the table. They're green copies over
5 here.

6 The staff recommendation to deny the test claim
7 did not change.

8 Will the parties please state your name for the
9 record.

10 MR. PALKOWITZ: Good morning. Art Palkowitz on
11 behalf of San Diego Unified School District.

12 MR. KAYE: Good morning. Leonard Kaye on behalf
13 of the County of Los Angeles.

14 MR. ROSSI: Alex Rossi, County of Los Angeles,
15 Chief Administrative Office.

16 MS. CASTANEDA: Carla Castaneda, Department of
17 Finance.

18 MS. FEREBEE: Donna Ferebee, Department of
19 Finance.

20 CHAIRMAN GENEST: And my notes have us starting
21 with Mr. Kaye.

22 MR. KAYE: Thank you.

23 Good morning. On June 29th, 2001, some time
24 ago, the County of Los Angeles, just months before the
25 tragic events of 9/11, sought reimbursement for the

1 special protection the legislature specifically ordered
2 for certain public safety personnel placed in harm's way.

3 In the test claim we filed with the Commission,
4 we detailed and documented the new benefits afforded
5 airport, harbor, and other special classes of public
6 safety personnel. We computed the increased costs we
7 incurred in providing what the legislature had promised,
8 a leave of absence without a loss of salary for up to one
9 year when disabled by injury or illness arising out of --
10 in the course of their perilous employment.

11 Commission staff, in their March 22nd, 2007
12 analysis, found that the test claim legislation
13 constituted a new program, a threshold requirement for
14 finding reimbursable costs mandated by the state as
15 defined by Government Code 17514.

16 Specifically, staff found, on page 9 of that
17 analysis, that the test claim legislation does constitute
18 a program that is subject to Article XIII-B, Section 6 of
19 the California Constitution.

20 Staff went on to say that the requirements --
21 also on page 9 -- the requirements imposed by the test
22 claim legislation are carried out by local government
23 agencies that employ the specified local safety personnel
24 who are entitled to the benefit and do not apply
25 generally to all residents and entities of the state as

1 did the requirements for workers' compensation
2 unemployment insurance benefits that were the subject of
3 the County of Los Angeles case.

4 We concur in staff's finding that the resulting
5 benefit costs here are not incidental costs which all
6 California employers must bear in compensating their
7 employees. Here the benefits claimed are solely and
8 exclusively governmental benefits, benefits for
9 performing quintessential government services, protecting
10 local safety personnel placed in harm's way.

11 And we would like to note that staff finds in
12 their analysis issued just yesterday, on May 30, 2007,
13 that this extraordinary program is not a short-term
14 workers' compensation program.

15 Regarding the county's costs in the matter and
16 the details, we're very fortunate to have with us today
17 Alex Rossi, with our chief administrative office, that
18 will cover certain questions regarding our local
19 administration of this program, the costs that we bear.
20 And so I won't go into that at this point.

21 We further note in Commission's May 22nd staff
22 analysis that staff did not dispute the county's and the
23 Attorney General's contention that zealous performance of
24 duties actually enhances services to the public.

25 Nevertheless, staff found that it does not do so

1 for the purposes of Article XIII-B, Section 6. It does
2 not result in enhanced service to the public. And, of
3 course, we disagree with that finding.

4 We maintain that reimbursement is required
5 because the county has met all the conditions for finding
6 a reimbursable program under Article XIII-B, Section 6 of
7 the California Constitution, even the new one added by
8 staff that the program resulted in enhanced service to
9 the public.

10 We further agree that on March 22nd, when staff
11 found that the test claim legislation is clearly a
12 program subject to reimbursement, and we agree with
13 Commission's past decisions which have found reimbursable
14 state-mandated programs with the test claim legislation
15 does not apply generally to all residents and entities of
16 the state. And we find such decisions to be compelling
17 here, and we presented, which I won't go into great
18 detail now, but it's in the administrative record, the --
19 a very similar program, threats against peace officers,
20 where the Commission has previously found that to be
21 reimbursable for much the same reasons as we're relying
22 on now.

23 Finally, we note that where there is a statewide
24 policy of protecting and assisting peace officers and
25 their immediate families and other public safety

1 personnel, that it clearly meets the second prong of the
2 Supreme Court test.

3 And I lay out that prong here, and that's simply
4 to say, the second prong simply means that you can find a
5 reimbursable program which to implement a statewide
6 policy imposes unique requirements on local governments
7 and do not apply generally to all residents and entities
8 of the state.

9 And so we conclude and finally note that this
10 has been the Commission's past findings. It's
11 well-established law. The California Supreme Court has
12 rendered their judgment on this matter with the second
13 prong.

14 And also, we note that even further we saw that
15 we are, you know, sort of rushed. Both the Commission
16 staff and we have filed late filings in this. We just
17 received their -- on May 22nd we received their analysis,
18 which was changed from their other, previous analysis in
19 March. And then we filed a response and then they filed
20 a response just yesterday to that analysis.

21 So if you bear with us, we found -- late last
22 night we found an even further example of where this is a
23 type of reimbursable program. And I have copies here
24 should the Commission want to examine -- this is a
25 Commission case, by the way, and, you know, is an

1 accommodation. We have copies here, and you can either
2 ask that we distribute this or you can just enter it into
3 the record or what have you, so -- okay. Thank you.

4 And in this case, it deals with Labor Code 4856,
5 and the finding there is, it's also not a law of general
6 application but it is included within the codified
7 sections of the general -- the workers' compensation
8 section, codes and so forth.

9 So here this Commission found that this is a
10 reimbursable activity providing health, various other
11 benefits to the family members of law enforcement
12 officers, a type of compensation.

13 So thank you very much.

14 Alex?

15 MR. ROSSI: Alex Rossi, County of Los Angeles.

16 Commissioners, hello. We do believe -- the
17 County of Los Angeles believes that the increased costs
18 mandated by providing probation officers a 100 percent
19 salary under Labor Code Section 4850 is very easy to
20 calculate.

21 The county, prior to 2000 and the passage of
22 that law, paid 70 percent under county code
23 Section 6.20.070. The 100 percent, the increased cost
24 would simply be that. It would be the difference between
25 the 100 percent and the 70 percent. So we do believe the

1 30 percent would be reimbursable.

2 The county's workers' compensation program is a
3 self-insured program, and we actually have contracts with
4 third-party administrators. The provision of benefits
5 are initiated by the third-party administrators. They're
6 all licensed through the state to provide those benefits.

7 County staff also oversees those. Each of the
8 individuals on county staff that oversee the workers'
9 compensation contracts maintain their certificate of
10 achievement through the state, through the self-insurance
11 plan director of industrial relations.

12 Whether the benefits are paid through county
13 payroll departments, which is the case in 4850 and salary
14 continuation, or through the trust fund, it's still part
15 of the program that is administered by the County of
16 Los Angeles.

17 And I'd be happy to answer any questions the
18 Commissioners have at this time.

19 CHAIRMAN GENEST: Mr. Palkowitz.

20 MR. PALKOWITZ: Yes. Good morning. My name is
21 Art Palkowitz on behalf of San Diego Unified School
22 District.

23 I just wanted to touch upon the issue that is in
24 the staff analysis is that staff concludes that the new
25 requirements are not intended to provide an enhanced

1 service to the public.

2 In the package of material provided, the
3 Attorney General rendered an opinion on this statute and
4 the Attorney General said, and I quote: "The reason for
5 such exceptional treatment for policemen and firemen is
6 obvious. Not only are their occupations particularly
7 hazardous, but they undertake these hazards on behalf of
8 the public. The legislature undoubtedly sought to ensure
9 that policemen and firemen would not be deterred from
10 zealous performance of their mission or protecting the
11 public by fear of loss of livelihood."

12 So this is the response from the
13 Attorney General on this statute. And really, what it
14 indicates there is that there is an enhancement of
15 service to the public.

16 I just wanted to touch upon that issue.

17 CHAIRMAN GENEST: Okay. Finance?

18 MS. CASTANEDA: Carla Castaneda, Department of
19 Finance.

20 We concur with the staff analysis,
21 recommendation. We also believe that there are no new
22 activities for local agencies, that this is a program run
23 by state, private, other entities, workers' compensation,
24 and it's just an increased cost with no additional
25 activities required by local governments.

1 CHAIRMAN GENEST: How do you respond to the --
2 Mr. Palkowitz's rendition of what the Attorney General
3 said?

4 MS. FEREBEE: Well, I don't think that we would
5 dispute that peace officers perform an important duty to
6 the public, but I don't think that that really provides a
7 legal basis for deciding against the staff recommendation
8 when there's clear legal authority for the proposition
9 that increased cost of benefits do not equal enhancement.

10 CHAIRMAN GENEST: Well, the argument was a
11 little different. It was that by providing this you have
12 a more enthusiastic, you know, service provided to the
13 public. The people are less reluctant to put themselves
14 on the line if they know that they won't lose their
15 livelihood. That was the argument.

16 MS. BORZELLERI: Go ahead.

17 MS. SHELTON: There is a similar case authority
18 that the Commission's required to comply with. It's a
19 City of Richmond case which was decided by the
20 Third District Court of Appeal.

21 In that case the statute did increase the
22 benefits to peace officers killed in the line of duty, to
23 their survivors. And they were seeking reimbursement for
24 the increased cost of those benefits.

25 And in that case the court said, following a

1 long line of cases, that anytime the statute increases
2 the salary benefits, workers' comp benefits, or other
3 retirement benefits of the employee, it does not provide
4 a service to the public and it's not reimbursable.

5 MS. BORZELLERI: And we cannot ignore that case
6 law.

7 CHAIRMAN GENEST: Right.

8 MR. KAYE: Leonard Kaye, County of Los Angeles.

9 But I think the City of Richmond case, as I
10 understand it, had to do very broadly with many aspects
11 of the workers' comp. It was more of an increase in
12 benefits for the general law, which affected many
13 organizations throughout -- up and down the state.

14 The other thing that I'd like to point out is --

15 CHAIRMAN GENEST: Wait a minute. That's not
16 what I heard.

17 MS. SHELTON: I can read it to you from the
18 case.

19 MR. KAYE: Yeah. Okay. Please.

20 MS. SHELTON: Do you want me to?

21 MR. KAYE: Yes. Thank you.

22 MS. SHELTON: "The amendment eliminated local
23 safety members of PERS from the coordination provisions
24 for death benefits payable under workers' compensation
25 and under PERS whereby survivors of local safety members

1 of PERS who are killed in the line of duty receive both a
2 death benefit under workers' comp and a special death
3 benefit under PERS instead of only the latter."

4 CHAIRMAN GENEST: That's not at all what you
5 were saying. That's not the argument that he was --

6 MR. KAYE: Mr. Genest, upon a close analysis of
7 what chief legal counsel just read, it appears as though
8 she said in the beginning of her rendition that a benefit
9 was removed. This removal of the benefit made these
10 provisions just like many other laws of general
11 application. So I think, with all due respect, this is
12 not quite on point.

13 I think on point is what the courts have held is
14 a valuable employee benefit that does provide an employee
15 benefit, and that's in firefighter clothing and
16 equipment.

17 And basically, there, as I understand it, the
18 courts have said, just to get it in very plain English,
19 very simple, that a pair of pants is a pair of pants, but
20 a better pair of pants, that's fire retardant, is
21 reimbursable.

22 And we were reimbursed for many, many years
23 under this program. It's an employee benefit. It's an
24 employee protection. It's to encourage employees to
25 persevere under the job.

1 So we don't think that 4850 is subject to the
2 same types of analyses and cases as has been done in
3 other cases. We think it's more like the firefighter
4 case.

5 MEMBER FILLMORE: Well, my understanding,
6 Mr. Kaye, was that the firefighter protective gear was to
7 allow for the more efficient fighting of fires; i.e., if
8 you gave firefighters a hose, they're more likely to be
9 able to put out a fire.

10 MR. KAYE: Right.

11 MEMBER FILLMORE: Whereas, this is saying --
12 giving a workers' compensation benefit similar to if you
13 gave firefighters a bonus or a higher salary is going to
14 make them more passionate about their job and more
15 willing to fight fires.

16 MR. KAYE: That is one interpretation. But I
17 think the firefighters union would say that that was an
18 employee benefit. So that whether it would be encouraged
19 by having fire-retardant clothing to rush into a burning
20 building, I think, obviously, would incentivise them to a
21 zealous performance, just as fear of loss of livelihood
22 and providing -- making those provisions would
23 incentivise them now.

24 So that's our point, that when we go out and buy
25 health insurance or protections for that, whether it's in

1 the form of clothing and equipment or whether it's in the
2 form of nontangibles and so forth, I don't see any basic
3 fundamental difference.

4 MS. BORZELLERI: May I?

5 CHAIRMAN GENEST: Sure.

6 MS. BORZELLERI: Each of the cases that goes
7 along here were recently analyzed in San Diego Unified,
8 and I have a passage that's directly on point that I'd
9 like to read into the record. I'll make it as short as I
10 can.

11 "Subsequently, the Court of Appeal in the
12 City of Richmond, following the County of Los Angeles
13 case, and City of Sacramento, concluded that requiring
14 local governments to provide death benefits to local
15 safety officers under both the Public Employees
16 Retirement System and the workers' compensation system
17 did not constitute a higher level of service to the
18 public.

19 "The Court of Appeal arrived at that
20 determination even though, as might have been argued in
21 the County of Los Angeles case and the City of
22 Sacramento, such benefits may generate a higher quality
23 of local safety officers and thereby, in general, in an
24 indirect sense, provide the public with a higher level of
25 service by its employees.

1 "Viewed together, these cases" -- and it cites
2 all of the cases -- "goes to the circumstances simply
3 because the state law or order may increase the costs
4 borne by local government in providing services. This
5 does not necessarily establish that the law or order
6 constitutes an increased or higher level of the resulting
7 service to the public under Article XIII-B."

8 CHAIRMAN GENEST: What was it you were reading
9 from?

10 MS. BORZELLERI: This is San Diego Unified,
11 page 86 and 87.

12 MS. SHELTON: It's a Supreme Court --

13 MS. BORZELLERI: It's a Supreme Court decision.

14 MR. PALKOWITZ: Well, but it had nothing to do
15 with workers' comp benefits.

16 CHAIRMAN GENEST: It seemed on point to me.

17 MS. SHELTON: It was analyzing the mandate case
18 law. It was summarizing the mandate case law and the
19 existence of the case law to date.

20 CHAIRMAN GENEST: Let's see if we have comments
21 or questions from the members of the Commission.

22 All right. I think we're ready for a motion.

23 MEMBER FILLMORE: Motion to accept staff
24 recommendation.

25 MEMBER OLSEN: I'll second.

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1 CHAIRMAN GENEST: Roll call.
2 MS. HIGASHI: Mr. Lujano?
3 MEMBER LUJANO: Aye.
4 MS. HIGASHI: Ms. Olsen?
5 MEMBER OLSEN: Aye.
6 MS. HIGASHI: Mr. Worthley?
7 MEMBER WORTHLEY: No.
8 MS. HIGASHI: Mr. Chivaro?
9 MR. CHIVARO: Yes.
10 MS. HIGASHI: Mr. Fillmore?
11 MEMBER FILLMORE: Yes.
12 MS. HIGASHI: And Mr. Glaab had to leave early.
13 Mr. Genest?
14 CHAIRMAN GENEST: Yes.
15 MS. HIGASHI: Motion is carried.
16 Item 13, Proposed Statement of Decision.
17 Ms. Borzelleri.
18 MS. BORZELLERI: The only issue before the
19 Commission is whether the statement of decision
20 accurately reflects the Commission's decision on the
21 prior item. Minor changes will be made to the final
22 statement.
23 CHAIRMAN GENEST: Do we have a motion?
24 MEMBER OLSEN: So move.
25 MR. CHIVARO: Second.

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1 CHAIRMAN GENEST: Call the roll.

2 MS. HIGASHI: Mr. Lujano?

3 MEMBER LUJANO: Aye.

4 MS. HIGASHI: Ms. Olsen?

5 MEMBER OLSEN: Aye.

6 MS. HIGASHI: Mr. Worthley?

7 MEMBER WORTHLEY: Aye.

8 MS. HIGASHI: Mr. Chivaro?

9 MR. CHIVARO: Yes.

10 MS. HIGASHI: Mr. Fillmore?

11 MEMBER FILLMORE: Yes.

12 MS. HIGASHI: Mr. Genest?

13 CHAIRMAN GENEST: Yes.

14 MS. HIGASHI: Motion is carried.

15 Item 14, Proposed Parameters and Guidelines.

16 Post Conviction, DNA Court Proceedings.

17 Assistant Executive Director Nancy Patton will
18 present this item.

19 MS. PATTON: Good morning. On July 28th, 2006,
20 the Commission adopted a Statement of Decision for this
21 program, finding that the test claim legislation imposes
22 a reimbursable state-mandated program on local agencies
23 within the meaning of Article XIII-B, Section 6, of the
24 California Constitution and Government Code Section 17514
25 for activities related to post conviction remedies for

1 convicted felons to obtain DNA testing and retention of
2 biological material.

3 The Commission also found that some of the
4 activities under this program such as holding a hearing
5 on the DNA-testing motion pursuant to Penal Code
6 Section 1405, as well as appointment of counsel when
7 counsel was previously appointed, and disposal of the
8 biological material before the convicted person's release
9 from prison are not reimbursable activities.

10 In its proposed parameters and guidelines, the
11 claimant proposed a number of additional activities that
12 it asserts are reasonably necessary to carry out the
13 mandate. The Department of Finance contends that the
14 proposed one-time activities under retention of
15 biological materials should not be reimbursable because
16 sufficient documentation has not been provided by the
17 claimant to demonstrate that they are necessary to
18 implement the test-claim legislation.

19 The Commission's regulations authorize the
20 Commission to include the most reasonable methods of
21 complying with the mandate in the parameters and
22 guidelines. The most reasonable methods of complying
23 with the mandate are those methods not specified in
24 statute or executive order that are necessary to carry
25 out the mandated program. Staff only included those

1 activities that are either consistent with the statement
2 of decision or are justified in the record to be the most
3 reasonable methods of complying with the mandate.

4 Staff recommends that the Commission adopt the
5 proposed P's and G's and that the Commission authorize
6 staff to make any nonsubstantive technical corrections to
7 the P's and G's following the hearing.

8 Will the parties and representatives please
9 state their name for the record?

10 MR. KAYE: Leonard Kaye, County of Los Angeles.

11 MS. CASTANEDA: Carla Castaneda, Department of
12 Finance.

13 MS. FEREBEE: Donna Ferebee, Department of
14 Finance.

15 CHAIRMAN GENEST: Start with Mr. Kaye.

16 MR. KAYE: Good morning again -- or good
17 afternoon.

18 This matter, I think, is an exceptionally
19 important matter for local government. I won't review
20 basically the very extensive conversations we've had and
21 motions we've filed for the test claim decision.

22 Suffice it to say that we feel that many of the
23 major reimbursable activities we requested and claimed
24 over a period of years were finally found to be
25 reimbursable, and then the parameters and guidelines

1 before you reflect that statement of decision, I don't
2 think we have much to go on to argue against that.

3 We did make a few small recommendations. And
4 this came from our legal staff, public defender's office
5 and so forth. And some of those were interpretations of
6 the various requirements as reasonably necessary, and we
7 do have some differences. But I think the fundamental
8 activities are here.

9 And most importantly, we requested that the
10 Attorney General's task force on this matter, their very
11 detailed report, 34 pages, be actually included and
12 incorporated by reference in the P's and G's.

13 This was for several reasons. One is because
14 this is a very complex matter as to what the standards
15 are for storage of the biologic materials and so forth
16 that vary up and down the state, whether a sample should
17 be desiccated or refrigerated and the various conditions
18 and so forth that I think were too much to include within
19 the Commission's parameters and guidelines, and we
20 recognize that.

21 On the other hand, we also recognize that
22 because we could not arrive at a reasonable reimbursement
23 methodology to simplify a way of coming up with unit
24 cost, that means that we're going to have to go back and
25 come up with an actual cost for a lot of prior years.

1 And that means we're going to have a lot of conversations
2 perhaps in the far distant future with the state
3 auditors, State Controller's Office auditors. And what
4 they do when they come down and visit us is they use
5 these parameters and guidelines strictly to evaluate
6 whether we're complying with these state-mandated
7 reimbursement providers.

8 So we're very happy to see that the
9 Attorney General's task force report is included verbatim
10 as part of the actual parameters and guidelines.

11 CHAIRMAN GENEST: Mr. Kaye, that seems like an
12 awfully expensive and time-consuming process in nobody's
13 best interest. Why can't we arrive at some sort of a
14 reasonable approximation that we can all agree to adopt?

15 MR. KAYE: I would heartily support that. And
16 we've informally talked. And perhaps Carla could address
17 that issue. And we're certainly willing to continue in
18 that area.

19 CHAIRMAN GENEST: There's only one point of
20 disagreement, I think, isn't there? It has to do with
21 storage?

22 MS. CASTANEDA: For reimbursement methodology,
23 is what you're asking? We have no argument. It's
24 been -- the current statutory requirements have been
25 difficult for us to meet. But part of the mandate reform

1 in the legislature right now would help us overcome those
2 obstacles and we could --

3 CHAIRMAN GENEST: But we have said before that
4 that mandate reform could probably be implemented without
5 statutory change. Why don't we just get busy and --

6 MS. CASTANEDA: Most of the statutes that we're
7 proposing could be. It's the reimbursement methodology.
8 We actually do need a statutory change to overcome the
9 hurdle we've come against.

10 MR. KAYE: Yeah. I think the -- Leonard Kaye,
11 County of Los Angeles. I think the -- one of the big
12 obstacles in current law is that we have to come up with
13 the median cost for the 50 percent.

14 And we're looking at hundreds of cities. We're
15 looking at many counties that are storing this evidence
16 and so forth. And even for the County of Los Angeles or
17 many other large counties, it's very difficult to
18 determine what those costs are.

19 So normally we've been working on some simpler,
20 you know, cost studies and so forth up and down the state
21 and we've been making some good progress.

22 So I think the key requirement in surveying the
23 state is making sure we send a form to the right folks
24 and that we clearly identify what the limitations and
25 parameters and guidelines are, which I think would

1 also -- we need to send them a copy of the
2 Attorney General's report so they can understand, you
3 know, what is reimbursable and what is not, so . . .

4 CHAIRMAN GENEST: Are there any objections to
5 entering the Attorney General's report into the record?

6 MS. HIGASHI: We've done that.

7 MS. PATTON: It's done.

8 CHAIRMAN GENEST: It's a shame that we're going
9 to have to go through this process, and it's going to end
10 up there's going to be a few dollars per case and we're
11 going to pay it. Why don't we just jump to it?

12 MR. KAYE: It may be more than a couple dollars
13 per case.

14 CHAIRMAN GENEST: In my terminology, a few
15 dollars could actually be quite a bit.

16 MS. CASTANEDA: Carla Castaneda, Department of
17 Finance. Our major concerns have already been addressed
18 in the staff analysis, so the limitations and the
19 clarifying language in the proposed parameters and
20 guidelines we have no objections to. And we are working
21 with local government now to try to come up with a
22 reimbursement methodology on several programs.

23 CHAIRMAN GENEST: So should we adopt the staff
24 recommendation or should we wait until we can get this
25 done in a more expeditious way?

1 MS. HIGASHI: I'm just trying to think this
2 through.

3 If the Commission adopts the parameters and
4 guidelines today, what you are doing, in fact, is
5 blessing what the reimbursable activities are and the
6 inclusion of the Attorney General's guidelines. That
7 then gives guidance to the parties in terms of figuring
8 out is there a better way of costing out the mandate.

9 The Controller's Office is not required to issue
10 the claiming instructions for 60 days, so that if we --
11 if we had some indication of whether or not this would be
12 possible, on one hand, you know, we could -- I guess the
13 Commission could adopt the parameters and guidelines and
14 ask me to hold them for 60 days or something, so then we
15 could delay the time in which the Controller's Office has
16 to issue those claim instructions, or, two, if the
17 claiming instructions are issued, the claimants then have
18 120 days after that to file their reimbursement claims.

19 There's another period of time that allows the
20 parameters and guidelines amendment to be filed after
21 that point -- up to the 60 days, Nancy? -- after the date
22 the claims are all filed, in which a parameters and
23 guidelines amendment could be made and be retroactive to
24 the initial reimbursement period. So then it could be a
25 formula approach at that time that would then replace the

1 actual cost claim.

2 CHAIRMAN GENEST: Mr. Dithridge, do you have a
3 suggestion?

4 MR. DITHRIDGE: We would be interested in trying
5 to work out a reimbursement methodology. And I think
6 we're making progress on the legislation that would make
7 it a little easier to do that.

8 The Commission, maybe at this meeting, could
9 approve in concept the parameters and guidelines with
10 intent to approve them later, but with the idea that if
11 we have our -- if we're successful in getting the
12 reimbursement methodology legislation enacted, then we
13 would move forward in that vein.

14 CHAIRMAN GENEST: Is that urgency?

15 MR. DITHRIDGE: It is not urgency right now. It
16 could be made urgency. That would make it a two-thirds
17 vote. I don't know if that would be a particular
18 impediment.

19 MEMBER WORTHLEY: Mr. Chairman, Mr. -- Leonard
20 was going to say something. I was curious.

21 MR. KAYE: Oh, yes. We would certainly support
22 the thing, but -- the idea that we develop a regional
23 reimbursement methodology as soon as possible, but we
24 tried once before. Granted, it was our -- some of our
25 initial efforts. It wasn't perfected. We did find some

1 issues, as I recall, with the median levels and the
2 statewide cost estimates and so forth.

3 So rather than to complexify our strategy, I
4 would urge the Commission to adopt the parameters and
5 guidelines as staff has presented it to you today with
6 our pledge -- and I think Finance has agreed to this, so
7 to speak -- that we will come back within, as Paula
8 suggested, within 120 days of the issuance of the
9 claiming instructions and try and come up with a better
10 reimbursement methodology.

11 CHAIRMAN GENEST: I'm more attracted to her
12 first option, where she holds them until we see if we can
13 work something -- because once you engage the creative
14 minds of thousands of police accountants, you've got a
15 mess on your hands. I'd rather do it fast and get it
16 approximately right than, you know, doing all that.

17 MR. BURDICK: Mr. Genest, Chairman Genest,
18 members of the Commission. Allan Burdick on behalf of
19 the SB 90 service. And I want to point out, I think what
20 the issue here is, is, do you want to put over all
21 parameters and guidelines until the December -- is it
22 November or December this year?

23 MS. PATTON: December.

24 MR. BURDICK: December this year? Okay. Until
25 the December meeting to see whether legislation is going

1 to be passed and signed.

2 And I think that, you know, this is -- you're
3 looking at this one particular case, but I think it's,
4 you know, it's precedent setting for all other parameters
5 and guidelines that are coming up. And maybe this is an
6 issue you want to put over until July, give the parties a
7 chance to sit down and look at the implications.

8 I don't know if that makes sense. I don't know
9 whether Los Angeles County wants to wait until July or
10 not and see if -- but essentially I think you're saying,
11 you know, we set aside all P's and G's until the year --
12 I think November or December -- November; right? When is
13 your hearing?

14 MS. SHELTON: December.

15 MR. BURDICK: December hearing in order to give
16 the legislature and the Governor a chance to see whether
17 or not we can work out legislation to get over the
18 reasonable reimbursement hump.

19 So I think since this is kind of new in
20 discussion, I think, you know, the -- I chatted briefly
21 with some of the educational representatives. Seems like
22 this is an issue, maybe if LA is not urgent, and put it
23 over until July, we could put this over and come back and
24 address this issue again in July.

25 CHAIRMAN GENEST: Are you comfortable with that?

1 MS. HIGASHI: What I suggest --

2 CHAIRMAN GENEST: It's a workload issue.

3 MS. HIGASHI: It's a workload issue, because
4 this is how we end up with a backlog.

5 CHAIRMAN GENEST: Right.

6 MS. HIGASHI: I might suggest that what you do
7 is that you continue this item to the December hearing
8 and ask us to put this on the consent calendar unless
9 there's been a reasonable reimbursement methodology
10 filed.

11 MR. KAYE: With all due respect, I don't know of
12 a reasonable reimbursement methodology that has actually
13 been presented to the Commission where they have adopted
14 it and so forth.

15 We are fairly anxious. I've been working with
16 the Attorney General's Office and we've been getting
17 calls from local law enforcement. I think it's important
18 to try and get this matter out to the field, because this
19 evidence -- these matters are urgent matters. I mean,
20 we're talking about folks on death row that need these
21 tests and they're filing motions.

22 And we've got several -- just in L.A. County
23 alone we've got several Costco-sized warehouses filled
24 with this biologic evidence.

25 And so they -- it's a signal from this

1 Commission that they've acted, they've adopted Commission
2 staff recommendation, and we would be very pleased to
3 work as fast as we can to develop a reasonable
4 reimbursement methodology. But at this point it's
5 almost -- you know, obviously, we'd like to do it, but at
6 this point it's a hypothetical endeavor, because nobody
7 has ever seen one.

8 MR. BURDICK: Just one comment on the process is
9 that if we do delay this, from Leonard's standpoint,
10 until then, the reimbursement will be put over for
11 another fiscal year, because unless that statute has
12 changed, the way it is now, they file the claims, you
13 have to adopt your statewide cost estimate -- is it the
14 end of March?

15 MS. HIGASHI: Mm-hmm.

16 MR. BURDICK: By the end of March. If you delay
17 this until December, that will not happen. And so
18 instead of it being in the '08-09 budget, it would be in
19 the -- it would be in the '09-10 budget.

20 So if you do put it over, they would, you
21 know -- and they've been waiting for six years, if you
22 will, so in a sense, you know, they would be putting it
23 over for another whole fiscal year.

24 So that's why I'm saying, you know, we need to
25 look at this, I think, in terms of the overall

1 consequences of what we're doing and its implications.
2 This is, you know, kind of brought out today, I think, as
3 something everybody supports, but I don't think we've had
4 an opportunity to think it all the way through.

5 MEMBER WORTHLEY: What would be the problem of
6 continuing this matter and put it on the consent calendar
7 for our next meeting? That way you're still getting a
8 little more time to work on it, but you're still working
9 on this --

10 MS. PATTON: There's no way that they can do a
11 methodology by July.

12 MEMBER WORTHLEY: Well, my thought was that you
13 give 30 days, you've still got those other time frames
14 you've talked about. Instead of the clock ticking as of
15 today, you've got 30 days plus the additional 60 days or
16 whatever you're talking about.

17 MS. HIGASHI: What ends up happening, though,
18 is, effectively, if we wanted to have a statewide cost
19 estimate adopted that's based on actual claims data,
20 these parameters and guidelines should be adopted now.
21 Otherwise, the statewide cost estimate could not be
22 adopted in time to qualify for -- potentially qualify for
23 funding.

24 MEMBER WORTHLEY: You know, one could probably
25 make the argument adopting the parameters and guidelines

1 may help to form -- to promote moving towards a new
2 methodology, because people understand, hey, this is a
3 serious problem. We're faced with these right now.
4 We've got to do something about it. If we put it off,
5 then it's easier to kind of delay further action.

6 MS. HIGASHI: Right. By adopting them, at least
7 there's certainty as to what the Commission has to do.

8 MEMBER WORTHLEY: Move approval.

9 MR. CHIVARO: Second.

10 CHAIRMAN GENEST: Okay. Roll call.

11 MS. HIGASHI: Ms. Olsen?

12 MEMBER OLSEN: Aye.

13 MS. HIGASHI: Mr. Worthley?

14 MEMBER WORTHLEY: Aye.

15 MS. HIGASHI: Mr. Chivaro?

16 MR. CHIVARO: Aye.

17 MS. HIGASHI: Mr. Fillmore?

18 MEMBER FILLMORE: Yes.

19 MS. HIGASHI: Mr. Lujano?

20 MEMBER LUJANO: Aye.

21 MS. HIGASHI: Mr. Genest?

22 CHAIRMAN GENEST: I'm not going to vote on this.

23 MS. HIGASHI: Motion carries.

24 CHAIRMAN GENEST: Primarily just because I think
25 the whole process of engaging all of those millions of

1 accountants out there and creative thinking is
2 counterproductive. I do appreciate the urgency of
3 getting this done.

4 MS. HIGASHI: Item 15 was adopted.

5 MR. DITHRIDGE: Mr. Chairman, just for the
6 record, I was going to identify myself. I'm Tom
7 Dithridge, Department of Finance. I didn't do that, and
8 I apologize.

9 CHAIRMAN GENEST: So we're going to 16 now?

10 MS. HIGASHI: Item 16. Ms. Patton.

11 MS. PATTON: The Commission approved the
12 Stull Act test claim for specific reimbursable activities
13 related to evaluation and assessment of the performance
14 of certificated personnel within each school district
15 except for those employed in local, discretionary
16 educational programs.

17 Staff reviewed the claims data submitted by the
18 claimants and compiled by the State Controller's Office.
19 As of May 9th, 2007, the actual claims data showed that
20 approximately 626 school districts filed 4,200 claims
21 between fiscal years 1997-98 and 2005-2006. This data
22 includes all initial years' claims, including late and
23 amended claims.

24 A draft staff analysis and proposed statewide
25 cost estimate were issued on August 3, 2006.

1 On May 10, 2007, Department of Finance submitted
2 comments highlighting its concerns with the accuracy of
3 the claims and proposing that the Controller audit the
4 claims. Staff agrees that an audit of this program may
5 be warranted. Therefore, the staff analysis assumes that
6 the actual claiming data is unaudited and may be
7 inaccurate and that an audit of these claims may reduce
8 the costs of the program.

9 The proposed statewide cost estimate includes
10 11 fiscal years for a total of \$182,828,898. This
11 averages to more than \$16.6 million annually in costs for
12 the state.

13 Staff recommends that the Commission adopt the
14 proposed statewide cost estimate.

15 Will the parties and reps please state your
16 names for the record.

17 MR. PALKOWITZ: Art Palkowitz on behalf of
18 San Diego Unified.

19 MS. FEREBEE: Donna Ferebee, Department of
20 Finance.

21 CHAIRMAN GENEST: Go ahead.

22 MR. PALKOWITZ: Thank you.

23 I just wanted to briefly comment on some of the
24 concerns that are in this analysis. I fully appreciate
25 the difficulty in trying to get a statewide estimate at

1 this early stage and without having a chance to fully
2 review the claims.

3 Just a couple of things that I wanted to touch
4 upon. One of the concerns of staff was that there wasn't
5 a relationship to the number of teachers evaluated.

6 I think that might be -- come about is that a
7 lot of this is driven by collective bargaining. In our
8 school district we do a minimum of one-hour class
9 evaluation three times. That right there is three hours
10 that we're required to do. For probationary we have to
11 do it every year; for permanent, every other year. That
12 doesn't include a pre-evaluation process and a
13 post-evaluation process. So our district is looking
14 around four to five for each evaluation of a teacher. We
15 have five to seven thousand teachers.

16 I think that created a disparity with
17 L.A. Unified that did a study that determined to be about
18 30 to 60 minutes. So there's just some information here
19 that could help justify why this is all over the map.

20 I think some school districts have a minimum of
21 one hour evaluation. So I think you're going to find a
22 big disparity on what's going on based on the collective
23 bargaining agreement.

24 Another comment was -- are the evaluations of
25 mandatory educational programs. Ed Code Section 51210

1 and 51220 set out the mandatory educational programs.
2 And on our claim form we put in it that our evaluations
3 were of those classes, which are almost all of them, but
4 maybe the claim form needs to be tweaked a little so
5 there would be a little more clarity that these
6 evaluations pertain to mandated educational programs,
7 usually the core courses.

8 And then the last item is that the training was
9 an issue, I think, in the staff analysis, and though we
10 didn't have any training that we claimed, I think the
11 form doesn't really call it out. So maybe there could be
12 a section on where districts could put in the claim
13 aspect, and maybe that will give some clarity to that.

14 And then I just wanted to comment on page two of
15 the chart. I see that the staff estimated in '06-07 and
16 '07-08 based on an inflated price, sort of use that as a
17 barometer. And I was curious why we didn't put in -- or
18 you guys didn't put in the number of claims filed. Seems
19 to me that in this type of claim you know is going to be
20 done every year, evaluations, at least to the amount done
21 in previous years, I think that would be more accurate to
22 show that would clearly be over 5,000 in claims filed.

23 Thank you very much.

24 CHAIRMAN GENEST: Finance.

25 MS. FEREBEE: Donna Ferebee, Department of

1 Finance.

2 Finance filed written comments on May 10th,
3 2007, and at this time we don't have anything further to
4 add to those comments.

5 CHAIRMAN GENEST: I didn't understand what
6 Ms. Patton's statement was about those comments, though,
7 because you said -- how do we acknowledge that the claims
8 need to be audited? How does that relate to the staff
9 recommendation, the Commission staff recommendation?

10 MS. PATTON: Well, Finance was recognizing that
11 maybe the SPO -- this happens frequently on statewide
12 cost estimates, because we're using claims that are
13 unaudited to come up with a statewide cost estimate,
14 Finance frequently argues that means it's probably
15 inaccurate because those claims may be high or low or,
16 you know, probably high.

17 So we were just acknowledging that given -- you
18 know, given the disparity in the number, the claims
19 between school districts, that maybe -- and the high
20 cost, we're just acknowledging that maybe an audit would
21 be warranted.

22 CHAIRMAN GENEST: Okay. So that we report these
23 costs as stated and note that they haven't been audited,
24 then, subsequently, the audit shows that they're
25 different, that would be -- that information would then

1 be reported to the legislature.

2 MS. PATTON: Right.

3 MS. HIGASHI: But our report would go to the
4 legislature, and the legislature would decide, if the
5 Controller's Office reported different numbers at another
6 point in time, to fund whatever amount the number had
7 been adjusted to.

8 MS. PATTON: And it's also a way of just letting
9 the State Controller know our concerns with the claims.

10 CHAIRMAN GENEST: Okay. Do we have a motion?

11 MR. CHIVARO: I'll move adoption.

12 MEMBER FILLMORE: Second.

13 CHAIRMAN GENEST: Roll call.

14 MS. HIGASHI: Mr. Worthley?

15 MEMBER WORTHLEY: Aye.

16 MS. HIGASHI: Mr. Chivaro?

17 MR. CHIVARO: Aye.

18 MS. HIGASHI: Mr. Fillmore?

19 MEMBER FILLMORE: Yes.

20 MS. HIGASHI: Mr. Lujano?

21 MEMBER LUJANO: Aye.

22 MS. HIGASHI: Ms. Olsen?

23 MEMBER OLSEN: Yes.

24 MS. HIGASHI: Mr. Genest?

25 CHAIRMAN GENEST: Aye.

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1 MS. HIGASHI: Motion is carried.

2 CHAIRMAN GENEST: Number 18.

3 MS. HIGASHI: Ms. Patton.

4 MS. PATTON: Item 18 is the proposed meeting and
5 hearing calendar for the Commission for 2008. And staff
6 recommends adoption of the hearing calendar as presented
7 under item 18.

8 CHAIRMAN GENEST: Any objections? Let's have a
9 motion.

10 MEMBER WORTHLEY: I have just one question. Do
11 we know -- have we checked -- do we have any conflicts?

12 MS. PATTON: That's why we're moving it from
13 November to December, so that we miss the
14 CSAC conference.

15 MEMBER LUJANO: Move approval.

16 CHAIRMAN GENEST: Is there a second?

17 MR. CHIVARO: Second.

18 CHAIRMAN GENEST: Without objection, that's
19 adopted. Next up?

20 MS. HIGASHI: Item 19, a report on mandate
21 reform. Ms. Patton will present that report.

22 MS. PATTON: At the April 16th hearing, the
23 Commission staff recommended that the Commission support
24 accommodation of mandate reform provisions proposed by
25 both the Legislative Analysts Office and the Department

1 of Finance and include technical amendments drafted by
2 our staff that would ensure proposed alternative
3 procedures can coexist with existing mandate process.

4 This proposal -- combined proposal was included
5 in Assembly Member Laird's bill. That bill has recently
6 passed the Assembly. It's pending committee assignment
7 in the Senate.

8 Department of Finance continues to conduct
9 working group meeting with LAO staff and our staff and
10 city, county and school representatives and the special
11 district representatives, and we are working on consensus
12 language. And I think we're, you know, moving along each
13 meeting, and we've all agreed to put that language in
14 Assembly Member Laird's bill. So we're meeting with his
15 staff eventually to talk about, you know, amendments to
16 his bill.

17 CHAIRMAN GENEST: And Ms. Olsen, do we have a
18 report from our leg. committee on this subject? Or do we
19 have our leg. committee? We have now formed the
20 leg. committee; right?

21 MEMBER OLSEN: Yes.

22 CHAIRMAN GENEST: Okay.

23 MS. HIGASHI: We're still in the process of
24 trying to draft language to even bring back. And every
25 time we think we are close to having a set of proposed

1 amendments and agreement, a new person comes to the next
2 meeting and we go back to the drawing board. So it's a
3 typical negotiated process, but --

4 CHAIRMAN GENEST: I'm familiar with that.

5 MS. HIGASHI: There's a matrix also before you
6 that is an overview of some of the issues.

7 CHAIRMAN GENEST: Does anybody have any
8 comments? Shall we just move on?

9 MS. HIGASHI: Item 20.

10 MS. SHELTON: I just have one item to add, a new
11 filing. The County of Los Angeles has dismissed their
12 lawsuit which challenged the animal adoption decision of
13 the Commission as of May 23rd, so that case will no
14 longer be on your pending litigation caseload.

15 CHAIRMAN GENEST: Okay.

16 MS. HIGASHI: Are there any questions on my
17 report, item 21?

18 CHAIRMAN GENEST: I don't think we have any
19 questions.

20 MS. HIGASHI: Public comment?

21 CHAIRMAN GENEST: Public comment? When are we
22 going to -- I thought we had to go into executive
23 session.

24 MS. HIGASHI: We do. But we do public comment
25 before executive committee.

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1 CHAIRMAN GENEST: Okay. Any public comment? I
2 guess not.

3 The Commission will meet in closed executive
4 session pursuant to Government Code Section 11126,
5 subdivision (E), to confer with and receive advice from
6 legal counsel, for consideration and action, as necessary
7 and appropriate, upon the pending litigation listed on
8 the published notice and agenda, and to confer with and
9 receive advice from legal counsel regarding potential
10 litigation. We will reconvene in open session at this
11 location in approximately 10 minutes.

12 (The Commission met in closed executive session
13 from 12:28 to 12:38 p.m.)

14 CHAIRMAN GENEST: The Commission met in closed
15 executive session pursuant to Government Code
16 Section 11126, subdivision (E), to confer with and
17 receive advice from legal counsel, for consideration and
18 action, as necessary and appropriate upon the pending
19 litigation listed on the published notice and agenda and
20 potential litigation.

21 All required reports from the closed session
22 having been made, and with no further business to
23 discuss, I will entertain a motion to adjourn.

24 MEMBER WORTHLEY: So move.

25 MEMBER LUJANO: Second.

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CHAIRMAN GENEST: All those in favor of
adjourning, say aye.

(A chorus of "ayes" was heard.)

CHAIRMAN GENEST: Meeting adjourned.

(Proceedings concluded at 12:39 p.m.)

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REPORTER'S CERTIFICATE

I hereby certify that the foregoing proceedings were duly reported by me at the time and place herein specified;

That the proceedings were reported by me, a duly certified shorthand reporter and a disinterested person, and was thereafter transcribed into typewriting.

I further certify that I am not of counsel or attorney for either or any of the parties to said deposition, nor in any way interested in the outcome of the cause named in said caption.

IN WITNESS WHEREOF, I subscribe my name on this 21st day of June 2006.


Carole W. Browne, RPR,
CSR Certificate No. 7351