

PROPOSED 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DISMISSAL OF WITHDRAWN TEST CLAIM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 it 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 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