ITEM 9

TEST CLAIM
FINAL STAFF ANALYSIS

Government Code Sections 3500, 3500.5, 3501, 3502.5, 3507.1, 3508.5, 3509, 3510, and 3511

California Code of Regulations, Title 8, Sections 31001-61630 (Register 2001, No. 49)

Statutes 2000, Chapter 901

Local Government Employment Relations
(01-TC-30)

City of Sacramento, Claimant
County of Sacramento, Claimant

EXECUTIVE SUMMARY

This test claim addresses statutes that amended the Meyers-Milias-Brown Act (hereafter "MMBA"), regarding employer-employee relations between local public agencies and their employees. The test claim statutes authorize an additional method for creating an agency shop arrangement and expand the jurisdiction of the Public Employment Relations Board (hereafter "PERB") to include resolving disputes and enforcing the statutory duties and rights of those public employers and employees subject to the MMBA.

Under the existing provisions of MMBA, the governing body of a local public agency is required to "meet and confer in good faith" regarding wages, hours, and other terms and conditions of employment with recognized employee organizations. When agreement is reached between the parties, a memorandum of understanding is jointly prepared to present to the governing body for acceptance; if accepted, the memorandum becomes binding on both the public employer and employee organization.

Local agencies are authorized to adopt reasonable rules and regulations, after consultation with employee organizations, for administering employer-employee relations under the MMBA. Prior to 2001, labor-management disputes under MMBA were resolved through locally adopted procedures, and appeals from that process could be made to the courts. In 2001, the test claim statutes placed enforcement of the MMBA under PERB jurisdiction, but excluded the City of Los Angeles, the County of Los Angeles, and peace officers from PERB jurisdiction.

The test claim poses the following issues:

- Are the test claim statutes and regulations subject to article XIII B, section 6 of the California Constitution?
- Do the activities mandated by the test claim statutes and regulations constitute a "new program or higher level of service" within the meaning of article XIII B, section 6 of the California Constitution?

- Do the activities mandated by the test claim statutes and regulations impose "costs mandated by the state" within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514?

The Test Claim Statutes and Regulations Impose a Partially Reimbursable State-Mandated Program on Local Public Agencies

Staff finds that the test claim statutes and regulations require local public agencies to perform specified activities, and those activities constitute a program since they impose unique requirements on local agencies and do not apply generally to all residents and entities in the state. The mandated activities also constitute a "new program or higher level of service" since the local public agency is required to perform new tasks, as compared with the pre-existing scheme, which result in an increase in the actual level of services provided by the local public agency. The mandated activities further impose "costs mandated by the state" since there is evidence in the record of increased costs and none of the statutory exceptions to reimbursement listed in Government Code section 17556 are applicable.

Conclusion

Staff finds that the test claim statutes and regulations impose a reimbursable state-mandated program on local public agencies within the meaning of article XIII B, section 6 of the California Constitution, and Government Code section 17514, for the following activities:

1. Deduct from employees' wages the payment of dues or service fees required pursuant to an agency shop arrangement that was established under subdivision (b) of Government Code section 3502.5, and transmit such fees to the employee organization. (Gov. Code § 3508.5, subd. (b))
2. Receive from the employee any proof of in lieu fee payments made to charitable organizations required pursuant to an agency shop arrangement that was established under subdivision (b) of Government Code section 3502.5. (Gov. Code § 3502.5, subd. (c))
3. Follow PERB procedures in responding to charges and appeals filed with PERB, by an entity *other than* the local public agency employer, concerning an unfair labor practice, a unit determination, representation by an employee organization, recognition of an employee organization, or an election. Mandated activities are:
    a. procedures for filing documents or extensions for filing documents with PERB (Cal. Code Regs., tit. 8, §§ 32132, 32135 (Register 2001, No. 49));
    b. proof of service (Cal. Code Regs., tit. 8, § 32140 (Register 2001, No. 49));
    c. responding to subpoenas and investigative subpoenas (Cal. Code Regs., tit. 8, §§ 32149, 32150 (Register 2001, No. 49));
    d. conducting depositions (Cal. Code Regs., tit. 8, § 32160 (Register 2001, No. 49));
    e. participating in hearings and responding as required by PERB agent, PERB Administrative Law Judge, or the five-member PERB (Cal. Code Regs., tit. 8, §§ 32168, 32170, 32175, 32176, 32180, 32205, 32206, 32207, 32209, 32210, 32212, 32310, 32315, 32375, 32455, 32620, 32644, 32649, 32680, 32980, 60010, 60030, 60050, and 60070 (Register 2001, No. 49)); and

f. filing and responding to written motions in the course of the hearing (Cal. Code Regs., tit. 8, § 32190 (Register 2001, No. 49)).

The City of Los Angeles, the County of Los Angeles, and peace officers as defined in Penal Code section 830.1 are not subject to PERB jurisdiction. Any other statute, regulation or executive order that is not addressed above does not constitute a reimbursable state-mandated program pursuant to article XIII B, section 6 of the California Constitution or Government Code section 17514.

Proposition 1A, approved by the voters November 2, 2004, amended article XIII B, section 6 of the California Constitution to require that unless the Legislature appropriates the full payable amount in a fiscal year for a mandate, the operation of the mandate shall be suspended for that fiscal year. However, section 6, subdivision (b)(5), states that this provision is not applicable to "a requirement to provide or recognize any procedural or substantive protection, right, benefit, or employment status of any local government employee or retiree, or of any local government employee organization, that arises from, affects, or directly relates to future, current, or past local government employment and that constitutes a mandate subject to this section." Staff finds that subdivision (b)(5) is applicable to this test claim.

Recommendation

Staff recommends the Commission adopt this analysis and partially approve the test claim.

STAFF ANALYSIS

Claimants

City of Sacramento

County of Sacramento

Chronology

08/01/02	City of Sacramento and County of Sacramento filed test claim with the Commission on State Mandates (Commission)
08/30/02	The Department of Finance submitted comments on test claim with the Commission
11/19/02	City of Sacramento and County of Sacramento submitted comments
12/18/02	The Department of Finance submitted comments
10/19/06	Commission staff issued draft staff analysis
11/09/06	City of Sacramento submitted comments
11/13/06	The Department of Finance submitted comments
11/17/06	County of Sacramento submitted comments
11/21/06	Commission staff issued final staff analysis

Background

This test claim addresses statutes that amended the MMBA, regarding employer-employee relations between local public agencies and their employees. The test claim statutes and regulations authorize an additional method for creating an agency shop[1] arrangement and expand the jurisdiction of PERB to include resolving disputes and enforcing the statutory duties and rights of those public employers and employees subject to the MMBA. If approved, the reimbursement period for this test claim would begin with the 2001-2002 fiscal year.

The MMBA was enacted in 1968[2] with the following intent:

> It is the purpose of this chapter to promote full communication between public employers and their employees by providing a reasonable method of resolving disputes regarding wages, hours, and other terms and conditions of employment between public employers and public employee organizations. It is also the purpose of this chapter to promote the improvement of personnel management and employer-employee relations within the various public agencies in the State of California by providing a uniform basis for recognizing the right of public employees to join organizations of their own

[1] "Agency shop" means "an arrangement that requires an employee, as a condition of continued employment, either to join the recognized employee organization, or to pay the organization a service fee in an amount not to exceed the standard initiation fee, periodic dues, and general assessments of such organization …" (Gov. Code § 3502.5, subd. (a)).

[2] Statutes 1968, chapter 1390.

> choice and be represented by those organizations in their employment relationships with public agencies ….[3]

Public agencies covered under the MMBA include "every governmental subdivision, every district, every public and quasi-public corporation, every public agency and public service corporation and every town, city, county, city and county and municipal corporation, whether incorporated or not and whether chartered or not," but do not include school districts, a county board of education, a county superintendent of schools, or a personnel commission in a school district having a specified merit system.[4]

Public employees covered under the MMBA include "any person employed by any public agency, including employees of the fire departments and fire services of counties, cities, cities and counties, districts, and other political subdivisions of the state, excepting those persons elected by popular vote or appointed to office by the Governor of this state."[5] The test claim statutes, however, specifically exclude peace officers from the provisions,[6] and therefore peace officers and their employee organizations are not considered in this analysis.

Under the existing provisions of MMBA, the governing body of a local public agency, or its designee, is required to "meet and confer in good faith" regarding wages, hours, and other terms and conditions of employment with recognized employee organizations.[7] When agreement is reached between the parties, a memorandum of understanding is jointly prepared to present to the governing body for acceptance;[8] if accepted, the memorandum becomes binding on both the public employer and employee organization for its duration.[9]

Local agencies are authorized to adopt reasonable rules and regulations, after consultation with employee organizations, for administering employer-employee relations under the MMBA.[10] The test claim statutes established that PERB may adopt rules in areas where a local public agency has no rule,[11] and enforce and apply the rules adopted by a local public agency concerning unit determinations, representation, recognition, and elections.[12]

An agency shop agreement may be established through negotiation between the local public agency employer and a public employee organization which has been recognized as the

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[3] Government Code section 3500, subdivision (a).

[4] Government Code section 3501, subdivision (c).

[5] Government Code section 3501, subdivision (d).

[6] Government Code section 3511.

[7] Government Code section 3505.

[8] Government Code section 3505.1.

[9] *San Bernardino Public Employees Assn. v. City of Fontana* (1998) 67 Cal.App.4th 1215.

[10] Government Code section 3507.

[11] Government Code section 3509, subdivision (a).

[12] Government Code section 3509, subdivision (c).

exclusive or majority bargaining agent.[13] The test claim statutes provide an additional method for an agency shop arrangement to be established:

> [A]n agency shop arrangement … shall be placed in effect, without a negotiated agreement, upon (1) a signed petition of 30 percent of the employees in the applicable bargaining unit requesting an agency shop agreement and an election to implement an agency fee arrangement, and (2) the approval of a majority of employees who cast ballots and vote in a secret ballot election in favor of the agency shop agreement. The petition may only be filed after the recognized employee organization has requested the public agency to negotiate on an agency shop arrangement and, beginning seven working days after the public agency received this request, the two parties have had 30 calendar days to attempt good faith negotiations in an effort to reach agreement.[14]

Agency shop arrangements are not applicable to management, confidential, or supervisory employees.[15]

With regard to agency fee arrangements, the MMBA states that nothing shall affect the right of a public employee to authorize a dues deduction from his or her salary.[16] The test claim statutes added the following requirement of the employer:

> A public employer *shall deduct* the payment of dues or service fees to a recognized employee organization as required by an agency shop arrangement between the recognized employee organization and the public employer. (Emphasis added.)[17]

Prior to 2001, the labor-management disputes under MMBA were resolved through locally adopted procedures, and appeals from that process could be made to the courts. In 2001, the test claim statutes placed enforcement of the MMBA under PERB jurisdiction.[18] Thus, a complaint alleging any violation of MMBA or of any rules adopted by a local public agency pursuant to Government Code section 3507 are now resolved by PERB as an unfair practice charge,[19] and rules adopted by a local public agency concerning unit determinations,

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[13] Government Code section 3502.5, subdivision (a).

[14] Government Code section 3502.5, subdivision (b).

[15] Government Code section 3502.5, subdivision (e), formerly subdivision (c); that provision was subsequently amended to delete confidential and supervisory employees (Stats. 2003, ch. 311).

[16] Government Code section 3508.5, subdivision (a).

[17] Government Code section 3508.5, subdivision (b).

[18] Government Code section 3510 (amended and renumbered from section 3509 by Stats. 2000, ch. 901); PERB is an independent state body, consisting of five members, with jurisdiction to administer and enforce several California employer-employee relations statutes including the MMBA (Gov. Code §§ 3541 and 3541.3).

[19] Government Code section 3509, subdivision (b).

representation, recognition, and elections are enforced and applied by PERB.[20] However, the City of Los Angeles, the County of Los Angeles, and peace officers as defined in Penal Code section 830.1 are not subject to PERB jurisdiction.[21]

Although the MMBA has not previously been the subject of a test claim, claims for some collective bargaining activities under the Educational Employment Relations Act (EERA) have been determined to constitute reimbursable state mandates, as described below.

Collective Bargaining Under the Educational Employment Relations Act (EERA)

In the *Collective Bargaining* Statement of Decision, the Board of Control determined that Statutes 1975, chapter 961 (the EERA), constituted a reimbursable mandate. Parameters and guidelines were adopted on October 22, 1980, and amended seven times before the decision on the next related claim: *Collective Bargaining Agreement Disclosure* (97-TC-08).

On March 26, 1998, the Commission adopted the Statement of Decision for the *Collective Bargaining Agreement Disclosure* test claim. The Commission found that Government Code section 3547.5 (Stats. 1991, ch. 1213) and California Department of Education Management Advisory 92-01 constitute a reimbursable mandate for requiring K-14 school districts to publicly disclose the major provisions of all collective bargaining agreements after negotiations, but before the agreement becomes binding.

The parameters and guidelines for *Collective Bargaining Agreement Disclosure* were adopted in August 19, 1998, and consolidated with the *Collective Bargaining* parameters and guidelines. The reimbursable activities in the consolidated parameters and guidelines can be summarized as follows:

- Determination of appropriate bargaining units for representation and determination of the exclusive representatives:
  a. Unit determination;
  b. Determination of the exclusive representative.
- Elections and decertification elections of unit representatives are reimbursable in the event the Public Employment Relations Board determines that a question of representation exists and orders an election held by secret ballot.
- Negotiations: reimbursable functions include -- receipt of exclusive representative's initial contract proposal, holding of public hearings, providing a reasonable number of copies of the employer's proposed contract to the public, development and presentation of the initial district contract proposal, negotiation of the contract, reproduction and distribution of the final contract agreement.
- Impasse proceedings:
  a. Mediation;

[20] Government Code section 3509, subdivision (c).

[21] Government Code sections 3509, subdivision (d), and 3511.

b. Fact-finding publication of the findings of the fact-finding panel.

- Collective bargaining agreement disclosure.
- Contract administration and adjudication of contract disputes either by arbitration or litigation. Reimbursable functions include grievances and administration and enforcement of the contract.
- Unfair labor practice adjudication process and public notice complaints.

Agency Fee Arrangements

In December 2005, the Commission approved in part and denied in part a test claim filed by Clovis Unified School District regarding fair share fees by non-union members in California's K-14 public schools (*Agency Fee Arrangements*, 00-TC-17/01-TC-14). In modifying the EERA, the test claim statutes required that: 1) employees of K-14 school districts must either join the selected employee organization or pay such organization a service fee; 2) employees who claim a conscientious objection to joining or supporting a union shall not be required to do so but may be required to pay equal amounts to a charitable organization and proof of such contribution may be required by the employee organization or the public school employer; 3) public school employers deduct the amount of the fair share service fee from the wages and salary of the employee and pay that amount to the employee organization; and 4) public school employers provide the exclusive representative of the employees with the home address of each member of a bargaining unit. The test claim regulations further required the public school employer to file an alphabetical list containing the names and job titles or classifications of the persons employed in the unit within 20 days after a petition is filed to rescind or reinstate an agency fee arrangement.

The Commission concluded that some of the activities did impose a reimbursable state-mandated program on public school employers, as follows:

- deducting the amount of the fair share service fee and paying that amount to the employee organization;
- providing the exclusive representative of a public employee with the home address of each member of a bargaining unit; and
- timely filing with PERB an alphabetical list containing the names and job titles or classifications of the persons employed in the unit.

Claimant's Position

The claimant states that there are "substantial activities and costs," that are "well in excess of $200.00 per year," which will be undertaken by local governments to comply with the test claim statutes and regulations.[22] These costs are "costs mandated by the State" under article XIII B, section 6 of the California Constitution, and Government Code sections 17500 et seq.

[22] At the time the test claim was filed, Government Code section 17564, subdivision (a), stated that the no test claim or reimbursement claim shall be made unless the claim exceeds $200. That section was subsequently modified in Statutes 2002, chapter 1124, to increase the minimum to $1,000. If this test claim is approved, any reimbursement claims must exceed $1,000.

Claimant asserts that costs for the following activities will be incurred and are reimbursable:

1. Engage in separate agency shop negotiations for up to 30 days, pursuant to Government Code section 3502.5, subdivision (b), and title 8, California Code of Regulations, section 32990, subdivisions (a) and (e).
2. Process agency shop petitions, pursuant to Government Code section 3502.5, subdivision (b), and Department of Industrial Relations (hereafter "DIR") website.
3. Participate in meetings with petitioning union to discuss jointly selecting a neutral person or entity to conduct the agency shop election, pursuant to Government Code section 3502.5, subdivision (b), and DIR website.
4. Participate in meetings with such neutral person or entity, or the State Conciliation Service (hereafter the "Election Supervisor"), and the petitioning union, and endeavor to reach an agreement, pursuant to Government Code section 3502.5, subdivision (b), and DIR website.
5. Compile and provide the Election Supervisor the necessary unit employee information to verify the 30 percent showing of interest, pursuant to Government Code section 3502.5, subdivision (b), and DIR website.
6. Post and distribute notices of election, pursuant to Government Code section 3502.5, subdivision (b), and DIR website.
7. Compile and provide appropriate payroll records for the Election Supervisor, pursuant to Government Code section 3502.5, subdivision (b), and DIR website.
8. Make available employees to serve as voting place observers, pursuant to Government Code section 3502.5, subdivision (b), and DIR website.
9. Staff, prepare for, and represent the agency in administrative or court proceedings regarding disputes as to management, supervisory and confidential designations (which are excluded from agency shop arrangements), pursuant to Government Code section 3502.5, subdivisions (b) and (e), and procedures of the State Mediation and Conciliation Service.
10. Provide staffing to institute and administer procedures for agency fee deductions and transmittal to union, pursuant to Government Code sections 3502.5, subdivision (b), and 3508.5, subdivisions (b) and (c).
11. Institute and administer procedures and documentation for in lieu fee payments of conscientious objectors, and transmittal to appropriate charities, pursuant to Government Code section 3502.5, subdivisions (b) and (c).
12. Negotiate with the union concerning the above two procedures, and represent the agency in the event of PERB intervention regarding disputes, pursuant to Government Code section 3502.5, subdivision (b).
13. Process agency shop rescission petitions, pursuant to Government Code section 3502.5, subdivision (d).

14. Participate in PERB's rulemaking process relating to implementation of its jurisdiction under the test claim legislation, pursuant to Government Code section 3509, subdivisions (a), (b), and (c), and PERB's website.
15. Develop and provide training in PERB's rules, procedures and decisions for agency supervisory and management personnel and attorneys.
16. Respond to appeals made to the PERB of agency actions regarding unit issues, representation matters, recognition, elections and unfair practice determinations, pursuant to Government Code section 3509, subdivisions (b) and (c), and title 8, California Code of Regulations, sections 60000 and 60010.
17. Respond to, or file, unfair labor practice charges, pursuant to Government Code section 3509, subdivision (b), and title 8, California Code of Regulations, sections 32450, 32455, 32602, 32603, 32615, 32620, 32621, 32625, 32644, 32646, 32647, and 32661.
18. Participate in PERB's investigation of charges, pursuant to title 8, California Code of Regulations, sections 32149, 32162, 32980, and 60010.
19. Prepare for hearings before PERB Administrative Law Judges including, but not limited to the preparation of briefs, documentation, exhibits, witnesses and expert witnesses, pursuant to title 8, California Code of Regulations, sections 32150, 32160, 32164, 32165, 32190, 32205, 32210, 32212, 32647, and 60040.
20. Present the agency's case before the PERB's Administrative Law Judge, including expert witness fees, increased overtime costs for employee witnesses, closing brief, costs of transcripts and travel expenses, pursuant to title 8, California Code of Regulations, sections 32170, 32175, 32176, 32178, 32180, 32190, 32206, 32648, 32649, 32207, 32209, 32230, 32680, 60041, and 60050.
21. Represent the agency at proceedings that appeal PERB Administrative Law Judge decisions to the Board itself, including travel expenses, pursuant to title 8, California Code of Regulations, sections 32200, 32300, 32310, 32315, 32320, 32360, 32370, 32375, 32410, 32635, and 60035.
22. Prepare for and represent the agency at appeals of final PERB decisions to superior and appellate courts, pursuant to title 8, California Code of Regulations, section 32500.
23. Prepare for and represent the agency in superior and appellate court proceedings regarding litigation over the test claim legislation's ambiguity and scope, as well as the parameters of the jurisdiction of the PERB.

Claimants, City of Sacramento and County of Sacramento, filed comments on November 19, 2002, in response to the Department of Finance's comments of August 30, 2002. Claimant City of Sacramento filed comments in response to the draft staff analysis, and claimant County of Sacramento filed comments in response to the Department of Finance's comments of November 13, 2006. The issues raised in those comments are addressed in the following analysis.

Position of Department of Finance

The Department of Finance states that there are not any state-reimbursable costs resulting from the test claim statutes, for the following reasons:

- The test claim statutes do not create a new program or higher level of service since, pursuant to the language of the statutes, the duties of the local agency employer representatives are "substantially similar to the duties and responsibilities required under existing collective bargaining enforcement procedures and therefore the costs incurred by the local agency employer representatives in performing those duties and responsibilities under this chapter are not reimbursable as state-mandated costs." Duties that the agencies already perform under the existing process include responding to unfair labor practice charges, compiling payroll and personnel records, and participating in meetings and negotiations with unions.
- Many of the activities listed in the test claim are discretionary and therefore do not qualify as reimbursable state-mandated costs, such as creating and providing training on the PERB rules and regulations, processing agency shop petitions, participating in PERB's rulemaking process, or appealing PERB decisions.
- The test claim statutes provide for offsetting savings to local agencies since the provisions shift local employers from a process wherein they rely on the court system to litigate unfair labor practice charges to a process where they would rely on PERB for those types of decisions. The costs that the employers would incur through the process with PERB would have been incurred if the unfair labor practice claims were still being litigated in the court system. To the extent that PERB settles claims before they ever reach a courtroom, the provisions within this chapter would result in savings to the public agencies.

The Department of Finance provided additional comments on December 18, 2002, in response to claimant's rebuttal of November 19, 2002, and in response to the draft staff analysis. The issues raised in those comments are addressed in the following analysis.

Discussion

The courts have found that article XIII B, section 6 of the California Constitution[23] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[24] "Its purpose is to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A

[23] Article XIII B, section 6, subdivision (a), (as amended by Proposition 1A in November 2004) provides: "Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the State shall provide a subvention of funds to reimburse that local government for the costs of the program or increased level of service, except that the Legislature may, but need not, provide a subvention of funds for the following mandates: (1) Legislative mandates requested by the local agency affected. (2) Legislation defining a new crime or changing an existing definition of a crime. (3) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975."

[24] *Department of Finance v. Commission on State Mandates* (*Kern High School Dist*.) (2003) 30 Cal.4th 727, 735.

and XIII B impose."[25] A test claim statutes or executive order may impose a reimbursable state-mandated program if it orders or commands a local agency or school district to engage in an activity or task.[26] In addition, the required activity or task must be new, constituting a "new program," and it must create a "higher level of service" over the previously required level of service.[27]

The courts have defined a "program" subject to article XIII B, section 6, of the California Constitution, as one that carries out the governmental function of providing public services, or a law that imposes unique requirements on local agencies or school districts to implement a state policy, but does not apply generally to all residents and entities in the state.[28] To determine if the program is new or imposes a higher level of service, the test claim legislation must be compared with the legal requirements in effect immediately before the enactment of the test claim legislation.[29] A "higher level of service" occurs when there is "an increase in the actual level or quality of governmental services provided."[30]

Finally, the newly required activity or increased level of service must impose costs mandated by the state.[31]

The Commission is vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6.[32] In making its decisions, the Commission must strictly construe article XIII B, section 6 and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[33]

The analysis addresses the following issues:

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

[26] *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 174.

[27] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 878 (*San Diego Unified School Dist.*); *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, 835-836 (*Lucia Mar*).

[28] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 874, (reaffirming the test set out in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56 (*Los Angeles*); *Lucia Mar, supra,* 44 Cal.3d 830, 835).

[29] *San Diego Unified School Dist., supra*, 33 Cal.4th 859, 877; *Lucia Mar, supra,* 44 Cal.3d 830, 835.

[30] *San Diego Unified School Dist., supra*, 33 Cal.4th 859, 877.

[31] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1265, 1284 (*County of Sonoma*); Government Code sections 17514 and 17556.

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

[33] *County of Sonoma, supra,* 84 Cal.App.4th 1264, 1280, citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817.

- Are the test claim statutes and regulations subject to article XIII B, section 6 of the California Constitution?
- Do the activities mandated by the test claim statutes and regulations constitute a "new program or higher level of service" within the meaning of article XIII B, section 6 of the California Constitution?
- Do the activities mandated by the test claim statutes and regulations impose "costs mandated by the state" within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514?

Issue 1: Are the test claim statutes and regulations subject to article XIII B, section 6 of the California Constitution?

A. Do the Test Claim Statutes or Regulations Mandate Any Activities?

In order for a test claim statute or executive order to impose a reimbursable state-mandated program under article XIII B, section 6, the language must mandate an activity or task upon local governmental agencies. If the language does not mandate or require local agencies to perform a task, then article XIII B, section 6 is not triggered.[34]

The claimant is requesting reimbursement for activities related to: 1) participation in PERB's rulemaking process to implement the test claim statutes; 2) representing the agency in court regarding litigation over the test claim statutes' ambiguity and scope; 3) agency shop arrangements; 4) agency shop rescissions; 5) dues or service fee deductions; 6) in lieu fee payments; 7) PERB jurisdiction and administrative hearings; and 8) representing the agency in court appeals of final PERB decisions.

In the following analysis, where the plain language of the test claim statutes or regulations does not require a particular activity, but such activity might reasonably stem from an activity approved for reimbursement by the Commission, the Commission can consider claimant's request for reimbursement for those activities at the Parameters and Guidelines stage to determine whether they are reasonable methods of complying with the mandate pursuant to title 2, California Code of Regulations, section 1183.1, subdivision (a)(4).

Rulemaking and Litigation Activities Regarding the Test Claim Statutes and Regulations

Staff finds that participation in PERB's rulemaking process to implement the test claim statutes and representing the agency in litigation over "ambiguity" in the test claim statutes *are not* activities required by the test claim statutes or regulations. Participation in these activities is discretionary on the part of the local public agency.

Claimant argues that without participation of the employers in the rulemaking process, the regulations would not have addressed the needs of the employers and would have been crafted with only the input of the various unions, resulting in needless expense to all local government employers. Nevertheless, the plain language of the test claim statutes contains no provision requiring local agencies to participate in the rulemaking process, nor to litigate the test claim statutes. Therefore, rulemaking participation and litigation costs are not subject to, or reimbursable pursuant to, article XIII B, section 6.

[34] *City of Merced v. State of California* (1984) 153 Cal.App.3d 777, 783 *(City of Merced).*

Agency Shop Arrangement Activities
(Gov. Code, § 3502.5, subds. (b) & (e))

The test claim statutes modified Government Code section 3502.5 to add a new method for creating an agency shop arrangement. Subdivision (b) states that, in addition to being established through negotiation between the local public agency employer and a public employee organization pursuant to subdivision (a), an agency shop arrangement shall be placed in effect upon a signed petition of 30 percent of the employees in a bargaining unit requesting both an agency shop agreement and an election to implement an agency fee arrangement, and the approval of a majority of employees who cast ballots in favor of the agreement. The petition for the agreement may only be filed after the employee organization has requested the public agency employer to negotiate on an agency shop arrangement, and the parties have had 30 calendar days to attempt good faith negotiations in an effort to reach agreement.[35] Subdivision (e) provides that agency shop arrangements are not applicable to management, confidential, or supervisory employees.[36]

For agency shop arrangements established pursuant to subdivision (b), the election is conducted by a neutral third party jointly selected by the local public agency employer and the employee organization.[37] Where the employer and employee organization cannot agree on a neutral third party, the Department of Industrial Relations, Division of Conciliation, shall conduct the election.[38]

Claimant is requesting reimbursement for: 1) engaging in separate agency shop negotiations for up to 30 days; 2) processing agency shop petitions; 3) participating in meetings with the petitioning union to discuss jointly selecting a neutral person or entity to conduct the agency shop election; 4) participating in meetings with the neutral person or entity, or the State Conciliation Service (Election Supervisor), to reach agreement; 5) compiling and providing the Election Supervisor the necessary unit employee information to verify the 30 percent showing of interest; 6) posting and distributing notices of election; 7) compiling and providing appropriate payroll records for the Election Supervisor; and 8) making employees available to serve as voting place observers. Claimant is also seeking reimbursement for staffing, preparing for, and representing the local public agency in administrative or court proceedings regarding disputes as to management, supervisory and confidential designations, which are excluded from agency shop arrangements.

The plain language of the test claim statutes and regulations regarding subdivision (b) agency shop arrangements *does not* require public agency employers to engage in separate agency shop negotiations for up to 30 days. The test claim statutes state that "[t]he petition [for the agency shop arrangement] may only be filed after the recognized employee organization has

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[35] Government Code section 3502.5, subdivision (b).

[36] Government Code section 3502.5, subdivision (e), formerly subdivision (c); that provision was subsequently amended to delete confidential and supervisory employees (Stats. 2003, ch. 311), but the amendment was not pled in the test claim and thus staff makes no findings with regard to it.

[37] *Ibid.*

[38] *Ibid*.

requested the public agency to negotiate on an agency shop arrangement and, beginning seven working days after the public agency received this request, the two parties *have had 30 calendar days* to attempt good faith negotiations in an effort to reach agreement." (Emphasis added.) This language does not mandate the filing of a petition or party negotiations.

Claimant states that for the public agency employer to fail to participate in good faith negotiations during the 30-day period is an unfair labor practice, citing title 8, California Code of Regulations, section 32603, subdivision (c), which states it shall be an unfair labor practice for a public agency to "[r]efuse or fail to meet and confer in good faith with an exclusive representative as required by Government Code section 3505 or any local rule adopted pursuant to Government Code section 3507." Section 3505 requires the local public agency to meet and confer in good faith regarding wages, hours and other terms and conditions of employment. Nevertheless, for the reasons stated below, staff finds that the test claim statutes *do not* require the local public agency employer to engage in agency shop negotiations.

The Third Reading Analysis of Senate Bill No. 739 – the test claim statutes – provide the following statements:

> 1. Some public agency employers unfairly withhold or refuse agreement on agency fee arrangements despite a significant interest demonstrated by employees.
>
> 2. The existing MMBA provisions are said to provide employers with an unfair veto authority over such arrangements.
>
> 3. This bill provides employees with an alternative process to obtain an agency fee agreement through a fair, democratic process.[39]

The California Attorney General has interpreted Government Code section 3502.5, subdivision (b), in an opinion finding that the Department of Industrial Relations may conduct an agency shop election during the term of an existing memorandum of understanding (MOU) with an existing agency shop provision if that provision is first rescinded or removed.[40] Citing the Senate Rules Committee Analysis for the test claim statutes, noted above, the Attorney General stated: "It is clear from the legislative history of section 3502.5 that the employee election procedures of subdivision (b) were added to the statute to deal with situations *where the negotiated MOU procedures specified in subdivision (a) proved to be unsuccessful*." (Emphasis added.)[41] Opinions of the Attorney General, while not binding, are entitled to great weight, and in the absence of controlling authority, these opinions are persuasive 'since the legislature is presumed to be cognizant of that construction of the statute.' [42]

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[39] Senate Rules Committee, Office of Senate Floor Analyses, Third Reading Analysis of Senate Bill Number 739 (1999-2000 Regular Session), as amended May 13, 1999, Page 3.

[40] 86 Ops. Cal. Atty. Gen. 169.

[41] *Id.* at page 4.

[42] *Napa Valley Educators' Assn. v. Napa Valley Unified School Dist.* (1987) 194 Cal.App.3rd 243, 251.

Claimant states in its comments that staff should "consider the fact that agency shop arrangements are no longer just the product of MOU negotiations, but under the terms of the test claim legislation, can be raised at any time during the term of an MOU. This new mandate vests unions with that right, and requires good faith negotiations in a manner and at a time that had never existed prior to the test claim legislation."[43] However, the subdivision (a) agency shop provisions have been in effect since 1981, and nothing in those preexisting provisions restricted negotiations to the time period of MOU negotiations.

Thus, in accordance with the Attorney General's opinion, the employer-employee negotiations referenced in subdivision (b) are the same negotiations that would occur under subdivision (a), but subdivision (b) merely establishes a date when the employee organization may file the agency shop petition. If the public agency employer refused to negotiate with the employee organization on an agency shop agreement, any resulting "unfair labor practice" would stem from subdivision (a) rather than subdivision (b), the test claim statutes.

Therefore, staff finds that the activity of engaging in agency shop negotiations is not required of the public agency employer as a result of the test claim statutes.

Staff further finds that none of the other activities claimed regarding subdivision (b) agency shop arrangements[44] are required by the test claim statutes or regulations, since, as noted below, no other document that could be considered an "executive order" has been pled indicating that any of those other activities are required.

Government Code section 17553, subdivision (b), states that:

> All test claims shall be filed on a form prescribed by the commission and shall contain at least the following elements and documents:
>
> (1) A written narrative that identifies the specific sections of statutes or executive orders alleged to contain a mandate …
>
> (3) (A) The written narrative shall be supported with copies of all of the following:
>
> (i) The test claim statute that includes the bill number or executive order, alleged to impose or impact a mandate.

The test claim form does not include a cite to a statute, regulation or executive order requiring the local public agency employer to perform any activities with regard to agency shop elections. Page 6 of the test claim makes a reference to the Department of Industrial Relations (DIR) website, at http://www.dir.ca.gov/csmcs/ase-sb739.html. As of October 5, 2006, that DIR website displays "Procedures for mandated agency shop elections," last updated April 2005. No actual document from the website was filed with the test claim, however, and the website reference itself cannot be considered a "document" filed with the test claim, pursuant to section 17553, subdivision (b)(3). Since those procedures from the website – that may

[43] Comments on Draft Staff Analysis submitted by City of Sacramento, claimant, on November 9, 2006.

[44] To the extent that any activities claimed here could result from charges filed with PERB, those activities are addressed under the "PERB Jurisdiction and Administrative Hearings (Gov. Code, § 3509)" heading, *infra.*

otherwise be expected of public agency employers with regard to subdivision (b) agency shop elections – were not pled, the Commission does not have jurisdiction to make any findings with regard to them.

In comments on the draft staff analysis, claimant asserts that the public agency employer must process agency shop petitions, since "[o]nly the employer possesses the records necessary for compiling the needed information concerning unit employees, in order to ascertain whether the 30% requirement has been met, and to makeup the required lists of qualified voters." However, claimant still has not pled a "document" upon which the Commission has jurisdiction to make a finding as to whether these activities are state-mandated.

Accordingly, staff finds that Government Code section 3502.5, subdivision (b), does not impose any state-mandated activities that are subject to article XIII B, section 6.

Agency Shop Rescission Activities
(Gov. Code, § 3502.5, subd. (d))

Government Code section 3502.5, subdivision (d), provides that an agency shop arrangement may be rescinded by a majority vote of all the employees in the unit pursuant to procedures specified or other procedures negotiated by the local public agency employer and the recognized employee organization. Pursuant to the test claim statutes, the agency shop rescission provisions are now "also applicable to an agency shop agreement placed in effect pursuant to subdivision (b)."

Claimant is requesting reimbursement for "processing" agency shop rescission petitions. Although there is no specific requirement in the test claim statutes or regulations to "process" agency shop rescission petitions, the test claim regulations contain one provision regarding agency shop rescissions. Title 8, California Code of Regulations, section 61610, states the following:

> Within 20 days following the filing of the petition to rescind an agency shop agreement or provision, the public agency shall file with the [PERB] regional office an alphabetical list containing the names and job titles or classifications of the persons employed in the unit described in the petition as of the last date of the payroll period immediately preceding the date the petition was filed, unless otherwise directed by the Board.

However, title 8, California Code of Regulations, section 61000, states that sections 61000 et seq. are applicable "only where a public agency has adopted such provisions as its local rules or where all parties to a representation case agree to be bound by the applicable PERB Regulations." Thus, any activities in those regulations flow from the discretionary act of adopting them or agreeing to be bound by them, and do not constitute state-mandated activities.[45]

Therefore, Government Code section 3502.5, subdivision (d), does not impose any state-mandated activities that are subject to article XIII B, section 6.

[45] Title 8, California Code of Regulations, section 61000 has been amended since the test claim was filed. However, the amended regulations were not pled and are not addressed in this analysis.

Dues or Service Fee Deductions
(Gov. Code, § 3508.5, subd. (b))

Test claim statute Government Code section 3508.5, subdivision (b), states that "[a] public employer shall deduct the payment of dues or service fees to a recognized employee organization as required by an agency shop arrangement between the recognized employee organization and the public employer."

The claimant is requesting reimbursement for costs to provide staffing to institute and administer procedures for agency fee deductions and their transmittal to the union for agency shop arrangements established pursuant to Government Code section 3502.5, subdivision (b), negotiate with the union concerning those procedures, and represent the agency in the event of PERB intervention regarding disputes.

Staff finds that the plain language of the statutes requires only that the local public agency cause the dues or services fees to be deducted from the affected employees' wages and transmitted to the union. There is no requirement in the test claim statutes or regulations requiring the agency to institute and administer "procedures," negotiate with the union concerning those procedures, or represent the agency in the event of PERB intervention.[46]

Thus, Government Code section 3508.5, subdivision (b), does impose a state-mandated activity on the local agency — causing the dues or service fees to be deducted and transmitted to the union — which is subject to article XIII B, section 6.

In Lieu Fee Payments
(Gov. Code,§ 3502.5, subd. (c))

Where an agency shop arrangement has been established, Government Code section 3502.5, subdivision (c), provides that employees who conscientiously object to joining or financially supporting public employee organizations shall not be required to join or financially support any public employee organization as a condition of employment. The test claim statutes made this existing provision applicable to agency shop arrangements established under Government Code section 3502.5, subdivision (b).

Conscientious objectors *may* be required to pay sums equal to the dues, initiation or agency shop fees to a nonreligious, nonlabor charitable fund, in lieu of fees paid to the employee organization. Proof of such payments, if they are required, "shall be made on a monthly basis to the public agency as a condition of continued exemption from the requirement of financial support to the public employee organization."

The claimant is requesting reimbursement for costs to institute and administer procedures and documentation for in lieu fee payments of conscientious objectors and their transmittal to appropriate charities, negotiate with the union concerning those procedures, and represent the agency in the event of PERB intervention regarding disputes.

Agency shop arrangements can be established under subdivision (b) without the local public agency employer's approval. Although the employee holding a conscientious objection "*may*

[46] To the extent that any activities claimed here could result from charges filed with PERB, those activities are addressed under the "PERB Jurisdiction and Administrative Hearings (Government Code section 3509)" heading, *infra*.

be required" to make in lieu fee payments, under subdivision (b) agency shop arrangements, that requirement would be established by the employee organization and covered employees, with no discretion on the part of the local public agency employer. Therefore, activities required because of an in lieu fee payment provision of a subdivision (b) agency shop arrangement would not be discretionary.

Based on the plain language of the test claim statutes and regulations, the only activity required of the local public agency employer is to receive the required monthly "proof" of in lieu fee payments. The Department of Finance asserts that since the test claim statutes do not require the local public agency to take any action once the monthly "proof" is received, it disagrees with the finding that such receipt is a state-mandated reimbursable activity. Nevertheless, the verb "receive" is defined as "to take or acquire (something given, offered, or transmitted.),[47] and staff maintains that "receiving proof of such payments" does constitute an actual activity required by the state of the local public agency employer.

The other activities claimed are not required by the statutes or regulations, and, as a result, are not state-mandated activities.[48]

Thus, Government Code section 3502.5, subdivision (c), does impose a state-mandated activity on the local agency — receiving monthly proof of in lieu fee payments — which is subject to article XIII B, section 6.

PERB Jurisdiction and Administrative Hearings
(Gov. Code, § 3509)

The test claim statutes added provisions granting the PERB jurisdiction over disputes arising under the MMBA, including enforcing and applying local rules and regulations adopted by a local public agency. Government Code section 3509 states:

> (a) The powers and duties of [PERB] described in Section 3541.3 shall also apply, as appropriate, to this chapter and shall include the authority as set forth in subdivisions (b) and (c).
>
> (b) A complaint alleging any violation of this chapter or of any rules and regulations adopted by a public agency pursuant to Section 3507 shall be processed as an unfair practice charge by [PERB]. [PERB] shall apply and interpret unfair labor practices consistent with existing judicial interpretations of this chapter.
>
> (c) [PERB] shall enforce and apply rules adopted by a public agency concerning unit determinations, representation, recognition, and elections.

In its quasi-judicial capacity to resolve employer-employee disputes, PERB has several powers and duties, including the ability to "hold hearings, subpoena witnesses, administer oaths, take the testimony or deposition of any person, and … to issue subpoenas duces tecum to require

[47] The American Heritage Dictionary, New College Edition, 1979, page 1087.

[48] To the extent that any activities claimed here result from any charges filed with PERB, those activities are addressed under the "PERB Jurisdiction and Administrative Hearings (Government Code section 3509)" heading, *infra*.

the production and examination of any employer's or employee organization's records, books, or papers relating to any matter within its jurisdiction."[49]

As a result of the test claim statutes, regulations setting forth PERB procedures were modified to reflect their applicability to MMBA disputes. These regulations set forth detailed procedures for conducting initial administrative hearings and administrative appeals of those decisions to the five-member PERB itself, including such matters as time and manner of filing complaints, investigations, subpoenas, depositions, conduct of hearings, rules of evidence, briefs, oral arguments, transcripts, decisions, reconsiderations and appeals.[50]

A complaint under MMBA can be made as an unfair labor practice charge or a request for PERB to review a local public agency employer's action concerning a unit determination, representation, recognition or elections.

The claimant is seeking reimbursement for costs to: 1) respond to appeals made to the PERB of agency actions regarding unit issues, representation matters, recognition, elections and unfair practice determinations; 2) respond to, or file, unfair labor practice charges; 3) participate in PERB's investigation of charges; 4) prepare for hearings before PERB Administrative Law Judges including, but not limited to, the preparation of briefs, documentation, exhibits, witnesses and expert witnesses; 5) present the agency's case before the PERB's Administrative Law Judge, including expert witness fees, increased overtime costs for employee witnesses, closing brief, costs of transcripts and travel expenses; 6) represent the agency at proceedings that appeal PERB Administrative Law Judge decisions to the Board itself, including travel expenses; and 7) develop and provide training in PERB's rules, procedures and decisions for agency supervisory and management personnel, and attorneys.

For the reasons stated below, staff finds that the local public agency employer is required to engage in the activities set forth in the PERB procedures when cases are filed with PERB by an entity other than the public agency employer. However, staff finds that where a local public agency employer *initiates* a charge or appeal with PERB, that decision is discretionary and thus does not mandate any of the PERB procedures.

Claimant argues that where PERB errs in the interpretation of a law or its application to the facts in a given situation to the detriment of the employer, the employer has no choice but to appeal its decisions; similarly, the employer has no choice but to respond to any union appeal of a PERB decision. Claimant also argues that, in coming under the jurisdiction of PERB, the employer now has no choice but to file an unfair labor practice if the union is engaging in conduct which constitutes a violation of MMBA. The types of actions which can be undertaken by the union, which constitute unfair labor practices and are illegal under MMBA, "include such concerted activities as refusals to perform all required job duties, slow downs, sick outs, rolling strikes and work stoppages."[51]

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[49] Government Code section 3541.3, subdivision (h).

[50] Title 8, California Code of Regulations, sections 31001 et seq.

[51] Comments on Draft Staff Analysis, submitted by claimant City of Sacramento on November 9, 2006, page 3.

Claimant further states that:

> Illegal concerted activities threaten public health, safety and welfare, if for example, emergencies are not promptly responded to; if garbage piles up and is not collected; if sewage is not properly treated and disposed of; if public assistance is not administered and paid as required; and if payroll, accounts payable and accounts receivable are not processed. Furthermore, it is disruptive to agencies if a union were to intimidate or coerce an employee because of the exercise of his or her rights guaranteed by Government Code, section 3502 or any local rule.
>
> Public health and safety can be seriously undermined if a union engages in unfair labor practices which go unchecked. Just as any violation of the MMBA by an employer constitutes an unfair labor practice charge, so too does any violation of the MMBA by an employee organization. This is not the type of conduct which should be countenanced by a finding of 'voluntariness' on the part of the Commission.[52]

The Department of Finance asserts that the public agency employer's PERB activities are discretionary, however, based on the case of *County of Los Angeles v. Commission on State Mandates* (1995) 32 Cal.App.4th 805 (*County of Los Angeles II)*. That case, in interpreting the holding in *Lucia Mar,*[53] noted that where local entities have alternatives under the statute other than paying the costs in question, the costs do not constitute a state mandate.[54] Finance argues that, in this case, the claimant has "alternatives available in that it may choose to argue an affected case in front of the PERB, it may externally develop a settlement, or it can try to resolve the employment issue internally. Only when the claimant chooses to engage the case within PERB's jurisdiction [which includes responding to charges and appeals filed with PERB] does the claimant then fall within the requirements of that process."[55]

Staff agrees that the public agency employer has alternatives to bringing an action to PERB when an employee organization engages in concerted activities such as strikes or work slowdowns. The MMBA itself provides significant flexibility for resolving employer-employee disputes, as set forth in Government Code section 3500, subdivision (a), which states:

> It is the purpose of this chapter to promote full communication between public employers and their employees by providing a reasonable method of resolving disputes regarding wages, hours, and other terms and conditions of employment between public employers and public employee organizations…. Nothing contained herein shall be deemed to supersede the provisions of existing state law and the charters, ordinances, and rules of local public agencies that establish and regulate a merit or civil service system or which provide for other methods of administering employer-

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[52] *Ibid.*

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

[54] *County of Los Angeles II, supra,* 32 Cal.App. 4th 805, page 818.

[55] Comments from Department of Finance, submitted December 20, 2002, page 2.

> employee relations nor is it intended that this chapter be binding upon those public agencies that provide procedures for the administration of employer-employee relations in accordance with the provisions of this chapter. This chapter is intended, instead, to strengthen merit, civil service and other methods of administering employer-employee relations through the establishment of uniform and orderly methods of communication between employees and the public agencies by which they are employed.

In *County Sanitation District No. 2 of Los Angeles County v. Los Angeles County Employees' Association* (1985) 38 Cal.3d 564 *(County Sanitation Dist.)*, addressing the issue of the legality of public sector strikes, the Supreme Court questioned the "essentiality" of most public services, and notes several alternatives available to the public agency employer. One such alternative is to simply hold firm to the employees' demands:

> [A] key assumption underlying the argument – that all government services are essential – is factually unsupportable. Modern governments engage in an enormous number and variety of functions, which clearly vary as to their degree of essentiality. As such, the absence of an unavoidable nexus between most public services and [essentiality] necessarily undercuts the notion that public officials will be forced to settle strikes quickly and at any cost. The recent case of the air-traffic controllers' strike … is yet another example that governments have the ability to hold firm against a strike for a considerable period, even in the face of substantial inconvenience. As this court concluded in *Los Angeles Met. Transit Authority v. Brotherhood of Railroad Trainmen, supra,* "Permitting employees to strike does *not* delegate to them authority to fix their own wages to the exclusion of the employer's discretion. In collective bargaining negotiations, whether or not the employees strike, the employer is free to reject demands if he determines that they are unacceptable." (54 Cal. 2d at p. 693, italics added.)[56]

County Sanitation Dist. also cites the situation where Santa Monica ended a strike of city employees by threatening to subcontract its sanitation operations, and noted that San Francisco has chosen to subcontract its entire sanitation system to private firms. Thus, filing an unfair labor practice charge with PERB is only one tactic in a variety of available options for the public agency employer.

The plain language of the statutes and regulations does not require the local public agency employer to *initiate* charges or appeals to PERB. The cases have found that, in the absence of strict legal compulsion, a local government entity might be "practically" compelled to take an action thus triggering costs that would be reimbursable. The case of *San Diego Unified School Dist.* addressed the compulsion issue in the context of student expulsions. There, the court found that in the absence of legal compulsion, compulsion might nevertheless be found when a school district exercised it discretion in deciding to expel a student for a serious offense to other students or property, in light of the state constitutional requirement to provide safe schools.[57]

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[56] *County Sanitation Dist., supra,* 38 Cal.3d 564, pages 577-578.

[57] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, at page 887, footnote 22.

Here, claimant is seeking reimbursement for costs to file unfair labor practice charges with PERB, or appeal decisions of PERB, claiming it has no choice in the matter when the union engages in such concerted activities as refusals to perform all required job duties, slow downs, sick outs, rolling strikes and work stoppages, because the public health and safety is at risk. This argument falls short of the circumstances discussed in *San Diego Unified School Dist*, where the constitutional requirement for safe schools might practically compel the school district to expel a student. And since the public agency employer has alternatives to initiating an unfair labor practice or filing an appeal with PERB, such as resolving employment issues internally, contracting out or developing settlements, the *County of Los Angeles II* case is applicable to find that no mandate exists. Moreover, the Supreme Court in *San Diego Unified School Dist*. underscored the notion that a state mandate is found when the state, rather than a local official, has made the decision to require the costs to be incurred.[58] In this case, the state has not required the local public agency employer to file any charge or appeal with PERB.

Thus, staff finds that where a *local public agency employer* files a charge or appeal with PERB, that decision is *discretionary*, and the PERB procedures are only triggered because of the employer's discretionary decision to bring the case forward.

However, since cooperation with PERB and its subpoena powers is needed to resolve MMBA disputes adjudicated by PERB, the local public agency employer does not have any alternatives and is required to engage in the activities set forth in the PERB procedures when such disputes are filed with PERB by an entity other than the local public agency employer.

Therefore, staff finds that only the following events trigger the requirement for the local public agency employer to participate and respond in accordance with the PERB procedures: 1) an unfair labor practice charge, or a request to review a local public agency employer's action concerning a unit determination, representation, recognition or election, is filed with PERB by an entity *other than the local public agency employer*; 2) a decision by a PERB agent, PERB Administrative Law Judge, or the five-member PERB is appealed by an entity *other than the local public agency employer*; or 3) the local public agency employer is ordered by PERB to join in a matter. Accordingly, the following activities are state-mandated, and are subject to article XIII B, section 6:

a. procedures for filing documents or extensions for filing documents with PERB (Cal. Code Regs., tit.8, §§ 32132, 32135);

b. proof of service (Cal. Code Regs., tit. 8, § 32140);

c. responding to subpoenas and investigative subpoenas (Cal. Code Regs., tit. 8, §§ 32149, 32150);

d. conducting depositions (Cal. Code Regs., tit. 8, § 32160);

e. participating in hearings and responding as required by PERB agent, PERB Administrative Law Judge, or the five-member PERB (Cal. Code Regs., tit. 8, §§ 32168, 32170, 32175, 32176, 32180, 32205, 32206, 32207, 32209, 32210, 32212, 32310, 32315, 32375, 32455, 32620, 32644, 32649, 32680, 32980, 60010, 60030, 60050, and 60070); and

[58] *Id.* at page 880.

f. filing and responding to written motions in the course of the hearing (Cal. Code Regs., tit. 8, § 32190).

As noted above, any action by the local public agency initiating a case or amending it, or an appeal of a decision by a PERB agent, PERB Administrative Law Judge, or the PERB itself, is discretionary and therefore not required. Accordingly, the following activities initiated by the local public agency are *not* state-mandated activities:

- file an unfair practice charge (Cal. Code of Regs., tit. 8, §§ 32602, 32604, 32615, 32621, 32625)
- appeal of a ruling on a motion (Cal. Code of Regs., tit. 8, § 32200);
- amendment of complaint (Cal. Code of Regs., tit. 8, §§ 32625, 32648);
- appeal of an administrative decision, including request for stay of activity and appeal of dismissal (Cal. Code of Regs., tit. 8, §§ 32350, 32360, 32370, 32635, and 60035);
- statement of exceptions to Board agent decision (Cal. Code of Regs., tit. 8, § 32300);
- request for reconsideration (Cal. Code of Regs., tit. 8, § 32410); and
- request for injunctive relief (Cal. Code of Regs., tit. 8, § 32450).

Furthermore, costs for related expert witness services, travel expenses and PERB training are not required by the test claim statutes or regulations and, thus, are not state-mandated activities.

Court Appeals of Final PERB Decisions
(Tit. 8, Cal. Code Regs., § 32500)

Section 32500, subdivision (a), states that "[a]ny party in a representation case by the Board itself … may file a request to seek judicial review within 20 days following the date of service of the decision." Subdivision (b) states that "[a]ny party shall have 10 days following the date of service of the request to file a response."

Claimant is requesting reimbursement for costs to prepare for and represent the agency in superior and appellate courts regarding appeals of final PERB decisions. The plain language of the test claim statutes and regulations does not require the local public agency employer to perform any activities with regard to superior or appellate court appeals of final PERB decisions. Therefore, these costs are not subject to article XIII B, section 6.

Summary of State-Mandated Activities

In summary, staff finds the following activities are state-mandated, and therefore subject to article XIII B, section 6:

1. Deduct from employees' wages the payment of dues or service fees required pursuant to an agency shop arrangement that was established under subdivision (b) of Government Code section 3502.5, and transmit such fees to the employee organization. (Gov. Code § 3508.5, subd. (b))
2. Receive from the employee any proof of in lieu fee payments made to charitable organizations required pursuant to an agency shop arrangement that was established

under subdivision (b) of Government Code section 3502.5. (Gov. Code § 3502.5, subd. (c))

3. Follow PERB procedures in responding to charges or appeals filed with PERB, by an entity *other than* the local public agency employer, concerning an unfair labor practice, a unit determination, representation by an employee organization, recognition of an employee organization, or an election. Mandated activities are:

   a. procedures for filing documents or extensions for filing documents with PERB (Cal. Code Regs., tit.8, §§ 32132, 32135);

   b. proof of service (Cal. Code Regs., tit. 8, § 32140);

   c. responding to subpoenas and investigative subpoenas (Cal. Code Regs., tit. 8, §§ 32149, 32150);

   d. conducting depositions (Cal. Code Regs., tit. 8, § 32160);

   e. participating in hearings and responding as required by PERB agent, PERB Administrative Law Judge, or the five-member PERB (Cal. Code Regs., tit. 8, §§ 32168, 32170, 32175, 32176, 32180, 32205, 32206, 32207, 32209, 32210, 32212, 32310, 32315, 32375, 32455, 32620, 32644, 32649, 32680, 32980, 60010, 60030, 60050, and 60070); and

   f. filing and responding to written motions in the course of the hearing (Cal. Code Regs., tit. 8, § 32190).

B. Do the Mandated Activities Constitute a Program?

The courts have held that the term "program" within the meaning of article XIII B, section 6 means a program that carries out the governmental function of providing a service to the public, or laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state. [59]

Here, the activities mandated by the test claim statutes and regulations constituted modifications to employer-employee relations under the MMBA. The provisions are applicable to "every governmental subdivision, every district, every public and quasi-public corporation, every public agency and public corporation and every town, city, county, city and county and municipal corporation …" and thus impose unique requirements on local governments and do not apply generally to all residents and entities in the state. Therefore, the mandated activities constitute a "program" within the meaning of article XIII B, section 6.

Issue 2: Do the activities mandated by the test claim statutes and regulations constitute a "new program or higher level of service" within the meaning of article XIII B, section 6 of the California Constitution?

A test claim statute or executive order imposes a "new program or higher level of service" when the mandated activities: a) are new in comparison with the pre-existing scheme; and

[59] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56 (*County of Los Angeles)*.

b) result in an increase in the actual level or quality of governmental services provided by the local public agency.[60] The first step in making this determination is to compare the mandated activities with the legal requirements in effect immediately before the enactment of the test claim statutes and regulations.

Prior to 2001, the MMBA contained provisions for an agency shop arrangement to be formed when an agreement was negotiated between the local public agency employer and the recognized employee organization.[61] The test claim statutes provided additional authorization for formation of an agency shop without a negotiated agreement between a local public agency employer and a recognized organization, and made the existing agency shop rescission provisions applicable to the new type of agency shop arrangement.[62] Thus, mandated activities related to the second category of agency shop formation, and rescission of such agency shop arrangements, are new in comparison to the pre-existing scheme.

Prior to 2001, the MMBA provided that nothing could affect the right of a public employee to authorize deduction of employee organization dues from his or her wages.[63] The test claim statutes *require* a local public agency employer to deduct the payment of dues or service fees to a recognized employee organization from the employee's wages pursuant to an agency shop arrangement,[64] regardless of how such arrangement is formed. These required deductions are new in comparison to the pre-existing scheme.

Prior to 2001, disputes arising under the MMBA were dealt with via local public agency rules adopted under MMBA, and any appeals were made in the courts. The test claim statutes brought MMBA disputes under the jurisdiction of PERB,[65] and thus local public agency employers are now subject to the procedures enacted by PERB for dispute resolution. Since these PERB dispute resolution procedures are now applicable to local public agency employers subject to MMBA, the activities required are new in comparison to the pre-existing scheme.

The Department of Finance points out that the test claim statutes provided specific language expressing the Legislature's intent that since the duties are similar to requirements in existing law, the statutes do not create a reimbursable state mandate. The language states:

> The Legislature finds and declares that the duties and responsibilities of local agency employer representatives under this chapter are substantially similar to the duties and responsibilities required under existing collective bargaining enforcement procedures and therefore the costs incurred by the local agency employer representatives in performing those duties and

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[60] *San Diego Unified School Dist., supra*, 33 Cal.4th 859, 877; *Lucia Mar, supra*, 44 Cal.3d 830, 835.

[61] Government Code section 3502.5, subdivision (a).

[62] Government Code section 3502.5, subdivisions (b) and (d).

[63] Government Code section 3508.5, subdivision (a).

[64] Government Code section 3508.5, subdivision (b).

[65] Government Code section 3509.

> responsibilities under this chapter are not reimbursable as state-mandated costs.[66]

However, courts have stated that "legislative disclaimers, findings and budget control language are not determinative to a finding of a state mandated reimbursable program …"[67] Moreover, the courts have determined that:

> [T]he statutory scheme contemplates that the Commission [on State Mandates], as a quasi-judicial body, has the sole and exclusive authority to adjudicate whether a state mandate exists. Thus, any legislative findings are irrelevant to the issue of whether a state mandate exists …[68]

Therefore, the Legislature's findings that the test claim statutes do not impose state-mandated costs may not be relied upon by the Commission as a basis for its conclusion.

The Department contends that the duties already performed by local public agencies under the existing process include responding to unfair labor practice charges, compiling payroll and personnel records, and participating in meetings and negotiations with unions. Staff does not dispute that some similar activities may have been performed under the existing process. However, many of those activities were previously triggered for different purposes, i.e., for *negotiated* agency shop arrangements, and performed in a different forum, i.e., the courts. Therefore, as set forth above, staff finds that there are specific activities that are newly mandated by the test claim statutes and regulations.

Furthermore, since the mandated activities require the local agency to perform new tasks in service of improving local public agency employer-employee relations, the new activities do result in an increase in the actual level of services provided by the local public agency.

Accordingly, staff finds that the activities mandated by test claim statutes and regulations constitute a "new program or higher level of service" on local agencies within the meaning of article XIII B, section 6.

Issue 3: Do the activities mandated by the test claim statutes and regulations impose "costs mandated by the state" within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514?

For the mandated activities to impose a reimbursable, state-mandated program, two additional elements must be satisfied. First, the activities must impose costs mandated by the state pursuant to Government Code section 17514. Second, the statutory exceptions to reimbursement listed in Government Code section 17556 cannot apply.

Government Code section 17514 defines "costs mandated by the state" as any increased cost a local agency is required to incur as a result of a statute that mandates a new program or higher

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[66] Government Code section 3500, subdivision (b).

[67] *County of Los Angeles v. Commission on State Mandates* (2003) 110 Cal.App.4th 1176, citing *Carmel Valley Fire Protection District v. State of California* (1987) 190 Cal.App.3d 521, 541.

[68] *County of Los Angeles, supra,* 32 Cal.App.4th 805, 819.

level of service. The claimant alleged in the test claim that the costs for activities necessary to comply with the test claim statutes and regulations are "well in excess of $200 per year."[69] Thus, there is evidence in the record, signed under penalty of perjury, that there are increased costs as a result of the test claim statutes and regulations.

Furthermore, for the reasons stated below, staff finds that none of the statutory exceptions to reimbursement listed in Government Code section 17556 are applicable. Government Code section 17556 states that:

> The commission shall not find costs mandated by the state, as defined in Section 17514, in any claim submitted by a local agency …, if, after a hearing, the commission finds that:
>
> …
>
> (e) The statute, executive order, or an appropriation in a Budget Act or other bill provides for offsetting savings to local agencies … that result in no net costs to the local agencies …, or includes additional revenue that was specifically intended to fund the costs of the state mandate in an amount sufficient to fund the cost of the state mandate.

The Department of Finance asserts that the test claim statutes provide for offsetting savings to local agencies since the provisions shift local employers from a process wherein they rely on the court system to litigate unfair labor practice charges to a process where they would rely on PERB for those types of decisions; thus, the costs that the employers would incur through the process with PERB would have been incurred if the unfair labor practice claims were still being litigated in the court system. Additionally, to the extent that PERB settles claims before they ever reach a courtroom, the provisions would result in savings to the public agencies.

Claimant contends, however, that there is no merit to the Department's statement that PERB settling claims before they ever reach a courtroom would result in savings to the public agencies, because this conjecture disregards the fact that a union facing the prospect of formal, more costly court proceedings could just as likely be a more compelling inducement for settling claims. Moreover, under PERB's regulations, settlement conferences occur only after the agency participates in the investigative process and responds to the unfair practice charge.

In response, the Department asserts that the PERB administrative process truncates the claimant's participation and provides operational savings through a faster adjudication, whereas, in comparison, a court process could take years to finalize. Since the claimant has not provided any statistical, fiscal, or numerical data showing case cost trends evidencing otherwise, the Department's position regarding offsetting savings continues to have merit.

The legislative history indicates that one factor in adopting the test claim statutes was the fact that, at the time, MMBA had no effective enforcement procedures except for time-consuming

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[69] At the time the test claim was filed, Government Code section 17564, subdivision (a), stated that the no test claim or reimbursement claim shall be made unless the claim exceeds $200. That section was subsequently modified in Statutes 2002, chapter 1124, to increase the minimum to $1,000. If this test claim is approved, any reimbursement claims must exceed $1,000.

and expensive court action.[70] The proponents of the bill argued that "[o]ne of the basic principles of an effective collective bargaining law should be to provide for enforcement by an administrative agency with expertise in labor relations," and the appropriate role for courts is to serve as an appellate body.[71] Thus, there could be savings using the PERB process.

However, other than the above-noted speculations, there is no evidence in the record to support the notion that "[t]he statute, executive order, or an appropriation in a Budget Act or other bill provides for offsetting savings to local agencies … that result in no net costs to the local agencies …, or includes additional revenue that was specifically intended to fund the costs of the state mandate in an amount sufficient to fund the cost of the state mandate."

As a final matter, any cost savings must be analyzed in light of Government Code section 17517.5, which states that "'[c]ost savings authorized by the state' means any decreased costs that a local agency … realizes as a result of any statute enacted or any executive order adopted that permits or requires the discontinuance of or a reduction in the level of service of an existing program that was mandated before January 1, 1975." Here, although MMBA disputes were resolved in the courts prior to 1975, there was no state-mandated activity regarding court resolution prior to 1975. Thus, staff finds Government Code section 17517.5 is inapplicable for this analysis.

Accordingly, staff finds that the activities mandated by the test claim statutes and regulations, as set forth above, impose "costs mandated by the state" within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514.

Conclusion

Staff finds that the test claim statutes and regulations impose a reimbursable state-mandated program on local agencies within the meaning of article XIII B, section 6 of the California Constitution, and Government Code section 17514, for the following activities:

1. Deduct from employees' wages the payment of dues or service fees required pursuant to an agency shop arrangement that was established under subdivision (b) of Government Code section 3502.5, and transmit such fees to the employee organization. (Gov. Code § 3508.5, subd. (b))
2. Receive from the employee any proof of in lieu fee payments made to charitable organizations required pursuant to an agency shop arrangement that was established under subdivision (b) of Government Code section 3502.5. (Gov. Code § 3502.5, subd. (c))
3. Follow PERB procedures in responding to charges filed with PERB, by an entity *other than* the local public agency employer, concerning an unfair labor practice, a unit determination, representation by an employee organization, recognition of an employee organization, or an election. Mandated activities are:
    a. procedures for filing documents or extensions for filing documents with PERB (Cal. Code Regs., tit.8, §§ 32132, 32135 (Register 2001, No. 49));

[70] Senate Bill 739, Bill Analysis, Assembly Committee on Appropriations, August 9, 2000, hearing, page 2.

[71] *Ibid.*

b. proof of service (Cal. Code Regs., tit. 8, § 32140 (Register 2001, No. 49));

c. responding to subpoenas and investigative subpoenas (Cal. Code Regs., tit. 8, §§ 32149, 32150 (Register 2001, No. 49));

d. conducting depositions (Cal. Code Regs., tit. 8, § 32160 (Register 2001, No. 49));

e. participating in hearings and responding as required by PERB agent, PERB Administrative Law Judge, or the five-member PERB (Cal. Code Regs., tit. 8, §§ 32168, 32170, 32175, 32176, 32180, 32205, 32206, 32207, 32209, 32210, 32212, 32310, 32315, 32375, 32455, 32620, 32644, 32649, 32680, 32980, 60010, 60030, 60050, and 60070 (Register 2001, No. 49)); and

f. filing and responding to written motions in the course of the hearing (Cal. Code Regs., tit. 8, § 32190 (Register 2001, No. 49)).

The City of Los Angeles, the County of Los Angeles, and peace officers as defined in Penal Code section 830.1 are not subject to PERB jurisdiction.[72] Any other statute, regulation or executive order that is not addressed above does not constitute a reimbursable state-mandated program pursuant to article XIII B, section 6 of the California Constitution or Government Code section 17514.

Recommendation

Staff recommends the Commission adopt this analysis and partially approve the test claim.

[72] Government Code sections 3509, subdivision (d), and 3511.