ITEM 9

TEST CLAIM
FINAL STAFF ANALYSIS

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

Statutes 2000, Chapter 901

Local Government Employment Relations
(01-TC-30)

City of Sacramento, Claimant
County of Sacramento, Claimant

TABLE OF CONTENTS

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

---

[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,

---

[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:

---

[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

---

[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]

---

[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]

---

[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-

---

[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, 2006, 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]

---

[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

---

[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

---

[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

---

[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.

PAGES 31-100 LEFT BLANK INTENTIONALLY

EXHIBIT A

State of California
COMMISSION ON STATE MANDATES
980 Ninth Street, Suite 300
Sacramento, CA 95814
(916) 323-3562
CSM 1 (2 91)

For Official Use Only

RECEIVED
AUG 0 1 2002
COMMISSION ON
STATE MANDATES

Claim No. 01-TC-30

TEST CLAIM FORM

Local Agency or School District Submitting Claim

City of Sacramento and County of Sacramento

Contact Person

Allan P. Burdick/Pamela A. Stone (MAXIMUS, INC.)

Telephone No.

(916) 485-8102
Fax (916) 485-0111

Address

4320 Auburn Blvd., Suite 2000
Sacramento, CA 95841

Representative Organization to be Notified

California State Association of Counties and League of California Cities

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

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

Chapter 901, Statutes of 2000, Title 8, California Code of Regulations, Sections 31001-61630

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

Name and Title of Authorized Representative

Terry Schutten, County Executive

Telephone No.

(916) 874-5878

Signature of Authorized Representative

July 26, 2002
Date

State of California
COMMISSION ON STATE MANDATES
980 Ninth Street, Suite 300
Sacramento, CA 95814
(916) 323-3562
CSM 1 (2 91)

TEST CLAIM FORM

Local Agency or School District Submitting Claim

City of Sacramento and County of Sacramento

Contact Person

Allan P. Burdick/Pamela A. Stone (MAXIMUS, INC.)

Address

4320 Auburn Blvd., Suite 2000
Sacramento, CA 95841

Representative Organization to be Notified

California State Association of Counties and League of California Cities

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

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

Chapter 901, Statutes of 2000, Title 8, California Code of Regulations, Sections 31001-61630

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

Name and Title of Authorized Representative

Patty Masciola
Asst. City Manager

* Signature of Authorized Representative

For Official Use Only
Claim No.

Telephone No.

(916) 485-8102
Fax (916) 485-0111

Telephone No.

Date

BEFORE THE
COMMISSION ON STATE MANDATES

Test Claim of:
City of Sacramento
And
County of Sacramento

Local Government Employment Relations

Chapter 901, Statutes of 2000
(S.B. 739)
Title 8, California Code of Regulations, Sections 31001-61630

STATEMENT OF THE CLAIM

A. MANDATE SUMMARY

The passage of Chapter 901, Statutes of 2000, substantially changed the face of labor relations between public employee unions and local government in the State of California.

Prior to the passage of the test claim legislation, public employee labor relations had been governed by the Meyers-Millias-Brown Act (hereinafter "MMBA") since 1968.[1] Labor disputes, strikes and litigation had been relatively infrequent, but the public employee unions had sought an environment more closely allied to their goals and objectives. These efforts resulted in the passage of Chapter 901, Statutes of 2000.

The test claim legislation modifies the existing labor relations environment in two primary areas, being: 1) agency shop, and 2) preemption of local administration of labor relations by expanding the jurisdiction of the Public Employment Relations Board (hereinafter "PERB").

Agency Shop

Prior to January 2, 2001, an agency shop[2] agreement could be negotiated between a local public agency and a recognized public employee organization. This type of "union

[1] Government Code, Sections 3500 *et seq.*

[2] An agency shop agreement is one which requires an employee, as a condition of continued employment, to either 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. This requirement under

security" agreement had been a major bargaining goal for most unions in their negotiations with the employer. An agency shop arrangement was part of the negotiations leading to the labor agreement specifying the terms and conditions of employment.

The significance of the test claim legislation is that Government Code, Section 3502.5 was amended to authorize an agency shop without it being part of such a negotiated agreement. Instead, the test claim legislation provides for a signed petition by a minority of 30% of the employees within the bargaining unit. After the submission of the petition, an election will be held. If 50% or more of those voting vote in favor of the agency shop, it will be implemented. Thus, a majority of those within the bargaining unit do not have to be in favor of the agency shop for it to be implemented. The test claim legislation further provides that a petition can be filed after only 30 days of "negotiating" the issue.

The result of this provision is that meaningful labor negotiations over the issue of agency shop are much less likely. Previously, when agency shop agreements were negotiated, an agency invariably obtained "tradeoffs" for its agreement. With this provision, such "tradeoffs" are much less likely as there is no incentive for the unions to agree to concessions. Rather, unions can just wait until another time, "negotiate" for 30 days, and then have an election.

Another important aspect pertains to the duration of the agency shop provision. This legislation provides that unless the agency shop is rescinded according to the MMBA by a majority of all unit employees, the agency shop provision lasts as long as the employee organization is the recognized bargaining representative. This change is significant, as under both private and public sector employment relations, the agency shop is an outgrowth of the collective bargaining process and agreement, and lasts only as long as the collective bargaining agreement remains in effect.[3]

Expansion of the Jurisdiction of the PERB

This is the most significant change wrought by the enactment of Chapter 901, Statutes of 2000.

Prior to the enactment of the test claim legislation, labor-management relations for local agency employers was governed by the MMBA, which was administered by each local agency in accordance with its own rules and regulations, subject to statutory standards and judicial enforcement.

With the passage of the test claim legislation, PERB is now vested with authority over local agencies, much like the National Labor Relations Board has over private entities.

---

prior law existed for a period not to exceed the duration of the agreement, or three years from the effective date of the agreement, whichever first occurred.

[3] See, for example, *Chemical Workers Local 112 (American Cyanamid Co.)* (1978) 237 NLRB 864, 99 LRRM 1152; *Local No. 25, Int'l Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Tech Weld Corp.)* (1975) 220 NLRB 76, 90 LRRM 1193.

Thus, the PERB was granted jurisdiction to administer and resolve disputes regarding bargaining unit and representation matters, as well as unfair labor practices, including any alleged violations of the MMBA.

Prior to the test claim legislation, the PERB had jurisdiction over three collective bargaining statutes, being: 1) the Education Employment Relations Act of 1976 (EERA)[4] which established collective bargaining in California's K-12 public schools and community colleges; 2) the State Employer-Employee Relations Act of 1978 (SEERA or the Dills Act)[5] which established collective bargaining for State government employees; and 3) the Higher Education Employer-Employee Relations Act of 1979 (HEERA)[6] which established collective bargaining rights to the California State University and University of California systems, as well as the Hastings College of Law.

The PERB board is composed of five members appointed by the Governor, and subject to confirmation by the State Senate. Each board member is appointed to a five year term, with the term of one member expiring at the end of each calendar year. In addition to the responsibility of administering the three statutes listed above, the Board also acts as an appellate body to hear challenges to proposed decisions issued by its staff. Decisions of the Board itself may be appealed under certain circumstances, to the courts.[7]

The primary function of the PERB staff involves the evaluation and adjudication of unfair practice charges and the administration of the statutory process through which public employees select employee organizations for representation in their labor relations with their employers.

The PERB was granted authority in the test claim legislation to hold hearings, subpoena witnesses, administer oaths, take testimony and depositions, issue subpoenas duces tecum for the production of documents and records of employers or employee organizations, conduct investigations, and bring actions in court.

In order to exercise its jurisdiction, the PERB enacted regulations in October of 2001[8]. These regulations set forth the procedure and practice of the PERB as it relates to the test claim legislation. Such requirements are incorporated into the test claim.

Unfair Labor Practice Claims

The test claim legislation defines an unfair labor practice as "a complaint alleging any violation of this chapter or of any rules and regulations adopted by the public agency

[4] Government Code, Sections 3540 *et seq.*
[5] Government Code, Sections 3512 *et seq.*
[6] Government Code, Sections 3560 *et seq.*
[7] The three statutes which the PERB previously administered prior to the test claim legislation, specified that appeal was to the Court of Appeals. However, the test claim legislation does not specify appeal rights nor the appropriate forum for appeals. It is probable that litigation will be necessary to resolve the issue under the test claim legislation as to whether recourse must be had first to the superior court or directly to the appellate court.
[8] Amendments to Title 8, California Code of Regulations, Sections 31001 through 61630.

pursuant to Section 3507". Thus, the test claim legislation grants a virtually unlimited scope of issues that can constitute an unfair labor practice. While under the other three statutes administered by the PERB only designated conduct can constitute an unfair labor practice, the new language makes virtually any claimed violation of the MMBA the subject of an unfair labor practice complaint.

Additionally, unlike the other statutes administered by PERB, SB 739 contains no statute of limitations. Thus, while there is a six month statute of limitations under the EERA[9], the lack of a statute of limitations will necessitate local agencies responding to stale claims.

The regulations of the PERB as adopted, set forth the procedures of unfair labor practice proceedings. The steps include the filing of the charge, Statements of Positions, Issuance of Complaint, Answer, Informal Settlement Conference, Formal Hearing, Appeal to the Board, and Appeal to Court.

A charge is filed in any regional office, alleging that an unfair practice has been committed. The charge is a simple filing, signed under penalty of perjury, and provides a statement of the facts and conduct alleged to constitute the unfair practice. There are no filing fees for the filing of these complaints, unlike the commencement of an action in court.

After a charge is filed, the Board's agent engages in an exchange of information, and makes inquiries to determine whether he or she believes there has been an unfair labor practice. Typically, the responding party is requested to provide a statement of position o the charge for consideration by the PERB in determining whether a complaint should issue. During this part of the process, the charge can be dismissed, withdrawn, amended, or a complaint issued.

The Board will issue a complaint if the allegations are sufficient to establish a prima facie case. Unlike prosecutorial agencies such as the Department of Fair Employment and Housing or the Equal Employment Opportunities Commission, the Board agent typically makes no determination regarding the merits of a factual claim. Thus, if the facts are in contention, typically a complaint will issue.

After a complaint is issued by the PERB, the respondent typically has twenty (20) days to respond by the filing of an Answer. An informal conference is held to clarify the issues and explore the possibility of a voluntary settlement. If the informal conference does not result in a settlement, the matter goes to a hearing. The hearing is a full evidentiary hearing before an Administrative Law Judge (hereinafter "ALJ"), which results in the provision of a written decision.

The ALJ who conducts the hearing typically has the power to:

- Inquire fully into all issues
- Authorize the taking of depositions

[9] *See* Government Code, Sections 3541.5, 3541.5(a) and 3563.2(a).

- Issue subpoenas
- Regulate the course and conduct of the hearing
- Hold settlement conferences
- Take evidence and rule on its admissibility
- Examine witnesses
- Authorize the submission of briefs
- Hear oral argument

As with other administrative hearings, strict compliance with the technical rules of evidence is not required. The charging party has the burden of proof by a preponderance of the evidence in order to prevail. Briefs are typically filed and the proposed decision is then submitted to the parties for review. Either party may appeal the ALJ's decision to the full PERB. The Board acts like an appellate court. Then the Board issues its opinion. The Board's opinion may then be appealed to the courts.[10]

This is to be contrasted with the prior state of the law regarding enforcement of the MMBA. Previously, the aggrieved party would file a petition for writ of mandate with the superior court. The matter would be briefed, oral argument had, and a decision issued by the superior court, which could, in turn, be appealed. The nature and extent of the filings were more substantial, and would call for an attorney to present the matter to court.

The net effect of the change in legislation will be to encourage filings for alleged violations of unfair labor practices. First of all, the impediment of having to obtain counsel for the bargaining unit is removed, as is its expense. Secondly, the requirements for filing an unfair labor practice charge is much less onerous or technical, which eliminates another impediment to the filing of such charges. As a result of charges being filed with the regional office of the PERB, those public agencies located in areas where there is no regional office, will have to incur transportation, lodging and food costs, rather than appearing in the local superior court.

Additionally, local governmental agencies will have to comply with a new administrative process prior to having matters resolved in court. Thus, the steps, requirements, and costs for resolving disputes have been substantially increased.

Representation Proceedings

The test claim legislation provides that "[u[nit determinations and representation elections shall be determined in accordance with the rules adopted by a public agency in accordance with this chapter." The reference to chapter is to the MMBA. While this language appears to grant deference to agency rules in representation proceedings, there is sufficient ambiguity in the context of the legislation's unfair practice provisions that challenges are likely to focus on both the rules of the agency as well as the application of

[10] Please see discussion *supra* regarding issue as to which court the appeal should be made.

the rules. The extent of the jurisdiction of the PERB to preempt local rules is unclear and will no doubt be the subject of litigation.

Local Agency Costs

There are substantial activities and costs which will be undertaken by local government to comply with this legislation, including:

- Engage in separate agency shop negotiations for up to 30 days, Government Code, Section 3502.5(b); Title 8, California Code of Regulations, Section 32990(a)(e)[11].
- Process agency shop petitions, Government Code, Section 3502.5(b); see also official website of the California Department of Industrial Relations, State Mediation & Conciliation Service pertaining to SB 739 agency shop elections, at 222.dir.ca.gov/csmcs/ase-sb739.html.
- Participate in meetings with petitioning union to discuss jointly selecting a neutral person or entity to conduct the agency shop election, Government Code, Section 3502.5(b); see also official website of the California Department of Industrial Relations, State Mediation & Conciliation Service pertaining to SB 739 agency shop elections, at 222.dir.ca.gov/csmcs/ase-sb739.html.
- Participate in meetings with such person or entity, or the State Conciliation Service, hereinafter the "Election Supervisor", and the petitioning union, and endeavor to reach an agreement, Government Code, Section 3502.5(b); see also official website of the California Department of Industrial Relations, State Mediation & Conciliation Service pertaining to SB 739 agency shop elections, at 222.dir.ca.gov/csmcs/ase-sb739.html.
- Compile and provide the Election Supervisor the necessary unit employee information to verify the 30% showing of interest, Government Code, Section 3502.5(b); see also official website of the California Department of Industrial Relations, State Mediation & Conciliation Service pertaining to SB 739 agency shop elections, at 222.dir.ca.gov/csmcs/ase-sb739.html.
- Post and distribute notices of election, Government Code, Section 3502.5(b); see also official website of the California Department of Industrial Relations, State Mediation & Conciliation Service pertaining to SB 739 agency shop elections, at 222.dir.ca.gov/csmcs/ase-sb739.html.
- Compile and provide appropriate payroll records for the Election Supervisor, Government Code, Section 3502.5(b); see also official website of the California Department of Industrial Relations, State Mediation & Conciliation Service pertaining to SB 739 agency shop elections, at 222.dir.ca.gov/csmcs/ase-sb739.html.
- Make available employees to serve as voting place observers, Government Code, Section 3502.5(b); see also official website of the California Department of Industrial Relations, State Mediation & Conciliation Service pertaining to SB 739 agency shop elections, at 222.dir.ca.gov/csmcs/ase-sb739.html.

[11] Hereinafter, all regulations will be referred to as "PERB Reg".

- 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), Government Code, Section 3502.5(b)(e), and procedures of the State Mediation & Conciliation Service.
- Staff to institute and administer procedures for agency fee deductions and transmittal to union, Government Code, Sections 3502.5(b) and 3508.5(b)(c).
- Institute and administer procedures and documentation for in lieu fee payments of conscientious objectors, and transmittal to appropriate charities, Government Code, Section 3502.5(b)(c).
- Negotiate with the union concerning the above two procedures, and represent the agency in the event of Public Employment Relations Board intervention regarding disputes, Government Code, Section 3502.5(b).
- Process agency shop rescission petitions, Government Code, Section 3502.5(d).
- Participation in PERB's rulemaking process relating to implementation of its jurisdiction under the within test claim legislation, Government Code, Section 3509(a)(b)(c). See also the official website of the PERB (www.perb.ca.gov), which contains the Final Statement of Reasons on the proposed regulations, which also references statements made on behalf of the League of California Cities, California State Association of Counties and others as provided for under the Administrative Procedures Act.
- Develop and provide training in PERB's rules, procedures and decisions for agency supervisory and management personnel and attorneys.[12]
- Respond to appeals made to the PERB of agency actions regarding unit issues, representation matters, recognition, elections and unfair practice determinations, Government Code, Section 3509(b)(c), PERB Regs 60000 and 60010.
- Responding to, or the filing of, Unfair Labor Practice charges, Government Code, Section 3509(b), PERB Regs 32450, 32455, 32602, 32603, 32615, 32620, 32621, 32625, 32644, 32646, 32647, and 32661.
- Participating in PERB's investigation of charges, PERB Regs 32149, 32162, 32980, and 60010.
- Participating in PERB's procedures, including but not limited to conferences, settlement conferences, and hearings, PERB Regs 32165 through 32230, 32650 and 60030.
- Preparation for hearings before PERB Administrative Law Judges (hereinafter "ALJ's") including, but not limited to the preparation of briefs, documentation, exhibits, witnesses and expert witnesses, PERB Regs 32150, 32160, 32164, 32165, 32190, 32205, 32210, 32212, 32647, and 60040.
- Presenting the agency's case before the PERB's ALJs, including expert witness fees, increased overtime costs for employee witnesses, closing brief, costs of transcripts and travel expenses, PERB Regs 32170, 32175, 32176, 32178, 32180, 32190, 32206, 32648, 32649, 32207, 32209, 32230, 32680, 60041 and 60050.

[12] The Commission on State Mandates typically allows training of individuals charged with implementing a new mandate process.

- Representation at proceedings that appeal ALJ decisions to the Board itself, including attendant travel expenses, PERB Regs 32200, 32300, 32310, 32315, 32320, 32360, 32370, 32375, 32410, 32635, and 60035.
- Preparation and representation at appeals of final PERB decisions to superior and appellate courts, PERB Reg 32500.
- Preparing for and representation 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.[13]

B. LEGISLATIVE HISTORY PRIOR TO 1975

There was no requirement prior to 1975, nor in any of the intervening years, until the passage of Chapter 901, Statutes of 2000, place local government employee relations under the jurisdiction of the PERB.

C. SPECIFIC STATUTORY SECTIONS THAT CONTAIN THE MANDATED ACTIVITIES

As related above, the mandated activities are contained in the Government Code, Sections 3500, 3501, 3502.5, 3507.1, 3508.5, 3510, 3511 and Title 8, California Code of Regulations, Sections 31001 to 61630, inclusive.

D. COST ESTIMATES

The activities necessary to comply with the mandated activities cost well in excess of $200.00 per year, and involve the department, negotiators, attorneys and other personnel in the employ of or contracted by the governmental entity.

E. REIMBURSABLE COSTS MANDATED BY THE STATE

The costs incurred by the both the City of Sacramento and the County of Sacramento as a result of the statute which is the subject of the test claim are all reimbursable costs as such costs are "costs mandated by the State" under Article XIII B (6) of the California Constitution, and Section 17500 *et seq.* of the Government Code. Section 17514 of the Government Code defines "costs mandated by the state", and specifies the following three requirements:

1. There are "increased costs which a local agency is required to incur after July 1, 1980."

2. The costs are incurred "as a result of any statute enacted on or after January 1, 1975."

[13] Again, see the official PERB website regarding issues which have been discussed in connection with the rulemaking procedure, defining some of the matters which will need litigation for clarification.

3. The costs are the result of "a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIIIB of the California Constitution."

All three of the above requirements for finding costs mandated by the State are met as described previously herein.

F. MANDATE MEETS BOTH SUPREME COURT TESTS

The mandate created by these three statutes clearly meets both tests that the Supreme Court in the *County of Los Angeles* v. *State of California* (1987) created for determining what constitutes a reimbursable state mandated local program. Those two tests, which the Commission on State Mandates relies upon to determine if a reimbursable mandate exists, are the "unique to government" and the "carry out a state policy" tests. Their application to this test claim is discussed below.

Mandate Is Unique to Local Government

The statutory scheme set forth above imposes a unique requirement on local government. The terms of the mandate refers only to local government and its relations to its employees.

Mandate Carries Out a State Policy

The state has previously set forth that local government employment relations is governed by the MMBA. This test claim legislation creates a new level of requirements, and places local government in the same position as the state in its bargaining with local governments' bargaining units.

In summary, the City of Sacramento and the County of Sacramento each believes that the test claim legislation placing local government employment relations under the jurisdiction of the PERB satisfies the constitutional requirements for a mandate.

STATE FUNDING DISCLAIMERS ARE NOT APPLICABLE

There are seven disclaimers specified in Government Code, Section 17556 which could serve to bar recovery of "costs mandated by the State", as defined in Government Code, Section 17556. None of the seven disclaimers apply to this test claim:

1. The claim is submitted by a local agency or school district which requests legislative authority for that local agency or school district to implement the Program specified in the statutes, and that statute imposes costs upon the local agency or school district requesting the legislative authority.

2. The statute or executive order affirmed for the State that which had been declared existing law or regulation by action of the courts.

3. The statute or executive order implemented a federal law or regulation and resulted in costs mandated by the federal government, unless the statute or executive order mandates costs which exceed the mandate in that federal law or regulation.

4. The local agency or school district has the authority to levy service charges, fees or assessments sufficient to pay for the mandated program or increased level of service.

5. The statute or executive order provides for offsetting savings to local agencies or school districts which result in no net costs to the local agencies or school districts, 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.

6. The statute or executive order imposed duties which were expressly included in a ballot measure approved by the voters in a Statewide election.

7. The statute created a new crime or infraction, eliminated a crime or infraction, or changed the penalty for a crime or infraction, but only for that portion of the statute relating directly to the enforcement of the crime or infraction.

None of the above disclaimers have any application to the within test claim by the City of Sacramento and the County of Sacramento.

CONCLUSION

As seen from the foregoing, the enactment of Chapter 901, Statutes of 2000 (S.B. 739) has subjected local government employment relations under the jurisdiction of the PERB. The mandated program meets all of the criteria and tests for the Commission on State Mandates to find a reimbursable state mandated program. None of the so-called disclaimers or other statutory or constitutional provisions that would relieve the State from its constitutional obligation to provide reimbursement have any application to this claim.

G. CLAIM REQUIREMENTS

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

Exhibit 1: Chapter 901, Statutes of 2000
Exhibit 2: Title 8, California Code of Regulations, Sections 31001-61630

CLAIM CERTIFICATION

The foregoing facts are known to me personally and if so required, I could and would testify to the statements made herein. I declare under penalty of perjury under the laws of the State of California that the statements made in this document are true and complete to the best of my personal knowledge and as to all matters, I believe them to be true.

Executed this 26th day of July, 2002, at Sacramento, California, by:

Terry Schutten, County Executive
County of Sacramento

CLAIM CERTIFICATION

The foregoing facts are known to me personally and if so required, I could and would testify to the statements made herein. I declare under penalty of perjury under the laws of the State of California that the statements made in this document are true and complete to the best of my personal knowledge and as to all matters, I believe them to be true.

Executed this 29th day of July, 2002, at Sacramento, California, by:

Patty Messerle

City of Sacramento

Senate Bill No. 739

CHAPTER 901

An act to amend Sections 3500, 3501, 3502.5, and 3508.5 of, to amend, renumber, and add Section 3509 of, to amend and renumber Section 3510 of, to add Section 3511 to, and to repeal and add Section 3507.1 of, the Government Code, relating to public employment.

[Approved by Governor September 28, 2000. Filed with Secretary of State September 29, 2000.]

LEGISLATIVE COUNSEL'S DIGEST

SB 739, Solis. Local public employees: agency shop arrangement and the Public Employment Relations Board.

(1) Under the Meyers-Milias-Brown Act, an agency shop agreement may be negotiated between a public agency and a recognized public employee organization.

This bill would additionally authorize an agency shop arrangement without a negotiated agreement upon a signed petition by 30% of the employees in the applicable bargaining unit requesting an agency shop agreement and majority approval of the employees voting in a secret ballot election on the issue. The bill would provide that the petition may be filed only after good faith negotiations, not to exceed 30 days, have taken place between the parties in an effort to reach an agreement. The bill would require the Division of Conciliation of the Department of Industrial Relations to conduct an election that may not be held more frequently than once a year, if the parties cannot agree within a prescribed time period on the selection of a neutral person or entity to conduct the election.

(2) Existing law establishes the Public Employment Relations Board in state government as a means of resolving disputes and enforcing the statutory duties and rights of employers and employees under the Educational Employment Relations Act, the Higher Education Employer-Employee Relations Act, and the Ralph C. Dills Act.

This bill would expand the jurisdiction of the Public Employment Relations Board to include resolving disputes and enforcing the statutory duties and rights of employers and employees under the Meyers-Milias-Brown Act and would specifically include resolving disputes alleging violation of rules and regulations adopted by a public agency, other than the County of Los Angeles and the City of Los Angeles, pursuant to the Meyers-Milias-Brown Act that are consistent with the act concerning unit determinations, representations, recognition, and elections. The bill would provide that implementation of this provision is subject to the appropriation

of funds for this purpose in the annual Budget Act and that the provision becomes operative on July 1, 2001.

(3) Existing law provides that in the absence of local procedures for resolving disputes on the appropriateness of a unit of representation, upon the request of any of the parties, the dispute is to be submitted to the Division of Conciliation of the Department of Industrial Relations.

This bill would require any dispute under rules adopted by a public agency on the appropriateness of a unit, exclusive or majority representation, and election procedures, upon request of a party, to be submitted to the board for resolution. The board would make its determinations based on the rules adopted by the public agency.

(4) The act specifies that nothing in its provisions affects the rights of a public employee to authorize a dues deduction from his or her salary or wages pursuant to specified provisions of law.

This bill would additionally require a public employer to 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. It would also provide that agency fee obligations shall continue in effect as long as the employee organization is the recognized bargaining representative, notwithstanding the expiration of any agreement between the public employer and the recognized employee organization.

(5) The provisions of this bill would not apply to any recognized employee organization representing peace officers, as defined in a specified provision of existing law.

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

SECTION 1. Section 3500 of the Government Code is amended to read:

3500. (a) It is the purpose of this chapter to promote full communication between public employers and their employees by providing a reasonable method of resolving disputes regarding wages, hours, and other terms and conditions of employment between public employers and public employee organizations. It is also the purpose of this chapter to promote the improvement of personnel management and employer-employee relations within the various public agencies in the State of California by providing a uniform basis for recognizing the right of public employees to join organizations of their own choice and be represented by those organizations in their employment relationships with public agencies. 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

88

employer-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.

(b) 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 responsibilities under this chapter are not reimbursable as state-mandated costs.

SEC. 2. Section 3501 of the Government Code is amended to read:

3501. As used in this chapter:

(a) "Employee organization" means any organization which includes employees of a public agency and which has as one of its primary purposes representing those employees in their relations with that public agency.

(b) "Recognized employee organization" means an employee organization which has been formally acknowledged by the public agency as an employee organization that represents employees of the public agency.

(c) Except as otherwise provided in this subdivision, "public agency" means 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. As used in this chapter, "public agency" does not mean a school district or a county board of education or a county superintendent of schools or a personnel commission in a school district having a merit system as provided in Chapter 5 (commencing with Section 45100) of Part 25 and Chapter 4 (commencing with Section 88000) of Part 51 of the Education Code or the State of California.

(d) "Public employee" means 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.

(e) "Mediation" means effort by an impartial third party to assist in reconciling a dispute regarding wages, hours and other terms and conditions of employment between representatives of the public

agency and the recognized employee organization or recognized employee organizations through interpretation, suggestion and advice.

(f) "Board" means the Public Employment Relations Board established pursuant to Section 3541.

SEC. 3. Section 3502.5 of the Government Code is amended to read:

3502.5. (a) Notwithstanding Section 3502 or 3502.6, or any other provision of this chapter, or any other law, rule, or regulation, an agency shop agreement may be negotiated between a public agency and a recognized public employee organization which has been recognized as the exclusive or majority bargaining agent pursuant to reasonable rules and regulations, ordinances, and enactments, in accordance with this chapter. As used in this chapter, "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 the organization.

(b) In addition to the procedure prescribed in subdivision (a), an agency shop arrangement between the public agency and a recognized employee organization that has been recognized as the exclusive or majority bargaining agent 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 good faith negotiations, not to exceed 30 days, have taken place between the parties in an effort to reach agreement. An election that may not be held more frequently than once a year shall be conducted by the Division of Conciliation of the Department of Industrial Relations in the event that the public agency and the recognized employee organization cannot agree within 10 days from the filing of the petition to select jointly a neutral person or entity to conduct the election. In the event of an agency fee arrangement outside of an agreement that is in effect, the recognized employee organization shall indemnify and hold the public agency harmless against any liability arising from any claims, demands, or other action relating to the public agency's compliance with the agency fee obligation.

(c) Any employee who is a member of a bona fide religion, body, or sect that has historically held conscientious objections 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 employee may be required, in lieu of periodic dues, initiation fees, or agency shop fees,

to pay sums equal to the dues, initiation fees, or agency shop fees to a nonreligious, nonlabor charitable fund exempt from taxation under Section 501(c)(3) of the Internal Revenue Code, chosen by the employee from a list of at least three of these funds, designated in a memorandum of understanding between the public agency and the public employee organization, or if the memorandum of understanding fails to designate the funds, then to any such fund chosen by the employee. Proof of the payments 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.

(d) An agency shop provision in a memorandum of understanding that is in effect may be rescinded by a majority vote of all the employees in the unit covered by the memorandum of understanding, provided that: (1) a request for such a vote is supported by a petition containing the signatures of at least 30 percent of the employees in the unit; (2) the vote is by secret ballot; (3) the vote may be taken at any time during the term of the memorandum of understanding, but in no event shall there be more than one vote taken during that term. Notwithstanding the above, the public agency and the recognized employee organization may negotiate, and by mutual agreement provide for, an alternative procedure or procedures regarding a vote on an agency shop agreement. The procedures in this subdivision are also applicable to an agency shop agreement placed in effect pursuant to subdivision (b).

(e) An agency shop arrangement shall not apply to management, confidential, or supervisory employees.

(f) Every recognized employee organization that has agreed to an agency shop provision or is a party to an agency shop arrangement shall keep an adequate itemized record of its financial transactions and shall make available annually, to the public agency with which the agency shop provision was negotiated, and to the employees who are members of the organization, within 60 days after the end of its fiscal year, a detailed written financial report thereof in the form of a balance sheet and an operating statement, certified as to accuracy by its president and treasurer or corresponding principal officer, or by a certified public accountant. An employee organization required to file financial reports under the Labor-Management Disclosure Act of 1959 covering employees governed by this chapter, or required to file financial reports under Section 3546.5, may satisfy the financial reporting requirement of this section by providing the public agency with a copy of the financial reports.

SEC. 4. Section 3507.1 of the Government Code is repealed.

SEC. 5. Section 3507.1 is added to the Government Code, to read:

3507.1. (a) Unit determinations and representation elections shall be determined and processed in accordance with rules adopted

by a public agency in accordance with this chapter. In a representation election, a majority of the votes cast by the employees in the appropriate bargaining unit shall be required.

(b) Notwithstanding subdivision (a) and rules adopted by a public agency pursuant to Section 3507, a bargaining unit in effect as of the effective date of this section shall continue in effect unless changed under the rules adopted by a public agency pursuant to Section 3507.

SEC. 6. Section 3508.5 of the Government Code is amended to read:

3508.5. (a) Nothing in this chapter shall affect the right of a public employee to authorize a dues or service fees deduction from his or her salary or wages pursuant to Section 1157.1, 1157.2, 1157.3, 1157.4, 1157.5, or 1157.7.

(b) 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.

(c) Agency fee obligations, including, but not limited to, dues or agency fee deductions on behalf of a recognized employee organization, shall continue in effect as long as the employee organization is the recognized bargaining representative, notwithstanding the expiration of any agreement between the public employer and the recognized employee organization.

SEC. 7. Section 3509 of the Government Code is amended and renumbered to read:

3510. (a) The provisions of this chapter shall be interpreted and applied by the board in a manner consistent with and in accordance with judicial interpretations of this chapter.

(b) The enactment of this chapter shall not be construed as making the provisions of Section 923 of the Labor Code applicable to public employees.

SEC. 8. Section 3509 is added to the Government Code, to read:

3509. (a) The powers and duties of the board 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 the board. The initial determination as to whether the charge of unfair practice is justified and, if so, the appropriate remedy necessary to effectuate the purposes of this chapter, shall be a matter within the exclusive jurisdiction of the board. The board shall apply and interpret unfair labor practices consistent with existing judicial interpretations of this chapter.

(c) The board shall enforce and apply rules adopted by a public agency concerning unit determinations, representation, recognition, and elections.

88

(d) Notwithstanding subdivisions (a) to (c), inclusive, the employee relations commissions established by, and in effect for, the County of Los Angeles and the City of Los Angeles pursuant to Section 3507 shall have the power and responsibility to take actions on recognition, unit determinations, elections, and unfair practices, and to issue determinations and orders as the employee relations commissions deem necessary, consistent with and pursuant to the policies of this chapter.

(e) This section shall not apply to employees designated as management employees under Section 3507.5.

(f) Implementation of this section is subject to the appropriation of funds for this purpose in the annual Budget Act.

(g) This section shall become operative on July 1, 2001.

SEC. 9. Section 3510 of the Government Code is amended and renumbered to read:

3500.5. This chapter shall be known and may be cited as the "Meyers-Milias-Brown Act."

SEC. 10. Section 3511 is added to the Government Code, to read:

3511. The changes made to Sections 3501, 3507.1, and 3509 of the Government Code by legislation enacted during the 1999–2000 Regular Session of the Legislature shall not apply to persons who are peace officers as defined in Section 830.1 of the Penal Code.

O

CHAPTER 1. PUBLIC EMPLOYMENT RELATIONS BOARD

SUBCHAPTER 1. INTERNAL PROCEDURES

Article 1. Public Meetings

31001. Meetings.

Except as permitted by law, the Public Employment Relations Board itself shall deliberate and take all actions only at public meetings. The Board's policy on public meetings shall be available to the public.

Authority cited: Sections 3509(a), 3513(h), 3541.3(g) and 3563(f), Government Code.
Reference: Sections 3509, 3513(h), 3541.3 and 3563, Government Code.

Article 2. Conflict of Interest Code

31100. General Provisions.

The Political Reform Act, Government Code Sections 81000, et seq., requires state and local government agencies to adopt and promulgate conflict of interest codes. The Fair Political Practices Commission has adopted a regulation, 2 California Code of Regulations Section 18730, which contains the terms of a standard conflict of interest code, which can be incorporated by reference, and which may be amended by the Fair Political Practices Commission to conform to amendments in the Political Reform Act after public notice and hearings. Therefore, the terms of 2 California Code of Regulations Section 18730 and any amendments to it duly adopted by the Fair Political Practices Commission, along with the attached Appendix in which officials and employees are designated and disclosure categories are set forth, are hereby incorporated by reference and constitute the conflict of interest code of the Public Employment Relations Board, except as provided below.

Designated employees shall file statements of economic interests with the agencies who will make the statements available for public inspection and reproduction. (Gov. Code section 1008). Upon receipt of the statements of Board Members, the agency shall make and retain a copy and forward the original of these statements to the Fair Political Practices Commission. Statements for all other designated employees will be maintained by the agency.

APPENDIX

Designated Positions	*Disclosure Category*
Board Members	(a) and (b)
Executive Director	(a) and (b)
Administrative Officer	(a) and (b)
General Counsel	(a) and (b)
Chief Administrative Law Judge	(a) and (b)
All attorneys employed in the Office of the General Counsel	(a)
All attorneys employed in the Division of Administrative Law Judges	(a)
All persons employed as Legal Advisors to a Board Member	(a)
Regional Directors	(a)
Executive Assistant to the Board	(a)
All Public Employment Relations Representatives and Specialists	(a)
Business Services Officer	(b)
Consultant[1]	

[1] Consultants shall be included in the list of designated employees and shall disclose pursuant to

Disclosure Categories

(a) Designated employees assigned to this disclosure category shall disclose: Investments held, income derived including salary and reimbursements for expenses, travel or per diem, and any positions of management, director, officer, partner, trustee or employee held by a designated employee to the extent that they know or have reason to know that the entity or source is a ~~school district, community college district~~**public employer,**[2] organization of employers, employee organization, individual, law firm, labor negotiations firm or consulting firm, which is subject to the jurisdiction of the Public Employment Relations Board or has appeared within the last 12 months in a dispute before the Board as a party, a representative for a party, or has provided assistance to a party in preparation for an appearance in a dispute before the Board.

(b) Designated employees assigned to this disclosure category shall disclose: Investments held, income derived including salary and reimbursements for expenses, travel or per diem, and any positions of management, director, officer, partner, trustee or employee held in any entity or source of the type which has provided services, supplies, materials, machinery, leased space or equipment to the Public Employment Relations Board within the previous two years.

EXCEPTIONS:

As provided in Section 1 of the standard Code, 2 California Code of Regulations Section 18730(b)(1), the definitions contained in the Political Reform Act of 1974 shall apply to the terms used in this Code except that:

(a) Designated employees who are required to disclose investments or positions of management, director, officer, partner, trustee or employee in a "business entity" shall also disclose such investments or positions held in a school district or other governmental or non-profit entity described in the disclosure categories; and

(b) Designated employees who are required to disclose "income from any source" shall also disclose salary and reimbursement for expenses or per diem from a local governmental agency described in the disclosure categories and shall further disclose reimbursement for travel expenses and per diem received from a bona fide educational or academic organization described in the

---

the broadest disclosure category in the code subject to the following limitation:

The Executive Director may determine in writing that a particular consultant, although a "designated position," is hired to perform a range of duties that is limited in scope and thus is not required to fully comply with the disclosure requirements in this section. Such written determination shall include a description of the consultant's duties and, based upon that description, a statement of the extent of disclosure requirements. The Executive Director's determination is a public record and shall be retained for public inspection in the same manner and location as this conflict of interest code.

[2] **The term "public employer" as used herein does not include the Public Employment Relations Board of the State of California.**

disclosure categories.

Authority cited: Sections 87300 and 87304, Government Code. Reference: Section 87300, et seq., Government Code

SUBCHAPTER 2. DEFINITIONS AND GENERAL PROVISIONS

Article 1. Definitions

32015. MMBA.

"MMBA" means the Meyers-Millias-Brown Act as contained in Chapter 10 of Division 4 of Title 1 of the Government Code (commencing with Section 3500).

Authority cited: Sections 3509(a) and 3541.3(g), Government Code. Reference: Section 3500.5, Government Code.

32016. Definition of Terms Under MMBA.

As applied to matters arising under MMBA:

(a) Public agency. "Public agency" means every governmental subdivision, every district, every public and quasi-public corporation, every public agency and public service corporation, every town, city, county, city and county and municipal corporation, whether incorporated and whether chartered or not. For purposes of these regulations, the term "public agency" shall exclude the City of Los Angeles, County of Los Angeles, and superior and municipal courts, and does not mean a school district or a county board of education or a county superintendent of schools or a personnel commission in a school district having a merit system as provided in Chapter 5 (commencing with Section 45100) of Part 25 and Chapter 4 (commencing with Section 88000) of Part 51 of the Education Code or the State of California. The term "public agency," as used herein, also excludes any transit agency not subject to the MMBA.

(b) Exclusive representative. References in these regulations to an "exclusive representative" means an employee organization that has been recognized or certified as an exclusive or majority bargaining agent pursuant to MMBA.

(c) Local rules. "Local rules" means the rules and regulations of a public agency adopted pursuant to the MMBA.

Authority cited: Sections 3509(a) and 3541.3(g), Government Code. Reference: Sections 3501(a), (b) and (c), 3501.5, 3507, 3507.1, 3507.3, 3507.5 and 3508, Government Code.

32020. Board.

"Board" means the five-member Public Employment Relations Board, any individual Board member or any Board agent.

Authority cited: Sections 3509(a), 3513(h), 3541.3(g) and 3563(f), Government Code.
Reference: Sections 3501(f), 3509, 3513(h), 3540.1(a), 3541 and 3562(b), Government Code.

32030. Board Itself.

"Board itself" means only the five-member Public Employment Relations Board, or members thereof authorized by law to act on behalf of the Board.

Authority cited: Sections 3509(a), 3513(h), 3541.3(g) and 3563(f), Government Code.
Reference: Sections 3501(f), 3509, 3513(h), 3540.1(a), 3541 and 3562(b), Government Code.

32040. Executive Director.

"Executive Director" means the officer of that title appointed by the Board pursuant to Government Code Section 3541(f).

Authority cited: Sections ~~3509(a),~~ 3513(h), 3541.3(g) and 3563(f), Government Code.
Reference: Section 3541(f), Government Code.

32050. General Counsel

"General Counsel" means the officer of that title appointed pursuant to Government Code Section 3541(f).

Authority cited: Sections 3509(a), 3513(h), 3541.3(g) and 3563(f), Government Code.
Reference: Section 3541(f), Government Code.

32055. Chief Administrative Law Judge.

"Chief Administrative Law Judge" means the officer of that title designated by the Board.

Authority cited: Sections 3509(a), 3513(h), 3541.3(g) and 3563(f), Government Code.
Reference: Sections 3509, 3513(h), 3541.3(k), and 3563(j), Government Code.

32060. Headquarters Office.

"The headquarters office" means the main office of the Board itself, the General Counsel, the Chief Administrative Law Judge, and the Executive Director. The headquarters office shall be located in Sacramento, CA.

Authority cited: Sections 3509(a), 3513(h), 3541.3(g), and 3563(f), Government Code.
Reference: Sections 3509, 3513(h), 3541.3(n), and 3563(m), Government Code.

32075. Regional Office.

"The regional office" means the office established by the Board which serves the county in which the principal office of an employer is located according to the following schedule:

Counties included in the Sacramento Regional Office jurisdiction: Alpine, Amador, Butte, Calaveras, Colusa, El Dorado, Fresno, Glenn, Inyo, Kings, Lassen, Madera, Mariposa, Merced, Modoc, Mono, Nevada, Placer, Plumas, Sacramento, San Joaquin, Shasta, Sierra, Siskiyou, Stanislaus, Sutter, Tehama, Trinity, Tulare, Tuolumne, Yolo, Yuba.

Counties included in San Francisco Regional Office jurisdiction: Alameda, Contra Costa, Del Norte, Humboldt, Lake, Marin, Mendocino, Monterey, Napa, San Benito, San Francisco, San Mateo, Santa Clara, Santa Cruz, Solano, Sonoma.

Counties included in Los Angeles Regional Office jurisdiction: Imperial, Kern, Los Angeles, Orange, Riverside, San Bernardino, San Diego, San Luis Obispo, Santa Barbara, Ventura.

Authority cited: Sections **3509(a),** 3513(h), 3541.3(g), and 3563(f), Government Code.
Reference: Sections **3509,** 3513(h), 3541.3(n) and 3563(m), Government Code.

32080. Day.

"Day" means calendar day unless otherwise specified.

Authority cited: Sections 3509(a), 3513(h), 3541.3(g) and 3563(f), Government Code.
Reference: Sections 3509, 3513(h), 3541.3(n) and 3563(m), Government Code.

32085. Workday.

(a) EERA - "Workday," as utilized in matters arising under EERA, means a day when schools in a district are in session, excluding Saturdays and Sundays, except that a day(s) may be included or excluded as a workday when the Board determines that a substantial number of affected employees would or would not be at work on that day(s).

(b) HEERA - "Workday," as utilized in matters arising under HEERA, means Monday through Friday, from September 20 through May 20, excluding Thanksgiving Day, and the Friday following Thanksgiving Day, and also excluding December 20 through January 2, except that a day(s) may be included or excluded as a workday when the Board determines that a substantial number of affected employees would or would not be at work on that day(s).

(c) Ralph C. Dills Act - "Workday," as utilized in matters arising under Ralph C. Dills Act, means Monday through Friday, excluding a holiday as defined under Government Code Section 6700 or 6701.

(d) MMBA - "Workday," as utilized in matters arising under MMBA, means Monday through Friday, excluding any holiday defined under the applicable local rules or collective bargaining agreement.

Authority cited: Sections **3509(a),** 3541.3(g), 3563(f), 3513(h) and 3563(f), Government Code. Reference: Sections **3509,** 3541.3(n), 3563(m), 3513(h), 3541.3(g) and 3563(f), Government Code.

32090. Fax Filing.

(a) ``Facsimile transmission'' is the transmission of a document by a system that encodes a document into electrical signals, transmits these electrical signals over a telephone line, and reconstructs the signals to print a duplicate of the original document at the receiving end.

(b) ``Facsimile machine'' means a machine that can send a facsimile transmission using the international standard for scanning, coding, and transmission established for Group 3 machines by the Consultative Committee of International Telegraphy and Telephone of the International Telecommunications Union, in regular resolution. Any facsimile machine used to send documents must send at an initial transmission speed of no less than 4800 baud and be able to generate a transmission record. Facsimile machine includes, but is not limited to, a facsimile modem that is connected to a personal computer.

(c) ``Facsimile filing'' or ``filing by fax'' means the facsimile transmission of a document to PERB.

(d) ``Fax'' is an abbreviation for ``facsimile,'' and refers, as indicated by the context, to facsimile transmission or to a document so transmitted.

Authority cited: Sections **3509(a),** 3513(h), 3541.3 and 3563, Government Code. Reference: Sections **3509,** 3513, 3514.5, 3541.3, 3541.5, 3563 and 3563.2, Government Code.

Article 2. General Provisions

32100. Application of Regulations.

(a) All rules and regulations within this Chapter shall apply to proceedings conducted under ~~any law under the jurisdiction of the Board~~ **EERA, Ralph C. Dills Act, and HEERA** and to ~~each other Chapter~~ **Chapters 2, 3 and 4** within this Division.

(b) All rules and regulations within this Chapter, except for Subchapter 6, shall apply to proceedings conducted under MMBA and to Chapter 5 within this Division.

Authority cited: Sections **3509(a),** 3513(h), 3541.3(g) and 3563(f), Government Code.
Reference: Sections **3507, 3507.1, 3507.5, 3508, 3509,** 3513(h), 3541.3 and 3563, Government Code.

32105. Severability.

If any section, subsection, clause or provision of these regulations is found to be invalid, the same shall not affect the remaining portion of the regulations.

Authority cited: Sections 3509(a), 3513(h), 3541.3(g), and 3563(f), Government Code.
Reference: Sections 3509, 3513(h), 3541.3, and 3563, Government Code.

32130. Computation of Time.

(a) In computing any period of time under these regulations, except under Section 32776(b), (c) and (d), the period of time begins to run the day after the act or occurrence referred to.

(b) Except for filings required during a "window period" as defined in Sections 33020, 40130, or 51026 or 61010, whenever the last date to file a document falls on Saturday, Sunday, or a holiday, as defined in Government Code Sections 6700 and 6701, or PERB offices are closed, the time period for filing shall be extended to and include the next regular PERB business day. The extension of time provided herein shall be applied subsequent to the application of any other extension of time provided by these regulations or by other applicable law.

(c) A five day extension of time shall apply to any filing made in response to documents served by mail if the place of address is within the State of California, ten days if the place of address is outside the State of California but within the United States, and twenty days if the place of address is outside the United States.

Authority cited: Sections 3509(a), 3513(h), 3541.3(g) and 3563(f), Government Code.
Reference: Sections 12, 12(a) and 1013(a), Code of Civil Procedure.

32132. Extension of Time.

(a) A request for an extension of time within which to file any document with the Board itself shall be in writing and shall be filed at the headquarters office at least three days before the expiration of the time required for filing. The request shall indicate the reason for the request and, if known, the position of each other party regarding the extension. Service and proof of service pursuant to Section 32140 are required. Extensions of time may be granted by the Board itself or an agent designated by the Board itself for good cause only.

(b) A request for an extension of time within which to file any document with a Board agent shall be in writing and shall be filed with the Board agent at least three days before the expiration of the time required for filing. The request shall indicate the reason for the request and, if known, the position of each other party regarding the extension and shall be accompanied by proof of service of the request upon each party. Extensions of time may be granted by the Board agent for good cause only.

Authority cited: Sections **3509(a),** 3513(h), 3541.3(g) and 3563(f), Government Code.
Reference: Sections **3509,** 3513(h), 3541.3(n) and 3563(m), Government Code.

32135. Filing.

(a) All documents shall be considered "filed" when actually received by the appropriate PERB office before the close of business on the last date set for filing, or when mailed by certified or Express United States mail, as shown on the postal receipt or postmark, or delivered to a common carrier promising overnight delivery, as shown on the carrier's receipt, not later than the last day set for filing and addressed to the proper PERB office.

(b) All documents, except proof of support as described in sections 32700 **and 61020**, shall also be considered "filed" when received by facsimile transmission at the appropriate PERB office before the close of business on the last day for filing together with a Facsimile Transmission Cover Sheet.

(c) A party filing documents by facsimile transmission must also place the original, together with the required proof of service and the required number of copies, in the U.S. mail for delivery to the appropriate PERB office. As an alternative to the service requirements set forth in Section 32140, any document filed by facsimile transmission may be concurrently served via facsimile transmission on all parties to the proceeding.

(d) A facsimile filing shall be accompanied by a Facsimile Transmission Cover Sheet which includes the following:

(1) The name of the party serving or filing papers by fax and the name and telephone number of the agent transmitting the document by facsimile transmission;

(2) The name or title of the document being transmitted and the number of pages;

(3) The date and time of the transmission;

(4) The PERB case number, if any.

Authority cited: Sections **3509(a),** 3513(h), 3541.3(g) and 3563(f), Government Code.
Reference: Sections **3509,** 3513(h), 3541.3(n) and 3563(m), Government Code.

32136. Late Filing.

A late filing may be excused in the discretion of the Board for good cause only. A late filing which has been excused becomes a timely filing under these regulations.

Authority cited: Sections 3509(a), 3513(h), 3541.3(g) and 3563(f), Government Code.
Reference: Sections 3509, 3513(h), 3541.3(n) and 3563(m), Government Code; and Sections 12, 12(a) and 1013, Code of Civil Procedure.

32140. Service.

(a) All documents referred to in these regulations requiring "service" or required to be accompanied by "proof of service," except subpoenas, shall be considered "served" by the Board or a party when personally delivered or deposited in the first-class mail properly addressed. All documents required to be served shall include a "proof of service" affidavit or declaration signed under penalty of perjury which meets the requirements of Section 1013(a) of the Code of Civil Procedure or which contains the following information:

I declare that I am employed or reside in the County of _____, California. I am over the age of 18 years and not a party to the within entitled cause; my address is _____. On , I served the _____ on the _____ by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the U.S. Mail at _____ addressed as follows:

(Names of Parties Served)

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on _____ at _____, California.

_____

(Type or print name) (Signature)

(b) Whenever "service" is required by these regulations, service shall be on all parties to the proceeding and shall be concurrent with the filing in question.

Authority cited: Sections **3509(a),** 3513(h), 3541.3(g) and 3563(f), Government Code.
Reference: Sections **3509,** 3513(h), 3541.3(n) and 3563(m), Government Code.

32142. Proper Recipient for Filing or Service.

Whenever a document is required to be "filed" or "served" with any of the below listed entities, the proper recipient shall be:

(a) The Board: the appropriate or designated regional office (see, e.g. Sections 32075, 32122, or 32612) unless the headquarters office is specified;

(b) The Board itself: only at the headquarters office;

(c) An employer

(1) in the case of a public school employer: the superintendent, deputy superintendent, or a designated representative of a school district; or to the school board at a regular or extraordinary meeting;

(2) in the case of a state employer: the Governor or his designated representative on behalf of the State of California;

(3) in the case of a higher education employer:

(A) If the employer is the Regents of the University of California, the Office of the General Counsel of the University;

(B) If the employer is the Directors of Hastings College of the Law, the Office of the General Counsel of Hastings;

(C) If the employer is the Trustees of the California State University for unfair practice proceedings, service shall be on the Office of the General Counsel of the California State University; for representation proceedings, filing or service shall be on the Office of the Director of Employee Relations.

(4) In the case of a public agency employer as defined in Government Code section 3501(c): the individual designated to receive service or the chief executive officer.

(d) An employee organization: the individual designated to receive service or to the president or if there is no president, an officer of the organization.

(e) An individual: to the named person or to their representative of record.

Authority cited: Sections **3509(a),** 3513(h), 3541.3(g) and 3563(f), Government Code.
Reference: Sections **3501(c),** 3513(j), 3541.3(n) and 3563(m), Government Code.

32145. Waiver of Time Periods.

The Board itself may waive or all parties to a proceeding, subject to the approval of the Board, may jointly waive any time period allowed for action by a party or the Board in order to expedite any pending matter.

Authority cited: Sections 3509(a), 3513(h), 3541.3(g) and 3563(f), Government Code.
Reference: Sections 3509, 3513(h), 3541.3(n) and 3563(m), Government Code.

32147. Expediting Matters Before the Board.

The Board itself, the Chief Administrative Law Judge or the General Counsel may expedite any matter pending before the Board pursuant to policy established by the Board itself. For purposes of this Section, expediting matters in the case of the Board itself means the matter shall be given priority and decided on an expedited basis.

Authority cited: Sections 3509(a), 3513(h), 3541.3(f) and 3563(f), Government Code.
Reference: Sections 3509, 3513(h), 3541.3(n) and 3563(m), Government Code.

32149. Investigative Subpoenas.

The Board may issue investigative subpoenas and subpoenas duces tecum compelling the attendance of witnesses and production of records at investigative proceedings. The provisions in Section 32150 governing issuance of subpoenas and motions to quash subpoenas shall be applicable to investigative subpoenas issued by the Board.

Authority cited: Sections **3509(a),** 3513(h), 3541.3(g) and 3563(f), Government Code.
Reference: Sections **3509,** 3513(h), 3541.3(h) and 3563(g), Government Code.

32150. Subpoenas.

(a) Before the hearing has commenced, the Board shall issue subpoenas at the request of any party for attendance of witnesses or production of documents at the hearing. Compliance with the provisions of Section 1985 of the Code of Civil Procedure shall be a condition precedent to the issuance of a subpoena for production of documents. After the hearing has commenced the Board may issue subpoenas.

(b) Any subpoenas issued pursuant to subdivision (a) shall be extended to all parts of the State and shall be served in accordance with the provisions of sections 1987 and 1988 of the Code of Civil Procedure.

(c) All witnesses appearing pursuant to subpoena, other than the parties, shall receive fees and mileage in the amount as prescribed by law for civil actions in a superior court. Fees, mileage and expenses of subsistence shall be paid by the party at whose request the witness is subpoenaed.

(d) A written motion to revoke a subpoena may be filed prior to the proceeding or made by an oral motion at the commencement of the proceeding. The Board shall revoke the subpoena if the evidence requested to be produced is not relevant to any matter under consideration in the proceeding or the subpoena is otherwise invalid.

(e) Upon a finding of the Board itself that a Board agent is essential to the resolution of a case and that no rational decision of the Board can be reached without such agent, the Board itself shall produce the agent if subpoenaed to do so by any party to the dispute.

(f) Upon the failure of any person to comply with a subpoena, the Board may apply to an appropriate superior court for an order requiring such person to appear and produce evidence and give testimony regarding the matter under investigation or in question. Requests for compliance with a subpoena shall be made to the Board agent assigned the case. If the Board agent deems it appropriate, he or she shall promptly recommend to the General Counsel that the Board seek enforcement of the subpoena. A request that the Board apply for an order may be made by the General Counsel at any stage of the proceedings. The Board shall seek enforcement on recommendation of the General Counsel unless in the judgment of the Board the enforcement of such subpoena or notice would be inconsistent with law or the policies of the applicable Act. If the request is granted, the record will remain open in the matter until the Board determines that the court order will not be forthcoming, or that further delay would frustrate the policies of the applicable Act, or until the testimony sought is included in the record.

Authority cited: Sections **3509(a),** 3513(h), 3541.3(g) and 3563(f), Government Code.
Reference: Sections **3509,** 3513(h), 3541.3(h) and 3563(g), Government Code.

32155. Disqualification of Board Agent or Board Members.

(a) No Board member, and no Board agent performing an adjudicatory function, shall decide or otherwise participate in any case or proceeding:

(1) In which he or she has a financial interest in the outcome.

(2) When he or she is related to any party or to an agent or officer of any party, or to an attorney or counsel of any party by consanguinity or affinity within the third degree computed according to the rules of law, or when he or she is indebted, through money borrowed as a loan, to any party or to an attorney or counsel of any party.

(3) When, in the case or proceeding, he or she has been attorney or counsel for any party; or when he or she has given advice to any party upon any matter involved in the proceeding before the Board; or when he or she has been retained or employed as attorney or counsel for any party within one years prior to the commencement of the case at the Board level.

(4) When it is made to appear probable that, by reason of prejudice of such Board member or Board agent, a fair and impartial consideration of the case cannot be had before him or her.

(b) Whenever such a Board agent shall have knowledge of any facts, which under the provisions of this rule disqualify him or her from presiding over any aspect of a hearing or investigation, it shall be his or her duty immediately to notify the General Counsel or the Chief Administrative Law Judge, as appropriate, setting forth all reasons for his or her belief.

(c) Any party may request the Board agent to disqualify himself or herself whenever it appears that it is probable that a fair and impartial hearing or investigation cannot be held by the Board agent to whom the matter is assigned. Such request shall be written, or if oral, reduced to writing within 24 hours of the request. The request shall be under oath and shall specifically set forth all facts supporting it. The request must be made prior to the taking of any evidence in an evidentiary hearing or the actual commencement of any other proceeding.

If such Board agent admits his or her disqualification, such admission shall be immediately communicated to the General Counsel or the Chief Administrative Law Judge, as appropriate, who shall designate another Board agent to hear the matter.

Notwithstanding his or her disqualification, a Board agent who is disqualified may request another Board agent who has been agreed upon by all parties to conduct the hearing or investigation.

(d) If the Board agent does not disqualify himself or herself and withdraw from the proceeding, he or she shall so rule on the record, state the grounds for the ruling, and proceed with the hearing or investigation and the issuance of the decision. The party requesting the disqualification may, within ten days, file with the Board itself a request for special permission to appeal the ruling of the Board agent. If permission is not granted, the party requesting disqualification may file an appeal, after hearing or investigation and issuance of the decision, setting forth the grounds of the alleged disqualification along with any other exceptions to the decision on its merits.

(e) Whenever a Board member shall have knowledge of any facts which, under the provisions of this rule, disqualify him or her to consider any case before the Board, it shall be his or her duty to declare the disqualification to the Board immediately upon learning of such facts. This declaration shall be made part of the official record of the Board. The Board member shall then refrain from participating and shall attempt in no way to influence any other person with respect to the matter.

(f) Any party to a case before the Board may file directly with the Board member a motion for his or her recusal from the case when exceptions are filed with the Board or within ten days of discovering a disqualifying interest provided that such facts were not available at the time exceptions were filed. The motion shall be supported by sworn affidavits stating the facts constituting the ground for disqualification of the Board member. Copies of the motion and supporting affidavits shall be served on all parties to the case.

(g) Within ten days after the filing of a motion for recusal, the Board member alleged to be disqualified shall render a decision stating the reasons therefore. If the Board member is not on the panel assigned to hear the case, he or she shall so inform the parties and indicate that he or she does not intend to participate in the case. In the event that the Board member decides to participate, he or she shall render a decision on the motion for recusal before doing so.

(h) Any party aggrieved by a determination made pursuant to subsections (d) or (g) of this rule may include the matter of claimed disqualification in a writ of extraordinary relief filed pursuant to Government Code Section 3520, 3542 or 3564 seeking judicial review of the Board's decision on the merits.

Authority cited: Sections **3509(a),** 3513(h), 3541.3(g) and 3563, Government Code. Reference: Sections **3509,** 3513, 3520, 3541.3, 3542, 3563 and 3564, Government Code.

32160. Depositions.

The Board may order the taking of testimony of a material witness within or outside the State by deposition in the manner prescribed for civil actions only upon the filing of an application by a party showing that:

(a) The witness is unable to attend the hearing because of illness, infirmity or imprisonment; or

(b) The witness cannot be compelled to attend the hearing by subpoena. The application shall state the case number, name and address of the witness, show the materiality of the testimony, and shall request an order requiring the witness to appear and testify before a named officer authorized by law to take depositions. Where the witness resides outside the State and the Board has authorized a deposition of the witness, the Board shall obtain an order of the Superior Court in Sacramento County for that purpose pursuant to Section 11189 of the Government Code.

Authority cited: Sections **3509(a),** 3513(h), 3541.3(g) and 3563(f), Government Code.
Reference: Sections **3509,** 3513(h), 3541.3(h) and 3563(g), Government Code.

32162. Confidentiality of Board Investigations.

The Board shall not disclose any confidential statement submitted by a party, or the identity of any person who submits such a statement, unless the person submitting the statement agrees to disclosure or disclosure is required:

(a) Pursuant to Section 32206, concerning production of statements of witnesses after direct testimony;

(b) In a court proceeding upon a complaint for injunctive relief;

(c) By order of the Board itself;

(d) By final order of a court of competent jurisdiction.

Authority cited: Sections **3509(a),** 3513(h), 3541.3(g) and 3563(f), Government Code.
Reference: Sections **3509,** 3513(h), 3541.3(h) and 3563(g), Government Code.

32164. Application for Joinder of Parties.

(a) Any employee, employee organization or employer may file with the Board agent an application for joinder as a party in a case. Service and proof of service of the application pursuant to Section 32140 are required.

(b) The application for joinder shall be in writing, signed by the representative filing it and contain a statement of the extent to which joinder is sought and a statement of all the facts upon which the application is based. The Board shall allow each party an opportunity to oppose the application.

(c) The Board may allow joinder if it determines that the party has a substantial interest in the case or will contribute substantially to a just resolution of the case and will not unduly impede the proceeding.

(d) The Board may order joinder of an employer, employee organization or individual, subject to its jurisdiction, on application of any party or its own motion if it determines that:

(1) In the absence of the employer, employee organization or individual, as a party, complete relief cannot be accorded; or

(2) The employer, employee organization or individual has an interest relating to the subject of the action and is so situated that the disposition of the action in their absence may:

(A) As a practical matter impair or impede their ability to protect that interest; or

(B) Leave any of the parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of said interest.

Authority cited: Sections **3509(a),** 3513(h), 3541.3(g) and 3563(f), Government Code.
Reference: Sections **3509,** 3513(h), 3541.3(h) and 3563(g), Government Code.

SUBCHAPTER 3. HEARINGS

32165. Application to Join a Representation Hearing As a Limited Party.

In a representation proceeding the Board agent may allow any person, employer, or employee organization which did not file a timely request for recognition, intervention or petition to join the hearing as a limited party provided:

(a) The person, employer, or employee organization files a written application prior to the commencement of the hearing stating facts showing that it has an interest in the proceedings; and

(b) The Board agent determines that the person, employee organization or employer has an interest in the case and will not unduly impede the proceeding.

(c) The Board agent may grant participation in the hearing which shall be limited to the right to make an oral statement on the record and to file a written brief subject to such conditions as may be prescribed.

Authority cited: Sections 3509(a), 3513(h), 3541.3(g) and 3563(f), Government Code.
Reference: 3509, 3513(h), 3541.3(a), (b), (h), (l), (m), (n) and 3563(a), (b), (g), (k), (l), (n), Government Code.

32166. Application to Join a Representation Hearing As a Full Party.

(a) An employee organization shall be allowed to participate fully in a representation hearing provided it has filed a written application with the regional office not less than 10 days prior to the commencement of the hearing, accompanied by either 10 percent support of any unit in dispute at the hearing, or 10 percent support of a proposed unit which overlaps another unit in dispute at the hearing. Proof of support is defined in Chapter 1, Section 32700 **and Chapter 5, Section 61020**. A copy of the written application, excluding the proof of support, shall be served on the parties. Proof of service pursuant to Section 32140 is required.

(b) The Board agent may waive the deadline for filing an application pursuant to this Section for good cause.

Authority cited: Sections **3509(a),** 3513(h), 3541.3(g) and 3563(f), Government Code.
Reference: Sections **3509,** 3513(h), 3541.3(a), (b), (h), (l), (m), (n) and 3563(a), (b), (g), (k), (l), (n), Government Code.

32168. Conduct of Hearing.

(a) Hearings shall be conducted by a Board agent designated by the Board, except that the Board itself or a Board member may act as a hearing officer.

(b) A Board agent may be substituted for another Board agent at any time during the proceeding at the discretion of the Chief Administrative Law Judge in unfair practice cases or the General Counsel in representation matters. Prior to ordering a substitution the parties shall be notified and provided an opportunity to state objections to the proposed substitution. Substitutions of Board agents shall be appealable only in accordance with Sections 32200 or 32300.

(c) Hearings shall be open to the public, except as provided in Section 32170.

Authority cited: Sections **3509(a),** 3513(h), 3541.3(g) and 3563(f), Government Code.
Reference: Sections **3509,** 3513(h), 3541.3(h), (k) and 3563(g), (j), Government Code.

32170. Powers and Duties of Board Agent Conducting a Hearing.

The board agent conducting a hearing shall have the powers and duties to:

(a) Inquire fully into all issues and obtain a complete record upon which the decision can be rendered;

(b) Authorize the taking of depositions;

(c) Issue subpoenas and rule upon petitions to revoke subpoenas;

(d) Regulate the course and conduct of the hearing, including the power to exclude a witness from the hearing room;

(e) Hold conferences for the settlement or simplification of issues;

(f) Rule on objections, motions and questions of procedure;

(g) Administer oaths and affirmations;

(h) Take evidence and rule on the admissibility of evidence;

(i) Examine witnesses for the purpose of clarifying the facts and issues;

(j) Authorize the submission of briefs and set the time for the filing thereof;

(k) Hear oral argument;

(l) Render and serve the proposed decision on each party;

(m) Carry out the duties of administrative law judge as provided or otherwise authorized by these regulations or by the applicable Act.

Authority cited: Sections 3509(a), 3513(h), 3541.3(g) and 3563(f), Government Code.
Reference: Sections 3509, 3513(h), 3541.3(h), (k) and 3563(g), (j), Government Code.

32175. Rules of Evidence: Representation Cases.

(a) Compliance with the technical rules of evidence applied in the courts shall not be required. Oral evidence shall be taken only on oath or affirmation. However, immaterial, irrelevant, or unduly repetitious evidence may be excluded. The rules of privilege shall apply.

(b) A party seeking to offer a written document into evidence shall provide a copy of the document for each party to the hearing.

Authority cited: Sections **3509(a),** 3513(h), 3541.3(g) and 3563(f), Government Code.
Reference: Sections **3509,** 3513(h), 3541.3(a), (b), (h), (l), (m) and 3563(a), (b), (g), (k), (l), Government Code.

32176. Rules of Evidence: Unfair Practice Cases.

Compliance with the technical rules of evidence applied in the courts shall not be required. Oral evidence shall be taken only on oath or affirmation. Hearsay evidence is admissible but shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. Immaterial, irrelevant, or unduly repetitious evidence may be excluded. The rules of privilege shall apply. Evidence of any discussion of the case that occurs in an informal settlement conference shall be inadmissible in accordance with Evidence Code Section 1152.

Authority cited: Sections **3509(a),** 3513(h), 3541.3(g) and 3563(f), Government Code.
Reference: Sections **3509,** 3513(h), 3541.3(h), (i) and 3563(g), (h), Government Code.

32178. Burden of Proof: Unfair Practice Cases.

The charging party shall prove the complaint by a preponderance of the evidence in order to prevail.

Authority cited: Sections 3509(a), 3513(h), 3541.3(g) and 3563(f), Government Code.
Reference: Sections 3509, 3513(h), 3541.3(h), (i) and 3563(g), (h), Government Code.

32180. Rights of Parties.

Each party to the hearing shall have the right to appear in person, by counsel or by other representative, and to call, examine and cross-examine witnesses and introduce documentary and other evidence on the issues.

Authority cited: Sections 3509(a), 3513(h), 3541.3(g) and 3563(f), Government Code.
Reference: Sections 3509, 3513(h), 3541.3(h) and 3563(g), Government Code.

32185. Ex Parte Communications.

(a) No party to a formal hearing before the Board on an unfair practice complaint shall, outside the hearing of the other parties, orally communicate about the merits of the matter at issue with the Board agent presiding. Nor shall any party to a formal hearing communicate in writing with the Board agent presiding without providing a copy of the writing to the other parties.

(b) A Board agent who receives such an ex parte communication shall state on the record that the communication was made, identify the person who made it and either summarize the contents of the communication, or provide all parties with a copy of such communication. The Board agent shall then afford the other parties to the hearing the opportunity to rebut the communication on the record.

Authority cited: Sections **3509(a),** 3541.3, 3513(h) and 3563, Government Code. Reference: Sections **3509,** 3513(h), 3541.3(h), ~~3541.3~~(i), **and** ~~3541.3~~(n), **and** 3563(g), ~~3563~~(h) and ~~3563~~(m), Government Code.

32190. Motions.

(a) Written motions made before, during or after a hearing shall be filed with the Board agent assigned to the proceeding. Service and proof of service pursuant to Section 32140 are required.

(b) Except as provided in Section 32646, responses to motions shall be filed with the Board agent within fourteen days of service of the motion, or within such time as is directed by the Board agent. Service and proof of service pursuant to Section 32140 are required.

(c) During the hearing, a motion or the response thereto may be made orally on the record.

(d) The Board may hear oral argument or take evidence on any motion.

(e) No hearing shall be delayed because a motion is filed unless the Board so directs.

(f) Rulings on motions shall not be appealable except as specified in Sections 32200 and 32646.

Authority cited: Sections 3509(a), 3513(h), 3541.3(g) and 3563(f), Government Code.
Reference: Sections 3509, 3513(h), 3541.3(h) and 3563(g), Government Code.

32200. Appeal of Rulings on Motions and Interlocutory Matters.

A party may object to a Board agent's interlocutory order or ruling on a motion and request a ruling by the Board itself. The request shall be in writing to the Board agent and a copy shall be sent to the Board itself. Service and proof of service pursuant to Section 32140 are required. The Board agent may refuse the request, or may join in the request and certify the matter to the Board. The Board itself will not accept the request unless the Board agent joins in the request. The Board agent may join in the request only where all of the following apply:

(a) The issue involved is one of law;

(b) The issue involved is controlling in the case;

(c) An immediate appeal will materially advance the resolution of the case.

Authority cited: Sections **3509(a),** 3513(h), 3541.3(g) and 3563(f), Government Code.
Reference: Sections **3509,** 3513(h), 3541.3(h) and 3563(g), Government Code.

32205. Continuances.

A party may file a request for a continuance of the formal hearing no later than five days prior to such hearing. Such request shall be in writing, signed by the party or its agent, state the grounds for the request, and state the position of each party regarding the request. An oral request or a request for continuance submitted less than five days prior to the hearing may be made only under unusual circumstances. A request for a continuance shall be granted only under unusual circumstances and if the other party will not be prejudiced thereby.

Authority cited: Sections **3509(a),** 3513(h), 3541.3(g) and 3563(f), Government Code.
Reference: Sections **3509,** 3513(h), 3541.3(h) and 3563(g), Government Code.

32206. Production of Statements of Witnesses After Direct Testimony.

(a) After direct examination of a witness, and upon motion of any party, the hearing officer shall order the production of any statement made by the witness to a Board agent that relates to the subject matter of the testimony.

(b) A statement includes a written declaration by the witness, signed or otherwise approved by the witness, or a recording or a transcription of a recording which is a verbatim recital of something said by the witness.

(c) If the party sponsoring the testimony claims that a statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony, the party shall deliver the statement to the hearing officer for his or her private inspection. The hearing officer may excise those portions of the statements which do not relate to the subject matter of the testimony. The remainder of the statement shall be delivered to the moving party.

Authority cited: Sections 3509(a), 3513(h), 3541.3(g) and 3563(f), Government Code.
Reference: Sections 3509, 3513(h), 3541.3(h) and 3563(g), Government Code.

32207. Hearings.

The parties may submit stipulated facts where appropriate to the Board agent. No hearing shall be required unless the parties dispute the facts in the case.

Authority cited: Sections 3509(a), 3513(h), 3541.3(g) and 3563(f), Government Code.
Reference: Sections 3509, 3513(h), 3541.3(h) and 3563(g), Government Code.

32209. Correction of Transcript.

A motion to correct alleged errors in the transcript of a proceeding before a Board agent must be filed with the Board agent presiding at the proceeding within 20 days of the date of service of the transcript. The motion shall specify the alleged errors and provide a proposed corrected version. Within 10 days following the date of service of such a motion, any party may file with the Board agent a response to the motion. Service and proof of service of the motion and of any response to a motion pursuant to Section 32140 are required. Failure to file a timely motion to correct will be deemed a waiver of any objection to the accuracy of the transcript.

Authority cited: Sections 3509(a), 3513(h), 3541.3(g) and 3563(f), Government Code.
Reference: Sections 3509, 3513(h), 3541.3(h) and 3563(g), Government Code.

32210. Informational Briefs and Arguments.

(a) Any person may file a petition to submit an informational brief or to argue orally in any case at a hearing or before the Board itself.

(b) The petition shall include the following information:

(1) The case number;

(2) The title of the case;

(3) The name, address, telephone number and any affiliation of the petitioner;

(4) The name, address and telephone number of any agent to be contacted;

(5) A statement setting forth the nature of the petitioner's interest or involvement in the case;

(6) A statement setting forth the specific issues of procedure, fact, law or policy which the petitioner wishes to address.

(c) The petition may be granted or denied at the discretion of the Board.

Authority cited: Sections 3509(a); 3513(h); 3541.3 (g), (n); 3563 (f), (m), Government Code. Reference: Sections 3509, 3513(h), 3541.3 (a), (b), (e), (g), (h), (i), (l), (m), (n), and 3563 (a), (b), (e), (f), (g), (h), (k), (l), (m), Government Code.

32212. Briefs and Oral Argument.

Prior to the close of the hearing, the Board agent shall rule on any request to make oral argument or to file a written brief. The Board agent shall set the time required for the filing of briefs. Any party filing a brief shall file the original and one copy with the Board agent. Service and proof of service of the brief pursuant to Section 32140 are required.

Authority cited: Sections 3509(a), 3513(h), 3541.3(g) and 3563(f), Government Code.
Reference: Sections 3509, 3513(h), 3541.3(h) and 3563(g), Government Code.

32215. Proposed Decision.

A Board agent shall issue a written proposed decision or submit the record of the case to the Board itself for decision pursuant to instructions from the Board itself. The Board shall serve the proposed decision on each party. Unless expressly adopted by the Board itself, a proposed or final Board agent decision, including supporting rationale, shall be without precedent for future cases.

Authority cited: Sections 3509(a), 3513(h), 3541.3(g) and 3563(f), Government Code.
Reference: Sections 3509, 3513(h), 3541.3(h) and 3563(g), Government Code.

32220. Contemptuous Conduct.

Contemptuous conduct of a party or its agent shall be grounds for the exclusion of the party or agent from any proceeding related to the case.

Authority cited: Sections **3509(a),** 3513(h), 3541.3(g) and 3563(f), Government Code.
Reference: Sections **3509,** 3513(h), 3541.3(h) and 3563(g), Government Code.

32230. Refusal of Witness to Testify.

The refusal of a witness at a hearing to answer any question which has been ruled proper by the Board agent conducting the hearing may be grounds for striking the full testimony of such witness on the same matter and or such other action as deemed appropriate by the Board.

Authority cited: Sections 3509(a), 3513(h), 3541.3(g) and 3563(f), Government Code.
Reference: Sections 3509, 3513(h), 3541.3(h) and 3563(g), Government Code.

SUBCHAPTER 4. DECISIONS OF THE BOARD ITSELF

Article 1. Ex Parte Communication

32295. Ex Parte Communications.

No party shall communicate with the Board itself, any member of the Board itself or any legal advisor to a member of the Board, orally or in writing, about any matter pending before the Board except as provided for in these regulations.

Authority cited: Sections **3509(a),** 3513(h), 3541.3 and 3563, Government Code. Reference: Sections **3509,** 3513, 3514.5, 3541.3, 3541.5, 3563, and 3563.2, Government Code.

Article 2. Appeal of Board Agent Decision to the Board Itself

32300. Exceptions to Board Agent Decision.

(a) A party may file with the Board itself an original and five copies of a statement of exceptions to a Board agent's proposed decision issued pursuant to Section 32215, and supporting brief, within 20 days following the date of service of the decision or as provided in Section 32310. The statement of exceptions and briefs shall be filed with the Board itself in the headquarters office. Service and proof of service of the statement and brief pursuant to Section 32140 are required. The statement of exceptions or brief shall:

(1) State the specific issues of procedure, fact, law or rationale to which each exception is taken;

(2) Identify the page or part of the decision to which each exception is taken;

(3) Designate by page citation or exhibit number the portions of the record, if any, relied upon for each exception;

(4) State the grounds for each exception.

(b) Reference shall be made in the statement of exceptions only to matters contained in the record of the case.

(c) An exception not specifically urged shall be waived.

Authority cited: Sections **3509(a),** 3513(h), 3541.3(g) and 3563(f), Government Code.
Reference: Sections **3509,** 3513(h), 3541.3(k), (n) and 3563(j), (m), Government Code.

32305. Failure to File Exceptions.

Unless a party files a timely statement of exceptions to the proposed decision, the decision shall become final on the date specified therein.

Authority cited: Sections **3509(a),** 3513(h), 3541.3(g) and 3563(f), Government Code.
Reference: Sections **3509,** 3513(h), 3541.3(k), (n) and 3563(j), (m), Government Code.

32310. Response to Exceptions.

Within 20 days following the date of service of the statement of exceptions, any party may file with the Board itself an original and five copies of a response to the statement of exceptions and a supporting brief. The response shall be filed with the Board itself in the headquarters office. The response may contain a statement of any exceptions the responding party wishes to take to the recommended decision. Any such statement of exceptions shall comply in form with the requirements of Section 32300. A response to such exceptions may be filed within 20 days. Such response shall comply in form with the provisions of this Section. Service and proof of service of these documents pursuant to Section 32140 are required.

Authority cited: Sections **3509(a),** 3513(h), 3541.3(g) and 3563(f), Government Code.
Reference: Sections **3509,** 3513(h), 3541.3(k), (n) and 3563(j), (m), Government Code.

32315. Oral Argument on Exceptions.

A party desiring to argue orally before the Board itself regarding the exceptions to the proposed decision shall file with the statement of exceptions or the response to the statement of exceptions a written request stating the reasons for the request. Upon such request or its own motion the Board itself may direct oral argument.

Authority cited: Sections 3509(a), 3513(h), 3541.3(g) and 3563(f), Government Code.
Reference: Sections 3509, 3513(h), 3541.3(k), (n) and 3563(j), (m), Government Code.

32320. Decision of the Board Itself.

(a) The Board itself may:

(1) Issue a decision based upon the record of hearing, or

(2) Affirm, modify or reverse the proposed decision, order the record re-opened for the taking of further evidence, or take such other action as it considers proper.

(b) The Board shall serve a copy of the decision on each party.

(c) All decisions and orders issued by the Board itself are precedential and may be cited in any matter pending before a Board agent or the Board itself. The precedential status of decisions issued by the Board itself includes decisions issued prior to July 1, 1997.

Authority cited: Sections 3509(a), 3513(h), 3541.3(g) and 3563(f), Government Code.
Reference: Sections 3509, 3513(h), 3514.5, 3541.3(k), (n), 3563(j), (m), 3563.2 and 11425.60, Government Code.

32325. Remedial Power of the Board.

The Board shall have the power to issue a decision and order in an unfair practice case directing an offending party to cease and desist from the unfair practice and to take such affirmative action, including but not limited to the reinstatement of employees with or without back pay, as will effectuate the policies of the applicable statute.

Authority cited: Sections 3509(a), 3513, 3541.3 and 3563, Government Code. Reference: Sections 3509, 3514.5(c), 3520, 3541.5(c), 3542, 3563.3 and 3564, Government Code, and Firefighters Union, Local 1186 v. City of Vallejo (1974) 12 Cal.3d 608.

Article 3. Administrative Appeals

32350. Definition of Administrative Decision.

(a) An administrative decision is any determination made by a Board agent other than:

(1) a refusal to issue a complaint in an unfair practice case pursuant to Section 32630,

(2) a dismissal of an unfair practice charge,

(3) a determination of a public notice complaint, or

(4) a decision which results from the conduct of a formal hearing or from an investigation which results in the submission of a stipulated record and a proposed decision written pursuant to Section 32215.

(b) An administrative decision shall contain a statement of the issues, fact, law and rationale used in reaching the determination.

Authority cited: Sections **3509(a),** 3513(h), 3541.3(g) and 3563(f), Government Code.
Reference: Sections **3509,** 3513(h), 3541.3(k), (n) and 3563(j), (m), Government Code.

32360. Appeal Requirements.

(a) An appeal may be filed with the Board itself from any administrative decision, except as noted in Section 32380.

(b) An original and five copies of the appeal shall be filed with the Board itself in the headquarters office within 10 days following the date of service of the decision or letter of determination.

(c) The appeal must be in writing and must state the specific issue(s) of procedure, fact, law or rationale that is appealed and state the grounds for the appeal.

(d) Service and proof of service of the appeal pursuant to Section 32140 are required.

Authority cited: Sections **3509(a),** 3513(h), 3541.3(g) and 3563(f), Government Code.
Reference: Sections **3509,** 3513(h), 3541.3(k), (n) and 3563(j), (m), Government Code

32370. Request for Stay of Activity.

An appeal will not automatically prevent the Board from proceeding in a case. Parties seeking a stay of any activity may file a request for a stay with the administrative appeal which shall include all pertinent facts and justification for the request. The Board may stay the matter, except as is otherwise provided in these regulations.

Authority cited: Sections 3509(a), 3513(h), 3541.3(g) and 3563(f), Government Code.
Reference: Sections 3509, 3513(h), 3541.3(k), (n) and 3563(j), (m), Government Code.

32375. Response to the Administrative Appeal.

Within 10 days following the date of service of the appeal, any party may file a response to the appeal. An original and five copies of the response shall be filed with the Board itself in the headquarters office. Service and proof of service of the response pursuant to Section 32140 are required.

Authority cited: Sections 3509(a), 3513(h), 3541.3(g) and 3563(f), Government Code.
Reference: Sections 3509, 3513(h), 3541.3(k), (n) and 3563(j), (m), Government Code.

32380. Limitation of Appeals.

The following administrative decisions shall not be appealable:

(a) A decision by a Board agent regarding the mechanics of an election provided the decision does not affect standing of a party to appear on a ballot;

(b) Except as provided in Section 32200, any interlocutory order or ruling on a motion.

(c) A decision by a Board agent pursuant to Section 32793 regarding the existence of an impasse.

Authority cited: Sections **3509(a),** 3513(h), 3541.3(g) and 3563(f), Government Code.
Reference: Sections **3509,** 3513(h), 3541.3(k), (n) and 3563(j), (m), Government Code.

Article 4. Reconsideration

32400. Administrative Remedies.

A motion for reconsideration need not be filed to exhaust administrative remedies.

Authority cited: Sections 3509(a), 3513(h), 3541.3(g) and 3563(f), Government Code.
Reference: Sections 3509, 3520, 3542 and 3564, Government Code.

32410. Request for Reconsideration.

(a) Any party to a decision of the Board itself may, because of extraordinary circumstances, file a request to reconsider the decision within 20 days following the date of service of the decision. An original and five copies of the request for reconsideration shall be filed with the Board itself in the headquarters office and shall state with specificity the grounds claimed and, where applicable, shall specify the page of the record relied on. Service and proof of service of the request pursuant to Section 32140 are required. The grounds for requesting reconsideration are limited to claims that: (1) the decision of the Board itself contains prejudicial errors of fact, or (2) the party has newly discovered evidence which was not previously available and could not have been discovered with the exercise of reasonable diligence. A request for reconsideration based upon the discovery of new evidence must be supported by a declaration under the penalty of perjury which establishes that the evidence: (1) was not previously available; (2) could not have been discovered prior to the hearing with the exercise of reasonable diligence; (3) was submitted within a reasonable time of its discovery; (4) is relevant to the issues sought to be reconsidered; and (5) impacts or alters the decision of the previously decided case.

(b) Any party shall have 20 days from service to file a response to the request for reconsideration. An original and five copies of the response shall be filed with the Board itself in the headquarters office. Service and proof of service of the response pursuant to Section 32140 are required.

(c) Unless otherwise ordered by the Board, the filing of a Request for Reconsideration shall not stay the effectiveness of a decision of the Board itself except that the Board's order in an unfair practice case shall automatically be stayed upon filing of a Request for Reconsideration.

Authority cited: Sections 3509(a), 3513(h), 3541.3(g) and 3563(f), Government Code.
Reference: Sections 3509, 3513(h), 3541.3(k), (n) and 3563(j), (m), Government Code.

Article 5. Request for Injunctive Relief

32450. Request.

(a) An original and six (6) copies of a request from a party that the Board seek injunctive relief shall be filed with the General Counsel at the headquarters office with a copy to the appropriate regional office as designated in sections 32075 and 32612 and shall include:

(1) The written request, accompanied by reasons stating why injunctive relief is appropriate;

(2) A copy of the charge or complaint; and

(3) Declarations, on personal knowledge, setting forth in detail all pertinent facts underlying the request for injunctive relief.

(b) Service and proof of service on the respondent, is required of all documents filed with the General Counsel. Under this section service and proof of service shall be conducted pursuant to section 32140 except that service by mail must be done by express mail or by another common carrier promising overnight delivery thereof. If the request is made during a work stoppage or lockout, personal service on the respondent of all documents filed with the General Counsel is required.

(c) Notice that such a request is being made shall be provided no less than 24 hours prior to the filing to the General Counsel and the party against whom the relief is sought. Such notice may be by telephone or in person, or by any other means reasonably calculated to provide notice.

(d) An affidavit of notice shall be filed with the request. Such affidavit shall indicate to whom, at what time, and in what manner the notice required by subparagraph (c) above was accomplished.

Authority cited: Sections 3509(a), 3513(h), 3541.3(g) and 3563, Government Code. Reference: Sections 3509, 3513(h), 3541.3(j), (n) and 3563(i), Government Code.

32455. Investigation.

Upon filing of a request for the Board to seek injunctive relief, the General Counsel shall initiate an investigation. The General Counsel shall give notice reasonably calculated to inform the parties an investigation is proceeding. The respondent shall be apprised of the allegations against it, and may state its position in the course of the inquiries. The original and six (6) copies of any written position statements or other documents filed with the General Counsel must be filed at the headquarters office with a copy to the appropriate regional office as designated in section 32075, and service and proof of service on the opposite party. Any filing with the General Counsel in accordance with this section by mail, shall be done by express mail, or by another common carrier promising overnight delivery thereof. Service and proof of service on opposite party shall be pursuant to section 32140 except that service shall be by express mail instead of first class mail. The Board agent may contact and question such persons as necessary to effectuate the investigation.

Authority cited: Sections 3509(a), 3513(h), 3541.3 and 3563, Government Code. Reference: Sections 3509, 3513(h), 3541.3(j), and 3563(i), Government Code.

32460. Recommendation.

After investigation, the General Counsel shall make a recommendation to the Board within 120 hours after the receipt of a request, unless the request is made during a work stoppage or lockout, in which case the General Counsel shall make a recommendation to the Board within 24 hours after the request is received.

Authority cited: Sections 3509(a), 3513(h), 3541.3(g) and 3563(f), Government Code.
Reference: Sections 3509, 3513(h), 3541.3(j), (n) and 3563(i), (m), Government Code.

32465. Decision of the Board Itself.

Upon receipt of the General Counsel's report, the Board itself shall determine whether to seek injunctive relief.

Authority cited: Sections 3509(a), 3513(h), 3541.3(g) and 3563(f), Government Code.
Reference: Sections 3509, 3513(h), 3541.3(j), (n) and 3563(i), (m), Government Code.

32470. Lack of Board Quorum.

In the event that a quorum of the Board itself is unavailable to act upon the request for injunctive relief within 24 hours after the time the General Counsel's recommendation is filed, the Board authorizes the General Counsel to seek injunctive relief in every case in which the General Counsel has reasonable cause to believe that such action is in accordance with Board policy and that legal grounds for injunctive relief are present.

Authority cited: Sections 3509(a), 3513(h), 3541.3(g) and 3563(f), Government Code.
Reference: Sections 3509, 3513(h), 3541(f), (g), 3541.3(j), (k) and 3563(i), (j), Government Code.

Article 6. Request for Judicial Review

32500. Review of Representation Case.

(a) Any party to a decision in a representation case by the Board itself, **except for decisions rendered pursuant to Chapter 5, Subchapter 1 of these Regulations,** may file a request to seek judicial review within 20 days following the date of service of the decision. An original and five copies of the request shall be filed with the Board itself in the headquarters office and shall include statements setting forth those factors upon which the party asserts that the case is one of special importance. Service and proof of service of the request pursuant to Section 32140 are required.

(b) Any party shall have 10 days following the date of service of the request to file a response. An original and five copies of the response shall be filed with the Board itself in the headquarters office. Service and proof of service of the request pursuant to Section 32140 are required.

(c) The Board may join in a request for judicial review or may decline to join, at its discretion.

Authority cited: Sections **3509(a),** 3513(h), 3541.3(g) and 3563(f), Government Code.
Reference: Sections **3509,** 3520, 3542, and 3564, Government Code.

SUBCHAPTER 5. UNFAIR PRACTICE PROCEEDINGS

32602. Processing Violations.

~~Complaints alleging~~ **Alleged** violations of **MMBA or local rules,** EERA, Ralph C. Dills Act or HEERA shall be processed as unfair practice charges except as otherwise provided in these regulations. **Such unfair practice charges may be filed by an employee, employee organization, or employer against an employee organization or employer.**

Authority cited: Sections **3509,** 3513, 3541.3 and 3563, Government Code. Reference: Sections **3509,** 3514.5, 3524, 3541.5 and 3563.2, Government Code.

32603. Employer Unfair Practices under MMBA.

It shall be an unfair practice for a public agency to do any of the following:

(a) Interfere with, intimidate, restrain, coerce or discriminate against public employees because of their exercise of rights guaranteed by Government Code section 3502 or by any local rule adopted pursuant to Government Code section 3507.

(b) Deny to employee organizations rights guaranteed to them by Government Code section 3503, 3504.5, 3505.1, 3505.3, 3508(c) or 3508.5 or by any local rule adopted pursuant to Government Code section 3507.

(c) Refuse 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.

(d) Dominate or interfere with the formation or administration of any employee organization, or contribute financial or other support to it, or in any way encourage employees to join any organization in preference to another in violation of rights guaranteed by Government Code section 3502 or 3508(c) or any local rule adopted pursuant to Government Code section 3507.

(e) Fail to exercise good faith while participating in any impasse procedure mutually agreed to pursuant to Government Code section 3505 or 3505.2 or required by any local rule adopted pursuant to Government Code section 3507.

(f) Adopt or enforce a local rule that is not in conformance with the requirements of Government Code section 3507, 3507.1 and/or 3507.5.

(g) In any other way violate MMBA or any local rule adopted pursuant to Government Code section 3507.

Authority cited: Sections 3509(a) and 3541.3(g), Government Code. Reference: Sections 3502, 3505, 3505.2, 3505.3, 3506, 3507, 3508.5 and 3509, Government Code, and Firefighters Union, Local 1186 v. City of Vallejo (1974) 12 Cal.3d 608.

32604. Employee Organization Unfair Practices under MMBA.

It shall be an unfair practice for an employee organization to do any of the following:

(a) Cause or attempt to cause a public agency to engage in conduct prohibited by the MMBA or by any local rule adopted pursuant to Government Code section 3507.

(b) Interfere with, intimidate, restrain, coerce or discriminate against public employees because of their exercise of rights guaranteed by Government Code section 3502 or by any local rule adopted pursuant to Government Code section 3507.

(c) Refuse or fail to meet and confer in good faith as required by Government Code section 3505 or by any local rule adopted pursuant to Government Code section 3507.

(d) Fail to exercise good faith while participating in any impasse procedure mutually agreed to pursuant to Government Code section 3505 or 3505.2 or required by any local rule adopted pursuant to Government Code section 3507.

(e) In any other way violate MMBA or any local rule adopted pursuant to Government Code section 3507.

Authority cited: Sections 3509(a) and 3541.3(g), Government Code. Reference: Sections 3502, 3505, 3505.2, 3506, 3507 and 3509, Government Code, and Firefighters Union, Local 1186 v. City of Vallejo (1974) 12 Cal.3d 608.

32605. Copies of Documents Required to be Filed.

All documents referred to in this chapter, unless otherwise noted, which are required to be "filed" by a party shall consist of an original and two copies of the document.

Authority cited: Sections 3509(a), 3513(h), 3541.3(g) and 3563(f), Government Code.
Reference: Sections 3509, 3513(h), 3514.5, 3541.3(i), 3541.5, 3563(h) and 3563.2, Government Code.

32612. Venue of Charge.

A charge may be filed in any regional office described in Section 32075 which serves any county in which the conduct or act constituting the alleged unfair practice occurred or is occurring, the county in which any employee affected by the alleged unfair practice works or the county in which the principal office of the employer is located. Any charge involving a worksite located outside the State of California shall be filed with the regional office serving the county in which the principal office of the employer is located. The Board may transfer any case to a different regional office. The Board may consolidate charges as it deems appropriate.

Authority cited: Sections **3509(a),** 3513(h), 3541.3(g), and 3563(f), Government Code.
Reference: Sections **3509,** 3513(h), 3514.5, 3541.3(i), 3541.5, 3563(h) and 3563.2, Government Code.

32615. Contents of Charge.

(a) A charge may be filed alleging that an unfair practice or practices have been committed. The charge shall be in writing, signed under penalty of perjury by the party or its agent with the declaration that the charge is true, and complete to the best of the charging party's knowledge and belief, and contain the following information:

(1) The name and address of the party alleged to have engaged in an unfair practice. If the party is the State of California, the name and address of the "appointing power" as defined in Government Code Section 18524, and of the Governor shall be set forth;

(2) The name, address, and telephone number of the charging party;

(3) The name, address, and telephone number of an authorized agent of the charging party to be contacted;

(4) The sections of the Government Code **and/or, under MMBA, the applicable local rules** alleged to have been violated;

(5) A clear and concise statement of the facts and conduct alleged to constitute an unfair practice;

(6) A statement whether or not an agreement or memorandum of understanding exists between the parties, and the date and duration of such agreement or memorandum of understanding;

(7) A statement of the extent to which and the inclusive dates during which the parties have invoked any grievance machinery provided by an agreement;

(8) A statement of the remedy sought by the charging party;.

(b) **A charge filed under MMBA alleging a violation of local rules must also contain a copy of the applicable rule(s).**

~~(c)~~ Service and proof of service on the respondent pursuant to Section 32140 are required.

Authority cited: Sections **3509,** 3513, 3541.3 and 3563, Government Code. Reference: Sections **3509,** 3514.5, 3519, 3519.5, 3541.5, 3543.5, 3543.6, 3563.2, 3571, 3571.1 and 3571.3, Government Code.

32620. Processing of Case.

(a) When a charge is filed, it shall be assigned to a Board agent for processing.

(b) The powers and duties of such Board agent shall be to:

(1) Assist the charging party to state in proper form the information required by section 32615;

(2) Answer procedural questions of each party regarding the processing of the case;

(3) Facilitate communication and the exchange of information between the parties;

(4) Make inquiries and review the charge and any accompanying materials to determine whether an unfair practice has been, or is being, committed, and determine whether the charge is subject to deferral to arbitration, or to dismissal for lack of timeliness.

(5) Dismiss the charge or any part thereof as provided in Section 32630 if it is determined that the charge or the evidence is insufficient to establish a prima facie case; or if it is determined that a complaint may not be issued in light of Government Code Sections 3514.5, 3541.5 or 3563.2.

(6) Place the charge in abeyance if the dispute arises under **MMBA or** HEERA and is subject to final and binding arbitration **pursuant to a collective bargaining agreement**, and dismiss the charge at the conclusion of the arbitration process unless the charging party demonstrates that the settlement or arbitration award is repugnant to the purposes of **MMBA or** HEERA, as provided in section 32661.

(7) Issue a complaint pursuant to Section 32640.

(c) The respondent shall be apprised of the allegations, and may state its position on the charge during the course of the inquiries.

Authority cited: Sections **3509(a),** 3513(h), 3541.3(g) and 3563(f), Government Code.
Reference: Sections **3509,** 3513(h), **3514.5**~~3541.5~~, 3519, 3519.5, 3541.3(i), 3541.5, 3543.5, 3543.6, 3563(h), 3563.2, 3571, 3571.1 and 3571.3, Government Code**, and Firefighters Union, Local 1186 v. City of Vallejo (1974) 12 Cal.3d 608**.

32621. Amendment of Charge.

Before the Board agent issues or refuses to issue a complaint, the charging party may file an amended charge. The amended charge must contain all allegations on which the charging party relies and must meet all of the requirements of Section 32615. The amended charge shall be processed pursuant to Section 32620.

Authority cited: Sections 3509, 3513, 3541.3 and 3563, Government Code. Reference: Sections 3509, 3514.5, 3519, 3519.5, 3541.5, 3543.5, 3543.6, 3563.2, 3571, 3571.1 and 3571.3, Government Code.

32625. Withdrawal of Charge.

Any request for withdrawal of the charge shall be in writing, signed by the charging party or its agent, and state whether the party desires the withdrawal to be with or without prejudice. Request for withdrawal of the charge before complaint has issued shall be granted. Repeated withdrawal and refiling of charges alleging substantially identical conduct may result in refusal to issue a complaint. If the complaint has issued, the Board agent shall determine whether the withdrawal shall be with or without prejudice. If, during hearing, the respondent objects to withdrawal, the hearing officer may refuse to allow it. Service and proof of service of the withdrawal pursuant to Section 32140 are required.

Authority cited: Sections **3509,** 3513, 3541.3 and 3563, Government Code. Reference: Sections **3509,** 3513, 3514.5, 3519, 3519.5, 3541.5, 3543.5, 3543.6, 3563.2, 3571, 3571.1 and 3571.3, Government Code.

32630. Dismissal/Refusal to Issue a Complaint.

If the Board agent concludes that the charge or the evidence is insufficient to establish a prima facie case, the Board agent shall refuse to issue complaint, in whole or in part. The refusal shall constitute a dismissal of the charge. The refusal, including a statement of the grounds for refusal, shall be in writing and shall be served on the charging party and respondent.

Authority cited: Sections **3509(a),** 3513(h), 3541.3(g), and 3563(f), Government Code.
Reference: Sections **3509,** 3513(h), 3514.5, 3519, 3519.5, 3541.3(i), 3541.5, 3543.5, 3543.6, 3563(h), 3563.2, 3571, 3571.1 and 3571.3, Government Code.

32635. Review of Dismissals.

(a) Within 20 days of the date of service of a dismissal, the charging party may appeal the dismissal to the Board itself. The original appeal and five copies shall be filed in writing with the Board itself in the headquarters office, and shall be signed by the charging party or its agent. Except as provided in Section 32162, service and proof of service of the appeal on the respondent pursuant to Section 32140 are required.

The Appeal shall:

(1) State the specific issues of procedure, fact, law or rationale to which the appeal is taken;

(2) Identify the page or part of the dismissal to which each appeal is taken;

(3) State the grounds for each issue stated.

(b) Unless good cause is shown, a charging party may not present on appeal new charge allegations or new supporting evidence.

(c) If the charging party files a timely appeal of the dismissal, any other party may file a statement in opposition to the appeal within 20 days following the date of service of the appeal. The original opposition and five (5) copies shall be filed in writing with the Board itself in the headquarters office, and shall be signed by the filing party. Service and proof of service of the statement pursuant to Section 32140 are required.

Authority cited: Sections 3509(a), 3513(h), 3541.3 and 3563, Government Code. Reference: Sections 3509, 3514.5, 3519, 3519.5, 3541.5, 3543.5, 3543.6, 3563.2, 3571, 3571.1 and 3571.3, Government Code.

32640. Issuance of Complaint.

(a) The Board agent shall issue a complaint if the charge or the evidence is sufficient to establish a prima facie case. The complaint shall contain a statement of the specific facts upon which Board jurisdiction is based, including the identity of the respondent, and shall state with particularity the conduct which is alleged to constitute an unfair practice. The complaint shall include, when known, when and where the conduct alleged to constitute an unfair practice occurred or is occurring, and the name(s) of the person(s) who allegedly committed the acts in question. The Board may disregard any error or defect in the complaint that does not substantially affect the rights of the parties.

(b) The Board shall serve the complaint on the charging party and respondent.

(c) The decision of a Board agent to issue a complaint is not appealable to the Board itself except in accordance with Section 32200.

Authority cited: Sections **3509(a),** 3513(h), 3541.3(g) and 3563(f), Government Code.
Reference: Sections **3509,** 3513(h), 3514.5, 3519, 3519.5, 3541.3(i), 3541.5, 3543.5, 3543.6, 3563(h), 3563.2, 3571, 3571.1 and 3571.3, Government Code.

32644. Answer.

(a) The respondent shall file with the Board an answer to the complaint within 20 days or at a time set by the Board agent following the date of service of the complaint. Service and proof of service of the answer pursuant to Section 32140 are required. If a formal hearing is set less than 20 days after the complaint is served, the answer shall be filed no later than the date of hearing stated in the notice of hearing or as otherwise directed by the Board agent. Amended complaints served after the answer is filed shall be deemed denied, except for those matters which were admitted in the answer and which have not been changed in the amended complaint.

(b) The answer shall be in writing, signed by the party or its agent and contain the following information:

(1) The case number appearing on the complaint;

(2) The name of the charging party;

(3) The name, address, telephone number and any affiliation of the respondent;

(4) The name, address, telephone number and capacity of any agent of the respondent to be contacted;

(5) A specific admission or denial of each allegation contained in the complaint. If the respondent does not have knowledge of information sufficient to form a belief as to the truth of a particular allegation, the respondent shall so state and such statement shall operate as a denial of the allegation;

(6) A statement of any affirmative defense;

(7) Notwithstanding the Code of Civil Procedure Section 446, a declaration under penalty of perjury that the answer is true and complete to the best of the respondent's knowledge and belief.

(c) If the respondent fails to file an answer as provided in this section, the Board may find such failure constitutes an admission of the truth of the material facts alleged in the charge and a waiver of respondent's right to a hearing.

Authority cited: Sections 3509, 3513, 3541.3 and 3563, Government Code. Reference: Sections 3509, 3514.5, 3519, 3519.5, 3541.5, 3543.5, 3543.6, 3563.2, 3571, 3571.1 and 3571.3, Government Code.

32645. Non-prejudicial Error.

The Board may disregard any error or defect in the original or amended charge, complaint, answer or other pleading which does not affect the substantial rights of the parties.

Authority cited: Sections 3509, 3513, 3541.3 and 3563, Government Code. Reference: Sections 3509, 3514.5(a), 3541.5(a) and 3563.2, Government Code.

32646. Defenses to Complaint.

If the respondent believes that issuance of the complaint is inappropriate either because the dispute is subject to final and binding arbitration, or because the charge is untimely, the respondent may assert such a defense in its answer and may move to dismiss the complaint, specifying fully the legal and factual reasons for its motion. The motion and all accompanying documents shall be served on the charging party. The charging party may respond to the respondent's motion within 10 days after service or within a lesser period of time set by the Board agent. The Board agent shall inquire into the issues raised by the motion, and shall dismiss the complaint and charge if appropriate. If the Board agent sustains the motion, the dismissal may be appealed to the Board itself in accordance with Section 32635. If the Board agent denies the motion, the denial is appealable only as provided in section 32200.

Authority cited: Sections 3509, 3513, 3541.3 and 3563, Government Code. Reference: Sections 3509, 3514.5, 3519, 3519.5, 3541.5, 3543.5, 3543.6, 3563.2, 3571, 3571.1 and 3571.3, Government Code.

32647. Amendment of Complaint Before Hearing.

After issuance of a complaint, the charging party may move to amend the complaint by filing with the Board agent:

(a) a request to amend the complaint, and

(b) an amended charge meeting the requirements of Section 32615.

Authority cited: Sections 3509, 3513, 3541.3 and 3563, Government Code. Reference: Sections 3509, 3514.5, 3519, 3519.5, 3541.5, 3543.5, 3543.6, 3563.2, 3571, 3571.1 and 3571.3, Government Code.

32648. Amendment of Complaint During Hearing.

During hearing, the charging party may move to amend the complaint by amending the charge in writing, or by oral motion on the record. If the Board agent determines that amendment of the charge and complaint is appropriate, the Board agent shall permit an amendment. In determining the appropriateness of the amendment, the Board agent shall consider, among other factors, the possibility of prejudice to the respondent.

Authority cited: Sections 3509, 3513, 3541.3 and 3563, Government Code. Reference: Sections 3509, 3514.5, 3519, 3519.5, 3541.5, 3543.5, 3543.6, 3563.2, 3571, 3571.1 and 3571.3, Government Code.

32649. Answer to Amendment.

Within 20 days or a time set by the Board agent after service of an amendment to the complaint, the Board agent may require the respondent to file an amendment to its answer, which shall respond only to the new allegations in the amended complaint. The respondent shall file with the Board proof of service of its amended answer.

Authority cited: Sections 3509(a), 3513(h), 3541.3(g) and 3563(f), Government Code.
Reference: Sections 3509, 3513(h), 3514.5, 3519, 3519.5, 3541.3(i), 3541.5, 3543.5, 3543.6, 3563(h), 3563.2, 3571, 3571.1 and 3571.3, Government Code.

32650. Informal Conference.

(a) A Board agent may conduct an informal conference or conferences to clarify the issues and explore the possibility of voluntary settlement. No record shall be made at such a conference.

(b) A Board agent shall give reasonable notice of such conference to each party directed to attend.

Authority cited: Sections **3509(a),** 3513(h), 3541.3(g) and 3563(f), Government Code.
Reference: Sections **3509,** 3513(h), 3514.5, 3519, 3519.5, 3541.3(i), 3541.5, 3543.5, 3543.6, 3563(h), 3563.2, 3571, 3571.1, and 3571.3, Government Code.

32661. Repugnancy Claims.

(a) An unfair practice charge concerning conduct subject to Government Code Section 3514.5(a)(2) or 3541.5(a)(2), or subject to final and binding arbitration **pursuant to a collective bargaining agreement** for parties governed by the **MMBA or** HEERA, may be filed based on a claim that the settlement or arbitration award is repugnant to the applicable Act.

(b) The charge shall comply with the requirements of Section 32615. It shall allege with specificity the facts underlying the charging party's claim that the arbitrator's award is repugnant to the purposes of the applicable Act.

(c) In reviewing the charge to determine whether a complaint shall issue, the Board agent shall have all of the powers and duties specified in Section 32620. A Board agent's issuance of a complaint under this section shall not be appealable to the Board itself except as provided in Section 32360.

(d) The Board itself may, at any time, direct that the record be submitted to the Board itself for decision.

Authority cited: Sections **3509,** 3513, 3541.3 and 3563, Government Code. Reference: Sections **3509,** 3514.5, 3519, 3519.5, 3541.5, 3543.5, 3543.6, 3563.2, 3571, 3571.1, 3571.3 and 3589, Government Code.

32680. Formal Hearing.

If the informal conference procedure fails to result in voluntary settlement, the Board may order a hearing. The hearing shall be conducted by the Board according to the provisions of Chapter 1, Subchapter 3 (commencing with Section 32165) of these regulations.

Authority cited: Sections **3509(a),** 3513(h), 3541.3(g) and 3563(f), Government Code.
Reference: Sections **3509,** 3513(h), 3514.5, 3519, 3519.5, 3541.3(i), 3541.5, 3543.5, 3543.6, 3563(h), 3563.2, 3571, 3571.1, and 3571.3, Government Code.

32690. Notice of Formal Hearing and Prehearing Memorandum.

(a) The Board shall serve on each party a notice of the formal hearing which shall state the date, time and place of the hearing.

(b) The Board may also serve on each party a pre-hearing memorandum which shall set forth the following information:

(1) A summary of the proceedings to date, including but not limited to a statement of the charge, a summary of any negotiations excluding offers of settlement and a statement of the issues settled;

(2) A statement of the issues to be decided at the formal hearing.

Authority cited: Sections 3509(a), 3513(h), 3541.3(g) and 3563(f), Government Code.
Reference: Sections 3509, 3513(h), 3514.5, 3519, 3519.5, 3541.3(i), 3541.5, 3543.5, 3543.6, 3563(h), 3563.2, 3571, 3571.1 and 3571.3, Government Code.

SUBCHAPTER 7. COMPLIANCE

Article 1. Compliance

32980. Compliance.

The General Counsel is responsible for determining that parties have complied with final Board orders. The General Counsel or his designate may conduct an inquiry, investigation, or hearing under Chapter 1, Subchapter 3 of these regulations, concerning any compliance matter.

(a) In each case in which a compliance investigation or hearing is conducted, a written determination shall be served on the parties.

(b) A determination based on an investigation may be appealed to the Board itself pursuant to Chapter 1, Subchapter 4, Article 2 of these regulations.

(c) A determination based on a hearing may be appealed to the Board itself pursuant to Chapter 1, Subchapter 4, Article 1 of these regulations.

Authority cited: Sections **3509(a),** 3513, 3541.3 and 3563, Government Code. Reference: Sections **3509, 3514.5(c),** 3520, **3541.5(c),** 3542**, 3563.3** and 3564, Government Code**, and Firefighters Union, Local 1186 v. City of Vallejo (1974) 12 Cal.3d 608**.

SUBCHAPTER 8. AGENCY FEE REGULATIONS

Article 1. Agency Fee

32990. Agency Fee.

(a) Pursuant to Government Code Section 3502.5, an exclusive representative may enter into an agreement with a public agency that provides for an "agency shop" form of organizational security or, alternatively, an exclusive representative may cause an "agency shop" arrangement to be placed in effect upon approval of a majority vote of those affected employees voting in a secret ballot election.

(~~a~~b) Pursuant to Government Code Sections 3515.7, 3540.1 and 3543, an exclusive representative may enter into an agreement with an employer which provides for the "fair share" or "agency shop" form of organizational security.

(~~b~~c) Pursuant to Government Code Section 3546, an exclusive representative of a bargaining unit including public school employees may initiate implementation of an organizational security provision for the payment of "fair share" or "agency shop" fees by covered employees.

(~~c~~d) Pursuant to Government Code Section 3583.5, an exclusive representative of a bargaining unit including employees of the University of California, other than a unit including faculty who are eligible for membership in the Academic Senate, or employees of the California State University may initiate implementation of an organizational security provision for the payment of "fair share" or "agency shop" fees by covered employees.

(~~d~~e) "Fair share" and "agency shop" forms of organizational security shall be known herein as "agency fee." All such agency fee agreements and provisions shall be administered in accordance with the following regulations.

Authority cited: Sections **3509(a),** 3513(h), 3541.3(g), (i) and (n) and 3563(f), (h) and (m), Government Code. Reference: Sections **3502.5,** 3515.7, 3540.1(i), 3543, 3546 and 3583.5, Government Code; and Chicago Teachers Union, Local No. 1 v. Hudson (1986) 475 U.S. 292.

32991. Amount of Agency Fee.

The agency fee shall not exceed the amounts set forth in Government Code Sections 3502.5(a), 3513(k), 3540.1(i)(2), 3546, and 3583.5.

Authority cited: Sections 3509(a), 3513(h), 3541.3(g) and 3563(f), Government Code.
Reference: Sections 3502.5(a), 3513(k), 3540.1(i), 3543, 3546 and 3583.5(a), Government Code; and Chicago Teachers Union, Local No. 1 v. Hudson (1986) 475 U.S. 292.

32992. Notification of Nonmember.

(a) Each nonmember who will be required to pay an agency fee shall annually receive written notice from the exclusive representative of:

(1) The amount of the agency fee which is to be expressed as a percentage of the annual dues per member based upon the chargeable expenditures identified in the notice;

(2) The basis for the calculation of the agency fee; and

(3) A procedure for appealing all or any part of the agency fee.

(b) All such calculations shall be made on the basis of an independent audit that shall be made available to the nonmember.

(c) Such written notice shall be sent/distributed to the nonmember either:

(1) At least 30 days prior to collection of the agency fee, after which the exclusive representative shall place those fees subject to objection in escrow, pursuant to Section 32995 of these regulations; or

(2) Concurrent with the initial agency fee collection, provided however, that all agency fees so noticed shall be held in escrow in toto until all objectors are identified. Thereafter, only the agency fees for agency fee objectors shall be held in escrow, pursuant to Section 32995 of these regulations.

Authority cited: Sections 3509(a), 3513(h), 3541.3(g) and 3563(f), Government Code.
Reference: Sections 3502.5, 3515.7, 3540.1(i), 3543, 3546 and 3583.5, Government Code; and Chicago Teachers Union, Local No. 1 v. Hudson (1986) 475 U.S. 292.

32993. Filing of Financial Report.

Each exclusive representative that has agreed to or has had implemented an agency fee provision shall, as part of the financial report required by Government Code Sections 3502.5(f), 3515.7(e), 3546.5, 3584(b), and 3587, also include (a) the amount of membership dues and agency fees paid by employees in the affected bargaining unit, and (b) identify the expenditure(s) that constitute(s) the basis for the amount of the agency fee.

Authority cited: Sections 3509(a), 3513(h), 3541.3(g) and 3563(f), Government Code.
Reference: Sections 3502.5, 3515.7(e), 3546.5, 3584(b) and 3587, Government Code; and Chicago Teachers Union, Local No. 1 v. Hudson (1986) 475 U.S. 292.

32994. Agency Fee Appeal Procedure.

(a) If an agency fee payer disagrees with the exclusive representative's determination of the agency fee amount, that employee (hereinafter known as an "agency fee objector") may file an agency fee objection. Such agency fee objection shall be filed with the exclusive representative. An agency fee objector may file an unfair practice charge that challenges the amount of the agency fee; however, no complaint shall issue until the agency fee objector has first exhausted the exclusive representative's Agency Fee Appeal Procedure. No objector shall be required to exhaust the Agency Fee Appeal Procedure where it is insufficient on its face.

(b) Each exclusive representative that has an agency fee provision shall administer an Agency Fee Appeal Procedure in accordance with the following:

(1) A agency fee objection shall be initiated in writing and shall be filed with an official of the exclusive representative who has authority to resolve agency fee objections.

(2) An agency fee objection shall be filed not later than 30 days following distribution of the notice required under Section 32992 of these regulations.

(3) Within 45 days of the last day for filing an objection under Section 32994(b)(2) of these regulations and upon receipt of the employee's agency fee objection, the exclusive representative shall request a prompt hearing regarding the agency fee before an impartial decisionmaker.

(4) The impartial decisionmaker shall be selected by the Public Employment Relations Board, the American Arbitration Association, or the California State Mediation Service. The selection among these entities shall be made by the exclusive representative.

(5) Any party may make a request for a consolidated hearing of multiple agency fee objections based on case similarities, including but not limited to, hearing location. At any time prior to the start of the hearing, any party may make a motion to the impartial decisionmaker challenging any consolidation of the hearing.

(6) The exclusive representative bears the burden of establishing the reasonableness of the amount of the agency fee.

(7) Agency fee objection hearings shall be fair, informal proceedings conducted in conformance with basic precepts of due process.

(8) All decisions of the agency fee impartial decisionmaker shall be in writing, and shall be rendered no later than 30 days after the close of the hearing.

(9) All hearing costs shall be borne by the exclusive representative, unless the exclusive representative and the agency fee objector agree otherwise.

Authority cited: Sections 3509(a), 3513(h), 3541.3(g) and 3563(f), Government Code.
Reference: Sections 3502.5, 3515.7, 3540.1(i), 3543, 3546 and 3583.5, Government Code; and

Chicago Teachers Union, Local No. 1 v. Hudson (1986) 475 U.S. 292.

32995. Escrow of Agency Fees in Dispute.

(a) The exclusive representative shall open an account in any independent financial institution in which to place in escrow either:

(1) Agency fees to be collected from nonmembers who have filed timely agency fee objections pursuant to Section 32994(b)(2) of these regulations; or

(2) Agency fees collected from nonmembers receiving concurrent notice with the initial agency fee collection provided in Section 32992(c)(2) of these regulations.

(b) Escrowed agency fees that are being challenged shall not be released until after either:

(1) Mutual agreement between the agency fee objector and the exclusive representative has been reached on the proper amount of the agency fee; or

(2) The impartial decisionmaker has made his/her decision, whichever comes first.

(c) Interest at the prevailing rate shall be paid by the exclusive representative on all rebated fees.

Authority cited: Sections 3509(a), 3513(h), 3541.3(g) and 3563(f), Government Code.
Reference: Sections 3502.5, 3515.7, 3540.1(i), 3543, 3546 and 3583.5, Government Code; and Chicago Teachers Union, Local No. 1 v. Hudson (1986) 475 U.S. 292.

32996. Filing of Agency Fee Appeal Procedure.

An exclusive representative with an agency fee agreement or provision shall file a copy of its Agency Fee Appeal Procedure with the Board within 30 days after entering into an agency fee agreement, or within 30 days of its notification to the employer that initiates the collection of agency fees, **or within 30 days after an election result is certified that initiates the collection of agency fees**. **For agency fee arrangements in effect under MMBA on July 1, 2001, the exclusive representative shall file its Agency Fee Appeal Procedure with the Board no later than July 31, 2001.**

Authority cited: Sections **3509(a),** 3513(h), 3541.3(g) and 3563(f), Government Code.
Reference: Sections **3502.5,** 3515.7, 3540.1(i), 3543, 3546 and 3583.5, Government Code; and Chicago Teachers Union, Local No. 1 v. Hudson (1986) 475 U.S. 292.

32997. Compliance.

It shall be an unfair practice for an exclusive representative to collect agency fees in violation of these regulations.

Authority cited: Sections 3509(a), 3513(h), 3541.3(g) and (i) and 3563(f), Government Code. Reference: Sections 3502.5, 3515.7, 3519.5, 3540.1(i), 3542(d), 3543.6, 3543, 3546, 3546.5, 3563.2, 3564(d), 3571.1 and 3583.5, Government Code; and Chicago Teachers Union, Local No. 1 v. Hudson (1986) 475 U.S. 292.

CHAPTER 5. MEYERS-MILIAS-BROWN ACT

SUBCHAPTER 1. ENFORCEMENT AND APPLICATION OF LOCAL RULES CONCERNING UNIT DETERMINATIONS, RECOGNITION, REPRESENTATION AND ELECTIONS

60000. Petition for Board Review.

(a) Any party to a determination by a public agency concerning unit determination, representation, recognition or elections may file a petition requesting the Board review the determination. Such a petition may only be filed within 30 days following exhaustion of administrative remedies available under the applicable local rules. A challenge to the validity of a local rule may not be filed under this section and may only be filed as an unfair practice charge pursuant to Section 32602 of these regulations.

(b) The petition shall be filed with the regional office. Service and proof of service of the petition pursuant to Section 32140 are required.

(c) The petition shall contain the following information:

(1) The name, address, county and telephone number of the public agency and the name, address and telephone number of the public agency agent to be contacted;

(2) The name, address and telephone number of the petitioner and the name, address and telephone number of the petitioner's agent to be contacted;

(3) The name, address and telephone number of any other interested party and the name, address and telephone number of the party's agent to be contacted;

(4) A copy of any petition or request filed with the public agency, a copy of the final determination of the public agency, and any related materials;

(5) A statement of the issue(s) in dispute;

(6) A statement indicating the specific action(s) requested of the Board.

Authority cited: Section 3509(a) and (c) and 3541.3(g) and (n), Government Code. Reference: Sections 3502.5, 3507, 3507.1, 3507.3, 3507.5, 3508, 3509 and 3541.3, Government Code.

60010. Board Investigation.

(a) Whenever a petition under Section 60000 is filed with the Board, the Board shall investigate and, where appropriate, conduct a hearing, or take such other action as deemed necessary to decide the questions raised by the petition.

(b) The petition shall be dismissed in part or in whole whenever the Board determines that:

(1) The petitioner has no standing to petition for the action requested; or

(2) The determination of the public agency was rendered in accordance with MMBA, the local rules of the public agency, and applicable precedent.

Authority cited: Section 3509(a) and (c) and 3541.3(g) and (n), Government Code. Reference: Sections 3502.5, 3507, 3507.1, 3507.3, 3507.5, 3508, 3509 and 3541.3, Government Code.

60020. Withdrawal of a Petition.

Any petition filed under Section 60000 may be withdrawn by the petitioner in writing at any time prior to a final decision by the Board. Service and proof of service of the withdrawal pursuant to Section 32140 are required.

Authority cited: Section 3509(a) and (c) and 3541.3(g) and (n), Government Code. Reference: Sections 3502.5, 3507, 3507.1, 3507.3, 3507.5, 3508, 3509 and 3541.3, Government Code.

60030. Informal Conference.

(a) A Board agent may conduct an informal conference to clarify the issues and explore settlement of the case. No record shall be made at such a conference.

(b) A Board agent shall give reasonable notice of such conference to each party directed to attend.

Authority cited: Section 3509(a) and (c) and 3541.3(g) and (n), Government Code. Reference: Sections 3502.5, 3507, 3507.1, 3507.3, 3507.5, 3508, 3509 and 3541.3, Government Code.

60035. Administrative Decision.

Any determination rendered without a hearing shall be issued in accordance with Section 32350 and may be appealed pursuant to Section 32360 of these Regulations.

Authority cited: Section 3509(a) and (c) and 3541.3(g) and (n), Government Code. Reference: Sections 3502.5, 3507, 3507.1, 3507.3, 3507.5, 3508, 3509 and 3541.3, Government Code.

60040. Notice of Hearing.

If the Board determines that a hearing is necessary, the Board shall serve a notice of hearing on each party. The notice shall state the date, time and place of the hearing.

Authority cited: Section 3509(a) and (c) and 3541.3(g) and (n), Government Code. Reference: Sections 3502.5, 3507, 3507.1, 3507.3, 3507.5, 3508, 3509 and 3541.3, Government Code.

60050. Conduct of Hearing; Issuance of Proposed Decision.

Hearings shall be conducted and proposed decisions shall be issued pursuant to procedures set forth in Chapter 1, Subchapter 3 of these Regulations.

Authority cited: Section 3509(a) and (c) and 3541.3(g) and (n), Government Code. Reference: Sections 3502.5, 3507, 3507.1, 3507.3, 3507.5, 3508, 3509 and 3541.3, Government Code.

60070. Decisions of the Board Itself.

Procedures before the Board itself shall be in accordance with Chapter 1, Subchapter 4, Articles 1 through 4 of these Regulations.

Authority cited: Section 3509(a) and (c) and 3541.3(g) and (n), Government Code. Reference: Sections 3502.5, 3507, 3507.1, 3507.3, 3507.5, 3508, 3509 and 3541.3, Government Code.

SUBCHAPTER 2. REPRESENTATION PROCEEDINGS CONDUCTED BY THE PUBLIC EMPLOYMENT RELATIONS BOARD

Article 1. General Provisions

61000. Application of Regulations.

Except as otherwise ordered pursuant to Chapter 1, the Board will conduct representation proceedings and/or agency fee rescission elections under MMBA in accordance with the applicable provisions of this Subchapter 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.

Authority cited: Section 3509(a) and 3541.3(g), Government Code. Reference: Sections 3502.5, 3507, 3507.1, 3507.3, 3507.5, 3508, 3509 and 3541.3, Government Code.

61005. Parties.

"Parties" means the public agency, the employee organization that is the exclusive or majority representative of any employee covered by a petition, any employee organization known to have an interest in representing any employees as demonstrated by having filed a pending petition, and/or any group of public employees which has filed a pending petition pursuant to Government Code Section 3502.5(d) or 3507.

Authority cited: Section 3509(a) and 3541.3(g) and (n), Government Code. Reference: Sections 3501(a), (b), (c) and (d), 3502.5, 3507, 3507.1, 3509 and 3541.3, Government Code.

61010. Window Period.

"Window period" means the 29-day period which is less than 120 days but more than 90 days prior to the expiration date of a lawful memorandum of understanding negotiated by the public agency and the exclusive representative. Expiration date means the last effective date of the memorandum. Notwithstanding the provisions of Section 32130, the date on which the memorandum of understanding expires shall not be counted for the purpose of computing the window period. Whenever the last day of the window period falls on a Saturday, Sunday, or holiday, as defined in Government Code Sections 6700 and 6701, and state offices are closed, any petition required to be filed during a window period must be filed on or before the last PERB business day during the window period.

Authority cited: Section 3509(a) and 3541.3(g), Government Code. Reference: Sections 3507, 3507.1, 3509 and 3541.3, Government Code.

61020. Proof of Support.

(a) Except as required in Section 61350(b)(1) or 61600, proof of employee support for all petitions requiring such support shall clearly demonstrate that the employee desires to be represented by the employee organization for the purpose of meeting and conferring on wages, hours and other terms and conditions of employment.

(b) The proof of support shall indicate each employee's printed name, signature, job title or classification and the date on which each individual's signature was obtained. An undated signature or a signature dated more than one calendar year prior to the filing of the petition requiring employee support shall be invalid for the purpose of calculating proof of support. Any signature meeting the requirements of this section shall be considered valid even though the signatory has executed authorizations for more than one employee organization.

(c) Any proof of support validly obtained within one year immediately prior to the date the petition or amendment requiring employee support is filed shall remain valid and may be used as proof of support to qualify for appearance on the ballot in an election, provided the employee's job classification is included in the unit in which the election is to be conducted.

(d) Subject to subsections (a), (b) and (c) of this section, proof of support may consist of any one of the following original documents or a combination thereof:

(1) Current dues deduction authorization forms;

(2) Membership applications;

(3) Authorization cards or petitions signed by employees. The purpose of the petition shall be clearly stated on each page thereof;

(4) A notarized membership list, provided it is accompanied by the date of each member's signature on an enrollment form, membership application, or designation card or cards, supported by a declaration under penalty of perjury that the employee organization has on file the aforementioned documents which indicate the employee's desire to be represented by the employee organization. A sample of such signed forms shall accompany the list.

(5) Other evidence as determined by the Board.

(e) Documents submitted to the board as proof of employee support shall remain confidential and not be disclosed by the Board.

(f) Any party which contends that proof of employee support was obtained by fraud or coercion, or that the signatures on such support documents are not genuine, shall file with the regional office evidence in the form of declarations under penalty of perjury supporting such contention within 20 days after the filing of the petition which the proof of support accompanied. The Board shall refuse to consider any evidence not timely submitted.

absent a showing of good cause for late submission. When prima facie evidence is submitted to the Board supporting a claim that proof of support was tainted by such misconduct, the Board shall conduct further investigations. If, as a result of such investigation, the Board determines that the proof of support is inadequate because of such misconduct, the petition shall be dismissed.

Authority cited: Sections 3509(a) and 3541.3(g), Government Code. Reference: Sections 3502.5, 3507, 3507.1, 3509 and 3541.3, Government Code.

61030. Withdrawal of a Petition.

Any petition may be withdrawn by the petitioner in writing at any time prior to a final decision by the Board. Service and proof of service of the withdrawal pursuant to Section 32140 are required.

Authority cited: Section 3509(a) and 3541.3(g) and (n), Government Code. Reference: Sections 3507, 3507.1, 3509 and 3541.3(h) and (l), Government Code.

61040. Informal Conference.

(a) A Board agent may conduct an informal conference to clarify the issues and explore settlement of the case. No record shall be made at such a conference.

(b) A Board agent shall give reasonable notice of such conference to each party directed to attend.

Authority cited: Section 3509(a) and 3541.3(g) and (n), Government Code. Reference: Sections 3507, 3507.1, 3509 and 3541.3(h) and (l), Government Code.

61050. Notice of Hearing.

If the Board determines that a hearing is necessary, the Board shall serve a notice of hearing on each party. The notice shall state the date, time and place of the hearing.

Authority cited: Section 3509(a) and 3541.3(g) and (n), Government Code. Reference: Sections 3507, 3507.1, 3509 and 3541.3(h) and (l), Government Code.

61055. Conduct of Hearing; Issuance of Proposed Decision.

Hearings shall be conducted and proposed decisions shall be issued pursuant to procedures set forth in Chapter 1, Subchapter 3 of these Regulations.

Authority cited: Section 3509(a) and (c) and 3541.3(g) and (n), Government Code. Reference: Sections 3502.5, 3507, 3507.1, 3507.3, 3507.5, 3508, 3509 and 3541.3, Government Code.

61060. Administrative Decision.

Any determination rendered without a hearing shall be issued in accordance with Section 32350 and may be appealed pursuant to Section 32360 of these Regulations.

Authority cited: Section 3509(a) and (c) and 3541.3(g) and (n), Government Code. Reference: Sections 3502.5, 3507, 3507.1, 3507.3, 3507.5, 3508, 3509 and 3541.3, Government Code.

61065. Elections in Consent Units.

At any time prior to a final decision of the Board regarding an appropriate unit, the parties may mutually agree upon an appropriate unit and request the Board to conduct a consent election. The conduct of an election in a consent unit should not be interpreted to mean that the Board would find the unit in question to be an appropriate unit in a disputed case.

Authority cited: Section 3509(a) and 3541.3(g) and (n), Government Code. Reference: Sections 3507, 3507.1(a), 3509 and 3541.3(c) and (l), Government Code.

61070. Decisions of the Board Itself.

Procedures before the Board itself shall be in accordance with Chapter 1, Subchapter 4, Articles 1 through 4 of these Regulations.

Authority cited: Section 3509(a) and (c) and 3541.3(g) and (n), Government Code. Reference: Sections 3502.5, 3507, 3507.1, 3507.3, 3507.5, 3508, 3509 and 3541.3, Government Code.

61072. Judicial Review.

A request for judicial review of a decision by the Board itself may be filed pursuant to Section 32500 and shall be allowed: (1) when the board, in response to a petition from the employer or an employee organization, agrees that the case is one of special importance and joins in the request for such review; or (2) when the issue is raised as a defense to an unfair practice complaint. A board order directing an election shall not be stayed pending judicial review.

Authority cited: Section 3509(a) and (c) and 3541.3(g) and (n), Government Code. Reference: Sections 3502.5, 3507, 3507.1, 3507.3, 3507.5, 3508, 3509 and 3541.3, Government Code.

61075. Notice of Decision.

When the Board itself issues a decision or when a hearing officer decision becomes final, the Board shall serve the decision and a notice of decision on the parties.

Authority cited: Section 3509(a) and 3541.3(g) and (n), Government Code. Reference: Sections 3507, 3507.1, 3509 and 3541.3(h) and (l), Government Code.

61080. Conduct of Elections; Eligibility to Appear on Ballot.

(a) If the Board determines that a Board-conducted election is necessary, the election shall be conducted in accordance with Article 2 of this Subchapter.

(b) Any employee organization which filed a valid petition or which became a party to a representation case may appear on the election ballot, provided that the organization has evidenced to the satisfaction of the Board at least 30 percent support in the appropriate unit. If an election is directed by a PERB decision, each eligible employee organization shall have 15 workdays from the date of service of the decision in which to demonstrate at least 30 percent support in the unit found to be appropriate by the Board.

(c) The Board shall determine the sufficiency of the proof of support in accordance with the provisions of Section 61020 of these Regulations.

Authority cited: Section 3509(a) and (c) and 3541.3(g) and (n), Government Code.
Reference: Sections 3502.5, 3507, 3507.1, 3507.3, 3507.5, 3508, 3509 and 3541.3, Government Code.

61090. Voluntary Recognition.

If only one employee organization qualifies to appear on the ballot and the organization has demonstrated proof of majority support in the appropriate unit, the public agency may grant recognition.

Authority cited: Section 3509(a) and 3541.3(g) and (n), Government Code. Reference: Sections 3507, 3507.1(a), 3509 and 3541.3(l), Government Code.

Article 2. Elections

61100. Authority to Conduct Elections.

An election shall be conducted when the Board issues a decision directing an election or approves an agreement for a consent election pursuant to the provisions of this Chapter. The Board shall determine the date, time, place and manner of the election absent an approved agreement of the parties.

Authority cited: Sections 3509(a) and 3541.3(g), Government Code. Reference: Sections 3502.5, 3507, 3507.1, 3509 and 3541.3, Government Code.

61105. Ballot.

(a) All elections shall be conducted by secret ballot under the supervision of the Board.

(b) Ballots shall be prepared under the supervision of the Board. The order of voting choices and the wording of each ballot entry shall be determined by the Board absent an approved agreement of the parties.

(c) Except in the case of a runoff election, in which the ballot entries are determined pursuant to Section 61145, or an election conducted pursuant to either Article 4 or 7 of this Subchapter, the ballot entry of "No Representation" shall appear on each ballot in a representation election.

(d) At any time prior to issuance of the notice of election (pursuant to Section 61110), an employee organization may file a request with the regional office to have its name removed from the ballot. The request shall disclaim any interest in representing the employees in the described unit. Service and proof of service of the request pursuant to Section 32140 are required.

Authority cited: Sections 3509(a) and 3541.3(g), Government Code. Reference: Sections 3502.5, 3507, 3507.1, 3509 and 3541.3, Government Code.

61110. Directed Election Order/Consent Election Agreement; Notice of Election.

(a) When the Board has determined that an election is required, the Board shall serve on the employer and the parties a Directed Election Order containing specific instructions regarding the conduct of the election. The Board may approve a Consent Election Agreement of the parties regarding the conduct of an election.

(b) Thereafter, the Board shall serve a notice of election on the parties. The notice shall contain a sample ballot, a description of the voting unit, and information regarding the balloting process. Unless otherwise directed by the Board, the employer shall post such notice conspicuously on all employee bulletin boards in each facility of the employer in which members of the described unit are employed.

(c) The Board shall supply the employer with sufficient copies of the notice for posting. The posting shall be accomplished by the date specified in the Consent Election Agreement or the Directed Election Order. The notice shall remain posted through the final day for casting ballots.

Authority cited: Sections 3509(a) and 3541.3(g), Government Code. Reference: Sections 3502.5, 3507, 3507.1, 3509 and 3541.3, Government Code.

61115. List of Voters.

(a) At a date established by the Board, the employer shall file with the regional office a list of names of all employees included in the voting unit as of the cutoff date for voter eligibility. Unless otherwise directed by the Board, the voter list for an on-site election shall be in alphabetical order by assigned polling site and shall include the job title or classification, work location and home address of each eligible voter. Unless otherwise directed by the Board, the voter list for a mailed ballot election shall be in alphabetical order and include the job title and home address of each eligible voter, and shall be accompanied by two sets of name and home address labels for each eligible voter.

(b) A list of eligible voters which meets the requirements of subsection (a) above but which contains in lieu of the home address a mailing address for each eligible voter shall be concurrently served by the employer on each other party to the election. Proof of service shall be filed with the regional office. For purposes of this subsection, mailing address means the home address of each eligible voter, except in the case where the release of the home address of the employee is prohibited by law, or if the Board shall determine that the release of home addresses is likely to be harmful to the employees.

(c) Any party which receives the mailing addresses of eligible voters pursuant to this section shall keep these addresses confidential and shall neither distribute them to any other organization or individual nor utilize them for any other purpose.

Authority cited: Sections 3509(a) and 3541.3(g), Government Code. Reference: Sections 3502.5, 3507, 3507.1 and 3509, Government Code.

61120. Voter Eligibility.

Unless otherwise directed by the Board, to be eligible to vote in an election employees must be employed in the voting unit as of the cutoff date for voter eligibility and still employed on the date they cast their ballots in the election. Employees who are ill, on vacation, on leave of absence or sabbatical, or temporarily laid off, and employees who are in the military service of the United States shall be eligible to vote.

Authority cited: Sections 3509(a) and 3541.3(g), Government Code. Reference: Sections 3502.5, 3507, 3507.1, 3509 and 3541.3, Government Code.

61125. Observers.

Each party shall be allowed to station an authorized observer selected from the employees of the employer at each polling site during an on-site election to assist in the conduct of the election and to challenge the eligibility of voters.

Authority cited: Sections 3509(a) and 3541.3(g), Government Code. Reference: Sections 3502.5, 3507, 3507.1, 3509 and 3541.3, Government Code.

61130. Challenges.

(a) In an on-site election, a Board agent or an authorized observer may challenge, for good cause, the eligibility of a voter. A person so challenged shall be permitted to cast a challenged ballot.

(b) In a mailed ballot election, a Board agent or an authorized agent of any party to the election may challenge, for good cause, the eligibility of a voter. Such challenges shall be made prior to the tally of the ballots.

(c) When sufficient in number to affect the outcome of the election, unresolved challenges shall be resolved by the Board.

Authority cited: Sections 3509(a) and 3541.3(g), Government Code. Reference: Sections 3502.5, 3507, 3507.1, 3509 and 3541.3, Government Code.

61135. Tally of Ballots.

(a) Each party shall be allowed to station an authorized agent at the ballot count to verify the tally of ballots.

(b) At the conclusion of the counting of ballots, the Board shall serve a tally of the ballots on each party.

(c) Unless otherwise authorized by statute, a majority of the valid votes cast shall determine the outcome of the election.

Authority cited: Sections 3509(a) and 3541.3(g), Government Code. Reference: Sections 3502.5, 3507, 3507.1, 3509 and 3541.3, Government Code.

61140. Resolution of Challenges.

When the tally of ballots discloses that the challenged ballots are sufficient in number to affect the outcome of the election, the Board agent shall conduct an investigation and, where appropriate, conduct a hearing or take such other action as deemed necessary to determine the eligibility of the challenged voters. Any determination made by a Board agent pursuant to this Section may be appealed to the Board itself in accordance with the provisions of Chapter 1, Subchapter 4, Article 2 or 3 of these regulations, as appropriate.

Authority cited: Sections 3509(a) and 3541.3(g), Government Code. Reference: Sections 3502.5, 3507, 3507.1, 3509 and 3541.3, Government Code.

61145. Runoff Elections.

In a representation election, the Board shall direct a runoff election when a valid election results in none of the choices receiving a majority of the valid votes cast. The ballot for the runoff election shall provide for a selection between the two ballot entries receiving the largest and second largest number of valid votes cast in the election.

Authority cited: Sections 3509(a) and 3541.3(g), Government Code. Reference: Sections 3502.5, 3507, 3507.1, 3509 and 3541.3, Government Code.

61150. Objections.

(a) Within 10 days following the service of the tally of ballots, any party to the election may file with the regional office objections to the conduct of the election. Any objections must be filed within the 10 day time period whether or not a runoff election is necessary or challenged ballots are sufficient in number to affect the results of the election.

(b) Service and proof of service of the objections pursuant to Section 32140 are required.

(c) Objections shall be entertained by the Board only on the following grounds:

(1) The conduct complained of interfered with the employees' right to freely choose a representative, or

(2) Serious irregularity in the conduct of the election.

(d) The statement of the objections must contain specific facts which, if true, would establish that the election result should be set aside, and must also describe with specificity how the alleged facts constitute objectionable conduct within the meaning of subsection (c) above.

(e) No party may allege as grounds for setting aside an election its own conduct or the conduct of its agents.

(f) At the direction of the Board, facts alleged as supportive of the election conduct objected to shall be supported by declarations. Such declarations must be within the personal knowledge of the declarant, or must otherwise be admissible in a PERB election objections hearing. The declarations shall specify the details of each occurrence; identify the person(s) alleged to have engaged in the allegedly objectionable conduct; state their relationship to the parties; state where and when the allegedly objectionable conduct occurred; and give a detailed description of the allegedly objectionable conduct. All declarations shall state the date and place of execution and shall be signed by the declarant and certified by him or her to be true under penalty of perjury.

(g) The Board agent shall dismiss objections that fail to satisfy the requirements of subsections (a) through (d). The objecting party may appeal the dismissal to the Board itself in accordance with Chapter 1, Subchapter 4, Article 3 of these regulations.

Authority cited: Sections 3509(a) and 3541.3(g), Government Code. Reference: Sections 3502.5, 3507, 3507.1, 3509 and 3541.3, Government Code.

61155. Powers and Duties of Board Agent Concerning Objections.

Concerning objections, the Board agent has the power to:

(a) Direct any party to submit evidence through declarations or documents;

(b) Order the inspection of documents by Board agents or the parties;

(c) Direct any party to submit an offer of proof;

(d) Obtain declarations from witnesses based on personal knowledge;

(e) Conduct investigatory conferences with the parties to explore and resolve factual or legal issues;

(f) Dismiss any objections which, after investigation, do not warrant setting aside the election. Any such dismissal is appealable to the Board itself pursuant to Chapter 1, Subchapter 4, Article 3 of these regulations.

(g) Issue a written determination setting aside the election when, after investigation, it appears that such action is warranted, and that no material factual disputes exist. Such determination shall be in writing and served on the parties. Any such determination is appealable to the Board itself pursuant to Chapter 1, Subchapter 4, Article 3 of these regulations.

(h) Schedule a hearing when substantial and material factual disputes exist. Any hearing shall be limited to the issues set forth in the notice of hearing.

Authority cited: Sections 3509(a) and 3541.3(g), Government Code. Reference: Sections 3502.5, 3507, 3507.1, 3509 and 3541.3, Government Code.

61160. Withdrawal of Objections.

Any party may withdraw its objections to an election prior to a final decision by the Board.

Authority cited: Sections 3509(a) and 3541.3(g), Government Code. Reference: Sections 3502.5, 3507, 3507.1, 3509 and 3541.3, Government Code.

61165. Hearings on Objections and Challenges.

Objections to the conduct of an election which have not been dismissed pursuant to Section 61155(f) or unresolved challenged ballots sufficient in number to affect the outcome of the election may be resolved through the hearing procedures described in Chapter 1, Subchapter 3.

Authority cited: Sections 3509(a) and 3541.3(g), Government Code. Reference: Sections 3502.5, 3507, 3507.1, 3509 and 3541.3, Government Code.

61170. Exception to Decision on Objections or Challenges.

Exceptions to a Board agent's proposed decision on objections to the conduct of the election or challenged ballots may be taken in accordance with the procedures set forth in Chapter 1, Subchapter 4, Article 2 of these regulations.

Authority cited: Sections 3509(a) and 3541.3(g), Government Code. Reference: Sections 3502.5, 3507, 3507.1, 3509 and 3541.3, Government Code.

61175. Revised Tally of Ballots.

Should a ruling on challenged ballots direct that any such ballots be voided or opened and counted, the Board shall serve a revised tally of ballots on each party at the conclusion of the counting and/or voiding of such ballots. Each party shall be allowed to station an authorized agent at the ballot count to verify the tally of ballots.

Authority cited: Sections 3509(a) and 3541.3(g), Government Code. Reference: Sections 3502.5, 3507, 3507.1, 3509 and 3541.3, Government Code.

61180. Objections to Revised Tally of Ballots.

(a) Within 10 days following the service of a revised tally of ballots, any party may file with the regional office objections to the revised tally.

(b) Service and proof of service of the objections pursuant to Section 32140 are required.

(c) Objections to a revised tally of ballots shall be entertained by the Board only on the grounds of serious irregularity in the conduct of the challenged ballot count or issuance of the revised tally.

Authority cited: Sections 3509(a) and 3541.3(g), Government Code. Reference: Sections 3502.5, 3507, 3507.1, 3509 and 3541.3, Government Code.

61185. Certification of Results of Election or Certification of Exclusive Representative.

Except in the case of elections conducted pursuant to either Article 4 or 7 of this Subchapter, the Board shall certify the results of the election or issue a certification of an exclusive representative if the results of the election are conclusive and no timely objections are filed.

Authority cited: Sections 3509(a) and 3541.3(g), Government Code. Reference: Sections 3502.5, 3507, 3507.1, 3509 and 3541.3, Government Code.

61190. Stay of Election.

The Board may stay an election pending the resolution of an unfair practice charge relating to the voting unit upon an investigation and a finding that alleged unlawful conduct would so affect the election process as to prevent the employees from exercising free choice. Any determination to stay an election made by the Board pursuant to this section may be appealed to the Board itself in accordance with the provisions of Chapter 1, Subchapter 4, Article 3 of these regulations.

Authority cited: Sections 3509(a) and 3541.3(g), Government Code. Reference: Sections 3502.5, 3507, 3507.1, 3509 and 3541.3, Government Code.

61200. Bar to Conducting Election.

The Board shall dismiss a petition requiring a representation election if it determines (1) there is currently in effect a memorandum of understanding between the employer and another employee organization recognized or certified as the exclusive representative of any employees covered by a petition requiring an election, unless the petition is filed less than 120 days but more than 90 days prior to the expiration of such memorandum, provided that if a memorandum has been in effect for three years or more, there shall be no restriction as to time of filing the petition; or, (2) that a representation election result has been certified affecting the described unit or a subdivision thereof within the 12 months immediately preceding the date of filing of the petition.

Authority cited: Sections 3509(a) and 3541.3(g), Government Code. Reference: Sections 3502.5, 3507, 3507.1, 3509 and 3541.3, Government Code.

Article 3. Petition for Certification

61210. Petition for Certification.

(a) An employee organization may file a petition to become the exclusive representative of an appropriate unit consisting of a group of employees who are not included in an established unit represented by an exclusive representative. The petition shall be filed with the appropriate regional office; be signed by an authorized agent of the employee organization; and include the following information:

(1) The name, address and telephone number of the employee organization and the name, address and telephone number of the agent to be contacted;

(2) The name, address and telephone number of the employer and the name, address and telephone number of the agent to be contacted;

(3) A description of the proposed appropriate unit, including the classifications and positions to be included and those to be excluded;

(4) The approximate number of employees in the proposed appropriate unit;

(5) The name and address of any other employee organization, if any, known to have an interest in representing the employees covered by the unit.

(b) The petition shall be accompanied by proof of at least 30 percent support of the employees in the unit claimed to be appropriate. Proof of support is defined in Section 61020 of these regulations.

(c) Service of the petition, excluding the proof of at least 30 percent support, and proof of service pursuant to Section 32140 are required.

Authority cited: Section 3509(a) and 3541.3(g) and (n), Government Code. Reference: Sections 3507, 3507.1, 3507.3, 3507.5, 3508, 3509 and 3541.3(l), Government Code.

61220. Posting Notice of Petition for Certification.

(a) The employer shall post a notice of the petition, as provided by the Board, as soon as possible but in no event later than 10 days following service of a copy of the petition.

(b) The notice shall be posted conspicuously on all employee bulletin boards in each facility of the employer in which members of the unit claimed to be appropriate are employed.

(c) The notice shall remain posted for 15 workdays.

(d) The employer shall inform the regional office and the parties in writing of the locations and date of posting of the notice.

Authority cited: Section 3509(a) and 3541.3(g) and (n), Government Code. Reference: Sections 3507, 3507.1, 3507.3, 3507.5, 3508, 3509 and 3541.3(l), Government Code.

61240. Determination of Proof of Support.

(a) Within 20 days of the date of service of a copy of the petition for certification, the employer shall file with the regional office an alphabetical list, including job titles or classifications, of the employees employed in the claimed unit as of the last date of the payroll period immediately preceding the date the petition was filed, unless otherwise directed by the Board.

(b) If after initial determination the proof of support is insufficient, the Board may allow up to 10 days to perfect the proof of support.

(c) Upon completion of the review of the proof of support, the Board shall inform the parties in writing of the final determination as to sufficiency or lack thereof regarding the proof of support. The petition shall be dismissed if the Board determines that the petition lacks sufficient proof of support.

Authority cited: Section 3509(a) and 3541.3(g) and (n), Government Code. Reference: Sections 3507, 3507.1, 3507.3, 3507.5, 3508, 3509 and 3541.3(l), Government Code.

61250. Employer Response Regarding Petition for Certification.

(a) Within 15 days following service of a Board determination finding sufficient proof submitted in support of the petition, the employer shall file a written response with the regional office.

(b) Service and proof of service of the response pursuant to Section 32140 are required.

(c) The employer shall use the following format for its response regarding a petition for certification:

(1) Name, address and telephone number of the employer and name, address and telephone number of the employer's agent to be contacted;

(2) Attach a copy of the petition for certification;

(3) Employer position regarding the petition for certification:

(A) Does the employer reasonably doubt the appropriateness of the unit proposed by the petitioner? If so, what classifications or positions remain in dispute? What is the employer's position regarding the dispute?

(B) Does the employer believe that there are other reasons why a representation election should not be held in the proposed unit? If so, please fully explain.

Authority cited: Section 3509(a) and 3541.3(g) and (n), Government Code. Reference: Sections 3507, 3507.1, 3507.3, 3507.5, 3508, 3509 and 3541.3(l), Government Code.

61260. Amendment of Petition for Certification.

(a) A petition for certification may be amended to correct technical errors or to add or delete job classifications from the proposed unit at any time prior to the issuance of a notice of hearing. The amendment shall be filed with the regional office and provide the information required in Section 61210(a). Service and proof of service of the amendment pursuant to Section 32140 are required.

(b) In addition, amendments to add new job classifications to a proposed unit shall be subject to the following:

(1) Additional proof of support, if needed to maintain standing as a petitioner, shall be filed with the regional office concurrently with the amendment.

(2) An employer response to the amended petition shall be filed with the regional office within 15 days following the service of the Board determination of adequacy of proof submitted in support of the petition, unless otherwise directed by the Board. The response shall conform to the requirements for employer responses set forth in Section 61250.

(c) Amendments to correct technical errors or to add or delete job classifications from a party's proposed unit which are requested after the issuance of the notice of hearing are subject to approval by the hearing officer. The hearing officer may grant the requested amendment, so long as it will not serve to unduly impede the hearing and provided that sufficient proof of support is evidenced to support any request for addition of job classifications. Posting of any such amendments shall be at the discretion of the Board agent.

Authority cited: Section 3509(a) and 3541.3(g) and (n), Government Code. Reference: Sections 3507, 3507.1, 3507.3, 3507.5, 3508, 3509 and 3541.3(l), Government Code.

61270. Board Investigation.

Whenever a petition for certification is filed with the Board, the Board shall investigate and, where appropriate, conduct a hearing and/or a representation election, or take such other action as deemed necessary to decide the questions raised by the petition.

Authority cited: Section 3509(a) and 3541.3(g) and (n), Government Code. Reference: Sections 3507, 3507.1, 3507.3, 3507.5, 3508, 3509 and 3541.3(h) and (l), Government Code.

Article 4. Petition for Amendment of Certification

61300. Petition.

(a) An employee organization may file with the regional office a petition to amend its certification or recognition in the event of a merger, amalgamation, affiliation or transfer of jurisdiction, or in the event of a change in the name or jurisdiction of the employer.

(b) The petition shall be in writing, signed by an authorized agent of the employee organization and shall contain the following information:

(1) The name, address and telephone number of the employee organization and the name, address and telephone number of the agent to be contacted;

(2) The name, address and telephone number of the employer;

(3) A brief description and the title of the established unit;

(4) A clear and concise statement of the nature of the merger, amalgamation, affiliation or other change in jurisdiction and the new name of the employee organization and/or employer.

(c) Service and proof of service of the petition pursuant to Section 32140 are required.

Authority cited: Sections 3509(a) and 3541.3(g), Government Code. Reference: Sections 3507, 3507.1, 3509 and 3541.3(m), Government Code.

61310. Employer Response.

The employer may file a responding statement to the petition filed pursuant to Section 61300. The statement shall be filed with the regional office within 15 days following the date of service of the petition. Service and proof of service pursuant to Section 32140 are required.

Authority cited: Sections 3509(a) and 3541.3(g), Government Code. Reference: Sections 3507, 3507.1, 3509 and 3541.3(m), Government Code.

61320. Board Investigation.

(a) Upon receipt of a petition filed pursuant to Section 61300, the Board shall conduct such inquiries and investigations or hold such hearings as deemed necessary and/or conduct a representation election in order to decide the questions raised by the petition.

(b) The Board may dismiss the petition if the petitioner has no standing to petition for the action requested or if the petition is improperly filed. The Board may deny a petition based on the investigation conducted pursuant to subsection (a) above.

(c) Upon approval of a petition, the Board shall issue a certification reflecting the new identity of the exclusive representative and/or employer. Such certification shall not be considered to be a new certification for the purpose of computing time limits pursuant to Section 61200 of these regulations.

Authority cited: Sections 3509(a) and 3541.3(g), Government Code. Reference: Sections 3507, 3507.1, 3509 and 3541.3(h) and (m), Government Code.

Article 5. Decertification Petition

61350. Petition.

(a) A petition for an election to decertify an existing exclusive representative in an established unit may be filed by a group of employees within the unit or an employee organization. The petition shall be filed with the regional office and include the following information:

(1) The name, address and telephone number of the petitioning employee organization, if any, and/or the name, address and telephone number of the agent to be contacted on behalf of a petitioning employee organization or group of employees;

(2) The name, address and telephone number of the employer and the name, address and telephone number of the agent to be contacted;

(3) A brief description and the title of the established unit;

(4) The name, address and telephone number of the exclusive representative of the established unit and the name, address and telephone number of the agent to be contacted;

(5) The approximate number of employees in the established unit;

(6) The date on which the exclusive representative was recognized or certified;

(7) The effective and expiration dates of the current memorandum of understanding, if any, covering employees in the unit.

(b) The petition shall be accompanied by proof that at least 30 percent of the employees in the established unit either:

(1) No longer desire to be represented by the incumbent exclusive representative; or

(2) Wish to be represented by another employee organization.

Proof of support is defined in Section 61020 of these regulations.

(c) Service of the petition, excluding the proof of at least 30 percent support, and proof of service pursuant to Section 32140 are required.

Authority cited: Sections 3509(a) and 3541.3(g), Government Code. Reference: Sections 3507, 3507.1, 3509 and 3541.3(c) and (l), Government Code.

61360. Posting Notice of Decertification Petition.

(a) The employer shall post a notice of the decertification petition, as provided by the Board, as soon as possible but in no event later than 15 days following service of a copy of the petition.

(b) The notice shall be posted conspicuously on all employee bulletin boards in each facility of the employer in which members of the established unit are employed.

(c) The notice shall remain posted for a minimum of 15 workdays.

(d) The employer shall inform the regional office and the parties in writing of the locations and date of posting of the notice.

Authority cited: Sections 3509(a) and 3541.3(g), Government Code. Reference: Sections 3507, 3507.1, 3509 and 3541.3(c) and (l), Government Code.

61370. Board Determination Regarding Proof of Support.

(a) Within 20 days of the date the decertification petition is filed with the regional office, the employer shall file with the regional office a description of the established unit and an alphabetical list, including job titles or classifications, of employees in the established unit as of the last date of the payroll period immediately preceding the date the decertification petition was filed, unless otherwise directed by the Board.

(b) Upon completion of the review of the proof of support, the Board shall inform the parties in writing of the determination as to sufficiency or lack thereof regarding the proof of support.

Authority cited: Sections 3509(a) and 3541.3(g), Government Code. Reference: Sections 3507, 3507.1, 3509 and 3541.3(c) and (l), Government Code.

61380. Board Investigation/Election.

(a) Upon receipt of a petition for decertification, the Board shall investigate and, where appropriate, conduct a hearing and/or an election or take such other action as necessary.

(b) The petition shall be dismissed if the existing exclusive representative files a valid disclaimer of interest in representing employees in the unit within 20 days of the date the petition is filed with the regional office.

(c) The petition shall be dismissed (1) whenever there is currently in effect a memorandum of understanding between the employer and the exclusive representative of the employees covered by a petition, unless the petition is filed during the window period defined in Section 61010 of these regulations, provided that if such memorandum has been in effect for three years or more, there shall be no restriction as to time of filing the petition; or, (2) whenever a representation election result has been certified affecting the described unit or a subdivision thereof within the 12 months immediately preceding the date of filing of the petition.

Authority cited: Sections 3509(a) and 3541.3(g), Government Code. Reference: Sections 3507, 3507.1, 3509 and 3541.3(c), (h) and (l), Government Code.

Article 6. Severance Petition

61400. Severance Petition.

(a) An employee organization may file a petition to become the exclusive representative of an appropriate unit consisting of a group of employees who are already members of a larger established unit represented by an incumbent exclusive representative by filing a petition for certification in accordance with the provisions of Article 3 of this Subchapter. Such a petition shall include the following information:

(1) The name, address and telephone number of the petitioning employee organization and the name, address and telephone number of the agent to be contacted;

(2) The name, address and telephone number of the employer and the name, address and telephone number of the agent to be contacted;

(3) A brief description and the title of the established unit;

(4) The name, address and telephone number of the exclusive representative of the established unit and the name, address and telephone number of the agent to be contacted;

(5) A description of the proposed appropriate unit, including the classifications and positions to be included and those to be excluded;

(6) The approximate number of employees in the proposed appropriate unit;

(7) The date on which the exclusive representative was recognized or certified;

(8) The effective and expiration dates of the current memorandum of understanding, if any, covering employees in the established unit.

(b) Whenever a memorandum of understanding exists, a severance petition or an amendment to a severance petition must be filed during the "window period" defined by Section 61010.

(c) Concurrent with the filing of a severance petition and any amendment to a severance petition, the employee organization shall serve a copy of the petition or amendment, excluding any proof of support, on the employer and the exclusive representative. Proof of service pursuant to Section 32140 is required.

Authority cited: Section 3509(a) and 3541.3(g) and (n), Government Code. Reference: Sections 3507, 3507.1, 3509 and 3541.3(a), (c), (e) and (f), Government Code.

61410. Response to Severance Petition.

(a) The public agency and the exclusive representative of the established unit may file responding statements supporting or opposing the severance petition. Such response shall be filed with the regional office within 20 days following the date of service of the severance petition. Service and proof of service of the response pursuant to Section 32140 are required.

(b) The response shall be in writing, signed by an authorized agent of the responding party and contain the following information:

(1) A copy of the severance petition;

(2) The name, address and telephone number of the respondent, and the name, address and telephone number of the respondent agent to be contacted;

(3) A statement confirming or refuting the information contained in the severance petition regarding the date the incumbent exclusive representative was recognized or certified, and the effective date and the expiration date of any current memorandum of understanding covering employees in the established unit; and,

(4) A concise statement setting forth the basis for support of or opposition to the unit proposed by the petition.

Authority cited: Section 3509(a) and 3541.3(g) and (n), Government Code. Reference: Sections 3507, 3507.1, 3509 and 3541.3(a), (e) and (l), Government Code.

61420. Board Investigation.

(a) Whenever a severance petition is filed with the Board, the Board shall investigate and, where appropriate, conduct a hearing and/or a representation election, or take such other action as deemed necessary to decide the questions raised by the petition.

(b) The petition shall be dismissed (1) whenever there is currently in effect a memorandum of understanding between the employer and the exclusive representative of any employees covered by a petition, unless the petition is filed during the window period defined in Section 61010 of these regulations, provided that if such memorandum has been in effect for three years or more, there shall be no restriction as to time of filing the petition; or, (2) whenever a representation election result has been certified affecting the described unit or a subdivision thereof within the 12 months immediately preceding the date of filing of the petition.

Authority cited: Section 3509(a) and 3541.3(g) and (n), Government Code. Reference: Sections 3507, 3507.1, 3509 and 3541.3(a), (e), (h) and (l), Government Code.

Article 7. Petition for Unit Modification

61450. Petition.

Absent agreement of the parties to modify a unit, an exclusive representative, an employer, or both must file a petition for unit modification in accordance with this section. Parties who wish to obtain Board certification of a unit modification may file a petition in accordance with the provisions of this section.

(a) An exclusive representative may file with the regional office a petition for modification of its unit(s):

(1) To add to the unit unrepresented classifications or positions;

(2) To divide the existing unit into two or more appropriate units;

(3) To consolidate two or more of its established units into one appropriate unit.

(b) An exclusive representative, an employer, or both jointly may file with the regional office a petition for unit modification:

(1) To delete classifications or positions which by virtue of change in circumstances are no longer appropriate to the established unit because said classification(s) or position(s) are not covered by MMBA or otherwise prohibited by statute or local rule from inclusion in the unit;

(2) To make technical changes to clarify or update the unit description;

(3) To resolve a dispute as to unit placement or designation of a new classification or position;

(4) To delete classifications or positions not subject to (1) above which are no longer appropriate to the established unit because said classification(s) or position(s) are not covered by MMBA or otherwise prohibited by statute or local rule from inclusion in the unit, provided that:

(A) The petition is filed jointly by the employer and the exclusive representative, or

(B) There is not in effect a lawful written agreement or memorandum of understanding, or

(C) The petition is filed during the "window period" of a lawful memorandum of understanding as defined in these regulations in Section 61010.

(c) All affected exclusive representatives may jointly file with the regional office a petition to transfer classifications or positions from one represented established unit to another.

(d) The petition shall be signed by an authorized agent of each petitioning party and include the following information:

(1) The name, address and telephone number of the exclusive representative(s) of the unit(s) affected by the petition;

(2) The name, address and telephone number of the employer and the name, address and telephone number of the agent to be contacted;

(3) A brief description and the title(s) of the established unit(s);

(4) The approximate number of employees in the established unit;

(5) The approximate number of employees covered by the petition;

(6) The effective and expiration dates of the current memorandum of understanding, if any, covering employees in the established unit;

(7) A description of the modification(s) sought by the petition;

(8) The name and address of any other employee organization known to have an interest in representing employees covered by the petition;

(9) A statement of the reasons for the modification(s).

(e) If the petition requests the addition of classifications or positions to an established unit, the Board may require proof of majority support of persons employed in the classifications or positions to be added. Proof of support is defined in Section 61020 of these regulations.

(f) A copy of a petition filed solely by an exclusive representative or an employer shall be concurrently served on the other party, and on any additional interested party. Proof of service pursuant to Section 32140 is required. Proof of majority support, if required, shall be filed only with the regional office.

Authority cited: Sections 3509(a) and 3541.3(e) and (g), Government Code. Reference: Sections 3507, 3507.1, 3507.3, 3507.5, 3508, 3509 and 3541.3(a) and (e), Government Code.

61460. Response to Petition.

(a) Unless otherwise notified by the Board, a party or interested party may file a response to a petition filed solely by an exclusive representative or an employer. Such response shall be filed with the regional office within 20 days following the date of service of the petition. Service and proof of service of the response pursuant to Section 32140 are required.

(b) The response shall be in writing, signed by an authorized agent of the responding party and contain the following information:

(1) The name, address and telephone number of the petitioner(s);

(2) The name, address and telephone number of the respondent and the name, address and telephone number of the agent to be contacted;

(3) A statement confirming or refuting information contained in the petition regarding the size and description of the established unit(s), the date(s) of recognition or certification, the approximate number of employees involved in the modification request and the identity of any other employee organization known to claim to represent affected employees;

(4) A concise statement setting forth the reasons for support of or opposition to the unit modification proposed by the petitioner(s).

Authority cited: Sections 3509(a) and 3541.3(e) and (g), Government Code. Reference: Sections 3507, 3507.1, 3507.3, 3507.5, 3508, 3509 and 3541.3(a) and (e), Government Code.

61470. Board Determination Regarding Proof of Support.

(a) If proof of majority support has been filed, the employer shall, within 20 days of the date the petition was filed, file with the regional office an alphabetical list, including job titles or classifications, of all employees proposed to be added to the unit as of the last date of the payroll period immediately preceding the date the petition was filed with PERB, unless otherwise directed by the Board.

(b) The Board may allow up to 10 days to perfect the proof of support.

(c) Upon completion of the review of the proof of support, the Board shall inform the parties in writing of the determination as to sufficiency of the proof of support.

Authority cited: Sections 3509(a) and 3541.3(e) and (g), Government Code. Reference: Sections 3507, 3507.1, 3507.3, 3507.5, 3508, 3509 and 3541.3(a) and (e), Government Code.

61480. Disposition of Petitions.

(a) Upon receipt of a petition for unit modification, the Board shall investigate and, where appropriate, conduct a hearing and/or a representation election, or take such other action as deemed necessary in order to decide the questions raised by the petition and to ensure full compliance with the provisions of the law.

(b) The Board shall dismiss a petition if it is found to be improperly or not timely filed, or if proof of support submitted falls short of the required majority support, or if a representation election result has been certified within the 12 months immediately preceding the date of filing of the petition which covers any employees proposed to be added to the unit.

(c) Board Order of Unit Modification.

(1) The Board shall issue an order of unit modification whenever the disposition of a petition filed under this Article results in the modification of a unit.

(2) The order shall not be considered to be a new certification for the purpose of computing time limits pursuant to Section 61200.

Authority cited: Sections 3509(a) and 3541.3(e) and (g), Government Code. Reference: Sections 3507, 3507.1, 3507.3, 3507.5, 3508, 3509 and 3541.3(a) and (e), Government Code.

Article 8. Rescission of Agency Shop Agreement or Provision

61600. Employee Petition.

(a) A group of employees in an established unit may file with the regional office a petition to rescind an existing agency shop agreement or provision pursuant to Government Code Section 3502.5(d).

(b) The petition shall be signed by an authorized representative of the group of employees and shall include the following information:

(1) The name, address and telephone number of the agent to be contacted on behalf of a petitioning group of employees;

(2) The name, address and telephone number of the employer and the name, address and telephone number of the agent to be contacted;

(3) A brief description and the title of the established unit;

(4) The name, address and telephone number of the exclusive representative of the established unit and the name, address and telephone number of the agent to be contacted;

(5) The approximate number of employees in the established unit;

(6) The effective and expiration dates of the current memorandum of understanding, if any, covering employees in the unit.

(c) Proof that at least 30 percent of the employees in the unit desire a vote to rescind the existing agency shop provision shall be filed with the regional office concurrent with the petition. Proof of support shall conform to the requirements of Section 61020(b), (c), (d)(3), (e) and (f).

(d) Service of the petition, excluding the proof of at least 30 percent support, and proof of service pursuant to Section 32140 are required.

Authority cited: Section 3509(a) and 3541.3(g) and (n), Government Code. Reference: Sections 3502.5(d), 3507, 3509 and 3541.3(c), Government Code.

61610. Board Determination Regarding Proof of Support.

(a) Within 20 days following the filing of the petition to rescind an agency shop agreement or provision, the public agency shall file with the 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.

(b) If after initial determination the proof of support is insufficient, the Board may allow up to 10 days to perfect the proof of support.

(c) Upon completion of the review of the proof of support, the Board shall inform the parties in writing of the determination as to sufficiency or lack thereof regarding the proof of support.

Authority cited: Section 3509(a) and 3541.3(g) and (n), Government Code. Reference: Sections 3502.5(d), 3507, 3509 and 3541.3(c), Government Code.

61620. Employee Vote.

(a) Provided the rescission petition is timely and properly filed pursuant to this Article 2, and the proof submitted in support of the petition is determined to be adequate pursuant to Section 61600, a rescission election among the employees in the established unit shall be conducted under procedures established by the Board and in accordance with election procedures described in these regulations.

(b) The agency shop agreement or provision shall be rescinded if a majority of the employees in the negotiating unit covered by the provision vote to rescind the agreement.

Authority cited: Section 3509(a) and 3541.3(g) and (n), Government Code. Reference: Sections 3502.5(d), 3507, 3509 and 3541.3(c), Government Code.

61630. Bar to Rescission.

The Board shall dismiss any petition to rescind the existing agency shop agreement or provision if the results of a prior rescission election concerning the agreement or provision in the same unit were certified during the term of the same memorandum of understanding.

Authority cited: Section 3509(a) and 3541.3(g) and (n), Government Code. Reference: Sections 3502.5(d), 3507, 3509 and 3541.3(c), Government Code.

EXHIBIT B

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

August 30, 2002

RECEIVED
AUG 30 2002
COMMISSION ON STATE MANDATES

Ms. Paula Higashi
Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

Dear Ms. Higashi:

As requested in your letter of August 2, 2002, the Department of Finance has reviewed the test claim submitted by the City of Sacramento and the County of Sacramento (claimant) asking the Commission to determine whether specified costs incurred under Chapter No. 901, Statutes of 2000, (SB 739, Solis) are reimbursable state mandated costs (Claim No. CSM-01-TC-30 "Local Government Employment Relations").

Commencing with page 6 of the test claim, the claimant has identified various duties, which it asserts are reimbursable state mandates. Article XIII B, Section 6 of the California Constitution states that a reimbursable mandate occurs if a new program or a higher level of service on local government exists. Pursuant to Government Code Section 17556(e), if the statute provides for offsetting savings to local agencies and results in no net costs to the agencies, the Commission on State Mandates shall not find those costs to be mandated by the State. As a result of these provisions, Finance concludes that there are not any state reimbursable costs resulting from Chapter 901.

This test claim legislation does not create a new program or a higher level of service since the duties of the local agency employer representatives as stated in Chapter 901 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 duties listed in this test claim are discretionary and therefore do not qualify as reimbursable state-mandated costs. For example the chapter does not require employers to create and provide training on the Public Employment Relations Board's (PERB) rules and regulations, process agency shop petitions, participate in PERB's rulemaking process, or appeal PERB decisions.

Chapter 901 provides for offsetting savings to local agencies since this chapter would shift local employers from a process where 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.

As required by the Commission's regulations, we are including a "Proof of Service" indicating that the parties included on the mailing list which accompanied your August 30, 2002 letter have been provided with copies of this letter via either United States Mail or, in the case of other state agencies, Interagency Mail Service.

If you have any questions regarding this letter, please contact Tom Lutzenberger, Principal Program Budget Analyst, or Keith Gmeinder, state mandates claims coordinator for the Department of Finance, at (916) 445-8913.

Sincerely,

Calvin Smith

S. Calvin Smith
Program Budget Manager

Attachments

Attachment A

DECLARATION OF
DEPARTMENT OF FINANCE
CLAIM NO. CSM-01-TC-30

1. I am currently employed by the State of California, Department of Finance (Finance), am familiar with the duties of Finance, and am authorized to make this declaration on behalf of Finance.

2. We concur that the Chapter No. 901, Statutes of 2000, (Solis) sections relevant to this claim are accurately quoted in the test claim submitted by claimants and, therefore, we do not restate them in this declaration.

3. Attachment B is a true copy of Finance's analysis of the June 6, 2000 version of SB 739 which was subsequently amended prior to enactment as Chapter No. 901, Statutes of 2000, (Solis).

I certify under penalty of perjury that the facts set forth in the foregoing are true and correct of my own knowledge except as to the matters therein stated as information or belief and, as to those matters, I believe them to be true.

8/30/02
at Sacramento CA

Tom Lutzenberger

PROOF OF SERVICE

Test Claim Name: Local Government Employment Relations
Test Claim Number: CSM-01-TC-30

I, the undersigned, declare as follows:
I am employed in the County of Sacramento, State of California, I am 18 years of age or older and not a party to the within entitled cause; my business address is 915 L Street, 8 Floor, Sacramento, CA 95814.

On August 30, 2002, I served the attached recommendation of the Department of Finance in said cause, by facsimile to the Commission on State Mandates and by placing a true copy thereof: (1) to claimants and non-state agencies enclosed in a sealed envelope with postage thereon fully prepaid in the United States Mail at Sacramento, California; and (2) to state agencies in the normal pickup location at 915 L Street, 8th Floor, for Interagency Mail Service, addressed as follows:

A-16
Ms. Paula Higashi, Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814
Facsimile No. 445-0278

B-29
Legislative Analyst's Office
Attention Marianne O'Malley
925 L Street, Suite 1000
Sacramento, CA 95814

Ms. Harmeet Barkschat
Mandate Resource Services
5325 Elkhorn Blvd. #307
Sacramento, CA 95842

Executive Director
Public Employment Relations Board
1031 18th Street
Sacramento, CA 95814

Mr. Leonard Kaye, Esq.,
County of Los Angeles
Auditor-Controller's Office
500 W. Temple Street, Room 603
Los Angeles, CA 90012

B-8
State Controller's Office
Division of Accounting & Reporting
Attention: Michael Havey
3301 C Street, Suite 500
Sacramento, CA 95816

Ms. Pam Stone, Legal Counsel
MAXIMUS
4320 Auburn Blvd., Suite 2000
Sacramento, CA 95841

C-50
Director
Department of Industrial Relations
770 L Street
Sacramento, CA 95814

Mr. David Wellhouse
David Wellhouse & Associates, Inc.
9175 Kiefer Blvd., Suite 121
Sacramento, CA 95826

Mr. Steve Keil
California State Association of Counties
1100 K Street, Suite 101
Sacramento, CA 95814

Ms. Patty Masuda, City Manager
City of Sacramento
980 Ninth Street, 10th Floor
Sacramento, CA 95814

Mr. Andy Nichols, Senior Manager
Centration, Inc.
12150 Tributary Point Drive, Suite 140
Gold River, CA 95670

Terry Schutten, County Executive
County of Sacramento
700 H Street, Room 7650
Sacramento, CA 95814

Mr. Steve Smith, CEO
Mandated Cost Systems, Inc.
11130 Sun Center Drive, Suite 100
Rancho Cordova, CA 95670

Mr. Allan Burdick
MAXIMUS
4320 Auburn Blvd., Suite 2000
Sacramento, CA 95841

Mr. Paul Minney
Spector, Middleton, Young, & Minney, LLP
7 Park Center Drive
Sacramento, CA 95825

Ms. Sandy Reynolds, President
Reynolds Consulting Group, Inc.
PO Box 987
Sun City, CA 92586

Mr. Steve Shields
Shields Consulting Group, Inc.
1536 36th Street
Sacramento, CA 95816

Ms. Catherine Smith
California Special District Association
1215 K Street, Suite 930
Sacramento, CA 95814

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on August 30, 2002, at Sacramento, California.

Mary Latorre

AMENDMENT DATE: June 6, 2000
POSITION: Oppose
SPONSOR: Service Employees International Union (SEIU)

BILL NUMBER: SB 739
AUTHOR: H. Solis, et al.
RELATED BILLS: SB 402

BILL SUMMARY

This bill would expand the jurisdiction of the Public Employment Relations Board to include resolving disputes and enforcing the statutory duties and rights of employers and employees of local public agencies, except that these provisions would not apply to peace officers or the City or County of Los Angeles. This bill also would allow for the establishment of an agency shop fee agreement without a negotiated agreement with the public employer under specified conditions.

FISCAL SUMMARY

This bill would result in a State-reimbursable mandate by requiring local unfair labor practices to be submitted to the Public Employment Relations Board (PERB) for resolution. The reimbursable costs would include staff time to prepare for and participate in the PERB hearings and the reimbursement of attorneys' fees. These costs are likely to be higher than the $32.7 million cost of the State-reimbursable mandate for school collective bargaining, as there are more local agencies (more than 5,000) than there are schools (approximately 1,200), and local collective bargaining agreements are less uniform than the collective bargaining agreements of schools.

The PERB estimates that the expansion of its jurisdiction, as proposed in this bill, would result in increased costs of $1.5 million annually.

The Department of Industrial Relations (DIR) indicates this bill would result in a significant cost increase to conduct the elections for the establishment of agency shop fee agreements.

COMMENTS

The Department of Finance is opposed to this bill for the following reasons:

- This bill would result in a significant increase in costs to the State due to the State-reimbursable mandate and additional workload requirements associated with this bill.
- This bill would remove dispute resolution from local control.

Analyst/Principal	Date	Program Budget Manager	Date
(0933) M. Wilkening	7/3/00	Robert J. Straight	7/3/00
Department Deputy Director		Original signed by Robert D. Miyashiro	Date JUL - 3 2000
Governor's Office: By:		Date: 7/5/00	Position Noted Position Approved X Position Disapproved

BILL ANALYSIS Form DF-43 (Rev 03/95 Buff)

ADMSERV:SB739-9480.doc 7/3/00 5:41 PM

ANALYSIS

A. Programmatic Analysis

The Meyers-Milias-Brown Act establishes principles which public agencies are required to follow in their rules and regulations for administering employer-employee relations. All public agencies are obligated to meet and to confer in good faith regarding wages, hours, and other terms and conditions of employment with representatives of recognized employee organizations. Under current law, the duty to bargain requires the public agency to refrain from making unilateral changes in employees' wages and working conditions until the employer and employee association have bargained to impasse; this duty continues in effect after the expiration of any employer-employee agreement. Current law also designates the DIR as the agency which resolves any local disputes regarding the designation of an exclusive representative.

Under current law, local collective bargaining agreements establish dispute resolution practices. If either party is unsatisfied with the outcome of this dispute resolution process, the issue can be appealed to the judicial system. This bill would, subject to the appropriation of funds in the Budget Act, require any complaint regarding a violation of the rules and regulations of a public agency to be submitted to the PERB for resolution as an unfair labor practice. This provision would not apply to peace officers or the City or County of Los Angeles.

Under current law, a public agency and a recognized public employee organization may require employees, as a condition of continued employment, to either join the recognized employee organization or pay a specified fee. Such an arrangement is termed an "agency shop" agreement. This bill also would allow the establishment of an agency shop arrangement without a negotiated agreement upon a signed petition by 30 percent of the employees in the applicable bargaining unit, and the approval of a majority of employees casting a ballot in a secret ballot election. This bill would require the DIR to conduct this election in the event that the employee organization and the employer fail to agree on a neutral entity to conduct the election. An election could not be held more than once per year. This bill would require agency fee obligations to continue as long as the employee organization is the recognized bargaining representative, even if the agreement between the employer and the employee organization expires.

B. Fiscal Analysis

This bill would result in a State-reimbursable mandate by requiring local unfair labor practices to be submitted to the PERB for resolution. The reimbursable costs would include staff time to prepare for and participate in the PERB hearings and the reimbursement of attorneys' fees. These costs are likely to be higher than the $32.7 million cost of the State-reimbursable mandate for school collective bargaining, as there are more local agencies (more than 5,000) than there are schools (approximately 1,200), and local collective bargaining agreements are less uniform than the collective bargaining agreements of schools.

The PERB estimates that the expansion of its jurisdiction, as proposed in this bill, would result in increased costs of $1.5 million annually.

AUTHOR	AMENDMENT DATE	BILL NUMBER
H. Solis, et al.	June 6, 2000	SB 739

The DIR indicates this bill would result in a significant cost increase to conduct the elections for the establishment of agency shop fee agreements.

Code/Department Agency or Revenue Type	SO LA CO RV	PROP 98	(Fiscal Impact by Fiscal Year) (Dollars in Thousands)						Fund Code
			FC	2000-2001	FC	2001-2002	FC	2002-2003	
8320/Employ Rel	SO	No	C	$750	C	$1,500	C	$1,500	0001
8350/DIR	SO	No		See Fiscal Analysis					0001
8885/Comm St Mndt	SO	No		See Fiscal Analysis					0001

Senate Bill No. 739

CHAPTER 901

An act to amend Sections 3500, 3501, 3502.5, and 3508.5 of, to amend, renumber, and add Section 3509 of, to amend and renumber Section 3510 of, to add Section 3511 to, and to repeal and add Section 3507.1 of, the Government Code, relating to public employment.

[Approved by Governor September 28, 2000. Filed with Secretary of State September 29, 2000.]

LEGISLATIVE COUNSEL'S DIGEST

SB 739, Solis. Local public employees: agency shop arrangement and the Public Employment Relations Board.

(1) Under the Meyers-Milias-Brown Act, an agency shop agreement may be negotiated between a public agency and a recognized public employee organization.

This bill would additionally authorize an agency shop arrangement without a negotiated agreement upon a signed petition by 30% of the employees in the applicable bargaining unit requesting an agency shop agreement and majority approval of the employees voting in a secret ballot election on the issue. The bill would provide that the petition may be filed only after good faith negotiations, not to exceed 30 days, have taken place between the parties in an effort to reach an agreement. The bill would require the Division of Conciliation of the Department of Industrial Relations to conduct an election that may not be held more frequently than once a year, if the parties cannot agree within a prescribed time period on the selection of a neutral person or entity to conduct the election.

(2) Existing law establishes the Public Employment Relations Board in state government as a means of resolving disputes and enforcing the statutory duties and rights of employers and employees under the Educational Employment Relations Act, the Higher Education Employer-Employee Relations Act, and the Ralph C. Dills Act.

This bill would expand the jurisdiction of the Public Employment Relations Board to include resolving disputes and enforcing the statutory duties and rights of employers and employees under the Meyers-Milias-Brown Act and would specifically include resolving disputes alleging violation of rules and regulations adopted by a public agency, other than the County of Los Angeles and the City of Los Angeles, pursuant to the Meyers-Milias-Brown Act that are consistent with the act concerning unit determinations, representations, recognition, and elections. The bill would provide that implementation of this provision is subject to the appropriation

88

of funds for this purpose in the annual Budget Act and that the provision becomes operative on July 1, 2001.

(3) Existing law provides that in the absence of local procedures for resolving disputes on the appropriateness of a unit of representation, upon the request of any of the parties, the dispute is to be submitted to the Division of Conciliation of the Department of Industrial Relations.

This bill would require any dispute under rules adopted by a public agency on the appropriateness of a unit, exclusive or majority representation, and election procedures, upon request of a party, to be submitted to the board for resolution. The board would make its determinations based on the rules adopted by the public agency.

(4) The act specifies that nothing in its provisions affects the rights of a public employee to authorize a dues deduction from his or her salary or wages pursuant to specified provisions of law.

This bill would additionally require a public employer to 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. It would also provide that agency fee obligations shall continue in effect as long as the employee organization is the recognized bargaining representative, notwithstanding the expiration of any agreement between the public employer and the recognized employee organization.

(5) The provisions of this bill would not apply to any recognized employee organization representing peace officers, as defined in a specified provision of existing law.

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

SECTION 1. Section 3500 of the Government Code is amended to read:

3500. (a) It is the purpose of this chapter to promote full communication between public employers and their employees by providing a reasonable method of resolving disputes regarding wages, hours, and other terms and conditions of employment between public employers and public employee organizations. It is also the purpose of this chapter to promote the improvement of personnel management and employer-employee relations within the various public agencies in the State of California by providing a uniform basis for recognizing the right of public employees to join organizations of their own choice and be represented by those organizations in their employment relationships with public agencies. 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

88

employer-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.

(b) 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 responsibilities under this chapter are not reimbursable as state-mandated costs.

SEC. 2. Section 3501 of the Government Code is amended to read:

3501. As used in this chapter:

(a) "Employee organization" means any organization which includes employees of a public agency and which has as one of its primary purposes representing those employees in their relations with that public agency.

(b) "Recognized employee organization" means an employee organization which has been formally acknowledged by the public agency as an employee organization that represents employees of the public agency.

(c) Except as otherwise provided in this subdivision, "public agency" means 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. As used in this chapter, "public agency" does not mean a school district or a county board of education or a county superintendent of schools or a personnel commission in a school district having a merit system as provided in Chapter 5 (commencing with Section 45100) of Part 25 and Chapter 4 (commencing with Section 88000) of Part 51 of the Education Code or the State of California.

(d) "Public employee" means 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.

(e) "Mediation" means effort by an impartial third party to assist in reconciling a dispute regarding wages, hours and other terms and conditions of employment between representatives of the public

agency and the recognized employee organization or recognized employee organizations through interpretation, suggestion and advice.

(f) "Board" means the Public Employment Relations Board established pursuant to Section 3541.

SEC. 3. Section 3502.5 of the Government Code is amended to read:

3502.5. (a) Notwithstanding Section 3502 or 3502.6, or any other provision of this chapter, or any other law, rule, or regulation, an agency shop agreement may be negotiated between a public agency and a recognized public employee organization which has been recognized as the exclusive or majority bargaining agent pursuant to reasonable rules and regulations, ordinances, and enactments, in accordance with this chapter. As used in this chapter, "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 the organization.

(b) In addition to the procedure prescribed in subdivision (a), an agency shop arrangement between the public agency and a recognized employee organization that has been recognized as the exclusive or majority bargaining agent 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 good faith negotiations, not to exceed 30 days, have taken place between the parties in an effort to reach agreement. An election that may not be held more frequently than once a year shall be conducted by the Division of Conciliation of the Department of Industrial Relations in the event that the public agency and the recognized employee organization cannot agree within 10 days from the filing of the petition to select jointly a neutral person or entity to conduct the election. In the event of an agency fee arrangement outside of an agreement that is in effect, the recognized employee organization shall indemnify and hold the public agency harmless against any liability arising from any claims, demands, or other action relating to the public agency's compliance with the agency fee obligation.

(c) Any employee who is a member of a bona fide religion, body, or sect that has historically held conscientious objections 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 employee may be required, in lieu of periodic dues, initiation fees, or agency shop fees,

to pay sums equal to the dues, initiation fees, or agency shop fees to a nonreligious, nonlabor charitable fund exempt from taxation under Section 501(c)(3) of the Internal Revenue Code, chosen by the employee from a list of at least three of these funds, designated in a memorandum of understanding between the public agency and the public employee organization, or if the memorandum of understanding fails to designate the funds, then to any such fund chosen by the employee. Proof of the payments 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.

(d) An agency shop provision in a memorandum of understanding that is in effect may be rescinded by a majority vote of all the employees in the unit covered by the memorandum of understanding, provided that: (1) a request for such a vote is supported by a petition containing the signatures of at least 30 percent of the employees in the unit; (2) the vote is by secret ballot; (3) the vote may be taken at any time during the term of the memorandum of understanding, but in no event shall there be more than one vote taken during that term. Notwithstanding the above, the public agency and the recognized employee organization may negotiate, and by mutual agreement provide for, an alternative procedure or procedures regarding a vote on an agency shop agreement. The procedures in this subdivision are also applicable to an agency shop agreement placed in effect pursuant to subdivision (b).

(e) An agency shop arrangement shall not apply to management, confidential, or supervisory employees.

(f) Every recognized employee organization that has agreed to an agency shop provision or is a party to an agency shop arrangement shall keep an adequate itemized record of its financial transactions and shall make available annually, to the public agency with which the agency shop provision was negotiated, and to the employees who are members of the organization, within 60 days after the end of its fiscal year, a detailed written financial report thereof in the form of a balance sheet and an operating statement, certified as to accuracy by its president and treasurer or corresponding principal officer, or by a certified public accountant. An employee organization required to file financial reports under the Labor-Management Disclosure Act of 1959 covering employees governed by this chapter, or required to file financial reports under Section 3546.5, may satisfy the financial reporting requirement of this section by providing the public agency with a copy of the financial reports.

SEC. 4. Section 3507.1 of the Government Code is repealed.

SEC. 5. Section 3507.1 is added to the Government Code, to read:

3507.1. (a) Unit determinations and representation elections shall be determined and processed in accordance with rules adopted

by a public agency in accordance with this chapter. In a representation election, a majority of the votes cast by the employees in the appropriate bargaining unit shall be required.

(b) Notwithstanding subdivision (a) and rules adopted by a public agency pursuant to Section 3507, a bargaining unit in effect as of the effective date of this section shall continue in effect unless changed under the rules adopted by a public agency pursuant to Section 3507.

SEC. 6. Section 3508.5 of the Government Code is amended to read:

3508.5. (a) Nothing in this chapter shall affect the right of a public employee to authorize a dues or service fees deduction from his or her salary or wages pursuant to Section 1157.1, 1157.2, 1157.3, 1157.4, 1157.5, or 1157.7.

(b) 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.

(c) Agency fee obligations, including, but not limited to, dues or agency fee deductions on behalf of a recognized employee organization, shall continue in effect as long as the employee organization is the recognized bargaining representative, notwithstanding the expiration of any agreement between the public employer and the recognized employee organization.

SEC. 7. Section 3509 of the Government Code is amended and renumbered to read:

3510. (a) The provisions of this chapter shall be interpreted and applied by the board in a manner consistent with and in accordance with judicial interpretations of this chapter.

(b) The enactment of this chapter shall not be construed as making the provisions of Section 923 of the Labor Code applicable to public employees.

SEC. 8. Section 3509 is added to the Government Code, to read:

3509. (a) The powers and duties of the board 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 the board. The initial determination as to whether the charge of unfair practice is justified and, if so, the appropriate remedy necessary to effectuate the purposes of this chapter, shall be a matter within the exclusive jurisdiction of the board. The board shall apply and interpret unfair labor practices consistent with existing judicial interpretations of this chapter.

(c) The board shall enforce and apply rules adopted by a public agency concerning unit determinations, representation, recognition, and elections.

88

(d) Notwithstanding subdivisions (a) to (c), inclusive, the employee relations commissions established by, and in effect for, the County of Los Angeles and the City of Los Angeles pursuant to Section 3507 shall have the power and responsibility to take actions on recognition, unit determinations, elections, and unfair practices, and to issue determinations and orders as the employee relations commissions deem necessary, consistent with and pursuant to the policies of this chapter.

(e) This section shall not apply to employees designated as management employees under Section 3507.5.

(f) Implementation of this section is subject to the appropriation of funds for this purpose in the annual Budget Act.

(g) This section shall become operative on July 1, 2001.

SEC. 9. Section 3510 of the Government Code is amended and renumbered to read:

3500.5. This chapter shall be known and may be cited as the "Meyers-Milias-Brown Act."

SEC. 10. Section 3511 is added to the Government Code, to read:

3511. The changes made to Sections 3501, 3507.1, and 3509 of the Government Code by legislation enacted during the 1999–2000 Regular Session of the Legislature shall not apply to persons who are peace officers as defined in Section 830.1 of the Penal Code.

O

88

RESPONSE TO DEPARTMENT OF FINANCE

Test Claim of the City of Sacramento and The County of Sacramento

Local Government Employment Relations

Chapter 901, Statutes of 2000 (S.B. 739)
Title 8, California Code of Regulations, Sections 31001-61630
CSM-01-TC-30

In its response, the Department of Finance (hereinafter "Finance") asserts that no reimbursable state mandate costs resulted from Chapter 901, Statutes of 2000 (S.B. 739). As a basis for its position, Finance quotes the statute's disclaimer language to the effect that the duties stated in Chapter 901 are substantially similar to those required under the pre-existing law, and that this includes "responding to unfair labor practices, compiling payroll and personnel records, and participating in meetings and negotiations with unions".

These contentions are directly contrary to Finance's analysis during the legislative process of Senate Bill 739, which was subsequently enacted as Chapter 901 without changes relevant to the test claim. Finance incorporated this analysis in its response as Attachment B. With that analysis, Finance had concluded that the legislation would result in a reimbursable state mandate, with a probable cost higher than the present $37.2 million in reimbursement for the schools mandate of collective bargaining. As related in Attachment B, PERB alone estimated its increased costs at $1.5 million annually.[1]

Agency Shop Mandate

Under the pre-existing law, agency shop arrangements could only be implemented if the employer agreed to do so as part of the parties' collective bargaining agreement. As a result, most labor agreements did not provide for agency shops.

Under Chapter 901, an agency shop can be put into effect with the support of a minority of unit employees, and without the agreement of the employer. The result is a substantial increase in the number of agency shop arrangements. This inevitable result was recognized by Finance in its analysis, Attachment B.

The agency shop procedure added under Chapter 901 requires separate negotiations for up to 30 days and the processing of agency shop petitions. This is in addition to the activities inherent in the implementation of agency shop arrangements generally, as itemized on page 6 of the test claim.

[1] See Bill Analysis, in Attachment B, subsection B., entitled "Fiscal Analysis".

Clearly the new, additional agency shop procedure provided for under Chapter 901, and the increase in the number of agency shop arrangements resulting from the legislation, mandates a substantial increase in activities imposed on employers.

PERB Jurisdictional Mandate

Finance's response argues that "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".

The reality is that the ease with which unions and employees can file charges with the PERB as compared to filing court petitions, results in a substantial increase in the number of filings to which the employers must respond.

Furthermore, the procedures for responding to Writs of Mandate are generally less burdensome and time consuming for employers than the multi-layered administrative procedures required under the PERB's regulations (see pages 7 and 8 of the test claim). Additionally, there are filing fees for a union or individual to file a Writ of Mandate, whereas it costs nothing to file with the PERB. Thus, the burdens imposed on unions under the prior process have been eliminated with the test claim legislation.

Finance's response argues that "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."

This conjecture by Finance disregards the fact that a union facing the prospect of formal, and often more costly court proceedings, as called for under pre-existing law, could just as likely be a more compelling inducement for the settlement of claims. Furthermore, under the PERB's regulations, settlement conferences occur only after participation in the PERB's investigative process and the filing by employers of responses to the unfair practice charges. Thus the Department's argument as to alleged savings is without merit.

Training

Finance contends that the provision by employers of training concerning the PERB is discretionary, and thus not reimbursable.

The Commission routinely allows training as a reimbursable component of a reimbursable mandate, as one of "the most reasonable methods of complying with the mandate." (Title 2, California Code of Regulations, Section 1183.1.)

It is unreasonable for an employer not to be familiar with the more complex processes and procedural requirements of the PERB. The regulations contain a plethora of procedural rules and timelines with which compliance must be had. The Public Employment Relations Board, 2000-2001 Annual Report, dated October 15, 2001,

attached hereto as Exhibit 1, contains in Appendix IV-E Decisions of the Board in summary form, a number of which were dismissed either for failing to meet the time lines, or for lack of a *prima facie* case. Without adequate training, employers would needlessly be subject to various proceedings brought by individuals and unions when there was no basis for the action.

Although the Commission has generally allowed training on a one-time basis per employee, this is a situation that warrants continual training. From the Annual Report, it is evident that the PERB is continually issuing decisions, and there is further litigation which results in published opinions, all of which can impact an employer. To not be kept current on the latest developments of the PERB could result in a more costly impact to the employer. Accordingly, continual training should be part of the reimbursable activities of this test claim.

Participate in PERB's Rulemaking Process

Finance contends that participation in this process is discretionary. However, without the participation of employers in the process, which was invited and encouraged by the PERB, the regulations would not only not address the needs of the employer, but would be crafted with only the input of the various unions. This would result in needless expense to all local government employers, which could have been easily obviated through participation in the rulemaking process.

Appeal of PERB's Decisions

Finance also claims that this function is clearly discretionary on behalf of employers. However, if the PERB errs in the interpretation of 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 appeal of a PERB decision made by a union.

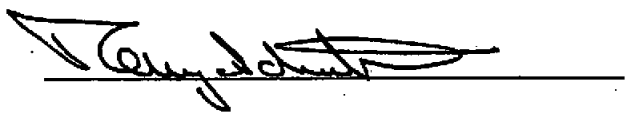
Conclusion

In conclusion, the City of Sacramento and the County of Sacramento respectfully request that the Commission find that Chapter 901, Statutes of 2000 constitute a reimbursable state mandated program.

CERTIFICATION

The foregoing facts are known to me personally and if so required, I could and would testify to the statements made herein, except those matters which are stated upon information and belief, and as to those matters, I believe them to be true. I declare under penalty of perjury under the laws of the State of California that the statements made in this document are true and complete to the best of my knowledge and as to all matters, I believe them to be true.

Executed this 25th day of October, 2002, at Sacramento, California, by:



County of Sacramento

CERTIFICATION

The foregoing facts are known to me personally and if so required, I could and would testify to the statements made herein, except those matters which are stated upon information and belief, and as to those matters, I believe them to be true. I declare under penalty of perjury under the laws of the State of California that the statements made in this document are true and complete to the best of my knowledge and as to all matters, I believe them to be true.

Executed this 19th day of November, 2002, at Sacramento, California, by:

Patty Masuda

City of Sacramento

PUBLIC EMPLOYMENT RELATIONS BOARD

2000-2001 ANNUAL REPORT

October 15, 2001

GRAY DAVIS, GOVERNOR

STATE OF CALIFORNIA

PUBLIC EMPLOYMENT RELATIONS BOARD

2000-2001 ANNUAL REPORT

October 15, 2001

Board Members

ANTONIO C. AMADOR
RICHARD T. BAKER
ALFRED K. WHITEHEAD
THEODORE G. NEIMA

TABLE OF CONTENTS

Message from the Board

The Public Employment Relations Board (PERB or Board) respectfully submits its 2000-2001 Annual Report to the Legislature. The report is intended to present a summary of PERB's role in promoting public service, by facilitating improved labor relations for California's public employers and employees.

This Annual Report marks the Silver Anniversary of the establishment of PERB to administer the collective bargaining statutes covering public school employees. PERB was later given jurisdiction over that process for employees of the University of California, the California State University, and the State of California. Effective July 1, 2001, Senate Bill 739 transferred jurisdiction to PERB for employee-employer relations in over 5,000 cities, counties and special districts.

Over the past twenty-five years, PERB has established precedential extensive expertise in labor relations through an ever-developing body of case law. Our mission is guided by the premise that by providing improved public sector labor relations in a fair manner, we can enhance the commitment to public service.

Recent events in our nation have reminded us all of the vital and often heroic work of public employees, their managers and employers. Their dedication to public service resulted in the ultimate sacrifice for far too many. However, their sacrifice reinforces PERB's obligation to pursue its duties in a manner which demonstrates respect for the service of our public employees and employers.

Finally we note that although PERB's jurisdiction has increased, the agency remains one of the State's smallest. While PERB provides guidance to nearly two million public employees and 7,000 employers, it does so with fewer than 40 dedicated staff members.

Despite its small size, PERB will endeavor to meet the challenge of its newly increased jurisdiction. With the support of the Governor and the Legislature, PERB can continue to fulfill its critical role in strengthening public service through the proper administration of California's collective bargaining statutes.

Antonio C. Amador
Board Member

Richard T. Baker
Board Member

Theodore G. Neima
Board Member

Alfred K. Whitehead
Board Member

Introduction of Board Members and Administrators

Board Members

Appointed to the Board in 1997, **Antonio C. Amador** served nearly seven years as Vice Chairman and Member of the United States Merit Systems Protection Board. He previously served as Chairman and Member of the Youthful Offender Parole Board; Deputy Director of the Employment Development Department, and as Director of the California Youth Authority. Mr. Amador also served as a Los Angeles Police Officer and was president of the Police Protective League from 1974 to 1976. His current term expires on December 31, 2001.

Appointed to the Board on March 29, 2000, **Richard T. Baker** was previously a self-employed labor relations consultant. From 1973 to 1995, he was the owner of the labor relations and consulting firm of Blanning and Baker Associates in Sacramento, San Francisco and Los Angeles. Baker earned a Bachelor of Arts Degree from California State University, Sacramento. His current term expires on December 31, 2003.

Appointed to the Board on January 3, 2001, **Alfred K. Whitehead** is General President Emeritus for the International Association of Fire Fighters (IAFF), where he served from 1988 to August 2000. In 1982, he was elected General Secretary/Treasurer of the IAFF and was re-elected through 1988. Mr. Whitehead served as a fire captain for the Los Angeles County Fire Department from 1954 to 1982. He was a member of the Los Angeles County Fire Fighters Local 1014 for more 20 years and was President for 12 years. Mr. Whitehead is a former member of the Los Angeles County Board of Retirement and served as an elected official to the National Conference on Public Employee Retirement Systems for more than 17 years. He attended East Los Angeles College, is a veteran of the United States Army, and also served as a United States Merchant Marine. His current term expires on December 31, 2005.

Appointed to the Board on August 7, 2001, **Theodore G. Nelma** was formerly a Grand Lodge Representative for the International Association of Machinists and Aerospace Workers, AFL-CIO (IAM), a position he held since 1979. In 1993, he assumed responsibility in the thirteen Western United States for coordination of IAM cases before employment relations agencies. This included the presentation of representational and unfair labor practice cases before the National Labor Relations Board, the Federal Labor Relations Authority and state employment relations boards, including PERB. In 1983 and 1984, he served as the Special Assistant to the California Labor Commissioner. His current term expires on December 31, 2004.

Martin B. Dyer served as a Board Member in the term expiring December 31, 2000. Appointed to the Board in 1995; he formerly served California as the Chief Deputy Director of the Department of Parks & Recreation. He also served as Chief Deputy Director, Governor's Office of Planning & Research; Transition Deputy, Office of Governor-Elect Pete Wilson; Chief, Department of Consumer Affairs Arbitration Review Program; Chief, Department of Consumer Affairs Bureau of Automotive Repair; Legislative Secretary to Governor Ronald Reagan, and consultant to the State Legislature. He earned an M.A. in Political Science from Rutgers University, a B.A. in Government and Sociology from Pomona College, and holds a Certificate in Teaching English to Speakers of Other Languages.

Administrators

Chief Administrative Law Judge **Ron Blubaugh** was first employed as legal counsel for the Educational Employment Relations Board [now PERB] on June 28, 1976; promoted to Administrative Law Judge at PERB in 1986; and was named Chief Administrative Law Judge July 21, 1994. He has taught labor-management relations courses for the University of California, Davis, Extension continuously from 1979 to the present. Ron received an in A.B. in economics from the University of Notre Dame, an M.S. in journalism from Northwestern University, and a J.D. from the University of the Pacific McGeorge School of Law

Deputy General Counsel **Robert Thompson** began working for PERB in 1980 as a Legal Advisor to then Chair Harry Gluck. He also worked as a Regional Attorney and has been the Deputy General Counsel since 1988.

Anita I. Martinez has been employed with PERB since 1976 and has served as San Francisco Regional Director since 1982. Her duties include supervision of the regional office, investigation of representation cases and unfair practice charges, and the conduct of settlement conferences, representation hearings, and elections. Before joining PERB in 1976, Anita worked for the National Labor Relations Board in San Francisco and the Agricultural Labor Relations Board in Sacramento and Salinas. A contributing author of the Matthew Bender treatise, *California Public Sector Labor Relations*, Anita has also addressed management and employee organization groups regarding labor relations issues. A San Francisco native, Anita received her B.A. from the University of San Francisco.

Les Chisholm has served as Sacramento Regional Director for PERB since 1987. His duties include investigation of representation cases and unfair practice charges, and conduct of settlement conferences and representation hearings and elections. Mr. Chisholm also has responsibilities in the areas of legislation, rulemaking and computer projects for the Board. He received an M.A. in political science from the University of Iowa.

Eileen Potter began working for PERB in 1993 as the Administrative Officer. Her state service includes service in the Governor's Office of Planning and Research (OPR) from 1979 through 1990 culminating in her appointment as the Assistant Chief of Administration. After leaving OPR, Eileen worked at the Office of Statewide Health Planning and Development and the Department of Health Services before coming to PERB as its Administrative Officer. She has a degree in Criminal Justice Administration with minors in Accounting and English from California State University, Sacramento.

I. OVERVIEW

A. Statutory Authority and Jurisdiction

The Public Employment Relations Board (PERB or Board) is a quasi-judicial agency created by the Legislature to oversee public sector collective bargaining in California. The Board administers four collective bargaining statutes, ensures their consistent implementation and application, and adjudicates disputes between the parties subject to them. The statutes administered by PERB prior to July 1, 2001 were: the Educational Employment Relations Act (EERA) of 1976 (Gov. Code sec. 3540, et seq.), authored by State Senator Albert S. Rodda, establishing collective bargaining in California's public schools (K-12) and community colleges; the State Employer-Employee Relations Act of 1978, known as the Ralph C. Dills Act (Dills Act) (Gov. Code sec. 3512, et seq.), establishing collective bargaining for State Government employees; and the Higher Education Employer-Employee Relations Act (HEERA) of 1979 (Gov. Code sec. 3560, et seq.), authored by Assemblyman Howard Berman, extending the same coverage to the California State University and University of California systems and Hastings College of Law.

As of July 1, 2001, PERB acquired jurisdiction over the Meyers-Milias-Brown Act (MMBA) of 1968, which established collective bargaining for California's municipal, county, and local special district employers and employees. This occurred as a result of Governor Gray Davis' signing of Senate Bill 739, authored by State Senator Hilda Solis (Statutes of 2000, Chapter 901). PERB's jurisdiction over the MMBA excludes peace officers, management employees and the City and County of Los Angeles.

In order to implement the MMBA, PERB promulgated new regulations after substantial involvement from the affected public at numerous open sessions. These regulations will be discussed in more detail later in this report.

With the passage of SB 739, approximately 1.5 million public sector employees and their employers are included within the jurisdiction of the four Acts administered by PERB. Approximately 675,000 employees work for California's public education system from pre-kindergarten through and including the community college level. Approximately 125,000 employees work for the State of California. The University of California, California State University and the Hastings College of Law employ approximately 100,000. The remainder are employees of California's cities, counties and special districts.

B. PERB's Purpose and Duties

1. The Board

The Board itself is composed of five members appointed by the Governor and subject to confirmation by the State Senate. Board members are appointed to five-year terms, with the term of one member expiring at the end of each calendar year. In addition to the overall responsibility for administering the four statutes, the Board itself acts as an appellate body to hear challenges to proposed decisions that are issued by the staff of the Board. Decisions of the Board itself may be

appealed under certain circumstances, and then only to the state appellate courts. The Board, through its actions and those of its staff, is empowered to:

- Conduct secret ballot elections to determine whether or not employees wish to have an employee organization exclusively represent them in their labor relations with their employer;
- Prevent and remedy unfair labor practices, whether committed by employers or employee organizations;
- Deal with impasses that may arise between employers and employee organizations in their labor relations in accordance with statutorily established procedures;
- Ensure that the public receives accurate information and has the opportunity to register its opinions regarding the subjects of negotiations between public sector employers and employee organizations;
- Interpret and protect the rights and responsibilities of employers, employees and employee organizations under the Acts;
- Bring action in a court of competent jurisdiction to enforce PERB's decisions and rulings;
- Conduct research and training programs related to public sector employer-employee relations;
- Take such other action as the Board deems necessary to effectuate the purposes of the Acts that it administers.

During fiscal year 2000-2001, the Board issued 76 decisions. A summary of the Board's 2000-2001 decisions is included in the Appendix.

2. Major PERB Functions

The major functions of PERB involve: (1) the administration of the statutory process through which public employees freely select employee organizations to represent them in their labor relations with their employer; (2) the evaluation and adjudication of unfair practice charges; and (3) the legal functions performed by the office of the General Counsel.

The representation process normally begins when a petition is filed by an employee organization to represent employees in classifications which reflect an internal and occupational community of interest. If only one employee organization petition is filed and the parties agree on the description of the bargaining unit, the employer may either grant voluntary recognition or ask for a representation election. If more than one employee organization is competing for representational rights of the same bargaining unit, an election is mandatory.

If either the employer or an employee organization disputes the appropriateness of the proposed bargaining unit, a Board agent convenes a settlement conference to assist the parties in resolving the dispute. If the dispute cannot be settled voluntarily, a Board agent conducts a formal investigation and/or hearing and issues a written determination which sets forth the appropriate bargaining unit, or modification of that unit, based upon application of statutory unit determination criteria and appropriate case law to the facts obtained in the investigation or hearing. Once an initial bargaining unit has been established, PERB conducts a representation election in cases in which the employer has not granted voluntary recognition to an employee organization. PERB also conducts decertification elections when a rival employee organization or group of employees obtains sufficient signatures to call for an election to remove the incumbent organization. The choice of "No Representation" appears on the ballot in every representation election.

Representation Section staff also assist parties in reaching negotiated agreements through the mediation process provided in the four Acts PERB administers, and through the fact-finding process provided under EERA and HEERA. If the parties are unable to reach an agreement during negotiations, either party may declare an impasse. At that time, a Board agent contacts both parties to determine if they have reached a point in their negotiations at which their differences are so substantial or prolonged that further meetings without the assistance of a mediator would be futile. Once PERB has determined that an impasse exists, the State Mediation and Conciliation Service of the Department of Industrial Relations is contacted to assign a mediator.

In the event settlement is not reached during mediation, either party, under EERA and HEERA, may request the implementation of statutory fact-finding procedures. PERB provides lists of neutral factfinders who make findings of fact and advisory recommendations to the parties concerning terms of settlement.

A summary of PERB's representation activity is included later in this report.

The evaluation and adjudication of unfair practice charges is another major function performed by PERB. An unfair practice charge may be filed with PERB by an employer, employee organization, or employee, alleging that an employer or employee organization has committed an act which is unlawful under one of the Acts administered by PERB. Examples of unlawful employer conduct are: refusing to negotiate in good faith with an employee organization; disciplining or threatening employees for participating in union activities; or promising benefits to employees if they refuse to participate in union activity. Examples of unlawful employee organization conduct are: threatening employees if they refuse to join the union; disciplining a member for filing an unfair practice charge against the union; or failing to represent bargaining unit members fairly in their employment relationship with the employer.

An unfair practice charge filed with PERB is evaluated by staff to determine whether a prima facie case of an unlawful action has been established. A charging party establishes a prima facie case by alleging sufficient facts to permit

a reasonable inference that a violation of the EERA, Dills Act, HEERA or MMBA has occurred. If it is determined that the charge fails to state a prima facie case, a Board agent issues a warning letter notifying the charging party of the deficiencies of the charge. The charging party is afforded time to either amend or withdraw its charge. If the charge is neither amended nor withdrawn, the Board agent dismisses it. The charging party may then appeal the dismissal to the Board itself.

If the Board agent determines that a charge, in whole or in part, states a prima facie case of a violation, a formal complaint is issued. The respondent is then given an opportunity to file an answer to the complaint.

Once a complaint has been issued, an Administrative Law Judge (ALJ) or other PERB agent is assigned to the case and calls the parties together for an informal settlement conference, usually within 30 days of the date of the complaint. If settlement is not reached, a formal hearing before a PERB ALJ is scheduled, normally within 60 days of the date of the informal conference. Following this adjudicatory proceeding, the ALJ prepares and issues a proposed decision. A party to the case may then file an appeal of the proposed decision to the Board itself. The Board itself may affirm, modify, reverse or remand the proposed decision.

Proposed decisions which are not appealed to the Board itself are binding upon the parties to the case but may not be cited as precedent in other cases before the Board.

Decisions of the Board itself are both binding on the parties to a particular case and precedential. A digest of PERB decisions is available upon request.

The Appeals Office, under direction of the Board itself, ensures that all appellate filings comply with Board regulations. It maintains case files, issues decisions rendered and prepares administrative records filed with California appellate courts. This office is the main contact with parties and their representatives while cases are pending before the Board itself.

The legal representation function of the Office of the General Counsel includes:

- Defending final Board decisions or orders in unfair practice cases when parties seek review of those decisions in state appellate courts;

- Seeking enforcement when a party refuses to comply with a final Board decision, order or ruling, or with a subpoena issued by PERB;

- Seeking appropriate interim injunctive relief against those responsible for certain alleged unfair practices;

- Defending the Board against attempts to stay its activities, such as complaints seeking to enjoin PERB hearings or elections; and

- Submitting amicus curiae briefs and other motions, and appearing in cases in which the Board has a special interest or in cases affecting the jurisdiction of the Board.

A summary of the litigation activity of the Office of the General Counsel is included later in this report.

3. Other PERB Functions and Activities

Retention of Collective Bargaining Agreements

PERB regulations require that most employers file with PERB a copy of all collective bargaining agreements reached pursuant to the four Acts PERB administers, within 60 days of the date of execution. These contracts are maintained as public records in PERB's regional offices.

Financial Records

The law requires recognized or certified employee organizations to file with PERB an annual financial report of income and expenditures. Organizations which have negotiated a fair share fee arrangement for bargaining unit members have additional filing requirements.

Complaints alleging noncompliance with these requirements may be filed with PERB, which may take action to bring the organization into compliance.

Advisory Committee

The Advisory Committee to PERB consists of approximately 100 people from throughout California representing employers, employee organizations, law firms, negotiators, professional consultants, the public and scholars. The Advisory Committee was originally established several years ago to assist the Board in its regulation review process. Currently, the Advisory Committee continues to assist the Board in its search for ways to improve PERB's effectiveness and efficiency in working with public sector employers and employee organizations to promote the resolution of disputes and contribute to greater stability in employer-employee relations.

Conference Sponsorship

The California Foundation for Improvement of Employer-Employee Relations (CFIER) is a non-profit foundation dedicated to assisting public education employers and employees in their efforts to improve working relationships, solve problems and provide leadership in the education community. CFIER began in 1987 as a project within PERB. Each year CFIER presents a conference entitled "Public Education: Meeting the Challenge." PERB is joined by the Institute of Industrial Relations at the University of California, Berkeley; the California State Mediation and Conciliation Service; and the Federal Mediation and Conciliation Service in sponsoring the annual conference. The 2000 CFIER conference was held in October 2000 in Los Angeles.

Information Requests

As California's expert administrative agency in the area of public sector collective bargaining, PERB is consulted by similar agencies from other states concerning its policies, regulations and formal decisions. Information requests from the Legislature and the general public are also received and processed. Additionally, PERB cooperates with the Institute of Industrial Relations of the University of California, Berkeley, in the dissemination of information concerning PERB policies and actions to interested parties throughout the State.

C. Support Functions and Board Operations

The **Administration Section** provides support services to PERB, such as business services, personnel, accounting, information technology, mail and duplicating. This section also engages in budget development and maintains liaison with the Department of Finance and other agencies within State Government.

Throughout the past few years, PERB has embraced automation as a means of increasing productivity, allowing it to handle increased workload with reduced staffing. PERB has also moved forward with the full development of its website, allowing those who do business with PERB the ability to access PERB Decisions, on-line forms and access the Board's rules, regulations and statutes.

II. LEGISLATION AND RULEMAKING

A. Legislative History of PERB

The Public Employment Relations Board's (PERB or Board) present involvement in California public sector labor relations can best be seen as a result of an evolutionary legislative process. Highlights are presented herein.

The George Brown Act

The George Brown Act of 1960 established a process to determine wage levels for public employees, including State employees. The Act involved the Legislature, the State Personnel Board and non-exclusive employee groups. Each year the State Personnel Board would conduct a study of employee wages and benefits. Using this information, along with input from the employee groups, Legislature and the Governor, a budget item would result reflecting any salary increase for State employees. The Brown Act required the State, as management, to meet and confer with non-exclusive employee organizations to hear their salary requests.

The Winton Act

The Winton Act of 1964 withdrew public school and community college employees from the George Brown Act. It granted school employees the right to form, join and participate in the activities of employee organizations and the right to refrain from such activities. It provided for meet and confer but not for exclusive representation. The Winton Act continued plural representation for classified employees and created certificated employee councils for certificated employees. The Winton Act did not provide for an administrative agency. Enforcement of the law was through the courts.

Meyers-Milias-Brown Act (MMBA)

The MMBA originally was enacted in 1968 when Senator George Moscone authored SB 1228. SB 1228 was approved by the Legislature on August 1, 1968 as Chapter 1390 of the Statutes of 1968 and was signed by former Governor Ronald Reagan on August 21, 1968. At the time it was written, the law withdrew all employees of local government from the George Brown Act. The MMBA authorized local governments to adopt rules and regulations to provide for administering employer-employee relations. It did not establish exclusive representation by the statute but permitted local government to establish exclusivity through local ordinance. It permitted negotiations of agency shop since 1981. Unfair practice provisions were not in the text of the statute. Local government entities are permitted to adopt reasonable rules establishing election procedures. The MMBA did not exclude management, supervisory or confidential employees.

Unsuccessful Legislation Leading to EERA

In 1972, Assembly Resolution No. 51 established the Assembly Advisory Council on Public Employee Relations. This blue ribbon panel recommended the enactment of a comprehensive public employment bargaining law for all public employees in California. Several legislative attempts were made to enact this panel's recommendations, each attempt failing to become law.

In 1973, Assembly Speaker Bob Moretti introduced AB 1243, which failed to receive the votes necessary to secure passage. Senator George Moscone introduced SB 400 in 1974, which did not reach the Assembly floor. Senate Bill 1857, authored by Senator Albert Rodda, was debated. Two other unsuccessful efforts were made in 1975, SB 275 (Dills) and AB 119 (Bill Greene and Julian Dixon). Despite these failures, momentum was building which finally led to the enactment of EERA in 1976.

The Educational Employment Relations Act (EERA)

On January 6, 1975, Senator Albert S. Rodda introduced SB 160, the EERA. Several amendments were made by the author in an attempt to achieve a consensus bill that both employers and employee organizations would support. This measure passed the Legislature on September 8, 1975, and was signed into law as Chapter 961 (Statutes of 1975) by Governor Edmund G. Brown Jr. on September 22, 1975.

The "meet and confer" provision of the Winton Act was strictly limited. Agreements reached under this process could not be incorporated into a written contract, were not binding and could be modified unilaterally by the public school employer.

EERA created the Educational Employment Relations Board (EERB). The EERB was the quasi-judicial agency created to implement, legislate, and settle disputes in, collective negotiations for California's public school employers and employees. The three-member Board assumed its responsibilities in April 1976. The new labor board was given the authority to:

- Determine appropriate bargaining units;
- Conduct representation elections;
- Decide whether or not disputed subjects fall within the scope of representation;
- Appoint fact finders and mediators in impasse situations;
- Investigate and resolve unfair practice charges;
- Bring actions in court to enforce its decisions.

State Employer-Employee Relations Act (SEERA or Dills Act)

Senate Bill 839, authored by Senator Ralph C. Dills, was passed by the Legislature on

September 19, 1977 as Chapter 1159 of the Statutes of 1977. SEERA was signed into law on September 30, 1977 by Governor Brown and became effective July 1, 1978. SEERA extended EERB coverage to State civil service employees. It also renamed EERB as the Public Employment Relations Board (PERB). The powers that had been given to the EERB were conferred on the new PERB.

SEERA contained additional provisions for the exclusive representation by employee organizations, the filing of unfair practice charges and the use of mediation for impasse resolution. SEERA also required the State employer to "meet and confer in good faith." Memoranda of Understandings supersede specified code sections under the provisions of SEERA.

Higher Education Employer-Employee Relations Act (HEERA)

Assemblyman Howard Berman authored AB 1091, the HEERA, which became law on September 13, 1978. HEERA took effect in July 1979. It covers all employees of the University of California, the California State University and College System, and the Hastings College of Law.

HEERA extends authority similar to that exercised by the Board under EERA and SEERA.

MMBA Amendments

In 2001, PERB assumed responsibility for administering the MMBA. Thus, nearly 30 years after it first was suggested that a labor board be created to supervise collective bargaining for all public employees in California, that idea has become reality.

PERB was given jurisdiction over the MMBA through the enactment of SB 739 by Senator Hilda L. Solis. Under the revised MMBA, PERB has jurisdiction over labor relations at all levels of local government except for the City of Los Angeles, the County of Los Angeles and all local police departments.

B. Rulemaking

Senate Bill 645 (Statutes of 1999, Chapter 952)

A regulations package regarding proposed changes necessary as a result of the enactment of Senate Bill 645, which provided for fair share fees under the Higher Education Employer-Employee Relations Act, previously submitted to the Office of Administrative Law (OAL) under emergency rulemaking authority, was submitted and approved through the regular rulemaking process during fiscal year 2000-2001. The package was adopted by the Board on July 11, 2000, submitted to OAL on July 26, 2000 and approved in September 2000.

Senate Bill 683 and 1960 (Statutes of 2000, Chapters 879 and 893)

PERB submitted a regulations package to OAL on January 2, 2001, to implement changes required by Senate Bills 683 and 1960. Senate Bill 683 amended the Ralph C.

Dills Act to, inter alia, provide for the continuation of both binding arbitration and fair share fees upon the expiration of memoranda of understanding. Senate Bill 1960 amended the Educational Employment Relations Act to allow an exclusive representative to require the implementation of a fair share fee requirement without an employer's agreement. The changes related to Senate Bill 1960 were implemented as emergency regulations effective January 2, 2001. The Board held a public hearing on the rulemaking package on March 15, 2001, took action to approve the changes on March 15 and April 19, 2001, and submitted it to OAL on April 27, 2001. The rule changes received final approval on April 30, 2001.

Senate Bill 739 (Statutes of 2000, Chapter 901)

In November 2000, PERB staff began meeting with interested parties to develop a comprehensive set of regulatory changes to support PERB's assumption of jurisdiction over the Meyers-Milias-Brown Act on July 1, 2001. Following a series of drafts and public workshops a final draft was prepared. On May 28, 2001, the Notice of Proposed Rulemaking was filed with OAL to begin the formal rulemaking process. The proposed regulations were also filed with OAL as emergency regulations and took effect on July 1, 2001. The Board itself then received written comments and held a public hearing on August 9, 2001. On August 31, 2001, the Board issued a Notice of Proposed Changes to the initial proposed rules. On September 20, 2001, the Board voted unanimously to adopt the proposed amendments and new regulations as submitted.

Other Rulemaking Activity

Additionally, a regulations package containing non-substantive and clarifying changes was submitted to OAL under the authority of Title 1, California Code of Regulations, section 100 during the fiscal year. The package was submitted for adoption to OAL on January 3, 2001 and was approved on February 15, 2001.

III. CASE DISPOSITIONS

A. Board Decisions

During the fiscal year, the Public Employment Relations Board (PERB or Board) issued 76 decisions and ruled on 5 requests for injunctive relief, a slight increase over the number of decisions in the prior fiscal year.

With the passage of SB 739, the Board anticipates a significant increase in the number of cases appealed to the Board in the coming fiscal year, including a number of cases involving legal questions of first impression as the Board assumes its responsibility for administering the Meyers-Milias-Brown Act (MMBA).

B. Litigation

There were a total of three new litigation cases opened during 2000-2001, which are summarized below. Five cases closed during the fiscal year, each with a result favorable to PERB.

C. Administrative Adjudication

During the fiscal year, the Division of Administrative Law conducted unfair practice hearings and settlement conferences throughout the state and issued proposed decisions. Proposed decisions become final if not appealed to the Board for review and over the year only 32 percent of the proposed decisions issued by the ALJ staff were appealed to the Board. The low appeal rate reflects favorably on the quality of the work by the division. The low appeal rate has the advantage of reducing the workload on the Board.

The division also assisted in conducting public meetings regarding PERB's implementation of the MMBA with local government representatives and unions representing local government employees. Judges of the division assisted the staff from the Office of the General Counsel in drafting regulations for the implementation of the MMBA.

A major activity by the division this fiscal year was the preparation and conduct of an examination for administrative law judge to select candidates to replace retiring judges. The exam involved both written and oral components. In the written portion, candidates were required to draft a proposed decision resolving an unfair practice dispute. The oral exam tested the ability of the candidates to conduct unfair practice hearings. The exam was difficult but was designed to secure a civil service list that will provide PERB with candidates of the highest quality for the critical position of administrative law judge.

D. Representation Activity

Election activity for the year was significantly higher than in recent years, with a total of 63 elections. PERB had averaged only 29 elections per year over the preceding three-year period. The types of elections showing the greatest increase were decertification (24 in 2000-2001, compared to an average of only seven in the three prior years) and fair share fee rescission (15 compared to two in 1999-2000 and none in the prior two years). All but two of the 15 rescission elections occurred under the EERA and followed the implementation of Senate Bill 1960 on January 1, 2001, which amended the Educational Employment Relations Act (EERA) to allow fair share fees to be required without a negotiated agreement or employee vote. The largest election conducted by PERB in this period involved the unsuccessful effort to rescind fair share fees in the State Bargaining Unit 1 - Administrative, Financial and Staff Services. That unit, represented by the California State Employees Association (CSEA), includes over 37,000 employees.

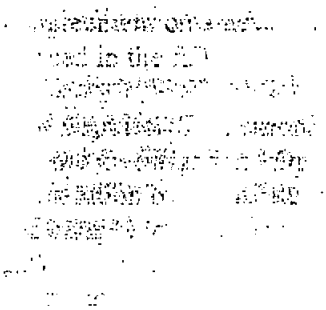
E. Dispute Resolutions and Settlements

PERB staff successfully assisted parties in resolving numerous unfair practice charges during the fiscal year. Of particular note is the work performed by PERB Administrative Law Judge James Tamm, who was invited to help resolve a dispute involving two pending unfair practice charges. The Fairfield Teachers Association went on strike in June 2001. As part of his mediation efforts on the unfair practice charges, Judge Tamm also worked with the parties about the issues involved in the strike. The strike was suspended in June and Judge Tamm met with the parties several times over the summer. Following marathon bargaining sessions that commenced on the Friday before the start of

the school year, Judge Tamm assisted the parties in reaching agreement on a new contract, eliminating the threat of the strike as classes commenced in the fall.

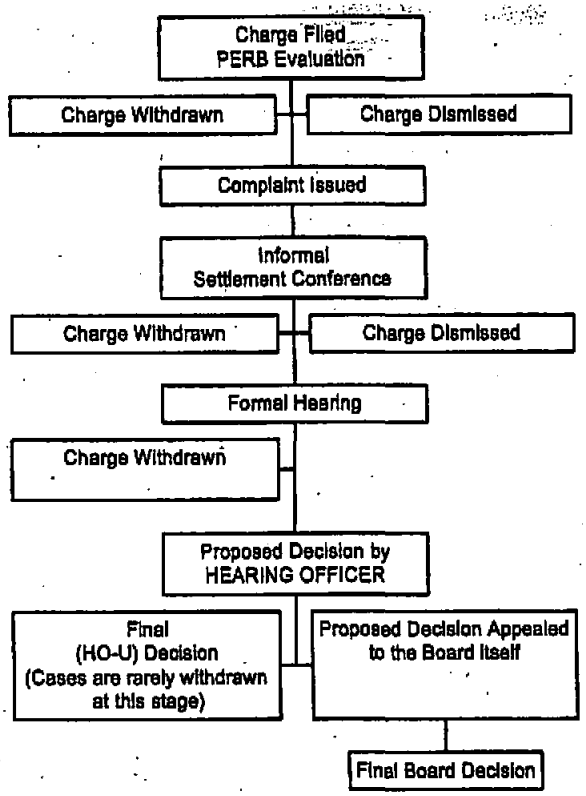
PERB continued to strongly emphasize voluntary resolution of disputes. This emphasis begins with the first step of the unfair practice charge process, the investigation. During this step 139 cases were withdrawn, many through informal resolution by the parties. For the 164 cases where the investigation resulted in issuance of a complaint, staff from the General Counsel's office and the Office of Administrative Law conducted 202 days of settlement conferences. These efforts resulted in voluntary settlements in 89 of these cases, or nearly 60 percent. PERB believes that such settlements are the most efficient way of resolving disputes as well as providing an opportunity for the parties to improve their relationship. Accordingly, it will continue to work with the parties to resolve disputes through mediation and looks forward to extending this commitment to the MMBA parties recently added to its jurisdiction.

IV. APPENDICES



Note: Appendix A - Organization Chart may be found on PERB's website

UNFAIR PRACTICE CHARGE FLOW CHART



APPENDIX IV-C

2000-2001 REPRESENTATION CASE ACTIVITY

I. Case Filings and Disposition Summary

Case Type	Filed	Closed
Request for Recognition	23	24
Severance	5	9
Petition for Certification	1	1
Decertification	22	25
Amended Certification	2	3
Unit Modification	32	31
Organizational Security	27	24
Financial Statement	1	1
Public Notice	4	2
Arbitration	1	2
Mediation	237	238
Factfinding	43	35
Compliance	20	24
Total	418	419

II. Prior Year Workload Comparison: Cases Filed

	1997-1998	1998-1999	1999-2000	2000-2001	4-Year Average
1st Half	129	120	149	183	145
2nd Half	215	219	213	235	221
Fiscal Year	344	339	362	418	366

III. Elections Conducted

Decertification	24
Organizational Security Approval	4
Organizational Security Rescission	15
Representation	14
Severance	4
Unit Modification	2
Total	63

Elections Conducted: 2000-2001

Case No.	Employer	Unit Type	Winner	Unit Size
Decertification				
LA-DP-00328-E	PALM SPRINGS USD	Wall Classified	Teamsters Local 911	663
LA-DP-00333-E	POWAY USD	Office Technical/Business Services		1107
LA-DP-00334-E	COMPTON UNIFIED SCHOOL DISTRICT	Instructional Aides	CSEA & its Compton Chapter #30	550
LA-DP-00335-E	EL CAMINO COMMUNITY COLLEGE DISTRICT	Wall Classified	El Camino Council of Classified Employees	361
LA-DP-00335-E	EL CAMINO COMMUNITY COLLEGE DISTRICT	Wall Classified	None-runoff needed	361
LA-DP-00336-E	CARPINTERIA USD	Wall Classified	CFT, Local 2215, AFL-CIO	156
LA-DP-00337-E	SAN BERNARDINO COE	All Classified Less Other Group	San Bernardino Public Employees Assn.	309
LA-DP-00338-E	BEAUMONT USD	Wall Classified	CSEA-Chapter 351	194
SA-DP-00189-E	STOCKTON CITY UNIFIED SCHOOL DISTRICT	Security	Operating Engineers Local 3	16
SA-DP-00190-E	CHAWANAKEE JtSD	Wall Certificated	Chawanakee Teachers Association, CTA/N	53
SA-DP-00191-E	LASSEN CCD	Wall Certificated	Lassen College Faculty Association	49
SA-DP-00192-E	TWAIN HARTE-LONG BARN UnESD	Wall Certificated	California Federation of Teachers/AFT	40
SA-DP-00193-E	BUTTE-GLENN CCD	Security	Butte College Police Officers Association	6
SA-DP-00194-E	WASHINGTON COLONY ESD	Wall Certificated	Washington Colony TA	24
SA-DP-00195-E	CORNING UnHSD	Operations, Support Services	Corning UnHS EA	20
SA-DP-00196-E	LEWISTON ELEMENTARY SCHOOL DISTRICT	Wall Classified	General Teamsters Local 137	16
SA-DP-00197-E	SUNNYSIDE UnESD	Wall Classified	CSEA, Chapter 675	25
SA-DP-00198-E	SUMMERVILLE UnHSD	Wall Classified	CSEA-Chapter 783	24
SA-DP-00199-E	TURLOCK JtUnHSD	Operations, Support Services	CSEA-Chapter 56	71
SA-DP-00200-E	TURLOCK JOINT ELEMENTARY SCHOOL DISTRICT	Operations, Support Services	CSEA-Chapter 56	100
SA-DP-00201-E	TURLOCK JOINT ELEMENTARY SCHOOL DISTRICT	Office Technical/Business Services	CSEA-Chapter 56	83
SF-DP-00238-E	LAYTONVILLE USD	Wall Classified	CSEA and its Laytonville Ch. 80	45

Case No.	Employer	Unit Type	Winner	Unit Size
Decertification				
SF-DP-00242-E	FERNDALE USD	Wall Classified	No Representation	30
SF-DP-00245-E	CONTRA COSTA CCD	Wall Classified	PEU Local 1	454
Organizational Security - Approval				
LA-OS-00194-E	LA CANADA UNIFIED SCHOOL DISTRICT	Wall Certificated	Approved	225
LA-OS-00195-E	SAN JACINTO USD	Wall Certificated	Approved	290
SA-OS-00121-E	PLACER UnHSD	Adult School	Not Approved	20
SF-OS-00193-E	SONOMA VALLEY USD	Wall Certificated	Approved	279
Organizational Security - Rescission				
LA-OS-00196-E	BEARDSLEY ELEMENTARY SCHOOL DISTRICT	Wall Classified	Rescinded	120
LA-OS-00197-E	OJAI UNIFIED SCHOOL DISTRICT	Wall Classified	Not rescinded	190
LA-OS-00198-E	PLEASANT VALLEY SD	Operations, Support Services	Rescinded	60
LA-OS-00200-E	GARDEN GROVE USD	All Classified Less Other Group	Rescinded	2500
LA-OS-00202-E	ENCINITAS UnESD	Wall Classified	Not rescinded	173
SA-OS-00120-S	STATE OF CALIFORNIA	Administrative, Financial & Staff Services	Not Rescinded	37521
SA-OS-00122-E	ISLAND UNION ELEMENTARY SCHOOL DISTRICT	Wall Classified	Not rescinded	17
SA-OS-00124-E	TEHAMA COE	Operations, Support Services	Not rescinded	46
SA-OS-00125-E	PLACERVILLE UnESD	Wall Classified	Rescinded	42
SA-OS-00126-E	SISKIYOU COE	Wall Classified	Not rescinded	55
SA-OS-00127-E	PLACER COE	Wall Classified	Not rescinded	214
SA-OS-00128-E	WEAVERVILLE ESD	Wall Classified	Not rescinded	27
SA-OS-00129-E	BIG VALLEY Jt UNIFIED SCHOOL DISTRICT	Wall Classified	Not rescinded	31

Case No.	Employer	Unit Type	Winner	Unit Size
Organizational Security - Rescission				
SF-OS-00191-H	HASTINGS COLLEGE OF LAW	Security	Rescinded	15
SF-OS-00194-E	FORESTVILLE UnESD	Wall Classified	Not rescinded	38
Representation				
LA-RR-01056-E	INGLEWOOD UNIFIED SCHOOL DISTRICT	Adult School	California Federation of Teachers	58
LA-RR-01057-E	COMPTON UNIFIED SCHOOL DISTRICT	Security	AFT Council of Classified Employees	50
LA-RR-01059-E	LOS ALAMOS ESD	Wall Certificated	Los Alamos Educators Assoc	13
LA-RR-01060-E	PALOMAR CCD	Wall Certificated	Palomar Faculty Federation	1423
LA-RR-01061-E	COPPER MOUNTAIN CCD	Wall Certificated	Copper Mountain College Faculty Assn	23
LA-RR-01062-E	PALO VERDE USD	Pupil Personnel	Teamsters Local 911	7
LA-RR-01063-E	MOUNT SAN JACINTO CCD	Certificated Part-Time	Communications Workers of America	424
LA-RR-01064-E	JULIAN UnHSD	Wall Classified	CSEA Chapter 807	12
LA-RR-01067-E	CITRUS COMMUNITY COLLEGE DISTRICT	Certificated Part-Time	Adjunct Faculty United	453
LA-RR-01068-E	LOS ALAMOS ESD	Wall Classified	Los Alamos Educators Assn.	19
SA-RR-01019-E	ATWATER ELEMENTARY SCHOOL DISTRICT	Operations, Support Services	No Representation	58
SA-RR-01022-E	GOLD TRAIL UNION SCHOOL DISTRICT	Wall Classified	Council of Classified Employees	19
SA-RR-01024-E	ALPINE COUNTY UNIFIED SCHOOL DISTRICT	Wall Classified	Operating Engineers Local 3	12
SA-RR-01026-E	ALPINE COUNTY OFFICE OF EDUCATION	Wall Classified	Operating Engineers Local 3	1
Severance				
LA-SV-00131-E	PALOMAR CCD	Operations, Support Services	Palomar CCE/AFT, Local 4522	47
LA-SV-00132-E	POMONA USD	Security	Pomona School Police Officers Assoc.	5
SA-SV-00148-E	AMADOR COUNTY UNIFIED SCHOOL DISTRICT	Transportation	CSEA-Chapter 239	26

Case No.	Employer	Unit Type	Winner	Unit Size
Severance				
SA-SV-00155-E	EVERGREEN UnESD	Operations, Support Services	Teamsters Local 137	24
Unit Modification				
LA-UM-00661-E	SAUGUS UnESD	Wall Classified	CSEA	80
LA-UM-00663-E	SADDLEBACK VALLEY USD	Wall Classified	CSEA	169

346

APPENDIX IV-D

2000-2001 UNFAIR PRACTICE CHARGE STATISTICS

I. Unfair Practice Charges Filed by Office

	1st Half	2nd Half	Total
Sacramento	51	65	116
San Francisco	58	64	122
Los Angeles	102	121	223
Total	211	250	461

II. Unfair Practice Charge Dispositions by Office

	Charge Withdrawal	Charge Dismissed	Complaint Issued	Total
Sacramento	40	35	53	128
San Francisco	28	31	65	124
Los Angeles	71	87	75	233
Total	139	153	193	485

III. Prior Year Workload Comparison: Charges Filed

	1997/1998	1998/1999	1999/2000	2000/2001	4-Year Average
1st Half	301	290	247	211	262
2nd Half	320	314	263	250	287
Total	621	604	510	461	549

APPENDIX IV-E

2000-2001 DECISIONS OF THE BOARD
BOARD DECISIONS

DECISION NO.	CASE NAME	DESCRIPTION	DISPOSITION
1394-S	International Union of Operating Engineers, Craft Maintenance Division, Unit 12 v. State of California (Department of General Services)	The Board dismissed the unfair practice charge. The charge alleged that the employer violated the Dills Act when it bypassed the union to deal directly with an employee.	Dismissed. The charge failed to provide any facts which indicate when the alleged unfair practice occurred, thus it cannot be determined whether the charge is timely filed.
1395-S	International Union of Operating Engineers, Craft Maintenance Division, Unit 12 v. State of California (Department of General Services)	The Board dismissed the unfair practice charge. The charge alleged that the employer violated the Dills Act by reducing an employee's annual performance evaluation results because he filed a grievance against the employer.	Dismissed. The charge failed to provide any facts which indicate when the alleged unfair practice occurred, thus it cannot be determined whether the charge is timely filed.
1396-S	International Union of Operating Engineers, Craft Maintenance Division, Unit 12 v. State of California (Department of General Services)	The Board granted the charging party's request to withdraw its unfair practice charge and appeal.	Unfair practice charge and appeal withdrawn. Granting this request is in the best interests of the parties and is consistent with the purposes of the Dills Act.

2000-2001 DECISIONS OF THE BOARD
BOARD DECISIONS

DECISION NO.	CASE NAME	DESCRIPTION	DISPOSITION
1397-S	International Union of Operating Engineers, Craft Maintenance Division, Unit 12 v. State of California (Department of General Services)	The Board dismissed the unfair practice charge, which alleged that the employer violated the Dills Act when it discriminated against an employee because he filed a grievance, and when it bypassed the union to deal directly with the employee regarding withdrawal of the grievance.	Dismissed. The charge failed to provide any facts which indicate when the alleged unfair practice occurred, thus it cannot be determined whether the charge is timely filed.
1398-E	Santa Monica Faculty Association v. Santa Monica Community College District	The Board granted the respondent's request to withdraw the exceptions.	Exceptions withdrawn. Granting this request is in the best interests of the parties and is consistent with the purposes of the EERA.
1399-S	California State Employees Association, Perry Kenny, Steven K. Alari and Barbara Glass v. State Employees Caucus for a Democratic Union, and its Agents Jim Hard, Cathy Hackett and Does 1-100	The Board dismissed the unfair practice charge. The charge alleged that the State Employees CDU and its agents are an employee organization with one of its primary purposes to represent state employees in their employment relations with the employer. CSEA claimed that CDU was therefore unlawfully competing with it.	Dismissed. CDU is a political faction within CSEA, not a competing employee organization, thus CDU is not subject to PERB sanction for violation of the Dills Act. Also, allegations filed against members of CDU as individuals are dismissed because the Dills Act only defines unlawful actions by the state and employee organizations.

2000-2001 DECISIONS OF THE BOARD
BOARD DECISIONS

DECISION NO.	CASE NAME	DESCRIPTION	DISPOSITION
1400-E	San Diego Community College District v. American Federations of Teachers Guild, Local 1931, AFL-CIO	The Board remanded the case to PERB General Counsel's Office for further investigation of the charge that the union violated the EERA by engaging in bad faith bargaining.	Pursuant to request of the General Counsel's Office, the Board remanded the case for further investigation.
1401-E	Hugh McAlpine, et al. v. Riverside County Office Teachers Association, CTA/NEA	The Board dismissed the unfair practice charge. The charge alleged that the union breached its duty of fair representation by negotiating a reduction in the salary augmentation for a class of instructors.	Dismissed. There is no violation of the duty of fair representation where the exclusive representative negotiated away part of charging parties' stipend while increasing the salaries of other bargaining unit members, because an exclusive representative is not expected or required to satisfy all members of the unit it represents.
1402-E	California School Employees Association and its Chapter #612 v. Antelope Valley Union High School District	The Board dismissed the unfair practice charge. The charge alleged that the employer replaced a full-time vacant cafeteria helper position with two part-time cafeteria helper positions and refused to negotiate the decision or its effects.	Dismissed. The employer's decision to phase out a full-time position at a particular school and to create two-part time positions was not negotiable because it represented a legitimate change in the nature, direction or level of service.

2000-2001 DECISIONS OF THE BOARD
BOARD DECISIONS

DECISION NO.	CASE NAME	DESCRIPTION	DISPOSITION
1403-S	California State Employees Association v. State of California (Department of Youth Authority)	The Board dismissed the unfair practice charge and complaint. The charge alleged that the employer discriminated against an employee when it: (1) initiated an internal affairs investigation against her with insufficient justification, (2) failed to select her for promotion to a position of assistant principal, (3) denied her educational leave opportunities, (4) required her to receive permission from a co-worker to obtain classroom supplies, and (5) had insufficient justification to give her an annual review with low performance evaluation marks.	Dismissed. There was insufficient evidence to support a charge that the adverse personnel actions were the result of the employee's protected activities.
1404-E	West Contra Costa Unified School District and Public Employees Union, Local One	The Board granted a unit modification petition. The petition, filed by the employer, requested the removal of the classifications of Cafeteria Leadworker and Cook Manager from the general services, maintenance and operations unit.	Unit modification petition granted. Two supervisory classifications are properly removed from the general services, maintenance and operations unit.

2000-2001 DECISIONS OF THE BOARD
BOARD DECISIONS

DECISION NO.	CASE NAME	DESCRIPTION	DISPOSITION
1387a-E	Deborah Newton Cooksey v. San Bernardino Teachers Association, CTA/NEA	The Board denied a request for reconsideration.	Denied. Charging party's request relied on arguments previously made and on evidence which would not impact or alter the decision of the previously decided case; hence, grounds for reconsideration do not exist.
1405-E	Hartnell College Faculty Association v. Hartnell Community College District	The Board remanded the case to the Board agent for further processing. The unfair practice charge alleged that the employer violated EERA by illegally interfering with the right of employees to be represented by the employee organization when it engaged in improper surveillance of e-mail.	Remanded to Board agent for further processing. Based on a review of the record, the Board granted the charging party's request for a remand because it appeared that the Board agent had not received a timely filed amended charge.
1406-S	Juanita Coleman v. State of California (Department of Mental Health)	The Board dismissed the unfair practice charge, which alleged that the employer violated the Dills Act by terminating an employee's employment in retaliation for her exercise of protected activity.	Dismissed. The charging party failed to meet her burden of demonstrating that the charge is timely filed.

2000-2001 DECISIONS OF THE BOARD
BOARD DECISIONS

DECISION NO.	CASE NAME	DESCRIPTION	DISPOSITION
1407-S	Juanita Coleman v. California State Employees Association	The Board dismissed the unfair practice charge, which alleged that the employee organization violated the Dills Act in its handling of her suspension and termination from employment.	Dismissed. The charging party failed to meet her burden of demonstrating that the charge is timely filed.
1408-S	Florence Elaine Torba v. California Association of Professional Scientists	The Board dismissed the unfair practice charge, which alleged a violation of the employee organization's duty of fair representation.	Dismissed. The statute of limitations begins to run on the date the charging party has actual or constructive notice of the respondent's clear intent to engage in the prohibited conduct; late discovery of a contractual summary does not toll the statute.
1409-H	Victoria Leitham v. Trustees of the California State University; Michael Twitty v. Trustees of the California State University	The Board dismissed the unfair practice charge, which alleged that the employer rejected two employees during their probationary period in retaliation for their having filed a grievance.	Dismissed. The employer proved that it would have taken adverse action against employees regardless of employees' participation in protected activity.

2000-2001 DECISIONS OF THE BOARD
BOARD DECISIONS

DECISION NO.	CASE NAME	DESCRIPTION	DISPOSITION
1410-E	San Joaquin Delta College Teachers Association, CTA/NEA v. San Joaquin Delta Community College District	The Board dismissed the unfair practice charge, which alleged that the employer violated EERA when it denied certain counselors' requests to move to alternate calendars.	Dismissed. The employer did not alter an existing policy when it denied employees' request to work an alternate calendar because the parties' agreement does not give employees the right to demand such a calendar.
1411-S	Paul Gonzalez-Coke v. California State Employees Association; Jim Hard and Cathy Hackett v. California State Employees Association	The Board dismissed the unfair practice charge, which alleged that the employee organization had unlawfully retaliated against charging parties by sustaining an internal union complaint filed against them.	Dismissed. The Board will not review charge allegations based on a union's filing an internal union complaint against charging parties when the charge concerns a purely internal union matter.
1412-E	Alisal Teachers Association, CTA/NEA v. Alisal Union Elementary School District	The Board found that the employer violated the EERA when it issued a letter of reprimand to an employee in retaliation for her protected activities.	Violation found. The Board found evidence of disparate treatment, departure from standard procedure, and cursory investigation.

2000-2001 DECISIONS OF THE BOARD
BOARD DECISIONS

DECISION NO.	CASE NAME	DESCRIPTION	DISPOSITION
1413-S	Robert Clayton v. State of California (Department of Social Services)	The Board dismissed allegations that the employer violated the Dills Act by terminating an employee's employment because of his protected activities.	Dismissed. There was insufficient evidence to support an inference of unlawful motivation; hence, the employee failed to establish that his dismissal was the result of his protected activities.
1414-E	California School Employees Association and its Golden Plains, Chapter 650 v. Golden Plains Unified School District	The Board dismissed the unfair practice charge, which alleged that the employer violated the EERA when it failed to negotiate the adoption of a board policy pertaining to termination of any bus driver employee who failed to pass a re-certification test.	Dismissed. There was no unilateral change because the employee organization failed to establish the existence of a past practice of accommodating bus driver employees who failed to pass a re-certification test.
1415-E	Michael Morrison v. California School Employees Association, Chapter 296	The Board dismissed the unfair practice charge. The charge alleged that the employee organization breached its duty of fair representation when it failed to file a grievance or otherwise represent the charging party properly regarding accusations made by the employer.	Dismissed. There was insufficient evidence that the employee organization breached its duty of fair representation when it failed to file a grievance or otherwise represent the employee properly.

2000-2001 DECISIONS OF THE BOARD
BOARD DECISIONS

DECISION NO.	CASE NAME	DESCRIPTION	DISPOSITION
1416-E	Orange Unified Education Association v. Orange Unified School District	The Board remanded the case for issuance of a complaint. The charge alleged that the employer unilaterally implemented changes in the terms and conditions of employment.	Remanded to General Counsel's office for issuance of a complaint to determine which of two agreements was the subject of the unfair practice charge, whether impasse had been broken, and adequacy of notice.
1403a-S	California State Employees Association v. State of California (Department of Youth Authority)	The Board denied a request for reconsideration based on an offer of new evidence.	Request for reconsideration based on an offer of new evidence denied. The party's failure to forward available documents to Board prior to close of record does not render those documents "unavailable"; hence, the grounds in PERB Regulation 32410(a) are not met and the Board cannot grant reconsideration.
1417-E	George R. Gerber, Jr., v. Sweetwater Union High School District	The Board dismissed the unfair practice charge, which alleged that the employer violated the EERA when it deducted agency fees from the charging party's paycheck on behalf of the exclusive representative without written authorization.	Dismissed. There is no violation of the EERA when an employer deducts agency fees from employee's paycheck without the employee's written authorization.

2000-2001 DECISIONS OF THE BOARD
BOARD DECISIONS

DECISION NO.	CASE NAME	DESCRIPTION	DISPOSITION
1418-E	Mildred Nicole Bryant v. Peralta Community College District	The Board dismissed the unfair practice charge. The charge alleged that the employer violated EERA by failing to adhere to the parties' grievance arbitration procedures.	Dismissed. The charging party failed to establish the charge was timely filed. No good cause existed to consider new supporting evidence on appeal to the Board.
1419-E	Mildred Nicole Bryant v. Service Employees International Union, Local 790	The Board dismissed the unfair practice charge. The charge alleged that the union breached the duty of fair representation by failing to represent the charging party properly.	Dismissed. The charging party failed to establish the charge was timely filed. No good cause existed to consider new supporting evidence on appeal to the Board.
1420-S	Armond Doval Bradford v. State of California (Department of General Services)	The Board dismissed the unfair practice charge. The charge alleged that the employer violated EERA by refusing to provide requested information and by taking reprisals against the charging party.	Dismissed. The employer has no duty to provide an individual employee with information requested by the exclusive representative. The remainder of the charge is deferred to the parties' contractual grievance procedure.
1421-S	Armond Doval Bradford v. California State Employees Association	The Board dismissed the unfair practice charge. The charge alleged that the employee organization breached the duty of fair representation.	Dismissed. The duty of fair representation does not extend to extra-contractual matters.

2000-2001 DECISIONS OF THE BOARD
BOARD DECISIONS

DECISION NO.	CASE NAME	DESCRIPTION	DISPOSITION
1422-E	Jeffry Peter LaMarca v. Capistrano Unified Education Association, CTA/NEA	The Board dismissed the unfair practice charge, which alleged that the employee organization denied an employee the right to fair representation by failing to assist him in a matter involving his previous employer.	Dismissed. The duty of fair representation is limited to contractually-based remedies under the union's exclusive control.
1423-H	California Faculty Association v. Trustees of the California State University	The Board granted the charging party's request to withdraw its appeal from a partial dismissal of its unfair practice charge.	Appeal withdrawn. Granting this request is in the best interests of the parties and is consistent with the purposes of the HEERA.
1424-E	Edward J. Gibbons v. Oxnard Educators Association	The Board dismissed the unfair practice charge. The charge alleged the employee organization breached the duty of fair representation by refusing to arbitrate legitimate grievances and disregarding and refusing to enforce specific contract provisions.	Dismissed. The charging party failed to prove that he could not have reasonably discovered the alleged unfair practice until six months before the charge was filed.
1415a-E	Michael Morrison v. California School Employees Association, Chapter 296	The Board denied the request for reconsideration.	Request for reconsideration denied. The request merely restated the grounds contained in the appeal.

2000-2001 DECISIONS OF THE BOARD
BOARD DECISIONS

DECISION NO.	CASE NAME	DESCRIPTION	DISPOSITION
1425-E	Sierra Sands Unified School District of Kern County v. Desert Area Teachers Association	The Board dismissed the unfair practice charge. The charge alleged that the employee organization violated the EERA by failing or refusing to bargain in good faith.	Dismissed. The union's conditioning bargaining based upon reopening of contract does not demonstrate evidence of bad faith under PERB's totality of conduct test.
1426-E	Deborah Susan Kerreos v. West Contra Costa Unified School District	The Board dismissed the charge, which alleged that the employer violated EERA in various ways, including the manner in which it handled grievances filed by the employee.	Dismissed. There is no violation of EERA section 3543.5(c), which obligates the employer to meet and negotiate in good faith with an exclusive representative because the charging party, an individual employee, lacks standing to pursue such a charge.
1427-E	Mary Hughes-Tutass v. West Contra Costa Unified School District	The Board dismissed the unfair practice charge, which alleged that the employer conspired with the union to ignore the charging party's contractual and/or legal rights to fair representation and due process, causing her to miss advancement opportunities; also, the charge alleged that the employer failed and refused to meet and negotiate with the employee or the union to address her grievances.	Dismissed. Individual employees lack standing to pursue a failure to negotiate charge; also, the charging party failed to provide a clear and concise statement of the facts.

2000-2001 DECISIONS OF THE BOARD
BOARD DECISIONS

DECISION NO.	CASE NAME	DESCRIPTION	DISPOSITION
1428-H	University Professional and Technical Employees, CWA, Local 9119 v. Regents of the University of California, Los Angeles	The Board dismissed the unfair practice charge, which alleged that the employer breached the neutrality required by the HEERA in the implementation of the "fair share" requirements. The employer's breach of neutrality allegedly occurred by its refusal to censure a web page of the UCLA Bruin Online web site created by a competing organization, NoFee4Me.	Dismissed. The employer is not obligated to advise exclusive representatives that employees have been granted access to web page space, even when employees are using it to oppose agency fee.
1429-E	Lodi Unified School District and Lodi Information Services Association and California School Employees Association & its Chapter 77	The Board denied the request for severance as proposed unit was not an appropriate unit for purposes of meeting and negotiating under EERA.	Denied request for severance. The proposed unit was not an appropriate unit for purposes of meeting and negotiating; no showing of a separate and distinct and distinct community of interest.
1430-E	Poway Federation of Teachers, Local 2357 v. Poway Unified School District	The Board remanded the case to the General Counsel's Office for issuance of a complaint and further processing.	Remanded to General Counsel's office for issuance of a complaint and further processing. The charging party has stated a prima facie violation of EERA by showing that the employer unilaterally adopted a final work calendar, not a tentative calendar.

2000-2001 DECISIONS OF THE BOARD
BOARD DECISIONS

DECISION NO.	CASE NAME	DESCRIPTION	DISPOSITION
1431-E	Kirk Anthony Robinson v. Los Angeles Unified School District	The Board dismissed the unfair practice charge. The charge alleged that the employer discriminated against the charging party because of his protected activity.	Dismissed. There was no prima facie case of retaliation where the only evidence of the charging party's protected activity consisted of contacting the union regarding notice of unsatisfactory conduct and where facts demonstrated that the charging party's termination was based on excessive absences, not because of contact with union.
1432-E	Kirk Anthony Robinson v. Los Angeles Unified School District	The Board dismissed the unfair practice charge. The charge alleged that the union breached its duty of fair representation in violation of EERA.	Dismissed. There is no violation of the duty of fair representation where the charging party is a probationary restricted employee with no right to appeal his dismissal; furthermore, the union met on numerous occasions with the charging party, yet the charging party failed to provide information requested by the union.

2000-2001 DECISIONS OF THE BOARD
BOARD DECISIONS

DECISION NO.	CASE NAME	DESCRIPTION	DISPOSITION
1365a-S	California State Employees Association v. State of California (Employment Development Department)	The Board modified Decision No. 1365 pursuant to a remand decision from the Court of Appeal. The underlying decision involved allegations that the employer violated the Dills Act by stopping a unity break and by issuing a memorandum to an employee apparently prohibiting future unity breaks.	Violation. Although employees have a protected right to communicate with each other at the work site concerning terms and conditions of employment during non-work times in non-work areas, unity break which consisted of employees displaying signs relating to ongoing contract negotiations at workstations during their break is not protected activity because other employees were working in the area at the time. However, the employer violated the Dills Act by issuing an overbroad memorandum to an employee.

2000-2001 DECISIONS OF THE BOARD
BOARD DECISIONS

DECISION NO.	CASE NAME	DESCRIPTION	DISPOSITION
1433-E	Woodland Education Association v. Woodland Joint Unified School District	The Board granted a post-settlement request to withdraw the unfair practice charge and complaint and to vacate the proposed decision.	Unfair practice charge and complaint withdrawn and proposed decision vacated. The Board exercised its discretion to dispose of a case in any fashion it deems appropriate; here, where it is clear that the parties have settled their dispute over the essential element of controversy that gave rise to the filing of the unfair practice charge, it would effectuate the purposes of the EERA to grant the request to withdraw the charge and complaint and to vacate the proposed decision.
1434-E	Wheatland Elementary School District and School Secretaries II Group of the Wheatland School District and California School Employees Association and its Wheatland Chapter 626	The Board granted the severance petition, having found that a unit of the employees in the Secretary I and Secretary II classifications is appropriate for meeting and negotiating provided an employee organization becomes the exclusive representative.	Severance petition granted. The Board found that the school secretaries share a community of interest that is distinct and separate from other classified employees of the district because only these employees perform primarily clerical work.

2000-2001 DECISIONS OF THE BOARD
BOARD DECISIONS

DECISION NO.	CASE NAME	DESCRIPTION	DISPOSITION
1435-S	International Union of Operating Engineers v. State of California (Department of Corrections)	The Board found that the employer, in violation of the Dills Act, unlawfully retaliated against a job steward because he engaged in protected conduct.	Violation. The Board found that the employer unlawfully retaliated against a job steward because he engaged in protected conduct. The Board concluded that the employer had not established that it had just cause to discipline the charging party, and that it had retaliated against him for engaging in protected activities as a union steward by investigating him for a tool incident and subsequently issuing him a letter of reprimand.

364

DECISION NO.	CASE NAME	DESCRIPTION	DISPOSITION
1436-E	Orange Unified School District v. Orange Unified Education Association, CTA/NEA	The Board granted a post-settlement request to withdraw the unfair practice charges and complaints and to vacate the proposed decision.	Unfair practice charges and complaints withdrawn and proposed decision vacated. The Board exercised its discretion to dispose of a case in any fashion it deems appropriate; here, where it is clear that the parties have settled their dispute over the essential element of controversy that gave rise to the filing of the unfair practice charge, it would effectuate the purposes of the EERA to grant the request to withdraw the charge and complaint and to vacate the proposed decision.

2000-2001 DECISIONS OF THE BOARD
BOARD DECISIONS

DECISION NO.	CASE NAME	DESCRIPTION	DISPOSITION
1437-E	Orange Unified School District v. Orange Unified Education Association	The Board granted a post-settlement request to withdraw the unfair practice charge and complaint and to vacate the proposed decision.	Unfair practice charge and complaint withdrawn and proposed decision vacated. The Board exercised its discretion to dispose of a case in any fashion it deems appropriate; here, where it is clear that the parties have settled their dispute over the essential element of controversy that gave rise to the filing of the unfair practice charge, it would effectuate the purposes of the EERA to grant the request to withdraw the charge and complaint and to vacate the proposed decision.
1438-E	United Educators of San Francisco v. San Francisco Unified School District	The Board dismissed the charge, which alleged that the employer violated the EERA when it unilaterally changed terms and conditions of employment at a charter school. The charge was dismissed on the grounds that PERB lacks jurisdiction over this type of charge.	Dismissed. PERB lacks jurisdiction because at the time the complaint issued, the EERA did not apply to school districts creating charter schools or the ongoing operation of those charter schools.

2000-2001 DECISIONS OF THE BOARD
BOARD DECISIONS

DECISION NO.	CASE NAME	DESCRIPTION	DISPOSITION
1439-E	Michael Nathaniel Miller v. Sweetwater Union High School District	The Board dismissed the charge for failure to state a prima facie case. The charge alleged that the employer violated the EERA by placing employee on administrative leave.	Dismissed. Although the adverse action followed closely the charging party's protected activity, there was no retaliation because the employer's action was consistent with its policy.
1440-E	California School Employees Association v. Lucia Mar Unified School District	The Board found that the employer violated EERA by contracting out entire bus services programs without negotiating.	Violation. The employer violated EERA by contracting out its entire bus services program without negotiating.
1441-E	Sheila Ann Hopper v. United Teachers of Los Angeles	The Board dismissed the unfair practice charge, which alleged that the union violated the EERA by failing to provide notice to new employees of their right not to join the union.	Dismissed. The charging party lacks standing to challenge the union's alleged failure to provide notice of certain rights.

2000-2001 DECISIONS OF THE BOARD
BOARD DECISIONS

DECISION NO.	CASE NAME	DESCRIPTION	DISPOSITION
1442-E	Kathleen M. Turney v. Fremont Unified School District	The Board partially dismissed the unfair practice charge, which alleged that the employer violated EERA by engaging in discrimination and retaliation because of the charging party's protected activity, making threats, and engaging in collusion with the charging party's exclusive representative.	Unfair practice charge partially dismissed. There is no prima facie case of interference or retaliation where the charge contains only limited evidence of what could be construed as harassment; also, evidence of previous PERB charges are insufficient to assist the charging party in establishing a prima facie violation of EERA.
1443-E	Kathleen M. Turney v. Fremont Unified District Teachers Association	The Board dismissed the unfair practice charge, which alleged that the union violated EERA by failing to represent the charging party properly in certain disputes with her employer and engaging in collusion with her employer.	Dismissed. The duty of fair representation does not extend to the filing of unfair practice charges with PERB.
1444-E	Martha D. Garcia v. California School Employees Association	The Board dismissed the unfair practice charge. The charge alleged that the union breached its duty of fair representation by failing to adequately represent the charging party regarding claims of sexual harassment.	Dismissed. The duty of fair representation is limited to contractually based remedies under the union's exclusive control.

2000-2001 DECISIONS OF THE BOARD
BOARD DECISIONS

DECISION NO.	CASE NAME	DESCRIPTION	DISPOSITION
1445-E	San Diego Community College District and San Diego Adult Educators Chapter of Local 4289, CFT, AFT, AFL-CIO and American Federation of Teachers Guild, Local 1931, CFT, AFT, AFL-CIO	The Board granted the unit modification petition, which sought to transfer continuing education counselors from a continuing education faculty unit to the college faculty unit (which includes counselors).	Unit modification petition granted. The Board granted the petition applying the totality of the circumstances approach after weighing the community of interest factors, negotiating history, evidence of dissatisfaction, and consideration of employee preference.
1446-H	Werner Franz Witke v. University Professional and Technical Employees, CWA Local 9119	The Board dismissed the unfair practice charge. The charge alleged that the arbitrator's award did not issue within 30 days of the close of the hearing, and that the exclusive representative failed to provide a reasonable basis by which chargeable and nonchargeable agency fee expenses could be calculated.	Dismissed. The award complied with the 30-day requirement of PERB Regulation 32994(b)(8); also, the charge failed to demonstrate that the decision was clearly repugnant to the EERA.
1447-E	Sheila Ann Hopper v. United Teachers of Los Angeles	The Board dismissed the unfair practice charge. The charge alleged that the exclusive representative violated the EERA by providing improper notice to nonmember fee payers as required.	Dismissed. The charging party did not indicate with specificity how the exclusive representative's agency fee notice failed to comply with PERB regulations.

2000-2001 DECISIONS OF THE BOARD
BOARD DECISIONS

DECISION NO.	CASE NAME	DESCRIPTION	DISPOSITION
1448-E	Michael Waymire v. California School Employees Association, Chapter 245	The Board dismissed the unfair practice charge. The charge alleged the Association violated EERA by failing to represent charging party properly.	Dismissed. The charge was untimely filed; also, PERB has no jurisdiction to enforce statutes regarding discrimination based on sex, religion or other prohibited bases.
1449-E	Michael Waymire v. Monterey Peninsula Community College District	The Board dismissed the unfair practice charge. The charge alleged that the employer violated the EERA by improperly calculating his holiday pay and other acts of discrimination.	Dismissed. The charge was untimely filed.
1450-E	Los Angeles School Police Officers Association v. Los Angeles Unified School District	The Board dismissed the unfair practice charge. The charge alleged that the employer unilaterally changed terms and conditions of employment and refused to bargain over negotiable subjects when it adopted a new policies and procedures manual.	Dismissed. The charge was untimely filed.

2000-2001 DECISIONS OF THE BOARD
BOARD DECISIONS

DECISION NO.	CASE NAME	DESCRIPTION	DISPOSITION
1451-H	Academic Professionals of California v. Trustees of the California State University	The Board found that the employer violated the HEERA. The charge alleged that the employer made a unilateral change in policy concerning name tags.	Violation. Name tag policies fall into the category of policies that are known as "plant rules" in the private sector. The NLRB has long held plant rules to be within the scope of representation.
1452-E	California School Employees Association and its Lodi Chapter #77 v. Lodi Unified School District	The Board dismissed the unfair practice charge. The charge alleged that the employer violated the EERA by unilaterally modifying the pay rate for its food service workers.	Dismissed. The Board found sufficient evidence that the employer had the authority to pay its substitute food service workers the rate found in a certain document, rather than a higher rate paid for many years.
1453-E	Ruth Valadez, et al. v. United Teachers of Los Angeles	The Board affirmed the excepted to portion of the proposed decision of the administrative law judge, which dismissed the allegation that the union violated EERA by discriminating against charging parties when it refused to waive a certain contractual provision.	Unfair practice charge partially dismissed. The union demonstrated a rational basis for refusing to waive a contractual provision.

2000-2001 DECISIONS OF THE BOARD
ADMINISTRATIVE APPEALS

DECISION NO.	CASE NAME	DESCRIPTION	DISPOSITION
Ad-304-S	Jim Hard and Cathy Hackett v. California State Employees Association	The Board denied motion to seal documents and to re-open the record.	Denied motions to seal documents and to re-open the record. Documents do not qualify for protection under any theory; no persuasive reason offered to re-open record.
Ad-305-H	California Faculty Association v. Trustees of the California State University	The Board found good cause for the late filing of a document pursuant to PERB Regulation 32136 and accepted it as timely filed.	Good cause found to excuse late filing. Had the document been mailed by certified or express mail on the same day it was mailed by regular first class mail, it would have been accepted as timely. The explanation for the error, set forth in an unrefuted declaration, was not so unreasonable as to be unbelievable and there was no evidence of prejudice resulting from the deficient filing.

2000-2001 DECISIONS OF THE BOARD
ADMINISTRATIVE APPEALS

DECISION NO.	CASE NAME	DESCRIPTION	DISPOSITION
Ad-306	Poway Unified School District and Poway Council of Classified Employees, CFT/AFT, AFL-CIO and California School Employees Association and its Poway Chapter 80	The Board found that the objections concerning serious irregularity in the conduct of a decertification election warranted setting aside the election results. A rerun election was ordered.	Set aside election results and ordered rerun election. Based on all the facts, the totality of the circumstances establishes that serious irregularities occurred in the conduct of the election which had a probable or actual impact on the election results.
Ad-306a	Poway Unified School District and Poway Council of Classified Employees, CFT/AFT, AFL-CIO and California School Employees Association and its Poway Chapter 80	The Board denied a request for reconsideration.	Denied. The request does not meet the limited grounds for reconsideration because it constitutes little more than a restatement of the arguments raised earlier on appeal.

2000-2001 DECISIONS OF THE BOARD
ADMINISTRATIVE APPEALS

DECISION NO.	CASE NAME	DESCRIPTION	DISPOSITION
Ad-307	Howard O. Watts v. Los Angeles Unified School District	The Board dismissed the public notice complaint. The complaint alleged the employer violated EERA by adopting amended initial negotiating proposals without making the amendments available for adequate review by the public.	Dismissed. The complaint failed to support the claim that the employer adopted an initial proposal which had been amended without allowing for public notice and comment on the amendments; also, failure to allow public comment on proposed amendments to initial proposals prior to the proposing of the amendments does not violate EERA section 3547.1.
Ad-308	Robert E. Clayton v. State of California (Department of Social Services)	The Board denied a request to excuse a late filing caused by alleged physical illness.	Denied. The party failed to demonstrate a conscientious effort to timely file.
Ad-309	Carlos A. Veltruski v. State of California	The Board denied charging party's request to file a late appeal.	Denied. The party failed to explain how illness prevented him from making a conscientious effort to timely file.

2000-2001 DECISIONS OF THE BOARD
INJUNCTIVE RELIEF REQUESTS

DECISION NO.	CASE NAME	DESCRIPTION	DISPOSITION
I.R. 415	California School Employees Association v. Lucia Mar Unified School District	The Board denied the request for injunctive relief, in which the union sought to enjoin the employer from contracting out bargaining unit work without bargaining the decision and the effects of that decision; laying off bargaining unit employees without bargaining the decision and the effects of that decision; and bypassing the union.	Request denied.
I.R. 416	James Dunlap v. United Teachers of Los Angeles	The Board denied the request for injunctive relief, in which an employee sought to enjoin the union from enforcing a four-year rule so as to deny him the opportunity to serve in a certain position.	Request denied.
I.R. 417	Gary Marcus v. Mount Diablo Education Association, CTA/NEA	The Board denied the request for injunctive relief, in which an employee sought to enjoin the Association from implementing a new benefits program prior to resolution of the underlying unfair practice charge.	Request denied.

2000-2001 DECISIONS OF THE BOARD
INJUNCTIVE RELIEF REQUESTS

DECISION NO.	CASE NAME	DESCRIPTION	DISPOSITION
I.R. 418	Charles Gentry Corum v. American Federation of Teachers	The Board denied the request for injunctive relief, in which an employee sought to enjoin or postpone the faculty contract ratification vote from taking place since he contends that the contract was allegedly negotiated in bad faith, without the informed consent of the faculty and without fairly representing every employee in the unit.	Request denied.
I.R. 419	Jim Hard and Cathy Hackett v. California State Employees Association	The Board denied the request for injunctive relief, in which the charging parties sought to enjoin the union from denying their right to approve and/or be on union leave.	Request denied.

2000-2001 LITIGATION ACTIVITY

Philip A. Kok v. Coachella Valley Unified School District; American Federation of Teachers; California Teachers Association; Does 1 to 10 (inclusive). California Supreme Court, Case S091570. Issue: Did the Appellate Court err when it dismissed Kok's case? Kok filed his Request for Review with the California Supreme Court on September 25, 2000. The Court denied the Petition for Review on November 15, 2000.

Charles Baird, Allen L. Appell and Edward J. Erler v. California Faculty Association, Kathleen Connell, Controller of the State of California and California Public Employment Relations Board. Ninth Circuit Court of Appeals, Case 00-17399 appealing U.S. District Court, Eastern District, Case S 00-999 DFL JFM. Issue: Did the District Court err when it found no violation of the Constitution? Plaintiffs appealed the District Court's decision on December 6, 2000. Plaintiffs-Appellants' Opening Brief filed on March 26, 2001. PERB filed its Notice of Intention Not to File Appellee's Brief on April 17, 2001. The State filed its Notice of Intention Not to File Appellee's Brief on April 19, 2001. CFA filed its Opening Brief on April 23, 2001. Plaintiffs-Appellants' Reply Brief filed on May 18, 2001.

Lucia Mar Unified School District v. Public Employment Relations Board/California School Employees Association. Second District Court of Appeal, Division Six. Case B150510 [PERB Decision 1440]. Issue: Did PERB err in its finding that the District had violated EERA when it contracted out transportation services and terminated bargaining unit positions? Petition filed on June 4, 2001.

CLOSED CASES

California State Employees Association v. PERB/State of California (Employment Development Department) Second Appellate District, Case B138299, (PERB
Decision 1365-S) Issue: Did PERB err when it determined that the Unity Break held by EDD employees was not an activity protected by the Dills Act? CSEA filed its Verified Petition for Writ of Review on January 18, 2000 and its Opening Brief on March 16, 2000. PERB filed its Brief in Opposition on April 13, 2000. The State filed its Opposition to Verified Petition for Writ of Review on April 14, 2000. CSEA filed its Reply Brief on May 2, 2000. On July 6, 2000, Oral Argument was heard. The Court issued its decision on October 17, 2000, affirming PERB's decision that CSEA and employee rights were not interfered with and modifying PERB's decision as it applied to future "unity breaks" and/or related activities in non-work areas during non-work time. The case is remanded to PERB.

Philip A. Kok v. Coachella Valley Unified School District, American Federation of Teachers, California Teachers Association, and Does 1 though 10, inclusive. Fourth District Court of Appeal, Division Two, Case E024883, (PERB Decisions 1302, 1302a and 1352). Issue: Amicus Curiae brief on behalf of the AFT and CTA arguing the case should be preempted by PERB's jurisdiction. On December 22, 1999, CTA submitted an amicus request to PERB. On February 7, 2000, PERB filed its Petition for Leave to File Amicus Curiae Brief; and Brief of Amicus Curiae in support of the AFT and CTA. The Court granted PERB's Petition to File as Amicus Curiae on March 23, 2000. On June 8, 2000, the Court issued its Tentative Ruling affirming the trial court's judgment in favor of the Defendants and denial of Kok's motion for reconsideration. The Court issued its Opinion denying the petition on August 15, 2000. Kok filed a request for reconsideration/ rehearing on August 18, 2000. The Court issued an Order denying Appellant's petition for rehearing on August 30, 2000.

Philip A. Kok v. Coachella Valley Unified School District; American Federation of Teachers; California Teachers Association; Does 1 to 10 (inclusive). California Supreme Court, Case S091570. Issue: Did the Appellate Court err when it dismissed Kok's case? Kok filed his Request for Review with the California Supreme Court on September 25, 2000. The Court denied the Petition for Review on November 15, 2000.

Kofi Opong-Mensah v. Terry Jackson, State of California (Department of Food and Agriculture) and PERB [PERB Decisions 1290-S and 1290a-S], Contra Costa County Superior Court, Case C 99 03749. Issue: Did PERB err in upholding the Regional Attorney's refusal to issue a complaint and dismissal of the charge. Mensah filed his Petition for Writ of Mandate on October 8, 1999. PERB filed its Preliminary Opposition on November 5, 1999. The State filed its Return by Way of Answer and Demurrer on November 8, 1999. PERB filed a Motion to Dismiss; Memorandum of Points & Authorities; and [Proposed] Order Granting PERB's Motion to Dismiss on June 8, 2000. Mensah filed his Opposition to Respondents Motions to Dismiss on November 4, 2000. The Court dismissed the case on November 17, 2000.

Kofi Opong-Mensah v. Steven B. Bassoff, John E. Sikora, CAPS and PERB [PERB Decision 1288-S], Contra Costa County Superior Court, Case C 99 03750. Issue: Did PERB err in upholding the Regional Attorney's refusal to issue a complaint and dismissal of the charge. Mensah filed his Petition for Writ of Mandate on October 8, 1999. PERB filed its Preliminary Opposition on November 5, 1999. PERB filed a Motion to Dismiss; Memorandum of Points & Authorities; and [Proposed] Order Granting PERB's Motion to Dismiss on June 8, 2000. On October 24, 2000, CAPS filed Defendants' Request for Judicial Notice; and Demurrer to Complaint. Mensah filed his Opposition to Respondents Motions to Dismiss on November 4, 2000. The Court dismissed the case on November 17, 2000.

DECLARATION OF BRUCE BARSOOK
IN SUPPORT OF
RESPONSE TO DEPARTMENT OF FINANCE

Test Claim of the City of Sacramento and
The County of Sacramento

Local Government Employment Relations

Chapter 901, Statutes of 2000 (S.B. 739)
Title 8, California Code of Regulations, Sections 31001-61630
CMS-01-TC-30

I, Bruce Barsook, declare:

1. This declaration is submitted in support of the subject test claim. Except as otherwise indicated, I have personal knowledge of the facts set forth herein and could and would testify competently thereto if called upon so to do.

2. I am a partner in the firm of Liebert Cassidy Whitmore (LCW), a Professional Law Corporation in its Los Angeles Office. I have been a public sector labor and employment lawyer since 1976. Prior to joining LCW, I worked for the Public Employment Relations Board (then known as the Educational Employment Relations Board) from 1976 until 1981. I served as counsel to the first chairperson of the agency, and beginning in 1978, as an Administrative Law Judge. As an Administrative Law Judge, it was my responsibility, in part, to review unfair practice charges, conduct informal settlement conferences, rule on discovery matters and motions, hold formal evidentiary hearings, and issue formal written decisions regarding unfair practice cases.

3. Since joining LCW in April 1981, I have maintained a continuing and extensive practice in all aspects of labor relations for local agencies and public school employers under both the Meyers-Milias-Brown Act (MMBA) and the Educational Employment Relations Act (EERA). This has included negotiating, implementing, administering and litigating all aspects of agency shop arrangements under both of these laws. It has also included representing public employers in dozens of Writs of Mandate proceedings under the MMBA and unfair labor practice charges under the EERA.

4. I have negotiated several hundred collective bargaining agreements during my tenure with LCW, all for public sector clients. Prior to the passage of S.B. 739 (Chapter 901, Statutes of 2000, the test claim legislation) most local agency contracts that I negotiated did not contain agency shop agreements. Under S.B. 739, agency shops can be implemented without a negotiated agreement by the use of an employee petition signed by 30% of the bargaining unit

(following a 30 day period for negotiations). Even though an agency shop arrangement will not be implemented unless more than 50% of those voting vote affirmatively for the agency shop, an agency shop may still be implemented by a minority of affected employees and without the employer's concurrence (*e.g.*, in a unit of 100 employees, 60 employees vote, 37 for agency shop and 33 against agency shop).

5. As a consequence of the passage of S.B. 739, my clients and I have been obligated to negotiate agency shop arrangements even though the exclusive representative and the employer had a collective bargaining agreement in place at the time of the request to negotiate. In addition, my clients and I have been obligated to process these agency shop petitions through election and implementation, where applicable. A more complete recitation of the new and additional responsibilities imposed on local agencies is set forth in the Test Claim.

6. Based on my experience since the passage of S.B. 739, it is my belief that there will be more agency shops implemented under this new law than existed prior to the passage of S.B. 739.

7. My law firm does legal work for approximately 30% of the cities in California and 45% of the Counties in California. During my tenure with the firm, we have handled less than one writ of mandate per year from non-police associations regarding alleged violations of the MMBA. (Sworn peace officers are not covered by the PERB's jurisdiction.) Since July 2001, when PERB began to exercise jurisdiction of local agency labor relations under S.B. 739, we have handled over a dozen unfair practice charges frilled by non-peace officer associations.

8. Defending Writs of Mandate in Superior Court are generally less time consuming, less expensive and less burdensome than defending the same action before the PERB. Unlike a writ of mandate action, PERB proceedings involve an initial response to the unfair practice charge, an informal settlement conference immediately after a complaint is issued, the opportunity for prehearing discovery, and a full evidentiary hearing. Like writs of mandate, PERB proceedings also involve the filing of an answer to the complaint, written arguments or briefs, a written decision, and an opportunity to appeal. Unlike a writ, however, a PERB case involves an appeal to the full board in Sacramento, then (at least until January 1, 2003) an appeal to the Superior Court prior to the appeal to the appropriate Court of Appeal.

9. A case prosecuted through all of the administrative levels of the PERB often takes up to two years (or more) before a final decision is reached. Although PERB tries diligently to settle cases prior to a formal hearing, because there are no filing fees, no evidentiary requirements, other than the specification of a prima facie case, and no requirement that parties be represented by an

attorney, public agencies can be left with the dilemma of choosing between a system that is more protracted and expensive to litigate than a writ, or settling on terms that are less favorable than otherwise would be the case.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 18TH day of October, 2002, at ~~October 18~~ San Francisco, California.

Bruce Barsook

Bruce Barsook

PROOF OF SERVICE BY MAIL

I, the undersigned, declare as follows:

I am a resident of the County of Sacramento, and I am over the age of 18 years and not a party to the within action. My place of employment is 4320 Auburn Blvd., Suite 2000, Sacramento, CA 95841.

On November 27, 2002 I served the Response to Department of Finance and Declaration of Bruce Barsook in Support of Response to Department of Finance, Test Claim of the City of Sacramento and the County of Sacramento, Local Government Employment Relations, Chapter 901, Statutes of 2000 (S.B. 739), Title 8, California Code of Regulations, Section 31001-61630, CSM-01-TC-30, by placing a true copy thereof in an envelope addressed to each of the persons listed on the mailing list attached hereto, and by sealing and depositing said envelope in the Untied State mail at Sacramento, California, with postage thereon fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed this 27th day of November, 2002 at Sacramento, California.

Declarant

Legislative Analyst's Office
Attention: Marianne O'Malley
925 L Street, Suite 1000
Sacramento, CA 95814

Ms. Harmeet Barkschat
Mandate Resource Services
5325 Elkorn Blvd., #307
Sacramento, CA 95842

Executive Director
Public Employment Relations Board
1031 18th Street
Sacramento, CA 95814

Mr. Leonard Kaye, Esq.
County of Los Angeles
Auditor-Controller's Office
500 W. Temple Street, Room 603
Los Angeles, CA 90012

State Controller's Office
Division of Accounting & Reporting
Attention: Michael Havey
3301 C Street, Suite 500
Sacramento, CA 95816

Director
Department of Industrial Relations
770 L Street
Sacramento, CA 95814

Mr. Steve Keil
California State Association of Counties
1100 K Street, Suite 101
Sacramento, CA 95814

Ms. Patty Masuda, City Manager
City of Sacramento
980 Ninth Street, 10th Floor
Sacramento, CA 95814

Mr. Andy Nichols, Senior Manager
Centration, Inc.
12150 Tributary Point Drive, Suite 140
Gold River, CA 95670

Terry Schutten, County Executive
County of Sacramento
700 H Street, Room 7650
Sacramento, CA 95814

Mr. Steve Smith, CEO
Mandated Cost Systems, Inc.
11130 Sun Center Drive, Suite 1000
Rancho Cordova, CA 95670

Mr. Paul Minney
Spector, Middleton, Young & Minney, LLP
7 Park Center Drive
Sacramento, CA 95825

Ms. Sandy Reynolds
Reynolds Consulting Group, Inc.
P. O. Box 987\
Sun City, CA 92586

Mr. Steve Shields
Shields Consulting Group, Inc.
1536 36th Street
Sacramento, CA 95816

Ms. Catherine Smith
California Special District Association
1215 K Street, Suite 930
Sacramento, CA 95814

S. Calvin Smith
Program Budget Manager
Department of Finance
915 L Street
Sacramento, CA 95814-3706

EXHIBIT D

DEPARTMENT OF FINANCE

GRAY
915 L STREET ■ SACRAMENTO CA ■ 95814-3

December 17, 2002

RECEIVED
DEC 18 2002
COMMISSION ON STATE MANDATES

Ms. Paula Higashi
Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

Dear Ms. Higashi:

The Department of Finance has reviewed the City of Sacramento and County of Sacramento's November 19th, 2002, rebuttal to our August 30, 2002 analysis of the test claim submitted by the City of Sacramento and the County of Sacramento (claimant) asking the Commission to determine whether specified costs incurred under Chapter No. 901, Statutes of 2000, (SB 739, Solis) are reimbursable state mandated costs (Claim No. CSM-01-TC-30 "Local Government Employment Relations").

On Page 1 of the Claimant's rebuttal, the Claimant raises the issue that our test claim analysis is inconsistent with Finance's bill analysis of the June 6, 2002 version of SB 739 in the 2000 Legislative Session which determined the related legislation would result in a significant mandated cost to the State.

First, according to the California Court of Appeals' finding in *City of Richmond v. Commission on State Mandates*, legislative bill analyses are irrelevant to the issue (64 Cal. App. 4th 1190, 1191). In *City of Richmond* the Court held that the Legislature has entrusted the determination of what constitutes a state mandate to the Commission.

Second, we note that the June 6th analysis attachment provided with our letter is for a version of SB 739 that no longer exists and therefore is not a viable basis of argument. We also disagree with the Claimant that later amendments to this legislation before chaptering were insignificant. In fact, we note that the August 25, 2002 version of SB 739 introduced the specific language that we believe creates the law barring this test claim from being a mandate. The introduction of Government Code Section 3500 as provided in the August 25th version and contained in the chaptered version of SB 739 specifically holds that this legislation's costs are not reimbursable.

We continue to hold the position that this test claim legislation does not create a new program or a higher level of service since the duties of the local agency employer representatives as stated in Chapter 901 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."

In addition, Chapter 901 provides for offsetting savings to local agencies since this chapter would shift local employers from a process where they rely on the court system to litigate unfair labor practice charges to a process where they would rely on the Public Employment Relations

Board (PERB) for those types of decisions. This is noted by the PERB process itself on the agency's website (http://www.perb.ca.gov/html/perbfunctions.htm):

> An unfair practice charge is filed with PERB by an employer, employee organization, or employee alleging that conduct has occurred which is unlawful under one of the Acts administered by PERB. The charge is evaluated to determine whether a prima facie case of an unlawful action has been established. A charging party establishes a prima facie case by alleging sufficient facts to permit a reasonable inference that a violation of the Meyers-Millias-Brown Act, the Educational Employment Relations Act, the Dills Act, or the Higher Education Employer-Employee Relations has occurred. If the charge fails to state a prima facie case, a Board agent issues a warning letter notifying the charging party of the deficiencies of the charge. If the charge is neither amended nor withdrawn, the Board agent dismisses it. The charging party may appeal the dismissal to the Board itself. If the Board agent determines that a charge states a prima facie case of a violation, a formal complaint is issued. The respondent is then given an opportunity to file an answer to the complaint.
>
> Once a complaint has been issued, an Administrative Law Judge (ALJ) or other PERB agent is assigned to the case and calls the parties together for an informal settlement conference, usually within 30 days of the date of the complaint. If settlement is not reached, a formal hearing before a PERB ALJ is scheduled, normally within 60 days of the date of the informal conference. Following this adjudicatory proceeding, the ALJ prepares and issues a proposed decision. A party to the case may then file an appeal of the proposed decision to the Board itself. The Board itself may affirm, modify, reverse or remand the proposed decision. Proposed decisions which are not appealed to the Board itself are binding upon the parties to the case.

The above process truncates the Claimant's participation and provides operational savings through a faster adjudication; a court process comparatively could take years to finalize. The Claimant's rebuttal is to argue by declaration that the PERB process does not provide savings. The Claimant has at this time not provided any statistical, fiscal, or numerical data showing case costs trends evidencing otherwise. Thus our position continues to have merit.

Again, we conclude that the duties listed in this test claim are discretionary and therefore do not qualify as reimbursable state-mandated costs. Under *County of Los Angeles v. Commission on State Mandates*, the Court of Appeal held that if a local entity has alternatives under the statute other than the mandate contribution, the contribution does not constitute a state mandate (32 Cal. App. 4th 805). The Claimant has the 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 does the Claimant then fall within the requirements of that process.

As required by the Commission's regulations, we are including a "Proof of Service" indicating that the parties included on the mailing list which accompanied your August 30, 2002 letter have been provided with copies of this letter via either United States Mail or, in the case of other state agencies, Interagency Mail Service.

If you have any questions regarding this letter, please contact Tom Lutzenberger, Principal Program Budget Analyst, or Keith Gmeinder, state mandates claims coordinator for the Department of Finance, at (916) 445-8913.

Sincerely,

Calvin Smith

S. Calvin Smith
Program Budget Manager

Attachments

PROOF OF SERVICE

Test Claim Name: Local Government Employment Relations
Test Claim Number: CSM-01-TC-30

I, the undersigned, declare as follows:
I am employed in the County of Sacramento, State of California, I am 18 years of age or older and not a party to the within entitled cause; my business address is 915 L Street, 8 Floor, Sacramento, CA 95814.

On December 17, 2002, I served the attached recommendation of the Department of Finance in said cause, by facsimile to the Commission on State Mandates and by placing a true copy thereof: (1) to claimants and non-state agencies enclosed in a sealed envelope with postage thereon fully prepaid in the United States Mail at Sacramento, California; and (2) to state agencies in the normal pickup location at 915 L Street, 8th Floor, for Interagency Mail Service, addressed as follows:

A-16
Ms. Paula Higashi, Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814
Facsimile No. 445-0278

B-8
State Controller's Office
Division of Accounting & Reporting
Attention: Michael Havey
3301 C Street, Suite 500
Sacramento, CA 95816

B-29
Legislative Analyst's Office
Attention Marianne O'Malley
925 L Street, Suite 1000
Sacramento, CA 95814

Ms. Pam Stone, Legal Counsel
MAXIMUS
4320 Auburn Blvd., Suite 2000
Sacramento, CA 95841

Ms. Harmeet Barkschat
Mandate Resource Services
5325 Elkhorn Blvd. #307
Sacramento, CA 95842

C-50
Director
Department of Industrial Relations
770 L Street
Sacramento, CA 95814

Executive Director
Public Employment Relations Board
1031 18th Street
Sacramento, CA 95814

Mr. David Wellhouse
David Wellhouse & Associates, Inc.
9175 Kiefer Blvd., Suite 121
Sacramento, CA 95826

Mr. Leonard Kaye, Esq.,
County of Los Angeles
Auditor-Controller's Office
500 W. Temple Street, Room 603
Los Angeles, CA 90012

Mr. Steve Keil
California State Association of Counties
1100 K Street, Suite 101
Sacramento, CA 95814

Ms. Patty Masuda, City Manager
City of Sacramento
980 Ninth Street, 10th Floor
Sacramento, CA 95814

Mr. Andy Nichols, Senior Manager
Centration, Inc.
12150 Tributary Point Drive, Suite 140
Gold River, CA 95670

Terry Schutten, County Executive
County of Sacramento
700 H Street, Room 7650
Sacramento, CA 95814

Mr. Steve Smith, CEO
Mandated Cost Systems, Inc.
11130 Sun Center Drive, Suite 100
Rancho Cordova, CA 95670

Mr. Allan Burdick
MAXIMUS
4320 Auburn Blvd., Suite 2000
Sacramento, CA 95841

Mr. Paul Minney
Spector, Middleton, Young, & Minney, LLP
7 Park Center Drive
Sacramento, CA 95825

Ms. Sandy Reynolds, President
Reynolds Consulting Group, Inc.
PO Box 987
Sun City, CA 92586

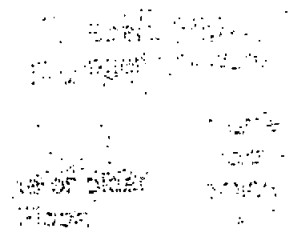
Mr. Steve Shields
Shields Consulting Group, Inc.
1536 36th Street
Sacramento, CA 95816

Ms. Catherine Smith
California Special District Association
1215 K Street, Suite 930
Sacramento, CA 95814

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on December 17, 2002, at Sacramento, California.

Mary Latorre

Mary Latorre



STATE OF CALIFORNIA ARNOLD SCHWARZENEGGER, *Governor*

COMMISSION ON STATE MANDATES
980 NINTH STREET, SUITE 300
SACRAMENTO, CA 95814
PHONE: (916) 323-3562
FAX: (916) 445-0278
E-mail: csminfo@csm.ca.gov

December 7, 2006

Mr. Allan P. Burdick
MAXIMUS
4320 Auburn Blvd., Suite 2000
Sacramento, CA 95841

And Affected State Agencies and Interested Parties (see attached mailing list)

RE: **Adopted Statement of Decision**
Local Government Employment Relations, 01-TC-30
City and County of Sacramento, Claimants
Statutes 2000, Chapter 901 (SB 739)
California Code of Regulations, Title 8, Sections 31001-61630

Dear Mr. Burdick

The Commission on State Mandates adopted the attached Statement of Decision on December 4, 2006. State law provides that reimbursement, if any, is subject to Commission approval of parameters and guidelines for reimbursement of the mandated program; approval of a statewide cost estimate; a specific legislative appropriation for such purpose; a timely-filed claim for reimbursement; and subsequent review of the claim by the State Controller's Office.

Following is a description of the responsibilities of all parties and the Commission during the parameters and guidelines phase.

- **Claimant's Submission of Proposed Parameters and Guidelines.** Pursuant to Government Code section 17557 and California Code of Regulations, title 2, sections 1183.1 et seq., the claimant is responsible for submitting proposed parameters and guidelines by **January 8, 2007.** See Government Code section 17557 and California Code of Regulations, title 2, sections 1183.1 et seq. for guidance in preparing and filing a timely submission. Also, the claimant may propose a "reasonable reimbursement methodology," a formula for reimbursing local agency costs mandated by the state. (See Gov. Code, § 17518.5 and Cal. Code Regs., tit.2, 1183.13.)
- **Review of Proposed Parameters and Guidelines.** Within ten days of receipt of completed proposed parameters and guidelines, the Commission will send copies to the Department of Finance, Office of the State Controller, affected state agencies, and interested parties who are on the enclosed mailing list. Any recipient may propose a "reasonable reimbursement methodology" pursuant to Government Code section 17518.5. All recipients will be given an opportunity to provide written comments or recommendations to the Commission within 15 days of service. The claimant and other interested parties may submit written rebuttals. (See Cal. Code Regs., tit. 2, § 1183.11.)

- **Adoption of Parameters and Guidelines.** After review of the proposed parameters and guidelines and all comments, Commission staff will recommend the adoption of the claimant's proposed parameters and guidelines or adoption of an amended, modified, or supplemented version of the claimant's original submission. (See Cal. Code Regs., tit. 2, § 1183.12.)

Please contact Nancy Patton at (916) 323-3562 if you have any questions.

Sincerely,

Paula Higashi

PAULA HIGASHI
Executive Director

Enclosure: Adopted Statement of Decision

J:\MANDATES\2001\01tc30\sodadopttr.doc

MAILED: FAXED:
DATE: 12/7/06 INITIAL: VS
CHRON: FILE:
WORKING BINDER:

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM:

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;

Statutes 2000, Chapter 901;

Filed on August 1, 2002 by the City of Sacramento and the County of Sacramento, Claimants.

Case No.: 01-TC-30

Local Government Employment Relations

STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7

(Adopted on December 4, 2006)

STATEMENT OF DECISION

The attached Statement of Decision of the Commission on State Mandates is hereby adopted in the above-entitled matter.

Paula Higashi

PAULA HIGASHI, Executive Director

December 7, 2006

Date

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM: 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; Statutes 2000, Chapter 901; Filed on August 1, 2002 by the City of Sacramento and the County of Sacramento, Claimants.	**Case No.: 01-TC-30** ***Local Government Employment Relations*** STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7 *(Adopted on December 4, 2006)*

STATEMENT OF DECISION

The Commission on State Mandates ("Commission") heard and decided this test claim during a regularly scheduled hearing on December 4, 2006. Pamela Stone, John Liebert, Ed Tackach, Dee Contreras, and Krista Whitman appeared on behalf of City of Sacramento and County of Sacramento, claimants. Susan Geanacou, Donna Ferebee, Carla Castaneda, and Wendy Ross appeared on behalf of Department of Finance.

The law applicable to the Commission's determination of a reimbursable state-mandated program is article XIII B, section 6 of the California Constitution, Government Code section 17500 et seq., and related case law.

At the hearing, the Commission adopted the staff analysis to partially approve this test claim by a vote of 6-0.

Summary of Findings

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 Commission 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)).

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." The Commission finds that subdivision (b)(5) is applicable to this test claim.

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 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

---

[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.

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

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

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

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 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]

---

[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).

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

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

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, 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).

---

[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).

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

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

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;
  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.

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.

---

[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.

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.

COMMISSION FINDINGS

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 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

---

[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.

[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*).

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:

- 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

---

[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.

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

The Commission 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.

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]

---

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

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

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 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, the Commission finds that the test

---

[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.*

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]

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.

---

[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.

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

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, the Commission 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.

The Commission 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 filed by claimants 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 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."

---

[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*.

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.[45]

Accordingly, the Commission 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.[46]

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] At the hearing, claimants provided a copy of the "Procedures for mandated agency shop elections" from the DIR website, dated December 2, 2006, which has been placed in the record. No amendment to the test claim was filed and thus the Commission did not have jurisdiction to make any findings on the information provided.

[46] 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.

The Commission finds that the plain language of the statutes requires only that the local public agency cause the dues or service 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.[47]

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*

[47] 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.),[48] and the Commission finds 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.[49]

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

---

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

[49] 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."[50]

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.[51]

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, the Commission 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, the Commission 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."[52]

---

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

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

[52] 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.[53]

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*,[54] 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. 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]

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.[56]

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.

---

[53] *Ibid.*

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

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

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

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 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.[57] In this case, the state has not required the local public agency employer to file any charge or appeal with PERB.

Thus, the Commission 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, the Commission 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

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

[57] *Id.* at page 880.

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, the Commission 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. [58]

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 b) result in an increase in the actual level or quality of governmental services provided by the local public agency.[59] 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.

---

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

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

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.[60] 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.[61] 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.[62] 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,[63] 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,[64] 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 responsibilities under this chapter are not reimbursable as state-mandated costs.[65]

---

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

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

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

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

[64] Government Code section 3509.

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

However, courts have stated that "legislative disclaimers, findings and budget control language are not determinative to a finding of a state mandated reimbursable program ..."[66] 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 ...[67]

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. The Commission 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, the Commission 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, the Commission 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 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."[68]

---

[66] *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.

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

[68] 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.

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, the Commission 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 and expensive court action.[69] 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

---

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.

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

administrative agency with expertise in labor relations," and the appropriate role for courts is to serve as an appellate body.[70] 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, the Commission finds Government Code section 17517.5 is inapplicable for this analysis.

Accordingly, the Commission 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

The Commission 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));
   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));

[70] *Ibid.*

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.[71] 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.

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

DECLARATION OF SERVICE BY MAIL

I, the undersigned, declare as follows:

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

December 7, 2006, I served the:

Adopted Statement of Decision
Local Government Employment Relations, 01-TC-30
City and County of Sacramento, Claimants
Statutes 2000, Chapter 901 (SB 739)
California Code of Regulations, Title 8, Sections 31001-61630

by placing a true copy thereof in an envelope addressed to:

Mr. Allan P. Burdick
MAXIMUS
4320 Auburn Blvd., Suite 2000
Sacramento, CA 95841

State Agencies and Interested Parties (See attached mailing list);

and by sealing and depositing said envelope in the United States mail at Sacramento, California, with postage thereon fully paid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on December 7, 2006 at Sacramento, California.

VICTORIA SORIANO

Original List Date: 8/1/2002
Last Updated: 7/19/2006
List Print Date: 12/07/2006
Claim Number: 01-TC-30
Issue: Local Government Employment Relations

Mailing Information: Notice of adopted SOD

Mailing List

TO ALL PARTIES AND INTERESTED PARTIES:

Each commission mailing list is continuously updated as requests are received to include or remove any party or person on the mailing list. A current mailing list is provided with commission correspondence, and a copy of the current mailing list is available upon request at any time. Except as provided otherwise by commission rule, when a party or interested party files any written material with the commission concerning a claim, it shall simultaneously serve a copy of the written material on the parties and interested parties to the claim identified on the mailing list provided by the commission. (Cal. Code Regs., tit. 2, § 1181.2.)

Mr. Steve Shields
Shields Consulting Group, Inc.
1536 36th Street
Sacramento, CA 95816

Tel: (916) 454-7310
Fax: (916) 454-7312

Mr. David Wellhouse
David Wellhouse & Associates, Inc.
9175 Kiefer Blvd, Suite 121
Sacramento, CA 95826

Tel: (916) 368-9244
Fax: (916) 368-5723

Mr. Leonard Kaye, Esq.
County of Los Angeles
Auditor-Controller's Office
500 W. Temple Street, Room 603
Los Angeles, CA 90012

Tel: (213) 974-8564
Fax: (213) 617-8106

Mr. Steve Keil
California State Association of Counties
1100 K Street, Suite 101
Sacramento, CA 95814-3941

Tel: (916) 327-7523
Fax: (916) 441-5507

Mr. Jim Spano
State Controller's Office (B-08)
Division of Audits
300 Capitol Mall, Suite 518
Sacramento, CA 95814

Tel: (916) 323-5849
Fax: (916) 327-0832

County Executive
County of Sacramento
711 G Street
Sacramento, CA 95814

Tel:
Fax:

Director
Department of Industrial Relations (C-50)
770 L Street
Sacramento, CA 95814

Tel: (916) 324-4163
Fax: (916) 327-6033

Ray Kerridge
City of Sacramento
915 "I" Street, 5th Floor
Sacramento,CA 95814
Phone: (916) 808-5704
Fax: (916) 808-7618

Tel: (916) 808-5704
Fax: (916) 808-7618

Executive Director
Public Employment Relations Board (D-12)
1031 18th Street
Sacramento, CA 95814-4174

Tel: (916) 322-3198
Fax: (916) 327-6377

Mr. J. Bradley Burgess
Public Resource Management Group
1380 Lead Hill Boulevard, Suite #106
Roseville, CA 95661

Tel: (916) 677-4233
Fax: (916) 677-2283

Ms. Annette Chinn
Cost Recovery Systems, Inc.
705-2 East Bidwell Street, #294
Folsom, CA 95630

Tel: (916) 939-7901
Fax: (916) 939-7801

Mr. Robert Thompson
Public Employment Relations Board (D-12)
General Counsel
1031 18th Street
Sacramento, CA 95814-4174

Tel: (916) 322-3198
Fax: (916) 327-7955

Ms. Carla Castaneda
Department of Finance (A-15)
915 L Street, 11th Floor
Sacramento, CA 95814

Tel: (916) 445-3274
Fax: (916) 323-9584

Ms. Donna Ferebee
Department of Finance (A-15)
915 L Street, 11th Floor
Sacramento, CA 95814

Tel: (916) 445-3274
Fax: (916) 323-9584

Mr. Allan Burdick
MAXIMUS
4320 Auburn Blvd., Suite 2000
Sacramento, CA 95841

Tel: (916) 485-8102
Fax: (916) 485-0111

Ms. Ginny Brummels State Controller's Office (B-08) Division of Accounting & Reporting 3301 C Street, Suite 500 Sacramento, CA 95816	Tel: Fax:	(916) 324-0256 (916) 323-6527
Ms. Susan Geanacou Department of Finance (A-15) 915 L Street, Suite 1190 Sacramento, CA 95814	Tel: Fax:	(916) 445-3274 (916) 324-4888
Mr. Glen Everroad City of Newport Beach 3300 Newport Blvd. P. O. Box 1768 Newport Beach, CA 92659-1768	Tel: Fax:	(949) 644-3127 (949) 644-3339
Ms. Bonnie Ter Keurst County of San Bernardino Office of the Auditor/Controller-Recorder 222 West Hospitality Lane San Bernardino, CA 92415-0018	Tel: Fax:	(909) 386-8850 (909) 386-8830
Ms. Beth Hunter Centration, Inc. 8570 Utica Avenue, Suite 100 Rancho Cucamonga, CA 91730	Tel: Fax:	(866) 481-2621 (866) 481-2682

STATE OF CALIFORNIA ARNOLD SCHWARZENEGGER, *Governor*

COMMISSION ON STATE MANDATES
980 NINTH STREET, SUITE 300
SACRAMENTO, CA 95814
PHONE: (916) 323-3562
FAX: (916) 445-0278
E-mail: csminfo@csm.ca.gov

EXHIBIT E

October 19, 2006

Mr. Allan Burdick
MAXIMUS
4320 Auburn Blvd., Suite 2000
Sacramento, CA 95841

And Interested Parties and Affected State Agencies (See Enclosed Mailing List)

RE: Draft Staff Analysis and Hearing Date
Local Government Employment Relations, 01-TC-30
City and County of Sacramento, Claimants
Statutes 2000, Chapter 901 (SB 739)
California Code of Regulations, Title 8, Sections 31001-61630

Dear Mr. Burdick:

The draft staff analysis of this test claim is enclosed for your review and comment.

Written Comments
Any party or interested person may file written comments on the draft staff analysis by Thursday, **November 9, 2006**. You are advised that comments filed with the Commission are required to be simultaneously served on the other interested parties on the mailing list, and to be accompanied by a proof of service. (Cal. Code Regs., tit. 2, § 1181.2.) If you would like to request an extension of time to file comments, please refer to section 1183.01, subdivision (c)(1), of the Commission's regulations.

Hearing
This test claim is set for hearing on **Monday, December 4, 2006**. We will notify you of the location of the hearing when a hearing room has been confirmed. The final staff analysis will be issued on or about November 22, 2006. Please let us know in advance if you or a representative of your agency will testify at the hearing, and if other witnesses will appear. If you would like to request postponement of the hearing, please refer to section 1183.01, subdivision (c)(2), of the Commission's regulations.

Please contact Deborah Borzelleri at (916) 322-4230 with any questions regarding the above.

Sincerely,

PAULA HIGASHI
Executive Director

Enc. Draft Staff Analysis

MAILED: FAXED:
DATE: 10/19/05 INITIAL: LD
CHRON: FILE:
WORKING BINDER:

ITEM ____

TEST CLAIM
DRAFT 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

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 a statute that amended the Meyers-Milias-Brown Act (hereafter "MMBA"), regarding employer-employee relations between local public agencies and their employees, to authorize an additional method for creating an agency shop arrangement without the local public agency employer's consent, and to 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 labor organization.

Local governments 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 statute 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 statute and regulations subject to article XIII B, section 6 of the California Constitution?
- Do the activities mandated by the test claim statute 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 statute 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 Statute and Regulations Impose a Partially Reimbursable State-Mandated Program on Local Government Agencies

Staff finds that the test claim statute and regulations require local government agencies to perform specified activities, and those activities constitute a program since they impose unique requirements on local governments 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 statute 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);
   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).

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.

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

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 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

---

[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.

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

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 statute, however, specifically excludes peace officers from its 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 labor organization for its duration.[9]

Local governments 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 statute 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 exclusive or majority bargaining agent.[13] The test claim statute provides 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)

---

[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).

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

> 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 statute 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 statute 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, representation, recognition, and elections are enforced and applied by PERB.[20] However, the City of Los Angeles and County of Los Angeles 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.

---

[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).

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

[21] Government Code section 3509, subdivision (d).

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;
  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 statute 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.

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.

[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.

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.

Claimant filed a response on November 19, 2002, to the Department of Finance's August 30, 2002, comments. The issues raised in that response are addressed in the analysis.

Position of Department of Finance

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

- The test claim statute does not create a new program or higher level of service since, pursuant to the language of the statute, 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 statute provides 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 provided additional comments on December 18, 2002, in response to claimant's rebuttal of November 19, 2002. Those comments are addressed in the 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 and XIII B impose."[25] A test claim statute or executive order may impose a reimbursable state-mandated program if it orders or commands a local agency or school district to engage in an activity or task.[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

---

[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.

[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*).

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:

- Are the test claim statute and regulations subject to article XIII B, section 6 of the California Constitution?
- Do the activities mandated by the test claim statute 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 statute 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 statute and regulations subject to article XIII B, section 6 of the California Constitution?

A. Mandatory vs. Discretionary Activities

In order for a test claim statute or regulation to impose a reimbursable state-mandated program under article XIII B, section 6, the language must mandate an activity or task upon local

---

[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.

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 statute; 2) representing the agency in court regarding litigation over the test claim statute's 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 statute or regulation 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 Statute and Regulations

Staff finds that participation in PERB's rulemaking process to implement the test claim statute and representing the agency in litigation over "ambiguity" in the test claim statute *are not* activities required by the test claim statute 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 statute contains no provision requiring local agencies to participate in the rulemaking process, nor to litigate the test claim statute. Therefore, rulemaking participation and litigation costs are not subject to, or reimbursable pursuant to, article XIII B, section 6.

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

The test claim statute 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 good faith negotiations, not to exceed 30 days, have taken place between the local public agency employer and the employee

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

organization.[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.

Based on the plain language of the test claim statute and regulations regarding subdivision (b) agency shop arrangements, staff finds that public agency employers are *not* required to engage in separate agency shop negotiations for up to 30 days. The test claim statute states that "[t]he petition [for the agency shop arrangement] may only be filed [by the employee organization] ... after the parties *have had 30 days* to attempt good faith negotiations." This language does not mandate the filing of a petition or party negotiations. Staff further finds that none of the other activities claimed regarding subdivision (b) agency shop arrangements are required by the test claim statute or regulations.[39, 40]

---

[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.*

[39] 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.*

[40] The test claim references the Department of Industrial Relations (DIR) website, at http://www.dir.ca.gov/csmcs/ase-sb739.html, with regard to subdivision (b) agency shop elections. As of October 5, 2006, the DIR website displays a document entitled "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

Thus, 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 statute, 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 statute or regulation 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.[41]

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

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

---

considered a "document" filed with the test claim, pursuant to California Code of Regulations, title 2, section 1183, subdivision (e). Although the website document contains procedures that may be expected of public agency employers with regard to subdivision (b) agency shop elections, since those procedures were not pled, the Commission does not have jurisdiction to make any findings regarding the DIR document.

[41] 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.

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 statute 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 statute 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.[42]

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 statute 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* be required" to make in lieu fee payments, under subdivision (b) agency shop arrangements, that requirement would be established by the employee organization 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.

---

[42] 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*.

Based on the plain language of the test claim statute 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 other activities claimed are not required by the statute or regulations, and thus are not mandated activities.[43]

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 statute 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 the production and examination of any employer's or employee organization's records, books, or papers relating to any matter within its jurisdiction."[44]

As a result of the test claim statute, 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.[45]

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.

---

[43] 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*.

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

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

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.

The Department of Finance asserts that the activities listed in the test claim are discretionary, based on the case of *County of Los Angeles v. Commission on State Mandates* (1995) 32 Cal.App.4th 805, finding that if a local entity has alternatives under the test claim statute other than the mandated contribution, the contribution does not constitute a state mandate. Finance further states that, in this case, the claimant has alternatives available in that it may choose to argue a 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 is the claimant subject to the requirements of that process.

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.

Staff finds that since MMBA disputes were brought under PERB jurisdiction with the test claim statute, and 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 a choice and is required to engage in the activities set forth in the PERB procedures when any such disputes are filed with PERB. However, 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 to PERB.

The plain language of the statute 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.[46]

Here, claimant is seeking reimbursement for costs to file charges with PERB, and argues the employer has no choice but to appeal decisions where PERB errs in the interpretation of the

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

law or its application to the fact in a given case, and decides a case to the detriment of the employer. This argument falls short of the circumstances discussed in *San Diego Unified School Dist*, where the safety of students and school property is at stake. Claimant provides no other basis for a finding that an employer filing charges or appeals with PERB is anything other than a discretionary decision made by the local 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

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 statute 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 statute 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.[47]

Here, the activities mandated by the test claim statute 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 statute 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 b) result in an increase in the actual level or quality of governmental services provided by the local public agency.[48] 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 statute 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.[49] The test claim statute 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.[50] 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.[51] The test

---

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

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

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

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

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

claim statute *requires* 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,[52] 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 statute brought MMBA disputes under the jurisdiction of PERB,[53] 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 statute provided specific language expressing the Legislature's intent that since the duties are similar to requirements in existing law, the statute does 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 responsibilities under this chapter are not reimbursable as state-mandated costs.[54]

However, courts have stated that "legislative disclaimers, findings and budget control language are not determinative to a finding of a state mandated reimbursable program ..."[55] 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 ...[56]

Therefore, the Legislature's findings that the test claim statute does 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

---

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

[53] Government Code section 3509.

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

[55] *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.

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

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 statute 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 statute 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 statute 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 level of service. The claimant alleged in the test claim that the costs for activities necessary to comply with the test claim statute and regulations are "well in excess of $200 per year."[57] Thus, there is evidence in the record, signed under penalty of perjury, that there are increased costs as a result of the test claim statute 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.

---

[57] 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.

The Department of Finance asserts that the test claim statute provides 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 statute was the fact that, at the time, MMBA had no effective enforcement procedures except for time-consuming and expensive court action.[58] 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.[59] 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.

---

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

[59] *Ibid.*

Accordingly, staff finds that the activities mandated by the test claim statute 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 statute and regulations impose a reimbursable state-mandated program on local agencies[60, 61] 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);
   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).

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.

---

[60] The County of Los Angeles and the City of Los Angeles are not subject to PERB jurisdiction (Gov. Code § 3509, subd. (d)).

[61] Peace officers as defined in Penal Code section 830.1 are not subject to PERB jurisdiction (Gov. Code § 3511).

Recommendation

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

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM ON:

Government Code Section 3547.5 as added by Chapter 1213, Statutes of 1991, and the California Department of Education Management Advisory 92-01

And filed on December 29, 1997;

By the Alameda County Office of Education, Claimant.

NO. 97-TC-08

Collective Bargaining Agreement Disclosure

STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; TITLE 2, CALIFORNIA CODE OF REGULATIONS, DIVISION 2, CHAPTER 2.5, ARTICLE 7.

(Adopted on March 26, 1998)

STATEMENT OF DECISION

The attached Statement of Decision of the Commission on State Mandates is hereby adopted in the above-entitled matter.

This Decision shall become effective on April 7, 1998.

Paula Higashi, Executive Director

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM ON: Government Code Section 3547.5 as added by Chapter 1213, Statutes of 1991, and the California Department of Education Management Advisory 92-01 And filed on December 29, 1997; By the Alameda County Office of Education, Claimant.	NO. 97-TC-08 *Collective Bargaining Agreement Disclosure* STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; TITLE 2, CALIFORNIA CODE OF REGULATIONS, DIVISION 2, CHAPTER 2.5, ARTICLE 7. (Adopted on March 26, 1998)

STATEMENT OF DECISION

The Commission on State Mandates (Commission) on March 26, 1998, heard this test claim during a regularly scheduled hearing. Keith Peterson appeared for the Alameda County Office of Education and Carol Berg appeared for the Education Mandated Cost Network.

At the hearing, evidence both oral and documentary was introduced, the test claim was submitted, and the vote was taken.

The law applicable to the Commission's determination of a test claim is Government Code section 17500 et seq. and section 6, article XIII B of the California Constitution and related case law.

The Commission, by a vote of 7-0 approved this test claim.

Issue

Do the provisions of Government Code section 3547.5, as added by Chapter 1213, Statutes of 1991, and the California Department of Education's Management Advisory 92-01, impose a new program or higher level of service upon school districts within the meaning of section 6, article XIII B of the California Constitution and Government Code section 17514?

Prior Law

Before the test claim legislation, school districts were only required to publicly disclose all *initial* proposals for collective bargaining agreements. Government Code section 3547 provides in pertinent part: "[a]ll initial proposals of exclusive representatives and of public school

employers, which relate to matters within the scope of representation, shall be presented at a public meeting of the public school employer and thereafter shall be public records."

Test Claim Legislation

Chapter 1213, Statutes of 1991, added section 3547.5 to the Government Code, as follows:

> "Before a public school employer enters into a written agreement with an exclusive representative covering matters within the scope of representation, the major provisions of the agreement, including, but not limited to, the costs that would be incurred by the public school employer under the agreement for the current and subsequent fiscal years, shall be disclosed at a public meeting of the public school employer in a format established for this purpose by the Superintendent of Public Instruction."

Under section 3547.5, school districts must now publicly disclose the major provisions of all collective bargaining agreements before they enter into a written agreement. The purpose of this new legislation is to ensure that the public is aware of the costs associated with the major provisions of the tentative collective bargaining agreement before it becomes binding on the school district.

California Department of Education Management Advisory 92-01[1]

Government Code section 3547.5 requires the Superintendent of Public Instruction to establish a format for the information that is to be publicly disclosed. To this end, the California Department of Education released Management Advisory 92-01 on May 15, 1992. The Advisory specifies the minimum procedures, format, and information required to be disclosed under section 3547.5.

Commission Findings

In order for a statute, which is the subject of a test claim, to impose a reimbursable state mandated program, the statutory language (1) must direct or obligate an activity or task upon local governmental entities, and (2) the required activity or task must be new or it must create an increased or higher level of service over the former required level of service. To determine if a required activity is new or imposes a higher level of service, a comparison must be undertaken between the test claim legislation and the legal requirements in effect immediately prior to the enactment of the test claim legislation.[2] Finally, the newly required activity or increased level of service must be state mandated.[3]

The Commission found that immediately before Government Code section 3547.5 was enacted under Chapter 1231, Statutes of 1991, public school employers were under no obligation to

---

[1] California Department of Education Management Advisory 92-01 is referenced in Claimant's initial filing dated December 29, 1997.

[2] Both Keith Peterson and Carol Berg disagreed at the hearing regarding the appropriate measurement date. Carol Berg wanted this sentence stricken from the Statement of Decision, while Keith Peterson wished to lodge his formal objection to staff's use of the measurement date. However, both supported adoption of the Statement of Decision.

[3] *County of Los Angeles* v. *State of California* (1987) 43 Cal.3d 46, 56; *Carmel Valley Fire Protection Dist.* v. *State of California* (1987) 190 Cal.App.3d 521, 537; *Lucia Mar Unified School Dist.* v. *Honig* (1988) 44 Cal.3d 830, 835.

publicly report the major provisions of a collective bargaining agreement *after* discussion with an exclusive representative of an employee group prior to entering into a written agreement.

The Commission found that under prior law school districts were only required to publicly disclose all *initial* proposals for collective bargaining agreements.

The Commission found that Government Code section 3547.5, as added by Chapter 1231, Statutes of 1991, requires school districts to publicly disclose major provisions of a collective bargaining agreement *after* negotiations, but before this agreement becomes binding.

The Commission found that the California Department of Education issued its Management Advisory 92-01, dated May 15, 1992, to establish the public disclosure format for school district compliance with the test claim statute. The Commission found that the Advisory sets forth the minimum procedures, format, and information for school districts to disclose under the new public reporting requirements. Further, the Commission found that the Advisory constitutes an "executive order" under Government Code section 17516[4] and is therefore a part of the test claim.

Conclusion

The Commission concludes that that Government Code section 3547.5, as added by Chapter 1213, Statutes of 1991, and the California Department of Education Management Advisory 92-01, impose a new program or higher level of service upon local school districts and therefore are reimbursable under section 6, article XIII B of the California Constitution and Government Code section 17514.

Further, the Commission concludes that the parameters and guidelines should allow reimbursement for compliance with the minimum procedures, format, and information specified in the California Department of Education's Management Advisory 92-01, as applicable and appropriate under the test claim statute.

[4] Government Code section 17516 provides in relevant part: "Executive order means any order, plan, requirement, rule, or regulation issued by any of the following: (a) The Governor. (b) Any officer or official serving at the pleasure of the Governor. (c) *Any agency, department, board, or commission of state government.*" (Emphasis added.)

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM:

Government Code Sections 3543, 3546, and 3546.3;

Statutes 1980, Chapter 816; Statutes 2000, Chapter 893; Statutes 2001, Chapter 805;

California Code of Regulations, Title 8, Sections 34030 and 34055

Filed on June 27, 2001, and Amended on May 15, 2002, by Clovis Unified School District, Claimant.

Case No.: 00-TC-17/01-TC-14

Agency Fee Arrangements

STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7

(*Adopted on December 9, 2005*)

STATEMENT OF DECISION

The attached Statement of Decision of the Commission on State Mandates is hereby adopted in the above-entitled matter.

PAULA HIGASHI, Executive Director

Date

BEFORE THE
COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

IN RE TEST CLAIM: Government Code Sections 3543, 3546, and 3546.3; Statutes 1980, Chapter 816; Statutes 2000, Chapter 893; Statutes 2001, Chapter 805; California Code of Regulations, Title 8, Sections 34030 and 34055 Filed on June 27, 2001, and Amended on May 15, 2002, by Clovis Unified School District, Claimant.	Case No.: 00-TC-17/01-TC-14 *Agency Fee Arrangements* STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7 (*Adopted on December 9, 2005*)

STATEMENT OF DECISION

The Commission on State Mandates ("Commission") heard and decided this test claim during a regularly scheduled hearing on December 9, 2005. Mr. Keith Petersen appeared on behalf of Clovis Unified School District, Claimant. Ms. Susan Geanacou, Senior Staff Counsel, appeared for the Department of Finance.

The law applicable to the Commission's determination of a reimbursable state-mandated program is article XIII B, section 6 of the California Constitution, Government Code section 17500 et seq., and related case law.

The Commission adopted the staff analysis to approve this test claim at the hearing by a vote of 6 to 0.

The Commission finds that Government Code section 3546, subdivisions (a) and (f), and California Code of Regulations, title 8, sections 34030, subdivision (a), and 34055, subdivision (a), impose a new program or higher level of service for K-14 school districts within the meaning of article XIII B, section 6 of the California Constitution, and impose costs mandated by the state pursuant to Government Code section 17514, for the following new activities:

- Upon receiving notice from the exclusive representative of a classified public school employee who is in a unit for which an exclusive representative has been selected, the employer shall deduct the amount of the fair share service fee authorized by this section from the wages and salary of the employee and pay that amount to the employee organization. (Gov. Code, § 3546, subd. (a).)

- School district employers of a public school employee shall provide the exclusive representative of a public employee with the home address of each member of a bargaining unit. (Gov. Code, § 3546, subd. (f).)
- Within 20 days following the filing of the petition to rescind or reinstate an organizational security arrangement, the school district employer shall file with the regional office of PERB 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. (Cal. Code Regs., tit. 8, §§ 34030, subd. (a), and 34055, subd. (a).)

BACKGROUND

The *Agency Fee Arrangements* test claim, filed by Clovis Unified School District, addresses issues within the collective bargaining process and employer-employee relations in California's K-14 public school systems. Specifically, the test claim legislation focuses on the payment of fees by non-union member (or "fair share") employees to exclusive representative organizations. In 1975, the Legislature enacted the Educational Employment Relations Act (EERA).[1] In doing so, the Legislature sought to "promote the improvement of personnel management and employer-employee relations within the public school systems in the State of California."[2] This policy aimed at furthering the public interest in "maintaining the continuity and quality of educational services."[3]

The EERA imposes on school districts the duty to "meet and negotiate" with an employee organization selected as the exclusive representative of an employee bargaining unit on matters within the scope of representation.[4] The scope of representation is limited to "matters relating to wages, hours of employment, and other terms and conditions of employment."[5] The EERA explicitly includes "organizational security" within the scope of representation.[6]

---

[1] Statutes 1975, chapter 961. Pursuant to Government Code section 3541.3, subdivision (g), the Public Employment Relations Board (PERB) is vested with the authority to "adopt... rules and regulations to carry out the provisions and effectuate the purposes and policies" of the EERA. (Government Code sections 3540 et seq.). Accordingly, in Code of Regulations, title 8, section 32001, subdivision (c), PERB has declared that "'[s]chool district' as used in the EERA means a school district of any kind or class, including any public community college district, within the state").

[2] Government Code section 3540.

[3] *San Diego Teachers Assn. v. Superior Court* (1979) 24 Cal.3d 1, 11.

[4] Government Code section 3543.3.

[5] Government Code section 3543.2.

[6] Former Government Code section 3546 provided that "organizational security... shall be within the scope of representation." (Stats. 1975, ch. 961, § 2). In 2000, former Government Code section 3546 was repealed (Stats. 2000, ch. 893), but similar language was added via the same bill to Government Code section 3540.1, subdivision (i), which now provides that "

Government Code section 3540.1, subdivision (i), provides two definitions for "organizational security." The first describes organizational security as:

> [a]n arrangement pursuant to which a public school employee may decide whether or not to join an employee organization, but which requires him or her, as a condition of continued employment, if he or she does join, to maintain his or her membership in good standing for the duration of the written agreement...

Thus, such an arrangement would provide that once an employee organization has been selected by an employee bargaining unit as exclusive representative, each employee has the option of either joining or not joining the employee organization.

Alternatively, the second definition describes organizational security as:

> [a]n arrangement that requires an employee, as a condition of continued employment, either to join the recognized or certified 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 the organization for the duration of the agreement...

This type of organizational security arrangement dictates that an employee in a bargaining unit for which an employee organization has been selected as exclusive representative *must* either (a) join the employee organization, or (b) pay such organization a service fee or agency fee arrangement. The EERA explicitly declares that the "employee organization recognized or certified as the exclusive representative for the purpose of meeting and negotiating shall fairly represent each and every employee in the appropriate unit."[7]

Under prior law, organizational security arrangements were subject to the collective bargaining process. Statutes 2000, chapter 893 created a statutory organizational security arrangement -- removing the basic issue from the bargaining process.

Claimant's Position

Claimant, Clovis Unified School District, filed a test claim on June 27, 2001, alleging Government Code sections 3543 and 3546, as amended by Statutes 2000, chapter 893, impose reimbursable state-mandated activities on K-14 school districts for activities including establishing and implementing payroll procedures for collecting fair share service fees, and remitting the fees to the certified employee organization. Claimant alleges a new activity to: "Draft, approve and distribute an appropriate and neutral notice to existing non-member employees and new employees, which explains the additional payroll deduction for 'fair share services fees' for non-member employees of a certified employee organization."

Additionally, claimant alleges that Government Code section 3546.3 as added by Statutes 1980, chapter 816, requires school districts to "Establish and implement procedures to determine which employees claim a conscientious objection to the withholding of 'fair share services fees,'" and

---

"'Organizational security' is within the scope of representation... ."

[7] Government Code section 3544.9.

establish and implement payroll procedures to prevent automatic deductions from the wages of such conscientious objectors.

Claimant also alleges the California Code of Regulations, title 8, sections 34030 and 34055, requires K-14 school districts, within 20 days of a filed petition to rescind or reinstate the collective bargaining agreement, file with the regional office of the Public Employment Relations Board (PERB) an alphabetical list containing the names and job titles or classifications of the persons employed in the unit as of the last date of the payroll period immediately preceding the date the petition, and establish new payroll procedures, as needed.

On May 15, 2002, claimant filed a test claim amendment alleging the following reimbursable state-mandated activities from amendments by Statutes 2001, chapter 805:

- Establish procedures and thereafter implement such procedures to verify, at least annually, that payments to nonreligious, nonlabor charitable organizations have been made by employees who have claimed conscientious objections pursuant to Government Code section 3546.3.
- Adjust payroll withholdings for rebates or withholding reductions for that portion of fair share service fees that are not germane to the employee organization function as the exclusive bargaining representative when so determined pursuant to regulations adopted by PERB, pursuant to Government Code section 3546, subdivision (a).
- Take any and all necessary actions, when necessary, to recover reasonable legal fees, legal costs and settlement or judgment liabilities from the recognized employee organization, arising from any court or administrative action relating to the school district's compliance with the section pursuant to Government Code section 3546, subdivision (e);
- Provide the exclusive representative of a public school employee a list of home addresses for each employee of a bargaining unit, regardless of when the employees commenced employment, and periodically update and correct the list to reflect changes of address, additions for new employees and deletions of former employees, pursuant to Government Code section 3546, subdivision (f).

Claimant's complete, detailed allegations are found in the Amendment to the Test Claim Filing, pages five through nine, received May 15, 2002.

Claimant filed comments on the draft the Commission analysis on October 31, 2005. The substantive comments will be summarized in the analysis below.

Department of Finance's Position

Department of Finance filed comments on August 3, 2001, and July 30, 2002, addressing the allegations stated in the test claim and subsequent amendment. Regarding claimant's allegations that the test claim legislation mandates a variety of activities involving the establishment and maintenance of payroll procedures to account for deducting fair share service fees and transmitting those fees to the employee organization, Department of Finance contends that public school employers who did not negotiate and implement organizational security arrangements prior to the enactment of Statutes 2000, chapter 893 are justified in claiming mandated costs.

However, those employers who did negotiate and implement organizational security arrangements prior to the enactment of Statutes 2000, chapter 893 are not justified in making similar claims for reimbursement. Department of Finance argues that those employers who did negotiate and implement such arrangements prior to the 2000 amendments "would presumably have already established" such payroll procedures and those employers should not "be reimbursed for costs they voluntarily incurred."

Department of Finance has similar arguments regarding claimant's allegations on costs incurred in complying with PERB's regulations in the event a petition to rescind or reinstate an organizational security arrangement is filed.

Regarding claimant's allegation that it must draft notices explaining the fee deductions to employees paying fair share service fees, Department of Finance argues that no such mandate exists. Department of Finance relies on California Code of Regulations, title 8, section 32992 which provides that each employee "required to pay an agency fee shall receive written notice from the exclusive representative" regarding the fee deduction.

Likewise, responding to claimant's allegation that it must incur costs in taking the necessary actions in recovering legal fees from an exclusive representative under Government Code section 3546, subdivision (e), Department of Finance asserts that the subdivision, by its plain language, does not impose any duties on the public school employer.

Department of Finance's other comments and arguments will be addressed in the analysis below, where pertinent.[8]

---

[8] Claimant argues that the Department of Finance's comments are "incompetent" and should be stricken from the record since they do not comply with section 1183.02, subdivision (d), of the Commission's regulations. That regulation requires written responses to be signed at the end of the document, under penalty of perjury by an authorized representative of the state agency, with the declaration that it is true and complete to the best of the representative's personal knowledge, information, or belief. The claimant contends that the Department of Finance's response "is signed without certification" and the declaration attached to the response "simply stipulate[s] to the accuracy of the citations of law in the test claim." (Claimant's comments to draft the Commission analysis, page 1-2.)

Determining whether a statute or executive order constitutes a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution is a pure question of law. (*City of Jose, supra*, 45 Cal.App.4th at p. 1817; *County of San Diego, supra*, 15 Cal.4th at p. 109). Thus, any factual allegations raised by a party, including the Department of Finance, regarding how a program is implemented is not relied upon by the Commission at the test claim phase when recommending whether an entity is entitled to reimbursement under article XIII B, section 6. The Department's response contains comments on whether the Commission should approve this test claim and is, therefore, not stricken from the administrative record.

California Community Colleges Chancellor's Office Position

The California Community Colleges Chancellor's Office ("Chancellor's Office") filed comments regarding this test claim on July 30, 2001. The Chancellor's Office begins by noting that community colleges are subject to PERB's jurisdiction. Secondly, looking to the statutes regarding organizational security, the Chancellor's Office believes that "the provisions of Government Code [sections] 3540.1 and 3546 and the related implementing regulations in the Code of Regulations impose a mandate of specific tasks for community college district the Commission."

The Chancellor's Office concludes by stating that no funds have been appropriated for costs incurred in performing these activities, and that none of the provisions of Government Code section 17556 apply to community colleges "complying with the mandate."

FINDINGS

The courts have found that article XIII B, section 6, of the California Constitution[9] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[10] "Its purpose is to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[11] A test claim statute or executive order may impose a reimbursable state-mandated program if it orders or commands a local agency or school district to engage in an activity or task.[12] In addition, the required activity or task must be new, constituting a "new program," or it must create a "higher level of service" over the previously required level of service.[13]

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

---

[9] Article XIII B, section 6, subdivision (a), provides: (a) 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.

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

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

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

[13] *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 Dist. v. Honig* (1988) 44 Cal.3d 830, 835 *(Lucia Mar)*.

policy, but does not apply generally to all residents and entities in the state.[14] 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.[15] A "higher level of service" occurs when the new "requirements were intended to provide an enhanced service to the public."[16]

Finally, the newly required activity or increased level of service must impose costs mandated by the state.[17]

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.[18] 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."[19]

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

Government Code Section 3543:

Government Code section 3543 was rewritten by Statutes 2000, chapter 893. Statutes 2001, chapter 805 amended one sentence, as indicated by underline below:

> (a) Public school employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations. If the exclusive representative of a unit provides notification, as specified by subdivision (a) of Section 3546, public school employees who are in a unit for which an exclusive representative has been selected, shall be required, as a condition of continued employment, to join the recognized employee organization or to pay the organization a fair share services fee, as required by Section 3546. If a majority

---

[14] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 874-875 (reaffirming the test set out in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; see also *Lucia Mar, supra,* 44 Cal.3d 830, 835.)

[15] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 878; *Lucia Mar, supra,* 44 Cal.3d 830, 835.

[16] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 878.

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

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

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

of the members of a bargaining unit rescind that arrangement, either of the following options shall be applicable:

(1) The recognized employee organization may petition for the reinstatement of the arrangement described in subdivision (a) of Section 3546 pursuant to the procedures in paragraph (2) of subdivision (d) of Section 3546.

(2) The employees may negotiate either of the two forms of organizational security described in subdivision (i) of Section 3540.1.

(b) Any employee may at any time present grievances to his or her employer, and have such grievances adjusted, without the intervention of the exclusive representative, as long as the adjustment is reached prior to arbitration pursuant to Sections 3548.5, 3548.6, 3548.7, and 3548.8 and the adjustment is not inconsistent with the terms of a written agreement then in effect; provided that the public school employer shall not agree to a resolution of the grievance until the exclusive representative has received a copy of the grievance and the proposed resolution and has been given the opportunity to file a response.

Before the amendment in 2000, prior law provided: "Public school employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations. Public school employees shall also have the right to refuse to join or participate in the activities of employee organizations and shall have the right to represent themselves individually in their employment relations with the public school employer, except that once the employees in an appropriate unit have selected an exclusive representative and it has been recognized pursuant to Section 3544.1 or certified pursuant to Section 3544.7, no employee in that unit may meet and negotiate with the public school employer." Current subdivision (b) is identical to prior law.

In order to be subject to article XIII B, section 6, of the California Constitution, the test claim legislation must impose a state-mandated activity on a local agency or school district.[20] Courts have adopted a "strict construction" interpretation of article XIII B, section 6.[21] Consistent with this narrow interpretation, the term "mandate" has been construed according to its commonly understood meaning as an "order" or "command."[22] Thus, the test claim legislation must require a local government entity to perform an activity in order to fall within the scope of article XIII B, section 6.

According to the well-settled rules of statutory construction, an examination of a statute claimed to constitute a reimbursable state mandate begins with the plain language of the statute, and "where the language is clear there is no room for interpretation."[23] Where the Legislature has not found it appropriate to include express requirements in a statute, it is inappropriate for a court

---

[20] *Kern High School Dist., supra*, 30 Cal.4th 727, 740.

[21] *City of San Jose, supra*, 45 Cal.App.4th 1802, 1816-17.

[22] *Long Beach Unified School Dist., supra*, 225 Cal.App.3d 155, 174.

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

to write such requirements into the statute.[24] The courts have noted that "[w]e cannot... read a mandate into language which is plainly discretionary."[25]

Beginning with the plain language of section 3543, subdivision (a), there is no activity imposed on the public school *employer*. While public school *employees* "shall be required" to either join the employee organization selected by the unit as exclusive representative or to pay such organization a service fee, there is nothing in the language of section 3543, subdivision (a), imposing upon the public school employer the obligation to perform any activities.

Government Code section 3543, subdivision (a), by its plain language, fails to impose any activities on school districts. Section 3543, subdivision (b), contains the same language found in former section 3543 and therefore is not new, nor does the plain language of subdivision (b) impose any duties upon school districts. Accordingly, the Commission finds that Government Code section 3543 is not subject to article XIII B, section 6, of the California Constitution.

Government Code Section 3546.3:

Government Code section 3546.3 was added by Statutes 1980, chapter 816, as follows:

> Notwithstanding subdivision (i) of Section 3540.1, Section 3546, or any other provision of this chapter, any employee who is a member of a religious body whose traditional tenets or teachings include objections to joining or financially supporting employee organizations shall not be required to join, maintain membership in, or financially support any employee organization as a condition of employment; except that such employee may be required, in lieu of a service fee, to pay sums equal to such service fee either to a nonreligious, nonlabor organization, charitable fund exempt from taxation under Section 501(c) (3) of Title 26 of the Internal Revenue Code, chosen by such employee from a list of at least three such funds, designated in the organizational security arrangement, or if the arrangement fails to designate such funds, then to any such fund chosen by the employee. Either the employee organization or the public school employer may require that proof of such payments be made on an annual basis to the public school employer as a condition of continued exemption from the requirement of financial support to the recognized employee organization. If such employee who holds conscientious objections pursuant to this section requests the employee organization to use the grievance procedure or arbitration procedure on the employee's behalf, the employee organization is authorized to charge the employee for the reasonable cost of using such procedure.

Claimant asserts that section 3546.3 requires school districts to establish and maintain procedures for determining which employees may claim a conscientious objection, establish procedures to ensure that fair share service fee deductions are not made from the wages of those employees claiming such objections, and to establish procedures to ensure, at least annually, that those employees are making payments to charitable organizations in lieu of service fee deductions. Claimant asserts that if section 3546.3 was determined to not impose any state-

---

[24] *Whitcomb Hotel, Inc. v. California Employment Commission* (1944) 24 Cal.App.2d 753, 757.

[25] *City of San Jose, supra*, 45 Cal.App.4th 1802, 1816.

mandated activities on school districts, then it must also be interpreted that "there is no requirement for religious objectors to pay any sum of money to either their employee organization or the specified alternative approved organizations."[26]

Department of Finance, in its August 3, 2001 comments, argues that school districts that negotiated and implemented organizational security arrangements prior to the enactment of the 2000 amendments are not justified in claiming mandated costs, but that school districts that did not negotiate such arrangements are justified in claiming mandated costs. Department of Finance's position is grounded in the discretionary nature of the collective bargaining process, and that employers who negotiated organizational security arrangements prior to the enactment of the 2000 amendments should not "be reimbursed for costs they voluntarily incurred."[27]

For the reasons below, the Commission finds that Government Code section 3546.3 is not subject to article XIII B, section 6, of the California Constitution because section 3546.3 does not impose any state-mandated activities on school districts.

In order to be subject to article XIII B, section 6, of the California Constitution, the test claim legislation must impose a state-mandated activity on a local agency or school district.[28] Courts have adopted a "strict construction" interpretation of article XIII B, section 6.[29] Consistent with this narrow interpretation, the term "mandate" has been construed according to its commonly understood meaning as an "order" or "command."[30] Thus, the test claim legislation must require a local government entity to perform an activity in order to fall within the scope of article XIII B, section 6.

According to the well-settled rules of statutory construction, an examination of a statute claimed to constitute a reimbursable state mandate begins with the plain language of the statute, and "where the language is clear there is no room for interpretation."[31] Where the Legislature has not found it appropriate to include express requirements in a statute, it is inappropriate for a court to write such requirements into the statute.[32] The courts have noted that "[w]e cannot... read a mandate into language which is plainly discretionary."[33]

Just as discussed above regarding Government Code section 3543, the plain language of Government Code section 3546.3 is also discretionary. Section 3546.3 states only that an employee holding a conscientious objection to joining or financially supporting an employee organization "*may* be required" to make payments to a nonreligious, nonlabor, charitable organization in lieu of paying a fair share service fee to such organization. (Emphasis added).

---

[26] Claimant's comments to draft the Commission analysis, page 3.

[27] Department of Finance, August 3, 2001 Comments, page 3.

[28] *Kern High School Dist., supra*, 30 Cal.4th 727, 740.

[29] *City of San Jose, supra*, 45 Cal.App.4th 1802, 1816-17.

[30] *Long Beach Unified School Dist., supra*, 225 Cal.App.3d 155, 174.

[31] *City of Merced, supra*, 153 Cal.App.3d 777.

[32] *Whitcomb Hotel, Inc., supra*, 24 Cal.App.2d 753, 757.

[33] *City of San Jose, supra*, 45 Cal.App.4th 1802, 1816.

Section 3546.3 does not impose any obligation on school districts. Section 3546.3 provides that "*[e]ither* the employee organization *or* the public school employer *may* require that proof of such payments be made on an annual basis." (Emphasis added). Section 3546.3, by its plain meaning, does not require or command school districts to perform an activity. Accordingly, the Commission finds that Government Code section 3546.3 is not subject to article XIII B, section 6, of the California Constitution.

Remaining Test Claim Legislation:

In order for the remaining test claim legislation to be subject to article XIII B, section 6 of the California Constitution, the legislation must constitute a "program." Government Code section 3546 provides, in part, that "the employer shall deduct the amount of the fair share service fee authorized by this section from the wages and salary of the employee and pay that amount to the employee organization," and that "[t]he employer of a public school employee shall provide the exclusive representative of a public employee with the home address of each member of a bargaining unit.... ." California Code of Regulations, title 8, sections 34030 and 34055 require that a school district employer 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 organizational security arrangement.

In *County of Los Angeles v. State of California*, the California Supreme Court defined the word "program" within the meaning of article XIII B, section 6 as one 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.[34] The court has held that only one of these findings is necessary.[35]

Department of Finance asserts that Government Code section 3546, subdivision (a), as it relates to rebates and reductions to the fair share service fee do not constitute a program because it neither provides a service to the public nor qualifies as a function unique to governmental entities. Department of Finance claims that the United States Supreme Court's holding in *Communication Workers v. Beck* (1988) 487 U.S. 735, which addresses fair share service fees, applies to both private and public employees. The Court in *Beck* interpreted and applied the provisions of the National Labor Relations Act (NLRA). However, the NLRA by its own terms expressly excludes public employees from its coverage. Section 2, subdivision (2), of the NLRA (29 U.S.C. § 152(2)) provides, in pertinent part, that "[t]he term 'employer' ... shall not include... any State or political subdivision thereof..." Furthermore, section 2, subdivision (3), of the NLRA (29 U.S.C. § 152(3)) provides that "[t]he term 'employee' ... shall not include any individual employed... by any... person who is not an employer as herein defined."[36]

---

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

[35] *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, 537.

[36] See *Carmen v. San Francisco Unified School District* (1997) 982 F.Supp. 1396, 1409 (concluding that "school districts are considered 'political subdivisions' of the State of California within the meaning of 29 U.S.C. § 152(2), and therefore are exempt from coverage under the NLRA").

The Commission finds that Government Code section 3546 and California Code of Regulations, title 8, sections 34030 and 34055, impose a program within the meaning of article XIII B, section 6 of the California Constitution under the second test, to the extent the test claim legislation requires school districts to engage in administrative activities solely applicable to public school administration. The test claim legislation imposes unique requirements upon school districts that do not apply generally to all residents and entities of the state.

Accordingly, the Commission finds that the remaining test claim legislation constitutes a "program" and, thus, may be subject to subvention pursuant to article XIII B, section 6 of the California Constitution if the legislation also imposes a new program or higher level of service, and costs mandated by the state.

Issue 2: Does the remaining test claim legislation impose a new program or higher level of service on school districts within the meaning of article XIII B, section 6 of the California Constitution, and impose "costs mandated by the state" within the meaning of Government Code sections 17514 and 17556?

Test claim legislation imposes a new program or higher level of service within an existing program when it compels a local agency or school district to perform activities not previously required.[37] The courts have defined a "higher level of service" in conjunction with the phrase "new program" to give the subvention requirement of article XIII B, section 6 meaning. Accordingly, "it is apparent that the subvention requirement for increased or higher level of service is directed to state-mandated increases in the services provided by local agencies in existing programs."[38] A statute or executive order imposes a reimbursable "higher level of service" when the statute or executive order, as compared to the legal requirements in effect immediately before the enactment of the test claim legislation, increases the actual level of governmental service provided in the existing program.[39]

Government Code Section 3546:

Government Code section 3546, as enacted by Statutes 2000, chapter 893, and amended by Statutes 2001, chapter 805,[40] follows:

> (a) Notwithstanding any other provision of law, upon receiving notice from the exclusive representative of a public school employee who is in a unit for which an exclusive representative has been selected pursuant to this chapter, *the employer shall deduct the amount of the fair share service fee authorized by this section from the wages and salary of the employee and pay that amount to the employee organization.* Thereafter, the employee shall, as a condition of continued employment, be required either to join the recognized employee organization or

---

[37] *Lucia Mar Unified School Dist., supra,* 44 Cal.3d 830, 836.

[38] *County of Los Angeles, supra,* 43 Cal.3d 46, 56; *San Diego Unified School District, supra,* 33 Cal.4th 859, 874.

[39] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 878; *Lucia Mar, supra,* 44 Cal.3d 830, 835.

[40] Reworded subdivision (a), and added subdivisions (e) and (f).

pay the fair share service fee. The amount of the fee shall not exceed the dues that are payable by members of the employee organization, and shall cover the cost of negotiation, contract administration, and other activities of the employee organization that are germane to its functions as the exclusive bargaining representative. Agency fee payers shall have the right, pursuant to regulations adopted by the Public Employment Relations Board, to receive a rebate or fee reduction upon request, of that portion of their fee that is not devoted to the cost of negotiations, contract administration, and other activities of the employee organization that are germane to its function as the exclusive bargaining representative.

(b) The costs covered by the fee under this section may include, but shall not necessarily be limited to, the cost of lobbying activities designed to foster collective bargaining negotiations and contract administration, or to secure for the represented employees advantages in wages, hours, and other conditions of employment in addition to those secured through meeting and negotiating with the employer.

(c) The arrangement described in subdivision (a) shall remain in effect unless it is rescinded pursuant to subdivision (d). The employer shall remain neutral, and shall not participate in any election conducted under this section unless required to do so by the board.

(d)(1) The arrangement described in subdivision (a) may be rescinded by a majority vote of all the employees in the negotiating unit subject to that arrangement, if a request for a vote is supported by a petition containing 30 percent of the employees in the negotiating unit, the signatures are obtained in one academic year. There shall not be more than one vote taken during the term of any collective bargaining agreement in effect on or after January 1, 2001.

(2) If the arrangement described in subdivision (a) is rescinded pursuant to paragraph (1), a majority of all employees in the negotiating unit may request that the arrangement be reinstated. That request shall be submitted to the board along with a petition containing the signatures of at least 30 percent of the employees in the negotiating unit. The vote shall be conducted at the worksite by secret ballot, and shall be conducted no sooner than one year after the rescission of the arrangement under this subdivision.

(3) If the board determines that the appropriate number of signatures have been collected, it shall conduct the vote to rescind or reinstate in a manner that it shall prescribe in accordance with this subdivision.

(4) The cost of conducting an election under this subdivision to reinstate the organizational security arrangement shall be borne by the petitioning party and the cost of conducting an election to rescind the arrangement shall be borne by the board.

(e) The recognized employee organization shall indemnify and hold the public school employer harmless against any reasonable legal fees, legal costs, and settlement or judgment liability arising from any court or administrative action

relating to the school district's compliance with this section. The recognized employee organization shall have the exclusive right to determine whether any such action or proceeding shall or shall not be compromised, resisted, defended, tried, or appealed. This indemnification and hold harmless duty shall not apply to actions related to compliance with this section brought by the exclusive representative of district employees against the public school employer.

(f) *The employer of a public school employee shall* provide the exclusive representative of a public employee with the home address of each member of a bargaining unit, regardless of when that employee commences employment, so that the exclusive representative can comply with the notification requirements set forth by the United States Supreme Court in *Chicago Teachers Union v. Hudson* (1986) 89 L.Ed. 2d 232. (Emphasis added.)

The test claim allegations regarding Government Code section 3546 will be analyzed in order of subdivision below.

Government Code Section 3546, Subdivision (a):

Claimant alleges that subdivision (a) of Government Code section 3546 constitutes a reimbursable state mandate in two respects by requiring school districts to (1) establish, implement, maintain and update payroll procedures to determine those employees from whose paychecks service fees must be deducted, and to make such deductions and transmit those fees to the employee organization; (2) "adjust payroll withholdings for rebates or withholding reductions" pursuant to the rebate or fee reduction provision of subdivision (a); and (3) provide notice to employees explaining the payroll deduction for the fair share service fees.

Department of Finance agrees that subdivision (a) requires school districts to deduct service fees from the wages of its employees, and then transmit those fees to the employee organization. However, Department of Finance also argues that those school districts that did establish organizational security arrangements prior to the enactment of the test claim legislation are not justified in claiming any mandated costs because those districts voluntarily chose to incur such costs, and so nothing new is mandated upon them by the test claim legislation. The Commission disagrees. Government Code section 17565 clearly provides that: "If a local agency or a school district, at its option, has been incurring costs which are subsequently mandated by the state, the state shall reimburse the local agency or school district for those costs incurred after the operative date of the mandate."

Department of Finance also argues that the rebate and fee reduction provision imposes no activities on school districts. Department of Finance asserts that PERB's regulations squarely place the burden of issuing fee rebates to employees on the employee organization.

Under prior law, a school district could voluntarily enter into organizational security arrangements with an employee organization. Organizational security has been within the scope of representation since the EERA's enactment.[41] This results in a duty upon the school district to

---

[41] Former Government Code section 3546 (added by Stats. 1975, ch. 961, and repealed by Stats. 2000, ch. 893); Gov. Code, § 3540.1, subd. (i) (as amended by Stats. 2000, ch. 893).

meet and negotiate in good faith with the exclusive representative upon request.[42] Prior to the 2000 amendments, the EERA, while imposing a duty to bargain, did not compel the parties to reach agreement on organizational security. Thus, any agreement ultimately reached through the bargaining process was entered into voluntarily by both sides.

Government Code section 3546, subdivision (a), requires what was once voluntary. Section 3546, subdivision (a), bypasses the discretion of a school district, and instead compels the district to institute an organizational security arrangement "upon receiving notice from the exclusive representative." This new requirement that school districts shall implement organizational security arrangements requires school districts to make service fee deductions from the wages of employees, and consequently transmit those fees to the employee organization. Such fee deductions and payments to the employee organization were never required immediately preceding the enactment of the test claim legislation, and thus impose a new program or higher level of service on school districts.

In addition, under prior law, certificated and classified employees could pay the service fees directly to the certificated or recognized employee organization in lieu of having the school district deduct the service fees from the employee's salary or wage order.[43] Claimant argues that Government Code section 3546, subdivision (a), expressly states that its terms apply "notwithstanding any other provision of law." Thus, claimant argues that the employee's right to pay the service fee directly to the employee organization is "nullified." Claimant contends the school districts are now required to make the service fee deductions from the wages of all employees that work in a unit for which an exclusive representative has been selected and transmit those fees to the employee organization.[44]

The Commission agrees with claimant. Government Code section 3546, subdivision (a), states the following:

> *Notwithstanding any other provision of law*, upon receiving notice from the exclusive representative of a public school employee who is in a unit for which an exclusive representative has been selected pursuant to this chapter, the employer shall deduct the amount of the fair share service fee authorized by this section from the wages and salary of the employee and pay that amount to the employee organization. (Emphasis added.)

The phrase "notwithstanding any other provision of law" has expressly been interpreted by the courts as "an express legislative intent to have the specific statute control despite the existence of other law which might otherwise govern."[45] Thus, any other provision of law that is contrary or inconsistent with the statute "is subordinated to the latter provision" containing the "notwithstanding" language.[46] In this case, the sections in the Education Code allowing the

---

[42] Government Code section 3543.3.

[43] Education Code sections 45061, 45168, 87834, and 88167.

[44] Claimant's response to draft the Commission analysis, page 4.

[45] *People v. Tillman* (1999) 73 Cal.App.4th 771, 784-785.

[46] *Id.* at page 786.

employee to directly pay the service fee to the employee organization is inconsistent with the test claim statute that requires, without exception, the employer to deduct the service fee from the wages of the employee that works in a unit for which an exclusive representative has been selected. Accordingly, the Commission finds that Government Code section 3456, subdivision (a), imposes a new program or higher level of service by requiring school districts to make service fee deductions from the wages of all certificated and classified employees that work in a unit for which an exclusive representative has been selected, and transmit those fees to the employee organization.

However, in order to be subject to the subvention requirement of article XIII B, section 6, of the California Constitution, the test claim legislation must also impose upon a local agency or school district "costs mandated by the state." Government Code section 17514 defines "costs mandated by the state" to mean "any increased costs which a local agency or school district is required to incur..."

Government Code section 17556 lists several exceptions which preclude the Commission from finding costs mandated by the state. Specifically, "The commission shall not find costs mandated by the state, as defined in Section 17514, in any claim submitted by a local agency or school district, if, after a hearing, the commission finds that: ... (d) The local agency or school district has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service."

Pursuant to Education Code sections 45061 and 87834, K-14 school districts retain the authority to levy the charges necessary to cover any costs incurred in making service fee deductions from the wages of certificated employees choosing not to join the employee organization. Education Code section 45061 applies to elementary and secondary districts, while Education Code section 87834 is for community colleges. Education Code section 45061 follows:

> The governing board of each school district when drawing an order for the salary or wage payment due to a certificated employee of the district shall, with or without charge, reduce the order for the payment of service fees to the certified or recognized organization as required by an organizational security arrangement between the exclusive representative and a public school employer as provided under Chapter 10.7 (commencing with Section 3540) of Division 4 of Title 1 of the Government Code. However, the organizational security arrangement shall provide that any employee may pay service fees directly to the certified or recognized employee organization in lieu of having such service fees deducted from the salary or wage order.
>
> If the employees of a district do not authorize the board to make a deduction to pay their pro rata share of the costs of making deductions for the payment of service fees to the certified or recognized organization, the board shall deduct from the amount transmitted to the organization on whose account the payments were deducted the actual costs, if any, of making the deduction. No charge shall exceed the actual cost to the district of the deduction. These actual costs shall be determined by the board and shall include startup and ongoing costs.

Education Code section 87834 is nearly identical, the only difference being that section 87834 substitutes the words "community college district" for the words "school district" in the first sentence of section 45061. As is evident from the plain language of sections 45061 and 87834,

school districts may deduct service fees from the wages of certificated employees "*with or without charge.*" (Emphasis added).

The language of Government Code section 17556, subdivision (d), is clear and unambiguous. In *Connell v. Superior Court* (1997) 59 Cal.App.4th 382, 401, the court found that "the plain language of the statute precludes reimbursement where the local agency has the authority, i.e., the right or the power, to levy fees sufficient to cover the costs of the state-mandated program." In making such a determination, the court explicitly rejected the argument that the term "authority" should be construed as meaning "a practical ability in light of surrounding economic circumstances."[47] Accordingly, the focus is not whether a local agency or school district *chooses* to exercise an authority to levy service charges or fees, but rather whether such authority exists at all. Section 17556, subdivision (d), explicitly declares that if the local agency or school district "has the authority" to assess fees, then the commission shall be precluded from finding "costs mandated by the state." Here, school districts do possess such authority.

According to the Education Code sections, "No charge shall exceed the actual cost to the district of the deduction," but the costs for which the governing board is authorized to assess charges "shall be determined by the board and shall include startup and ongoing costs." Thus, the school district may assess charges for costs it must incur in establishing, maintaining, and adjusting its service fee deduction procedures, in addition to transmitting those fees to the employee organization.

Education Code sections 45061 and 87834 provide school districts with "the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program," within the meaning of Government Code section 17556, subdivision (d). Accordingly, the Commission finds that Government Code section 3546, subdivision (a), does not constitute a reimbursable state mandate because the test claim legislation does not impose "costs mandated by the state" as to activities regarding certificated employees.

This same fee authority does not apply for classified employees. Subdivision (b) of both Education Code sections 45168 and 88167 (for K-12 districts and community college districts, respectively), provide:

> The governing board of each [ ] district, when drawing an order for the salary or wage payment due to a classified employee of the district may, *without charge*, reduce the order … for the payment of service fees to the certified or recognized organization as required in an organizational security arrangement between the exclusive representative and a [ ] district employer as provided under Chapter 10.7 (commencing with Section 3540) of Division 4 of Title 1 of the Government Code. [Emphasis added.]

Thus, the Commission finds that Government Code section 3546, subdivision (a) imposes a new program or higher level of service upon school districts within the meaning of article XIII B, section 6 of the California Constitution, and imposes costs mandated by the state pursuant to Government Code section 17514, for the following new activity:

---

[47] *Ibid.*

- Upon receiving notice from the exclusive representative of a classified public school employee who is in a unit for which an exclusive representative has been selected, the employer shall deduct the amount of the fair share service fee authorized by this section from the wages and salary of the employee and pay that amount to the employee organization.

This activity does not apply for certificated employees; fee authority is available pursuant to Education Code sections 45061 and 87834.

Claimant further alleges that Government Code section 3546, subdivision (a), requires school districts to make payroll adjustments for service fee deductions to account for fee reductions or rebates to which the fee-paying employees may become entitled. Claimant alleges that this activity is mandated since school districts are required to report accurate payroll information to their employees and the state and federal governments.[48]

Government Code section 3546, subdivision (a), recognizes the right of employees paying fair share service fees "to receive a rebate or fee reduction upon request, of that portion of their fee" determined to be beyond the permissible scope of the employee organization's role as exclusive bargaining representative. To implement these provisions, PERB regulations require the exclusive representative to provide annual notice to nonmembers that are required to pay the fair share service fee of the amount of the service fee deduction and the calculation used to arrive at the amount of the fee.[49] If the employee disagrees with the amount of the service fee deduction, the employee may file an agency fee objection and the exclusive representative is required to administer an agency fee appeal procedure.[50] The Commission finds that the requirement imposed by Government Code section 3546, subdivision (a), on school districts to deduct the correct amount from the wages of the employee after receiving notice from the exclusive representative of the amount, applies when the agency fee objection is resolved and it is determined that the employee is entitled to a reduction of future agency fee deductions.

But there is no mandate in the statutes or regulations plead by the claimant requiring the school district to make payroll adjustments for rebates. Rather, any rebates are paid by the exclusive representative. Under PERB regulations, once an agency fee objection is filed, the exclusive representative is required to hold any disputed agency fees in an escrow account for the duration of the dispute.[51] Escrowed agency fees that are being challenged shall not be released until after there is a mutual agreement between the agency fee objector and the exclusive representative, or an impartial decisionmaker has made a decision.[52] Interest at the prevailing rate shall be paid by the exclusive representative on all rebated fees.[53]

---

[48] Claimant's response to draft the Commission analysis, page 5.

[49] California Code of Regulations, title 8, section 32992, subdivision (a).

[50] California Code of Regulations, title 8, section 32994.

[51] California Code of Regulations, title 8, section 32995, subdivision (a).

[52] California Code of Regulations, title 8, section 32995, subdivision (b).

[53] California Code of Regulations, title 8, section 32995, subdivision (c).

Finally, claimant requests reimbursement to "draft, approve, and distribute an appropriate and neutral notice to existing nonmember employees and new employees which explains the additional payroll deduction for 'fair share service fees' for nonmember employees of an employee organization." Claimant argues that these activities are "implicit in the legislation" and are necessary since the employer is responsible for changes to employee payroll amounts. Claimant asserts this activity is required since there is no statutory requirement for the exclusive representative to provide such notices to employees about these payroll adjustments.[54] Neither Government Code section 3546, nor the PERB regulations, require school districts to provide notice to its employees regarding the service fee deduction. If this test claim is approved, however, the Commission can consider claimant's request at the parameters and guidelines stage and determine whether the requested activities are a reasonable method of complying with the mandate to deduct the fair share service fee in an amount authorized by Government Code section 3546.[55]

Government Code Section 3546, Subdivisions (b) through (e):

Government Code section 3546, subdivision (b), describes the permissible costs towards which an employee organization may apply the fair share service fees. Nothing in the language of subdivision (b), imposes any activities upon school districts.

Subdivision (c) provides that the "employer shall remain neutral, and shall not participate in any election conducted under this section unless required to do so by the board." Claimant alleges that subdivision (c) requires the public school employer to supply "administrative support" as required by PERB.[56] However, PERB has not enacted any rules or regulations requiring a school district's participation in an organizational security election.[57] Therefore, subdivision (c) does not impose any required activities on school districts.

Government Code section 3546, subdivision (d), contains four subparts. Subdivisions (d)(1) and (d)(2) describe the process by which employees in a bargaining unit may either rescind or reinstate, respectively, an organizational security arrangement. Such a process includes the submission of a petition to PERB and a consequent election among the employees if the petition meets PERB's requirements as promulgated by its regulations. Claimant alleges that subdivisions (d)(1) and (d)(2) require school districts to adjust payroll procedures when the organizational security arrangement is rescinded or reinstated to comply with the requirement to deduct fair share service fees in the appropriate amount from the employee salaries. Government Code section 3546, subdivisions (d)(1) and (d)(2), however, do not impose any state-mandated

---

[54] Claimant's response to draft the Commission analysis, pages 5 and 6.

[55] California Code of Regulations, title 2, section 1183.1, subdivision (a)(4).

[56] First Amendment to the Test Claim, page 6; claimant's response to draft the Commission analysis, page 6.

[57] See California Code of Regulations, title 8, division 3, chapter 2, subchapter 2 for PERB's regulations governing organizational security arrangements under the EERA.

activities on school districts and, therefore, reimbursement is not required to comply with these subdivisions.[58]

Subdivision (d)(3) provides that PERB shall conduct a vote to either rescind or reinstate an organizational security arrangement if the required number of employee signatures on a petition have been collected. Claimant alleges that subdivision (d)(3) requires school districts to "supply any required administrative support as may be required by PERB."[59] Claimant asserts that "it can be reasonably anticipated that if, for example, the Board determines that the appropriate number of signatures have not been collected, there may be some inquiry as to the content of the list of employees the school district is required to provide to PERB pursuant to Title 8, CCR, Sections 34030 and 34055."[60] Government Code section 3546, subdivision (d)(3), however, does not require anything of school districts, thus any mandated activities related to this subdivision would only arise from an executive order. No such executive order is included in this test claim, therefore no findings can be made that school districts have reimbursable state-mandated costs to supply administrative support to PERB.

Subdivision (d)(4) states that the costs of conducting an election to rescind an organizational security arrangement "shall be borne by the board," while the costs in an election to rescind "shall be borne by the petitioning party." The Commission finds that nothing in the plain language of section 3546, subdivision (d)(4), requires school districts to perform any activities.

Finally, Government Code section 3546, subdivision (e), requires that the "recognized employee organization shall indemnify and hold the public school employer harmless against any reasonable legal fees, legal costs, and settlement or judgment liability arising from any court or administrative action relating to the school district's compliance with this section."

Claimant argues that subdivision (e) requires school districts to take any and all necessary actions... to recover reasonable legal fees... from the recognized employee organization."[61] Claimant also contends that "the right to indemnification stems from this subdivision and the cause of civil action which may result in the indemnification of the school district arises from this code section, thus making it s a source of costs mandated by the state."[62] Department of Finance rebuts this argument by asserting that the plain language of subdivision (e) does not impose any activities on school districts.

---

[58] The requirement for school districts to deduct the fair share service fees from employee wages in the appropriate amount is mandated by Government Code section 3546, subdivision (a), and not subdivision (d). Thus, the requested activity to adjust payroll procedures to the reflect the amount required to be deducted from an employee's salary because of a rescission or reinstatement of the organizational security arrangement may be considered by the Commission as a reasonable method of complying with Government Code section 3546, subdivision (a), at the parameters and guidelines stage. (Cal. Code Regs., tit. 2, § 1183.1, subd. (a)(4).)

[59] First Amendment to the Test Claim, page 6.

[60] Claimant's response to draft the Commission analysis, page 6.

[61] First Amendment to the Test Claim, page 8.

[62] Claimant's response to draft the Commission analysis, page 7.

The Commission finds that the plain language of subdivision (e) does not impose any duties on school districts. Rather, subdivision (e) imposes a requirement on the *employee organization* to indemnify and hold harmless a school district for any legal expenses incurred in complying with implementing an organizational security arrangement. If a school district asserts its legal right to indemnification, that action is a decision of the school district and not a mandate by the state.

Accordingly, the Commission finds that Government Code section 3546, subdivisions (b), (c), (d), and (e) do not mandate a program, or impose a new program or higher level of service upon school districts within the meaning of article XIII B, section 6, of the California Constitution.

Government Code Section 3546, Subdivision (f):

Statutes 2001, chapter 805 added subdivision (f) to Government Code section 3546 "so that the exclusive representative can comply with the notification requirements set forth by the United States Supreme Court in *Chicago Teachers Union v. Hudson* (1986) 89 L.Ed. 2d 232."

Claimant asserts that Government Code section 3546, subdivision (f) imposes a state-mandated activity on school districts for providing a list of employee home addresses to the exclusive representative. Department of Finance, on the other hand, claims that the activity "consists of producing a report which should readily be available through the school district's payroll system,"[63] and that any costs incurred by the claimant in providing such a list are *de minimis*, and should therefore not be reimbursable because claimant's costs would be unlikely to reach the threshold for a claim.

Government Code section 3546, subdivision (f) requires school districts to file a list of employee home addresses with an employee organization selected by an employee bargaining unit to act as exclusive representative. Prior to the enactment of
Statutes 2001, chapter 805, no statutory or regulatory requirement obligated a school district to provide a list of home addresses to the exclusive representative. The requirements imposed upon school districts by Government Code section 3546, subdivision (f), impose a new program or higher level of service within the meaning of article XIII B, section 6, of the California Constitution for the following new activity:

- School district employers of a public school employee shall provide the exclusive representative of a public employee with the home address of each member of a bargaining unit.

Government Code section 3546, subdivision (f), also imposes "costs mandated by the state" upon school districts as defined in Government Code section 17514. Government Code section 17556, states, in pertinent part:

> The commission shall not find costs mandated by the state, as defined in Section 17514, in any claim submitted by a local agency or school district, if, after a hearing, the commission finds that: ...
>
> (b) The statute or executive order affirmed for the state a mandate that had been declared existing law or regulation by action of the courts.

---

[63] Department of Finance, July 30, 2002 Comments, page 3.

(c) [t]he statute or executive order imposes a requirement that is mandated by a federal law or regulation and results in costs mandated by the federal government, unless the statute or executive order mandates costs that exceed the mandate in that federal law or regulation.

However, the Commission finds that Government Code section 17556, subdivisions (b) and (c) do not apply in this case.

In *Chicago Teachers Union v. Hudson, supra*, 475 U.S. 292, 305-07, the United States Supreme Court held that employee organizations must: (1) establish procedures prior to making agency fee deductions which will ensure that the funds from such fees are not used to finance ideological activities beyond the scope of collective bargaining; (2) provide agency fee payers with the methods used for calculating the amount of the agency fee; and (3) establish an appeals process to ensure that agency fee objections are addressed in a timely and fair manner by an impartial decision maker.

In order to facilitate the exclusive representative's responsibility to provide notice to nonmember employees regarding the service fee deductions and the methods used to calculate the amount of such fees, Government Code section 3546, subdivision (f) imposes upon school districts the obligation to provide a list of employee home addresses to the exclusive representative. Although subdivision (f) aims at imposing certain notification requirements upon the employee organization in order to comply with federal case law, the requirement that school districts provide the employee organization with a list of employee home addresses goes beyond mere compliance with federal case law.

In *County of Los Angeles v. Commission on State Mandates* (1995) 32 Cal.App.4th 805, 817, the court found that Penal Code section 987.9, which requires counties to provide ancillary investigative services when providing defense services to indigent criminal defendants, constituted a federal mandate. The court determined that the right to counsel under the Sixth Amendment and the due process clause of the Fourteenth Amendment of the United States Constitution include "the right to reasonably necessary ancillary services."[64] Accordingly, Penal Code section 987.9 "merely codified these constitutional guarantees," and thus section 987.9 simply required local compliance with the federal mandate.[65]

In *San Diego Unified School District, supra*, 33 Cal.4th 859, 889, the California Supreme Court adopted the reasoning that procedural protections that are merely incidental to the codification of a federal right, and which add only a *de minimis* financial impact, constitute an implementation of federal law not reimbursable under article XIII B, section 6, of the California Constitution.

Here, however, while the notification requirements imposed on the employee organization are mandated by the United States Supreme Court's holding in *Hudson*, nothing in the *Hudson* decision imposes any required activities on school districts. Thus, because Government Code section 3546, subdivision (f) imposes a new required activity on school districts beyond compliance with federal case law, Government Code section 17556, subdivisions (b) and (c) do not apply. Nor are any other provisions of Government Code section 17556 applicable here;

---

[64] *County of Los Angeles, supra*, 32 Cal.App.4th 805, 815.

[65] *Ibid.*

therefore, the Commission finds that Government Code section 3546, subdivision (f) imposes costs mandated by the state pursuant to Government Code section 17514.

California Code of Regulations, Title 8, Sections 34030 and 34055:

PERB has enacted regulations implementing the procedures for filing petitions to either rescind or reinstate an organizational security arrangement. Title 8, section 34030, was added to the California Code of Regulations in 1980, and subsection (b) was added, operative January 1, 2001:

> (a) Within 20 days following the filing of the petition to rescind an organizational security arrangement, the employer shall file with the 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.
>
> (b) If after initial determination the proof of support is insufficient, the Board may allow up to 10 days to perfect the proof of support.
>
> (c) Upon completion of the review of the proof of support, the Board shall inform the parties in writing of the determination as to sufficiency or lack thereof regarding the proof of support.

Title 8, section 34055, was added to the California Code of Regulations, operative January 1, 2001, and is nearly identical in language to section 34030, except that it provides that the employer shall file the required list "Within 20 days following the filing of the petition *to reinstate* an organizational security provision ..."

Claimant alleges that section 34030, subdivision (a), and section 34055, subdivision (a), impose state-mandated activities on school districts to file a list of employee names and job titles with PERB. Department of Finance, on the other hand, contends that only those districts that did not negotiate and implement organizational security arrangements prior to the 2000 amendments are justified in claiming mandated costs. Department of Finance alleges that districts that did negotiate organizational security arrangements prior to the 2000 amendments should not be reimbursed for voluntarily assumed costs.

California Code of Regulations, title 8, section 34030, subdivision (a), was enacted by PERB in 1980. Prior to the enactment of Statutes 2000, chapter 893, any organizational security arrangement entered into between a school district and employee organization was the product of a voluntary agreement resulting from the collective bargaining process. Statutes 2000, chapter 893, however, required the parties to implement an organizational security arrangement.

Under prior law, a school district retained discretion on entering into an organizational security arrangement with an employee organization. Thus, the provisions of section 34030, subdivision (a), requiring school districts to file a list of names and job titles to PERB upon the submission of an employee petition to rescind an organizational security arrangement would not have been state-mandated or required. This conclusion flows from the fact that the decision to participate in the underlying program was within the school district's discretion, and thus any

downstream requirements imposed within such a program were also voluntary.[66] Accordingly, if the district did enter into an organizational security arrangement, compliance with PERB's filing requirements in section 34030, subdivision (a), did not constitute a mandate by the state until January 1, 2001, the operative date of Statutes 2000, chapter 893.

Government Code section 3546, subdivision (d)(1), as added by Statutes 2000, chapter 893, recognizes the right of public school employees in a unit for which an employee organization has been selected as exclusive representative to rescind an organizational security arrangement. Subdivision (d)(1), states that the organizational security arrangement required by subdivision (a) of section 3546 "may be rescinded by a majority vote of all the employees in the negotiating unit subject to that arrangement, if a request for a vote is supported by a petition containing 30 percent of the employees in the negotiating unit." If the organizational security arrangement is rescinded pursuant to such a vote, subdivision (d)(2) allows that "a majority of all employees in the negotiating unit may request that the arrangement be reinstated."[67]

Sections 34030 and 34055 implement the provisions of Government Code section 3546, subdivision (d). California Code of Regulations, title 8, sections 34030 and 34055 require that within 20 days of the submission of a petition to either rescind or reinstate an organizational security arrangement, the public school "employer shall file with the regional [PERB] office an alphabetical list containing the names and job titles or classifications of the persons employed in the unit described in the petition." The Commission finds that California Code of Regulations, title 8, sections 34030, subdivision (a), and 34055, subdivision (a), impose a new program or higher level of service on school districts within the meaning of article XIII B, section 6 of the California Constitution for the following new activity:

- Within 20 days following the filing of the petition to rescind or reinstate an organizational security arrangement, the school district employer shall file with the regional office of PERB 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.

None of the provisions of Government Code section 17556 are applicable; therefore, the Commission finds that California Code of Regulations, title 8, sections 34030, subdivision (a), and 34055, subdivision (a) impose costs mandated by the state pursuant to Government Code section 17514.

---

[66] *Kern High School Dist., supra*, 30 Cal.4th 727, 742. The California Supreme Court addressed the issue whether legislation imposing certain notice and agenda requirements on school site councils administering various school-related educational programs constituted a reimbursable state mandate. The Court concluded that mandatory "downstream" requirements flowing from a local government entity's voluntary decision to participate in an underlying program do not constitute reimbursable state mandates.

[67] Government Code section 3546, subdivision (d)(2).

CONCLUSION

The Commission concludes that Government Code section 3546, subdivisions (a) and (f), and California Code of Regulations, title 8, sections 34030, subdivision (a), and 34055, subdivision (a), impose new programs or higher levels of service for K-14 school districts within the meaning of article XIII B, section 6 of the California Constitution, and impose costs mandated by the state pursuant to Government Code section 17514, for the following specific new activities:

- Upon receiving notice from the exclusive representative of a classified public school employee who is in a unit for which an exclusive representative has been selected, the employer shall deduct the amount of the fair share service fee authorized by this section from the wages and salary of the employee and pay that amount to the employee organization. (Gov. Code, § 3546, subd. (a).)[68]
- School district employers of a public school employee shall provide the exclusive representative of a public employee with the home address of each member of a bargaining unit. (Gov. Code, § 3546, subd. (f).)[69]
- Within 20 days following the filing of the petition to rescind or reinstate an organizational security arrangement, the school district employer shall file with the regional office of PERB 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. (Cal. Code Regs., tit. 8, §§ 34030, subd. (a), and 34055, subd. (a).)[70]

The Commission concludes that Government Code sections 3543, 3546, subdivisions (b) through (e), and 3546.3, as added or amended by Statutes 1980, chapter 816, Statutes 2000, chapter 893, and Statutes 2001, chapter 805 are not reimbursable state-mandated programs within the meaning of article XIII B, section 6, and Government Code section 17514.

---

[68] As added by Statutes 2000, chapter 893, operative January 1, 2001.

[69] As amended by Statutes 2001, chapter 805, operative January 1, 2002.

[70] As amended and operative on January 1, 2001.

Welcome to California

DIR home page

CSMCS home page

Apply for a position as a state mediator

Apply to join the SMCS panel of private arbitrators

State Mediation & Conciliation Service (SMCS)

SMCS skilled mediators mediate labor disputes between employers and employee organizations.

search

My CA This Site

Advanced

Feature

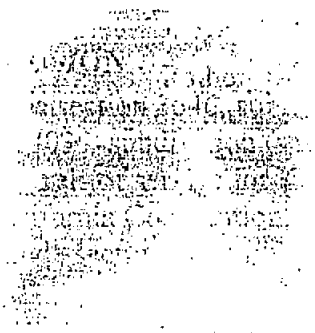
- How to request an arbitration list

Agency shop elections -- SB 739 (effective 1/1/01)

- Procedures for mandated agency shop elections
- Petition for agency shop election (Fill and print form)
- Request for agency shop election (Fill and print form)
- Proof of service by mail
- Proof of service--personal service

Back to Mediation & Conciliation home page

Back to top of page



Procedures for mandated agency shop elections

The California State Mediation and Conciliation Service (SMCS) conducts agency shop elections in public agencies covered by the Meyers-Milias-Brown Act (Government Code 3500-3510), and in the trial courts (per Goverment Code 71632). The following procedures will be followed:

Request for Election

Only a recognized employee organization that is the exclusive or majority bargaining agent of the employees in the bargaining unit has the authority to request an agency shop election. The organization must submit the documents described below in order to proceed to election.

1. An election request (the SMCS Agency Shop Election Request Form may be used), which includes:
   a. the name, address, telephone number and contact person for the employee organization;
   b. the name, address, telephone number and contact person for the employer;
   c. a description of the bargaining unit for which the election has been requested;
   d. the name(s) and classification(s) of any bargaining unit member(s) designated supervisory, management or confidential (if known);
   e. the approximate number of employees in the bargaining unit;
   f. a statement certifying that the employee organization has requested the employer to negotiate an agency shop arrangement and, beginning seven working days after receipt of the request, the two parties have had 30 calendarr days to attempt good faith negotiations in an effort to reach agreement;
   g. a statement certifying that an agency shop election has not been held in the bargaining unit within one (1) calendar year of the date of the request; and
   h. proof of service indicating that a copy of the election request has been served on the employer.
2. A petition signed by at least thirty percent (30%) of the employees in the bargaining unit, stating that the employees request an agency shop arrangement and an election to implement the agency shop arrangement. The petition must include the printed name and signature of each employee, the employee's classification, and the date he or she signed the petition. The SMCS form, "Petition for Agency Shop Election" may be used for this purpose.

Investigation of Petition

Upon receipt of the election request and other required documents, SMCS will contact the employer to request the information necessary to verify the showing of interest. The employer will provide an alphabetical list of employees in the bargaining unit to assist SMCS in the investigation of the petition. The list will include the employees' classifications, and will identify any bargaining unit employees designated supervisory, confidential, or management. The information will be provided as soon as possible, but not later than fifteen (15) business days after the request has been made.

Upon determination of the existence of the requisite showing of interest, SMCS will assign an Election Supervisor to conduct the election.

Conduct of Election

In the absence of an agreement between the parties as to the manner in which the election will be conducted, the Election Supervisor will have the discretion to determine the terms of the election. In the absence of an agreement as to the ballot language, the Election Supervisor will determine the ballot language. In the absence of agreement as to the payroll period upon which the list of eligible voters is based, the last complete payroll period prior to the date of the election will be used.

1. **Notice of Election:** The Election Supervisor will provide the parties with a notice of election to be posted or distributed to the affected employees. The notice must be posted in a conspicuous location on the employer's premises, or distributed to all unit members, at least five (5) working days before the date of the election. The notice will state the time and place of the election, and will include a copy of the proposed agency shop provision and a sample copy of the ballot. The employer will complete and submit an Affidavit of Posting.
2. **Observers:** The employer and the employee organization may each station one authorized observer or representative at each voting place during the election. Under the direction of the Election Supervisor, the observers may assist in the identification of voters, challenge voters and ballots, and otherwise assist the Election Supervisor. The parties will provide the names of the observers to the Election Supervisor. Failure to appoint an observer or failure of an observer to appear will be deemed a waiver of the right to station such observer.
3. **Secret Ballot:** The election will be conducted by secret ballot. All voters will be allowed to vote without interference, restraint or coercion.
4. **Challenged Votes:** Any observer or the Election Supervisor may challenge the eligibility of a voter. The Election Supervisor will mark the outer envelope containing the challenged ballot and subsequently determine the eligibility of the voter. The Election Supervisor will either count or reject said vote based on the eligibility list and any other information germane to the question.
5. **Election Results:** After the conclusion of the election, the Election Supervisor will certify the result to the employer and the employee organization. There will be no other election on the question of agency shop for this unit for at least one (1) year from the date of this election.
6. **Confidentiality:** The ballots, ballot envelopes, and other election materials are confidential and will not be released by the SMCS after the election.

Back to Agency shop elections page
Back to Mediation & Conciliation home page

Updated: April 2005
DIR home page

C

Briefs and Other Related Documents

SAN BERNARDINO PUBLIC EMPLOYEES ASSOCIATION, Plaintiff and Respondent,
v.
CITY OF FONTANA et al., Defendants and Appellants.
No. E021207.

Court of Appeal, Fourth District, Division 2, California.
Nov. 16, 1998.

SUMMARY

A public employees labor organization petitioned for a writ of mandate against a city and the city manager to set aside various provisions in the parties' memoranda of understanding (MOU's) relating to longevity pay, personal leave accrual, and retiree medical insurance for certain city employees. The trial court granted the petition, finding that personal leave and longevity pay benefits were fundamental vested rights that could not be bargained away through the collective bargaining process. (Superior Court of San Bernardino County, No. SCV36883, Bob N. Krug, Judge.)

The Court of Appeal reversed. The court held that the trial court erred in concluding that employees represented by plaintiff possessed vested, contractual rights to personal leave accrual, longevity pay, and retirement health benefits, and that such benefits could not be altered through collective bargaining. The benefits were provided for in prior collective bargaining agreements reached between the city and its bargaining groups. Those agreements, as implemented through previous MOU's, were of fixed duration. Once the MOU's expired, the employees had no legitimate expectation that the benefits would continue unless they were renegotiated as part of a new bargaining agreement. Public employees have no vested right in any particular measure of compensation or benefits, and these may be modified or reduced by the proper statutory authority. Treating the benefits as vested would have subverted the policies underlying the Meyers-Milias-Brown Act (Gov. Code, § 3500 et seq.), which was designed for the purpose of resolving labor disputes. The act does not permit employees to accept the benefits of a collective bargaining agreement and reject less favorable provisions. (Opinion by Ward, J., with Richli, Acting P. J., and Gaut, J., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1) Appellate Review § 144--Scope--Questions of Law.
Questions of law are subject to de novo review on appeal.

(2a, 2b) Public Officers and Employees § 25--Compensation--Fixing and Altering Amount--Personal Leave and Longevity Pay Benefits--As Subject to Collective Bargaining Process.
In writ proceedings brought by a public employees labor organization against a city to challenge various terms and conditions of employment under memoranda of understanding (MOU's) negotiated with the city, the trial court erred in concluding that employees represented by plaintiff possessed vested, contractual rights to personal leave accrual, longevity pay, and retirement health benefits, and that such benefits could not be altered through collective bargaining. The benefits were provided for in collective bargaining agreements reached between the city and its bargaining groups. Those agreements, as implemented through previous MOU's, were of fixed duration. Once the MOU's expired, the employees had no legitimate expectation that the benefits would continue unless they were renegotiated as part of a new bargaining agreement. Public employees have no vested right in any particular measure of compensation or benefits, and these may be modified or reduced by the proper statutory authority. Treating the benefits as vested would have subverted the policies underlying the Meyers-Milias-Brown Act (Gov. Code, § 3500 et seq.), which was designed for the purpose of resolving labor disputes. The act does not permit employees to accept the benefits of a collective bargaining agreement and reject less favorable provisions. Moreover, no outside statutory source gives the employees additional protection or entitlement to future benefits; therefore, the longevity based benefits were a proper subject of negotiation.

[See 2 Witkin, Summary of Cal. Law (9th ed. 1987) Agency and Employment, § 455 et seq.]

(3) Labor § 37--Collective Bargaining--Public Employers and Employees-- Meyers-Milias-Brown Act--Memoranda of Understanding.

The Meyers-Milias-Brown Act (Gov. Code, § 3500 et seq.) requires public agencies to negotiate exclusively with the collective bargaining units. Once a memoranda of understanding (MOU) has been negotiated, it is reviewed and approved by the governing body of the public entity and the membership of the bargaining unit (*1217Gov. Code, § 3505). When an MOU has expired, however, the parties may negotiate changes to its provisions (Gov. Code, § 3505.1). An MOU is binding on both parties for its duration.

(4) Constitutional Law § 72--Right to Contract--Constitutional Ban on Impairment of Contracts--As Limiting Power of Public Entities to Modify Contracts.

As a general rule, the terms and conditions of public employment are controlled by statute or ordinance rather than by contract. However, public employment gives rise to certain obligations that are protected by the contract clause of the Constitution, including the right to the payment of salary that has been earned. Such obligations include pension rights. Under the California Constitution, a "law impairing the obligation of contracts may not be passed" (Cal. Const., art. I, § 9). Similarly, under the Federal Constitution, no state shall pass any law impairing the obligation of contracts (U.S. Const., art. I, § 10, cl. 1). The contract clauses of the state and federal Constitutions limit the power of public entities to modify their own contracts with other parties.

(5) Constitutional Law § 72--Right to Contract--Impairment of Contracts.

For purposes of the constitutional ban on the impairment of contracts, a statute will be treated as a contract with binding obligations when the statutory language and circumstances accompanying its passage clearly evince a legislative intent to create private rights of a contractual nature enforceable against the state. There can be no impairment of a contract by a change thereof effected with the consent of one of the contracting parties.

(6) Actions and Special Proceedings § 6--Existence of Right of Action-- Ripeness and Advisory Opinions.

In writ proceedings brought by a public employees labor organization against a city to challenge various terms and conditions of employment under memoranda of understanding (MOU's) negotiated with the city, the trial court erred in compelling the city to refrain from reducing or eliminating the retirement medical and dental benefits unless comparable offsetting benefits are provided in their stead, since the matter of retiree medical and dental benefits was not yet ripe for review. The city and the collective bargaining units simply agreed to meet and confer regarding retiree benefits; however, they did not agree to eliminate or modify those benefits. In granting the petition compelling the city to refrain from reducing or eliminating retirement medical and dental benefits unless offsetting benefits were provided, the trial court issued an advisory opinion. *1218

COUNSEL

Best, Best & Krieger, Jack B. Clarke, Jr., Bradley E. Neufeld and Kevin T. Collins for Defendants and Appellants.

Liebert, Cassidy & Frierson, Arthur A. Hartinger and Alison C. Neufeld as Amici Curiae on behalf of Defendants and Appellants.

Olins, Foerster & Hayes, Barbara J. Ginsberg and Dennis Hayes for Plaintiff and Respondent.

WARD, J.

The City of Fontana (City) appeals from the grant of the petition for writ of mandate brought by San Bernardino Public Employees Association (SBPEA). SBPEA's petition, brought under Code of Civil Procedure section 1085, challenged various terms and conditions of employment under memoranda of understanding (MOU) negotiated with the City. The City, supported by amici curiae, [FN1] contends the trial court erred in concluding that the employees represented by the SBPEA possessed vested, contractual rights to personal leave accrual, longevity pay, and retirement health benefits, and such benefits could not be altered through collective bargaining. We agree, and we therefore reverse the judgment.

FN1 The request of 68 individual towns and cities in the State of California to appear in this action as amici curiae is granted.

Facts and Procedural Background

The SBPEA is a labor organization that represents certain employees of the City for purposes of bargaining under the Meyers-Milias-Brown Act (the Act) (Gov. Code, § 3500 et seq.) In 1995, the City and three bargaining units, the City Hall Unit, the City Yard Unit, and the Police Benefit Association,

all acting through and represented by SBPEA, entered into new MOU's.

Before 1993, the MOU's for the three bargaining units all provided for longevity pay, leave accrual increases based on longevity, and paid retiree medical and dental insurance benefits (sometimes referred to hereafter as the longevity-based benefits). Those benefits had been agreed upon by the three bargaining units through the collective bargaining process. *1219

During negotiations for the 1995-1997 MOU's, [FN2] the City proposed to reduce accrual of personal leave, longevity pay, and retiree insurance benefits. The City warned that if the membership rejected the proposal to reduce those benefits, the City would implement a 7 percent reduction in the City's contribution to PERS (Public Employees' Retirement System (Gov. Code, § 20000 et seq.)) retirement. The SBPEA took the position that the longevity-based benefits were vested and could not be bargained away. However, the members of the three bargaining units ratified the MOU's that reduced the longevity-based benefits. The new MOU's reduced the personal leave accrual rate for employees having 10 or more years of service and changed longevity pay from a percentage of salary payable annually to a fixed amount payable only in the year of service the employee became eligible. Retirement insurance benefits were to be renegotiated.

FN2. The negotiations extended over 31/2 months and consumed 100 hours, with 50 to 100 proposals and counterproposals being submitted.

On October 31, 1995, the SBPEA filed a petition for writ of mandate against the City and the city manager seeking to set aside provisions in the MOU's relating to longevity pay, personal leave accrual, and retiree medical insurance. After conducting a hearing, the trial court granted the petition. The trial court found that personal leave and longevity pay benefits were fundamental vested rights that could not be bargained away through the collective bargaining process.

The 1990-1993 MOU's stated, "The terms and conditions of this Agreement shall be applicable to all employees set forth in Appendix A commencing July 1, 1990 and ending June 30, 1993." The 1990-1993 MOU's further stated, "Unless otherwise specifically changed or modified by this Memorandum of Understanding, all prevailing benefits existing from previous agreements between the parties and approved by the City Council shall be maintained at current levels."

Discussion

I. *Standard of Review*

(1) This case involves a question of law subject to de novo review on appeal. (See., e.g., *Evans v. Unemployment Ins. Appeals Bd.* (1985) 39 Cal.3d 398, 407 [216 Cal.Rptr. 782, 703 P.2d 122].)

II. *Personal Leave and Longevity Pay Benefits Are Conditions of Employment Subject to the Collective Bargaining Process*

(2a) The City contends the trial court erred in concluding that personal leave and longevity pay benefits were fundamental rights that could not be *1220 bargained away through the collective bargaining process. We first review the role of collective bargaining in public employment.

A. *The Meyers-Milias-Brown Act*

The Act (Gov. Code, § 3500 et seq.) controls collective bargaining between public employers and their employees. The purpose of the Act is 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." (Gov. Code, § 3500.) To implement that purpose, employee collective bargaining units have the authority to represent their employees in "all matters relating to employment conditions and employer-employee relations, including, but not limited to, wages, hours, and other terms and conditions of employment, ..." (Gov. Code, § 3504; *Relyea v. Ventura County Fire Protection Dist.* (1992) 2 Cal.App.4th 875, 880 [3 Cal.Rptr.2d 614].)

(3) The Act requires public agencies to negotiate exclusively with the collective bargaining units. Once an MOU has been negotiated, it is reviewed and approved by the governing body of the public entity and the membership of the bargaining unit. (Gov. Code, § 3505.) When an MOU has expired,

however, the parties may negotiate changes to its provisions. (Gov. Code, § 3505.1.)

An MOU is binding on both parties for its duration. In *Glendale City Employees' Assn., Inc. v. City of Glendale* (1975) 15 Cal.3d 328 [124 Cal.Rptr. 513, 540 P.2d 609] (hereafter *City of Glendale*), the court explained the operation of the Act: "Section 3505.1 ... provides that if agreement is reached it should be reduced to writing and presented to the governing body of the agency for determination. This statutory structure necessarily implies that an agreement, *once approved by the agency, will be binding.* The very alternative prescribed by the statute-that the memorandum 'shall not be binding' except upon presentation 'to the governing body or its statutory representative *for determination*,'-manifests that *favorable* 'determination' engenders a binding agreement." (*Id.* at p. 336, original italics.)

In *Relyea v. Ventura County Fire Protection Dist., supra,* 2 Cal.App.4th 875, the court rejected an argument that the Act permits individual employees to negotiate the terms of their employment with public employers. The court explained, "Appellant's interpretation of the [Act] would subvert the legislative scheme of providing for a structured collective bargaining system by requiring an employer to negotiate over working conditions with any ***1221** number of employees. This could complicate employer-employee relations to the extent of undermining collective bargaining and its benefits, thereby defeating the Act's goals of ensuring stability in labor management relations and the right of employees to join and be represented by an employee organization. (§ 3500.) [¶] Moreover, certain basic principles which govern a collective bargaining system contradict appellant's view that individual bargaining rights do not impede collective rights. Normally the employer has the duty to negotiate only with the chosen employee representative. [Citation.] It is also a fundamental principle that a member of an employee bargaining unit is bound by the terms of a valid collective bargaining agreement, though he is not formally a party to it and may not even belong to the union which negotiated it. [Citation.] Individual contracts, no matter what the circumstances which justify their execution, may not interfere with the terms of the collective agreement. [Citation.]" (*Id.* at p. 882.)

B. *The Contractual Protection for Pension Rights Does Not Extend to Vacation Leave and Longevity Pay Benefits Negotiated Under an MOU*

(4) As a general rule, the terms and conditions of public employment are controlled by statute or ordinance rather than by contract. (*California League of City Employee Associations v. Palos Verdes Library Dist.* (1978) 87 Cal.App.3d 135, 139 [150 Cal.Rptr. 739] (hereafter *California League*).) However, " 'public employment gives rise to certain obligations which are protected by the contract clause of the Constitution, including the right to the payment of salary which has been earned.' " (*Ibid.*, citing *Kern v. City of Long Beach* (1947) 29 Cal.2d 848, 852-853 [179 P.2d 799].) Such obligations include pension rights.

In *Kern*, the court explained the nature of a public employee's pension rights: "It is true that an employee does not earn the right to a full pension until he has completed the prescribed period of service, but he has actually earned some pension rights as soon as he has performed substantial services for his employer. [Citations.] He is not fully compensated upon receiving his salary payments because, in addition, he has then earned certain pension benefits, the payment of which is to be made at a future date. While payment of these benefits is deferred, and is subject to the condition that the employee continue to serve for the period required by the statute, the mere fact that performance is in whole or in part dependent upon certain contingencies does not prevent a contract from arising, and the employing governmental body may not deny or impair the contingent liability any more than it can refuse to make the salary payments which are immediately due." (*Kern v. City of Long Beach, supra,* 29 Cal.2d at p. 855, see also *Miller v. State of California* (1977) 18 Cal.3d 808, 814 [135 Cal.Rptr. 386, 557 P.2d 970].) ***1222**

Under the California Constitution, a "law impairing the obligation of contracts may not be passed." (Cal. Const., art. I, § 9.) Similarly, under the federal Constitution, "No state shall ... pass any ... law impairing the obligation of contracts ...." (U.S. Const., art. I, § 10, cl. 1.) The contract clauses of the state and federal Constitutions limit the power of public entities to modify their own contracts with other parties. (*Board of Administration v. Wilson* (1997) 52 Cal.App.4th 1109, 1130 [61 Cal.Rptr.2d 207].)

In *California League, supra,* 87 Cal.App.3d 135, the court held that certain employee benefits were entitled to protection under the constitutional contract clauses. In that case, a library district unilaterally

eliminated certain fringe benefits for long-term employees, including a fifth week of vacation after ten years of service, a longevity salary increase, and a four-month paid sabbatical after six years of service. The library district took its action after "meet and confer" sessions under Government Code section 3505 et seq. had failed to lead to an MOU between the library district and the employee association. (87 Cal.App.3d at p. 137.) The court, relying substantially on *Kern*, held the fringe benefits had been important to the employees, had been an inducement for the employees to remain in service with the district, and were a form of compensation that had been earned by remaining in employment. Thus, the court concluded, the employees had fundamental vested rights to the benefits, not subject to unilateral termination by the employer. Moreover, a general salary increase did not offset the termination of the benefits, because the loss of benefits fell unequally on different classes of employees. (*California League, supra,* at p. 140; see also *Thorning v. Hollister School Dist.* (1992) 11 Cal.App.4th 1598 [15 Cal.Rptr.2d 91] [holding that retired school board members had a vested right to postretirement continuation of paid health benefits because those benefits were included in the school district's official declaration of policy pertaining to remuneration and other benefits for board members, and such benefits were important to the board members as an inducement for their continued service on the board and a factor in their decision to retire].)

In reaching its determination that the employees had vested rights in the longevity-based benefits, the trial court relied primarily on *California League*. The court in *California League* ruled that whenever benefits or conditions of employment are important to the employees, they acquire protection under the contract clause. The court's analysis leading to this conclusion is set forth in a single sentence: "While the three benefits in question may not be as important to an employee as a pension, in determining whether they are fundamental the court is to evaluate 'the effect of it in human terms and the importance of it to the individual in the life situation.' *1223 (*Bixby v. Pierno*, 4 Cal.3d 130, 144 [93 Cal.Rptr. 234, 481 P.2d 242].)" (*California League, supra,* 87 Cal.App.3d at pp. 139-140.)

The *California League* court's reliance on *Bixby* is misplaced. *Bixby* merely established a rule of judicial review applicable to adjudicatory orders or decisions of public agencies. (*Bixby v. Pierno* (1971) 4 Cal.3d 130 [93 Cal.Rptr. 234, 481 P.2d 242].) The case cannot fairly be read as establishing a new measure of substantive rights to be protected under the contract clause.

(5) For purposes of the constitutional ban on the impairment of contracts, "[a] statute will be treated as a contract with binding obligations when the statutory language and circumstances accompanying its passage clearly '... evince a legislative intent to create private rights of a contractual nature enforceable against the State.' " (*Valdes v. Cory* (1983) 139 Cal.App.3d 773, 786 [189 Cal.Rptr. 212].) There can be no impairment of a contract by a change thereof effected with the consent of one of the contracting parties. (*Mulcahy v. Baldwin* (1932) 216 Cal. 517, 525 [15 P.2d 738].)

() Here, the longevity-based benefits were provided for in collective bargaining agreements reached between the City and its bargaining groups. Those collective bargaining agreements, as implemented through previous MOU's, were of fixed duration. Once the MOU's expired under their own terms, the employees had no legitimate expectation that the longevity-based benefits would continue unless they were renegotiated as part of a new bargaining agreement. It has long been held that "public employees have no vested right in any particular measure of compensation or benefits, and that these may be modified or reduced by the proper statutory authority. [Citations.]" (*Butterworth v. Boyd* (1938) 12 Cal.2d 140, 150 [82 P.2d 434, 126 A.L.R. 838].)

In *Butterworth*, public employees contended that compulsory salary deductions to cover the cost of a medical insurance plan deprived them of due process of law. The *Butterworth* court responded that no public employee has a vested right in continued employment "except in so far as the right is conferred by statute or other valid regulation; that the employment is accepted under the terms and conditions fixed by law; and that one of the terms of the employment in the present case is the provision for the benefits of the health service system at the charge imposed therefor. The charter governs the salaries of city employees; by the amendment to the charter, in force at the time the municipal salaries were fixed for the current fiscal year, *1224 the deduction was authorized and made accordingly." (*Butterworth v. Boyd, supra,* 12 Cal.2d at p. 150.) The court further held that "[i]f salaries can be reduced it is certainly clear enough that compensation provisions may be modified by substituting for a fraction thereof the valuable protection of comprehensive medical service." (*Ibid.*)

In *Vielehr v. State of California* (1980) 104 Cal.App.3d 392 [163 Cal.Rptr. 795], the court drew a distinction between retirement rights and employment rights, and held that only the former are entitled to contract clause protections. Thus, the court ruled that a statute reducing the amount of interest paid to public employees who withdrew their pension fund contributions upon leaving public service before retirement diminished a right of employment, not a right of retirement, and therefore the statute did not violate the contract clauses. (*Id.* at pp. 395-396; see also *Miller v. State of California, supra,* 18 Cal.3d at pp. 815-817 [holding that changing mandatory retirement age did not impair any contractual obligation].)

We conclude that within the context of the Act, the collective bargaining process properly included such terms and conditions of employment as annual leave and longevity pay benefits. The benefits at issue could not have become permanently and irrevocably vested as a matter of contract law, because the benefits were earned on a year-to-year basis under previous MOU's that expired under their own terms.

Moreover, treating the annual leave and longevity pay benefits as vested would subvert the policies underlying the Act. Here, the SBPEA negotiated new MOU's that provided general salary increases and other benefits to the employees. The MOU's were negotiated with representatives of the recognized employee organizations and were submitted to and approved by the general membership of those organizations. Nonetheless, the SBPEA now attacks certain provisions of the MOU's although contending the employees were entitled to the concessions and advantages of the MOU's. The words of the California Supreme Court in *City of Glendale* bear repeating: "The Legislature designed the act ... for the purpose of resolving labor disputes. (See Gov. Code, § 3500.) But a statute which encouraged the negotiation of agreements, yet permitted the parties to retract their concessions and repudiate their promises whenever they choose, would impede effective bargaining. Any concession by a party from a previously held position would be disastrous to that party if the mutual agreement thereby achieved could be repudiated by the opposing party. Successful bargaining rests upon the sanctity and legal viability of the given word." (*City of Glendale, supra,* 15 Cal.3d at p. 336.) The Act does not permit the employees to accept the *1225 benefits of a collective bargaining agreement and reject less favorable provisions.

The SBPEA next argues that the city council acted unilaterally in adopting the MOU's. To support its position, it cites *Wright v. City of Santa Clara* (1989) 213 Cal.App.3d 1503 [262 Cal.Rptr. 395]. *Wright* is not on point. In that case, the court declared the City of Santa Clara exceeded its authority by enacting an ordinance which incorporated provisions of an agreement with its police officers' association. The agreement provided that an employee on temporary military leave must turn over his salary from military service or take approved time off to continue to receive his regular pay. The case did not turn on the City of Santa Clara's having taken a "unilateral" action; that was not even an issue in the case. Rather, the dispositive issue was that the challenged provision of the agreement directly conflicted with Military and Veterans Code section 395.01. Thus, the case merely stands for the proposition that a collective bargaining unit may not bargain away individual statutory or constitutional rights which flow from sources outside the collective bargaining agreement itself.

The SBPEA further argues that the right of representation is limited when the bargain reached significantly infringes on the constitutional or statutory rights of individual employees (*California Teachers' Assn. v. Parlier Unified School Dist.* (1984) 157 Cal.App.3d 174, 183 [204 Cal.Rptr. 20] [holding that a collective bargaining agreement could not waive benefits to which employees were statutorily entitled]; *Phillips v. State Personnel Bd.* (1986) 184 Cal.App.3d 651, 660 [229 Cal.Rptr. 502], disapproved on another ground in *Coleman v. Department of Personnel Administration* (1991) 52 Cal.3d 1102, 1123, fn. 8 [278 Cal.Rptr. 346, 805 P.2d 300] [holding that a collective bargaining agreement could not waive an employee's right to due process]), and the benefits at issue should be treated as constitutional rights of individual employees. Here, no outside statutory source gives the employees additional protection or entitlement to future benefits; therefore, the benefits are a proper subject of negotiation.

Although the case is not precisely on point, the reasoning of *Olson v. Cory* (1980) 27 Cal.3d 532 [178 Cal.Rptr. 568, 636 P.2d 532] is instructive. In that case, the court held a statute limiting annual cost-of-living increases in judicial salaries was unconstitutional as to any judge whose term began before the statute was enacted, but the statute could be applied to judges upon the commencement of new terms. The court explained, "A judge who completes

one term during which he was entitled to unlimited cost-of-living increases and elects to enter a new term has impliedly agreed to be bound by *1226 salary benefits then offered by the state for a different term." (*Id.* at p. 540.) By parity of reasoning, upon the expiration of an MOU, an employee who elects to continue employment with a public entity has impliedly agreed to be bound by the salary and benefit package provided in the new MOU. We note that the previous MOU explicitly stated that the terms and conditions of employment stated therein were to remain in force and effect during the term of that MOU.

We conclude that personal leave and longevity pay benefits are simply terms and conditions of employment subject to negotiation in the collective bargaining process.

III. *The Matter of Retiree Medical and Dental BenefitsIs Not Ripe for Review*

(6) The petition for writ of mandate challenged provisions of the MOU's that stated, "During the period of July 1, 1995 through March 31, 1996, both the City and the PBA agree to meet and confer regarding the additional incremental costs of future benefits (i.e. beyond the amount currently budgeted for the expense during the 1995/96 fiscal year), including but not limited to: scope of coverage, funding sources, and the elimination of the City's participation in the PERS Health Care Plans. The City further agrees that it will not impose the elimination of retiree health benefits or modification of the current program, contingent upon the employee's agreement to fund the cost of the program in excess of the amount currently being funded by the City, from their compensation. The amount needed to fund this benefit shall be determined pursuant to an actuarial study." The trial court noted that neither the City nor the collective bargaining units had made any decision to affect retirement medical benefits. The court stated, "The court is aware that, as of the hearing in this case, the issue was unresolved.... Nonetheless, the Court feels it is appropriate to grant the petition compelling City to refrain from reducing or eliminating the retirement medical and dental benefits unless comparable offsetting benefits are provided in their stead."

A court may not issue rulings on matters that are not ripe for review. (*Pacific Legal Foundation v. California Coastal Com.* (1982) 33 Cal.3d 158, 171 [188 Cal.Rptr. 104, 655 P.2d 306].) In this case, the City and the collective bargaining units simply agreed to meet and confer regarding retiree benefits; however, they did not agree to eliminate or modify those benefits. In granting the petition compelling the City to refrain from reducing or eliminating retirement medical and dental benefits unless offsetting *1227 benefits were provided, the trial court issued an advisory opinion. (*Carsten v. Psychology Examining Com.* (1980) 27 Cal.3d 793, 798 [166 Cal.Rptr. 844, 614 P.2d 276].)

Disposition

The judgment is reversed. Defendants shall recover costs on appeal.

Richli, Acting P. J., and Gaut, J., concurred. *1228
Cal.App.2.Dist.
San Bernardino Public Employees Assn. v. City of Fontana
67 Cal.App.4th 1215, 79 Cal.Rptr.2d 634, 98 Daily Journal D.A.R. 11,843, 160 L.R.R.M. (BNA) 2179

Briefs and Other Related Documents (Back to top)

- 1998 WL 34115083 (Appellate Brief) Supplementry Brief in Answer to Amicus Curiae Brief (Jul. 30, 1998) Original Image of this Document (PDF)
- 1998 WL 34115115 (Appellate Brief) Appellants City of Fontana and the City Manager for the City of Fontana's Answer to Amicus Curiae's Brief in Support of Appellant's Opening Brief (Jul. 30, 1998) Original Image of this Document (PDF)
- 1998 WL 34113367 (Appellate Brief) Appellants' Reply Brief (Jun. 22, 1998) Original Image of this Document (PDF)
- 1998 WL 34113146 (Appellate Brief) Amicus Curiae Brief in Support of Appellants By California Cities of Alameda; Albany; Avalon; Bakersfield; Burbank; Chino; Chowchilla; Chula Vista; Coachella; El Cajon; Eureka; Fremont; Fresno; Glendale; Grand Terrace; Gustine; Hayward; Huntington Be ach; King City; Laguna Beach; Lawndale; Livermore; Long Beach; Los Alamitos; Los Altos; Modesto; Montclair; Montebello; Monterey; Murrieta; Nevada City; Norco; Ontario; Orange; Palm Desert; Pismo Beach; Pleasant Hill; Redding; Redlands; Roseville; Sa (May. 29, 1998) Original Image of this Document (PDF)
- 1998 WL 34113147 (Appellate Brief) Petitioner-Respondent's Opposition Brief (May. 29, 1998) Original Image of this Document (PDF)
- 1998 WL 34137194 (Appellate Brief) Appellants'

Opening Brief (Apr. 30, 1998) Original Image of this Document (PDF)

END OF DOCUMENT

Date of Hearing: August 9, 2000

ASSEMBLY COMMITTEE ON APPROPRIATIONS
Carole Migden, Chairwoman

SB 739 (Solis) - As Amended: June 6, 2000

Policy Committee:
P.E.R.&S.S.Vote:4-1

Urgency: No State Mandated Local
Program:NoReimbursable:

SUMMARY :

This bill revises the Meyers-Milias-Brown Act, the bargaining and employee relations law governing cities, counties and special districts in California. The significant provisions of the bill are as follows:

1) Extension of PERB Jurisdiction to MMB Act .

The bill transfers jurisdiction for the resolution of unfair labor practice charges and representation disputes under the MMB Act to the Public Employment Relations Board (PERB). Presently, the MMB Act provides for the resolution of labor-management disputes through procedures adopted by local collective bargaining. Parties not satisfied with local dispute resolution may seek judicial relief.

Examples of employer conduct that would be considered "unfair labor practices" subject to PERB jurisdiction under this bill include refusing to negotiate in good faith; disciplining or threatening employees for participating in union activities; and unilaterally changing the terms and conditions of employment without bargaining. Examples of employee organization conduct that would be considered unfair labor practices subject to PERB jurisdiction include threatening employees who refuse to join a union and failing to represent bargaining unit members fairly in negotiations with their employer.

2) Agency Shop

a) The bill authorizes an agency shop agreement to take effect

without a negotiated agreement between a public agency and a recognized employee organization, in contrast to current law, subject to the following conditions:

i) A petition requesting an agency shop agreement is signed by 30% of the employees in the bargaining unit.

ii) The agency shop agreement is approved by a majority of employees who cast ballots in an election held to determine the level of support for an agency fee arrangement.

b) Additionally, the bill applies these procedures to the rescission of agency shop agreements, and repeals existing limitations on the duration of "agency shop" fee agreements, authorizing agency fee deductions indefinitely beyond the expiration of collective bargaining agreements

FISCAL EFFECT :

The bill would result in General Fund costs of approximately $1.4 million annually to the PERB to resolve local agency labor disputes under the MMB Act.

COMMENTS :

1) Background. The PERB was established to resolve unfair practice charges and representation disputes under the Educational Employee Relations Act (governing K-14 school employees) the Higher Education Employee Relation Act (UC, CSU and Hastings College of Law employees) and the Ralph Dills Act (state employees). The MMB Act, enacted in 1965, predates the statutes governing labor relations for state and educational employees, and has only been substantively amended once, to allow negotiated agency shop agreements. This bill extends PERB jurisdiction to local government employees under the MMB Act.

2) Purpose . Proponents argue that the MMB Act has no effective enforcement procedures except for court action, which is time-consuming and expensive. One 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. The appropriate role for the courts is to serve as an appellate body. Additionally, proponents argue

that the agency shop election provisions of the bill are

necessary because under current law, employers may simply refuse to negotiate agency shop agreements, thereby requiring unions to represent nonmembers.

3)Opposition . City and county representatives believe that agency shop provisions of the bill would confer a significant benefit upon employee organizations that should be subject to collective bargaining. Additionally, these representatives believe that locally-determined dispute resolution procedures are adequate and more appropriate than the transfer of these responsibilities to the PERB.

4)Governor's Veto. The 2000-01 State Budget approved by the Legislature included a General Fund appropriation of $1.4 million to cover the first-year costs to the PERB of resolving local agency labor disputes under the MMB Act. The governor vetoed this appropriation, stating that he did not agree with the policy rationale of the bill.

Analysis Prepared by : Stephen Shea / APPR. / (916) 319-2081

Original List Date: 8/1/2002
Last Updated: 7/19/2006
List Print Date: 10/18/2006
Claim Number: 01-TC-30
Issue: Local Government Employment Relations

Mailing Information: Draft Staff Analysis

Mailing List

TO ALL PARTIES AND INTERESTED PARTIES:

Each commission mailing list is continuously updated as requests are received to include or remove any party or person on the mailing list. A current mailing list is provided with commission correspondence, and a copy of the current mailing list is available upon request at any time. Except as provided otherwise by commission rule, when a party or interested party files any written material with the commission concerning a claim, it shall simultaneously serve a copy of the written material on the parties and interested parties to the claim identified on the mailing list provided by the commission. (Cal. Code Regs., tit. 2, § 1181.2.)

Mr. Steve Shields
Shields Consulting Group, Inc.
1536 36th Street
Sacramento, CA 95816

Tel: (916) 454-7310
Fax: (916) 454-7312

Mr. David Wellhouse
David Wellhouse & Associates, Inc.
9175 Kiefer Blvd, Suite 121
Sacramento, CA 95826

Tel: (916) 368-9244
Fax: (916) 368-5723

Mr. Leonard Kaye, Esq.
County of Los Angeles
Auditor-Controller's Office
500 W. Temple Street, Room 603
Los Angeles, CA 90012

Tel: (213) 974-8564
Fax: (213) 617-8106

Mr. Steve Keil
California State Association of Counties
1100 K Street, Suite 101
Sacramento, CA 95814-3941

Tel: (916) 327-7523
Fax: (916) 441-5507

Mr. Jim Spano
State Controller's Office (B-08)
Division of Audits
300 Capitol Mall, Suite 518
Sacramento, CA 95814

Tel: (916) 323-5849
Fax: (916) 327-0832

County Executive
County of Sacramento
711 G Street
Sacramento, CA 95814

Tel:
Fax:

Director
Department of Industrial Relations (C-50)
770 L Street
Sacramento, CA 95814

Tel: (916) 324-4163
Fax: (916) 327-6033

Ray Kerridge
City of Sacramento
915 "I" Street, 5th Floor
Sacramento,CA 95814
Phone: (916) 808-5704
Fax: (916) 808-7618

Tel: (916) 808-5704
Fax: (916) 808-7618

Executive Director
Public Employment Relations Board (D-12)
1031 18th Street
Sacramento, CA 95814-4174

Tel: (916) 322-3198
Fax: (916) 327-6377

Mr. J. Bradley Burgess
Public Resource Management Group
1380 Lead Hill Boulevard, Suite #106
Roseville, CA 95661

Tel: (916) 677-4233
Fax: (916) 677-2283

Ms. Annette Chinn
Cost Recovery Systems, Inc.
705-2 East Bidwell Street, #294
Folsom, CA 95630

Tel: (916) 939-7901
Fax: (916) 939-7801

Mr. Robert Thompson
Public Employment Relations Board (D-12)
General Counsel
1031 18th Street
Sacramento, CA 95814-4174

Tel: (916) 322-3198
Fax: (916) 327-7955

Ms. Carla Castaneda
Department of Finance (A-15)
915 L Street, 11th Floor
Sacramento, CA 95814

Tel: (916) 445-3274
Fax: (916) 323-9584

Mr. Allan Burdick
MAXIMUS
4320 Auburn Blvd., Suite 2000
Sacramento, CA 95841

Tel: (916) 485-8102
Fax: (916) 485-0111

Ms. Ginny Brummels
State Controller's Office (B-08)
Division of Accounting & Reporting
3301 C Street, Suite 500
Sacramento, CA 95816

Tel: (916) 324-0256
Fax: (916) 323-6527

Ms. Susan Geanacou
Department of Finance (A-15)
915 L Street, Suite 1190
Sacramento, CA 95814
Tel: (916) 445-3274
Fax: (916) 324-4888

Mr. Glen Everroad
City of Newport Beach
3300 Newport Blvd.
P. O. Box 1768
Newport Beach, CA 92659-1768
Tel: (949) 644-3127
Fax: (949) 644-3339

Ms. Bonnie Ter Keurst
County of San Bernardino
Office of the Auditor/Controller-Recorder
222 West Hospitality Lane
San Bernardino, CA 92415-0018
Tel: (909) 386-8850
Fax: (909) 386-8830

Ms. Beth Hunter
Centration, Inc.
8570 Utica Avenue, Suite 100
Rancho Cucamonga, CA 91730
Tel: (866) 481-2621
Fax: (866) 481-2682

COMMENTS ON DRAFT STAFF ANALYSIS
Local Government Employment Relations
01-TC-30
By City of Sacramento

Although the City of Sacramento agrees in large part with the analysis of the Commission's Staff, we believe there are issues which have been overlooked.

Agency Shop Petitions

Prior to the test claim legislation, a request by a union to have an agency shop in any given representation unit was subject to bargaining pursuant to the Meyers-Milias-Brown Act[1]. This would only occur as part of the regular Memorandum of Understanding (MOU) negotiations.

Government Code, Section 3504 specifies the scope of negotiation as follows:

> The scope of representation shall include all matters relating to employment conditions and employer-employee relations, including, but not limited to, wages, hours, and other terms and conditions of employment, except, however, that the scope of representation shall not include consideration of the merits, necessity, or organization of any service or activity provided by law or executive order.

As a result, it would be during the period of time of negotiations that a union could raise the issue of agency shop. However, with the test claim legislation, the process for arriving at an agency shop was substantially changed. Further, another change to statute altered agency shop matters. If an employer and employee organization reached impasse after expiration of the agreement and did not agree to continue provision of the agreement until a successor agreement was reached, working without a contract meant just that. An employer could refuse to honor the agency shop provision previously agreed to, thereby cutting off dues.

Previously, an agency shop could only be had by agreement through negotiations with the union and employer. However, with the test claim legislation, an alternative process was instituted. At any time, whether or not there is a contract in existence, the process set forth in Government Code, section 3502.5(b) may be instituted by the union. As a result, the process for agency shop by petition may be commenced unilaterally by the union at any time during the term of an MOU, or in the absence of an MOU. The only precondition is that the union negotiate with the employer for a period of up to30 days.

[1] Hereinafter "MMBA".

The statement of Commission staff on page 14[2] does not make sense in light of statute. To fail to participate in good faith negotiations during the 30 day period is an unfair labor practice. Thus, to not negotiate in good faith is unlawful, and is certainly not discretionary.

The State has stated what constitutes an unfair labor practice charge and who may file same, as follows:

The State has defined, in its regulations, what constitutes an unfair labor practice for both the employer and the union. See Sections 32603 and 32604 of the regulations. Under subdivision (c), it is an unfair labor practice for an employer to "Refuse 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." Thus, if the employer does not meet and confer in good faith during the 30 day period, such constitutes an unfair labor practice.

Thus for the Commission to state that the employer is under no duty to negotiate during that period of time is contrary to law. Thus, negotiations must be entered into during the 30 day period of time by both the union and the employer: to fail to do so is an unfair labor practice.

Furthermore, there are additional activities in processing agency shop petitions which must be engaged in by the employer. Only 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. These election related expenses are recognized as reimbursable under the Educational Employment Relations Act. This has not been recognized by the Commission Staff. Employer's Ability To File Unfair Labor Practice Charges With PERB

Coming under the jurisdiction of the PERB, the employer now has to file an unfair labor practice charge if the union is engaging in conduct which constitutes a violation of the Meyers-Milias-Brown Act. The position of the Commission's staff is that such an action is voluntary, and does not need to be taken.

However, the type of actions which can be undertaken by the union, which constitute an unfair labor practices and are illegal under the MMBA, include such concerted activities as refusals to perform all required job duties, slow downs, sick outs, rolling strikes and work stoppages. Any activity undertaken by a union in contravention of the MMBA is an unfair labor practice and illegal.

It is the position of the Commission staff that such undertaking on behalf of an employer is voluntary, as an unfair labor practice charge does not have to be filed, thus

[2] "Based on the plain language of the test claim statute and regulations regarding subdivision (b) agency shop arrangements, staff finds that public agency employers are *not* required to engage in separate agency shop negotiations for up to 30 days." [Emphasis in original.]

overlooking the unlawful actions of the union. The Commission staff distinguishes *San Diego Unified School Dist.* v. *Commission on State Mandates* (2004) 16 Cal. 3d 466, on the basis that the circumstances in labor relations do not rise to the circumstances of *San Diego* where the safety of students and school property is at stake.

However, public employees form the very basis upon which an agency provides its public services to the people. 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.[3]

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.

Conclusion

We respectfully request that the Commission staff 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

However, one of the most important issues is the fact that the agency should be entitled to reimbursement for filing unfair labor practice charges. As demonstrated above, the type of conduct which a union can engage in which constitutes an unfair labor practice charge is serious, and can result in substantial harm to the public health and safety. It is specious to assert that for a local governmental agency to file an unfair labor practice charge is "voluntary", when the wrong sought to be redressed can harm not only the agency, but the public health and safety. This type of activity should not be condoned by claiming that the activities by the employer in enforcing the law are not reimbursable.

Lastly, the number of unfair practice charges previously filed were likely much less. In the last two years alone, the number of filings under MMBA for years 2004-2005 and 2005-2006 were 293 and 254 respectively. Previously, charges were filed with the court, after exhausting whatever internal process existed. The process has been opened up to almost everyone. Since filing does not require an attorney, employees can file on their own, even against their employee organization, there is no cost to file, and filing can now be accomplished online. In short, it is much easier to file now than ever before.

[3] See Regs., section 32604 as to what constitutes an unfair labor practice charge by an employee organization (union).

I declare under penalty of perjury the foregoing is true and correct and that this declaration is executed this 9th day of November, at Sacramento, California.

Dee Contreras

Dee Contreras, Director of Labor Relations
City of Sacramento

EXHIBIT G

DEPARTMENT OF FINANCE
OFFICE OF THE DIRECTOR
ARNOLD SCHWARZENEGGER
STATE CAPITOL ■ ROOM 1145 ■ SACRAMENTO CA ■ 95814-4998 ■ WWW.DOF.CA.GOV

November 9, 2006

Ms. Paula Higashi
Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

Dear Ms. Higashi:

As requested in your letter of October 19, 2006, the Department of Finance has reviewed the draft staff analysis of test claim No. CSM-01-TC-30 "Local Government Employment Relations" submitted by the County of Sacramento and the City of Sacramento (claimants). The claimants allege that specified costs were incurred under Chapter 901, Statutes of 2000.

The Draft Staff Analysis finds the following activities to be reimbursable:

1. Deduct from employees' wages the payment of dues or service fees required pursuant to an agency shop arrangement and transmit the fees to the employee organization.

Finance concurs with the Commission staff that this activity is reimbursable.

2. Receive from the employee any proof of in lieu fee payments made to charitable organizations required pursuant to an agency shop arrangement (Government Code section 3502.5, subdivision (c)).

The test claim statute requires an employee to submit proof to the local agency on a monthly basis that in lieu fee payments have been made in accordance with agency shop agreements established pursuant to Government Code section 3502.5, subdivision (b). The test claim statute does not require the local agency to take any action once this information is received. The local agency is not required to transmit the fee payments to charitable organizations as claimed by the claimant. Because the test claim statute does not specifically require the local agency to take any action related to in lieu fee payments, Finance disagrees with the Commission staff's finding that receiving proof of payment is a reimbursable activity.

3. Follow Public Employment Relations Board (PERB) procedures in responding to charges and appeals filed with PERB by an entity other than the local public agency employer.

These activities are discretionary and do not create reimbursable state mandated costs because local agencies have several alternatives available to them in handling employment relations cases. Local agencies can argue a case in front of PERB, externally develop a settlement, or resolve the issue internally. Furthermore, engaging in the PERB process

should generate savings to local agencies compared to a much lengthier and more expensive litigation process through the court system.

As required by the Commission's regulations, we are including a "Proof of Service" indicating that the parties included on the mailing list which accompanied your October 19, 2006 letter have been provided with copies of this letter via either United States Mail or, in the case of other state agencies, Interagency Mail Service.

If you have any questions regarding this letter, please contact Carla Castañeda, Principal Program Budget Analyst at (916) 445-3274.

Sincerely,

Thomas E. Dithridge
Program Budget Manager

Attachments

Attachment A

DECLARATION OF
DEPARTMENT OF FINANCE
CLAIM NO. CSM-01-TC-30

1. I am currently employed by the State of California, Department of Finance (Finance), am familiar with the duties of Finance, and am authorized to make this declaration on behalf of Finance.

2. We concur that the sections relevant to this claim are accurately quoted in the test claim submitted by claimants and, therefore, we do not restate them in this declaration.

I certify under penalty of perjury that the facts set forth in the foregoing are true and correct of my own knowledge except as to the matters therein stated as information or belief and, as to those matters, I believe them to be true.

11/09/06
at Sacramento, CA

Carla Castañeda
Carla Castañeda

PROOF OF SERVICE

Test Claim Name: Local Government Employment Relations
Test Claim Number: CSM-01-TC-30

I, Antonio Lockett, the undersigned, declare as follows:
I am employed in the County of Sacramento, State of California, I am 18 years of age or older and not a party to the within entitled cause; my business address is 915 L Street, 12th Floor, Sacramento, CA 95814.

On November 9, 2006, I served the attached recommendation of the Department of Finance in said cause, by facsimile to the Commission on State Mandates and by placing a true copy thereof: (1) to claimants and nonstate agencies enclosed in a sealed envelope with postage thereon fully prepaid in the United States Mail at Sacramento, California; and (2) to state agencies in the normal pickup location at 915 L Street, Floor, for Interagency Mail Service, addressed as follows:

A-16
Ms. Paula Higashi, Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814
Facsimile No. 445-0278

B-8
State Controller's Office
Division of Accounting & Reporting
Attention: Ginny Brummels
3301 C Street, Room 500
Sacramento, CA 95816

B-29
Legislative Analyst's Office
Attention Marianne O'Malley
925 L Street, Suite 1000
Sacramento, CA 95814

Mr. Allan Burdick
MAXIMUS
4320 Auburn Boulevard, Suite 2000
Sacramento, CA 95841

County of Los Angeles
Department of Auditor-Controller
Kenneth Hahn Hall of Administration
Attention: Leonard Kaye
500 West Temple Street, Suite 525
Los Angeles, CA 90012

County of San Bernardino
Office of Auditor / Controller-Recorder
Attention: Bonnie Ter Keurst
222 West Hospitality Lane, Fourth Floor
San Bernardino, CA 92415 - 0018

Wellhouse and Associates
Attention: David Wellhouse
9175 Kiefer Boulevard, Suite 121
Sacramento, CA 95826

Mr. Steve Shields
Shields Consulting Group, Inc.
1536 36th Street
Sacramento, CA 95816

Mr. Steve Keil
California State Association of Counties
110 K Street, Suite 101
Sacramento, CA 95814-3941

B-08
Mr. Jim Spano
State Controller's Office
Division of Audits
300 Capitol Mall, Suite 518
Sacramento, CA 95814

County Executive
County of Sacramneto
711 G Street
Sacramento, CA 95814

Ray Kerridge
City of Sacramento
915 "I" Street, 5th Floor
Sacramento, CA 95814

Mr. J. Bradley Burgess
Public Resource Management Group
1380 Lead Hill Blvd, Suite #106
Roseville, CA 95661

D-12
Mr. Robert Thompson
Public Employment Relations Board
General Counsel
1031 18th Street
Sacramento, CA 95814-4174

Mr. Glen Everroad
City of Newport Beach
3300 Newport Blvd.
P O Box 1768
Newport Beach, CA 92659-1768

C-50
Director
Department of Industrial Relations
770 L Street
Sacramento, CA 95814

D-12
Executive Director
Public Employment Relations Board
1031 18th Street
Sacramento, CA 95814-4174

Ms. Annette Chinn
Cost Recovery Systems, Inc
705-2 East Bidwell Street, #294
Folsom, CA 95630

A-15
Ms. Carla Casteneda
Department of Finance
915 L Street, Suite 1280
Sacramento, CA 95814

Ms. Beth Hunter
Centration, Inc.
8570 Utica Avenue, Suite 100
Rancho Cucamonga, CA 91730

A-15
Ms. Susan Geanacou
Department of Finance
915 L Street, Suite 1280
Sacramento, CA 95814

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on at Sacramento, California.

Antonio Lockett

ICC: DITHRIDGE, LYNN, CASTANEDA, TIFFANY, GEANACOU, FEREBEE, FILE
I:\MANDATES\Local Gov't Employment Relations\Test Claim Comments.doc

C

Briefs and Other Related Documents

SAN BERNARDINO PUBLIC EMPLOYEES ASSOCIATION, Plaintiff and Respondent,
v.
CITY OF FONTANA et al., Defendants and Appellants.
No. E021207.

Court of Appeal, Fourth District, Division 2, California.
Nov. 16, 1998.

SUMMARY

A public employees labor organization petitioned for a writ of mandate against a city and the city manager to set aside various provisions in the parties' memoranda of understanding (MOU's) relating to longevity pay, personal leave accrual, and retiree medical insurance for certain city employees. The trial court granted the petition, finding that personal leave and longevity pay benefits were fundamental vested rights that could not be bargained away through the collective bargaining process. (Superior Court of San Bernardino County, No. SCV36883, Bob N. Krug, Judge.)

The Court of Appeal reversed. The court held that the trial court erred in concluding that employees represented by plaintiff possessed vested, contractual rights to personal leave accrual, longevity pay, and retirement health benefits, and that such benefits could not be altered through collective bargaining. The benefits were provided for in prior collective bargaining agreements reached between the city and its bargaining groups. Those agreements, as implemented through previous MOU's, were of fixed duration. Once the MOU's expired, the employees had no legitimate expectation that the benefits would continue unless they were renegotiated as part of a new bargaining agreement. Public employees have no vested right in any particular measure of compensation or benefits, and these may be modified or reduced by the proper statutory authority. Treating the benefits as vested would have subverted the policies underlying the Meyers-Milias-Brown Act (Gov. Code, § 3500 et seq.), which was designed for the purpose of resolving labor disputes. The act does not permit employees to accept the benefits of a collective bargaining agreement and reject less favorable provisions. (Opinion by Ward, J., with Richli, Acting P. J., and Gaut, J., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1) Appellate Review § 144--Scope--Questions of Law.
Questions of law are subject to de novo review on appeal.

(2a, 2b) Public Officers and Employees § 25--Compensation--Fixing and Altering Amount--Personal Leave and Longevity Pay Benefits--As Subject to Collective Bargaining Process.
In writ proceedings brought by a public employees labor organization against a city to challenge various terms and conditions of employment under memoranda of understanding (MOU's) negotiated with the city, the trial court erred in concluding that employees represented by plaintiff possessed vested, contractual rights to personal leave accrual, longevity pay, and retirement health benefits, and that such benefits could not be altered through collective bargaining. The benefits were provided for in collective bargaining agreements reached between the city and its bargaining groups. Those agreements, as implemented through previous MOU's, were of fixed duration. Once the MOU's expired, the employees had no legitimate expectation that the benefits would continue unless they were renegotiated as part of a new bargaining agreement. Public employees have no vested right in any particular measure of compensation or benefits, and these may be modified or reduced by the proper statutory authority. Treating the benefits as vested would have subverted the policies underlying the Meyers-Milias-Brown Act (Gov. Code, § 3500 et seq.), which was designed for the purpose of resolving labor disputes. The act does not permit employees to accept the benefits of a collective bargaining agreement and reject less favorable provisions. Moreover, no outside statutory source gives the employees additional protection or entitlement to future benefits; therefore, the longevity based benefits were a proper subject of negotiation.

[See 2 Witkin, Summary of Cal. Law (9th ed. 1987) Agency and Employment, § 455 et seq.]

(3) Labor § 37--Collective Bargaining--Public Employers and Employees-- Meyers-Milias-Brown Act--Memoranda of Understanding.

The Meyers-Milias-Brown Act (Gov. Code, § 3500 et seq.) requires public agencies to negotiate exclusively with the collective bargaining units. Once a memoranda of understanding (MOU) has been negotiated, it is reviewed and approved by the governing body of the public entity and the membership of the bargaining unit (*1217Gov. Code, § 3505). When an MOU has expired, however, the parties may negotiate changes to its provisions (Gov. Code, § 3505.1). An MOU is binding on both parties for its duration.

(4) Constitutional Law § 72--Right to Contract--Constitutional Ban on Impairment of Contracts--As Limiting Power of Public Entities to Modify Contracts.

As a general rule, the terms and conditions of public employment are controlled by statute or ordinance rather than by contract. However, public employment gives rise to certain obligations that are protected by the contract clause of the Constitution, including the right to the payment of salary that has been earned. Such obligations include pension rights. Under the California Constitution, a "law impairing the obligation of contracts may not be passed" (Cal. Const., art I, § 9). Similarly, under the Federal Constitution, no state shall pass any law impairing the obligation of contracts (U.S. Const., art. I, § 10, cl. 1). The contract clauses of the state and federal Constitutions limit the power of public entities to modify their own contracts with other parties.

(5) Constitutional Law § 72--Right to Contract--Impairment of Contracts.

For purposes of the constitutional ban on the impairment of contracts, a statute will be treated as a contract with binding obligations when the statutory language and circumstances accompanying its passage clearly evince a legislative intent to create private rights of a contractual nature enforceable against the state. There can be no impairment of a contract by a change thereof effected with the consent of one of the contracting parties.

(6) Actions and Special Proceedings § 6--Existence of Right of Action-- Ripeness and Advisory Opinions.

In writ proceedings brought by a public employees labor organization against a city to challenge various terms and conditions of employment under memoranda of understanding (MOU's) negotiated with the city, the trial court erred in compelling the city to refrain from reducing or eliminating the retirement medical and dental benefits unless comparable offsetting benefits are provided in their stead, since the matter of retiree medical and dental benefits was not yet ripe for review. The city and the collective bargaining units simply agreed to meet and confer regarding retiree benefits; however, they did not agree to eliminate or modify those benefits. In granting the petition compelling the city to refrain from reducing or eliminating retirement medical and dental benefits unless offsetting benefits were provided, the trial court issued an advisory opinion. *1218

COUNSEL

Best, Best & Krieger, Jack B. Clarke, Jr., Bradley E. Neufeld and Kevin T. Collins for Defendants and Appellants.

Liebert, Cassidy & Frierson, Arthur A. Hartinger and Alison C. Neufeld as Amici Curiae on behalf of Defendants and Appellants.

Olins, Foerster & Hayes, Barbara J. Ginsberg and Dennis Hayes for Plaintiff and Respondent.

WARD, J.

The City of Fontana (City) appeals from the grant of the petition for writ of mandate brought by San Bernardino Public Employees Association (SBPEA). SBPEA's petition, brought under Code of Civil Procedure section 1085, challenged various terms and conditions of employment under memoranda of understanding (MOU) negotiated with the City. The City, supported by amici curiae, [FN1] contends the trial court erred in concluding that the employees represented by the SBPEA possessed vested, contractual rights to personal leave accrual, longevity pay, and retirement health benefits, and such benefits could not be altered through collective bargaining. We agree, and we therefore reverse the judgment.

FN1 The request of 68 individual towns and cities in the State of California to appear in this action as amici curiae is granted.

Facts and Procedural Background

The SBPEA is a labor organization that represents certain employees of the City for purposes of bargaining under the Meyers-Milias-Brown Act (the Act) (Gov. Code, § 3500 et seq.) In 1995, the City and three bargaining units, the City Hall Unit, the City Yard Unit, and the Police Benefit Association,

all acting through and represented by SBPEA, entered into new MOU's.

Before 1993, the MOU's for the three bargaining units all provided for longevity pay, leave accrual increases based on longevity, and paid retiree medical and dental insurance benefits (sometimes referred to hereafter as the longevity-based benefits). Those benefits had been agreed upon by the three bargaining units through the collective bargaining process. *1219

During negotiations for the 1995-1997 MOU's, [FN2] the City proposed to reduce accrual of personal leave, longevity pay, and retiree insurance benefits. The City warned that if the membership rejected the proposal to reduce those benefits, the City would implement a 7 percent reduction in the City's contribution to PERS (Public Employees' Retirement System (Gov. Code, § 20000 et seq.)) retirement. The SBPEA took the position that the longevity-based benefits were vested and could not be bargained away. However, the members of the three bargaining units ratified the MOU's that reduced the longevity-based benefits. The new MOU's reduced the personal leave accrual rate for employees having 10 or more years of service and changed longevity pay from a percentage of salary payable annually to a fixed amount payable only in the year of service the employee became eligible. Retirement insurance benefits were to be renegotiated.

FN2. The negotiations extended over 31/2 months and consumed 100 hours, with 50 to 100 proposals and counterproposals being submitted.

On October 31, 1995, the SBPEA filed a petition for writ of mandate against the City and the city manager seeking to set aside provisions in the MOU's relating to longevity pay, personal leave accrual, and retiree medical insurance. After conducting a hearing, the trial court granted the petition. The trial court found that personal leave and longevity pay benefits were fundamental vested rights that could not be bargained away through the collective bargaining process.

The 1990-1993 MOU's stated, "The terms and conditions of this Agreement shall be applicable to all employees set forth in Appendix A commencing July 1, 1990 and ending June 30, 1993." The 1990-1993 MOU's further stated, "Unless otherwise specifically changed or modified by this Memorandum of Understanding, all prevailing benefits existing from previous agreements between the parties and approved by the City Council shall be maintained at current levels."

Discussion

I. *Standard of Review*

(1) This case involves a question of law subject to de novo review on appeal. (See., e.g., *Evans v. Unemployment Ins. Appeals Bd.* (1985) 39 Cal.3d 398, 407 [216 Cal.Rptr. 782, 703 P.2d 122].)

II. *Personal Leave and Longevity Pay Benefits Are Conditions of Employment Subject to the Collective Bargaining Process*

(2a) The City contends the trial court erred in concluding that personal leave and longevity pay benefits were fundamental rights that could not be *1220 bargained away through the collective bargaining process. We first review the role of collective bargaining in public employment.

A. *The Meyers-Milias-Brown Act*

The Act (Gov. Code, § 3500 et seq.) controls collective bargaining between public employers and their employees. The purpose of the Act is 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." (Gov. Code, § 3500.) To implement that purpose, employee collective bargaining units have the authority to represent their employees in "all matters relating to employment conditions and employer-employee relations, including, but not limited to, wages, hours, and other terms and conditions of employment, ..." (Gov. Code, § 3504; *Relyea v. Ventura County Fire Protection Dist.* (1992) 2 Cal.App.4th 875, 880 [3 Cal.Rptr.2d 614].)

(3) The Act requires public agencies to negotiate exclusively with the collective bargaining units. Once an MOU has been negotiated, it is reviewed and approved by the governing body of the public entity and the membership of the bargaining unit. (Gov. Code, § 3505.) When an MOU has expired,

however, the parties may negotiate changes to its provisions. (Gov. Code, § 3505.1.)

An MOU is binding on both parties for its duration. In *Glendale City Employees' Assn., Inc. v. City of Glendale* (1975) 15 Cal.3d 328 [124 Cal.Rptr. 513, 540 P.2d 609] (hereafter *City of Glendale*), the court explained the operation of the Act: "Section 3505.1 ... provides that if agreement is reached it should be reduced to writing and presented to the governing body of the agency for determination. This statutory structure necessarily implies that an agreement, *once approved by the agency, will be binding.* The very alternative prescribed by the statute-that the memorandum 'shall not be binding' except upon presentation 'to the governing body or its statutory representative *for determination*,'-manifests that *favorable* 'determination' engenders a binding agreement." (*Id.* at p. 336, original italics.)

In *Relyea v. Ventura County Fire Protection Dist., supra,* 2 Cal.App.4th 875, the court rejected an argument that the Act permits individual employees to negotiate the terms of their employment with public employers. The court explained, "Appellant's interpretation of the [Act] would subvert the legislative scheme of providing for a structured collective bargaining system by requiring an employer to negotiate over working conditions with any ***1221** number of employees. This could complicate employer-employee relations to the extent of undermining collective bargaining and its benefits, thereby defeating the Act's goals of ensuring stability in labor management relations and the right of employees to join and be represented by an employee organization. (§ 3500.) [¶] Moreover, certain basic principles which govern a collective bargaining system contradict appellant's view that individual bargaining rights do not impede collective rights. Normally the employer has the duty to negotiate only with the chosen employee representative. [Citation.] It is also a fundamental principle that a member of an employee bargaining unit is bound by the terms of a valid collective bargaining agreement, though he is not formally a party to it and may not even belong to the union which negotiated it. [Citation.] Individual contracts, no matter what the circumstances which justify their execution, may not interfere with the terms of the collective agreement. [Citation.]" (*Id.* at p. 882.)

B. *The Contractual Protection for Pension Rights Does Not Extend to Vacation Leave and Longevity Pay Benefits Negotiated Under an MOU*

(4) As a general rule, the terms and conditions of public employment are controlled by statute or ordinance rather than by contract. (*California League of City Employee Associations v. Palos Verdes Library Dist.* (1978) 87 Cal.App.3d 135, 139 [150 Cal.Rptr. 739] (hereafter *California League*).) However, " 'public employment gives rise to certain obligations which are protected by the contract clause of the Constitution, including the right to the payment of salary which has been earned.' " (*Ibid.*, citing *Kern v. City of Long Beach* (1947) 29 Cal.2d 848, 852-853 [179 P.2d 799].) Such obligations include pension rights.

In *Kern*, the court explained the nature of a public employee's pension rights: "It is true that an employee does not earn the right to a full pension until he has completed the prescribed period of service, but he has actually earned some pension rights as soon as he has performed substantial services for his employer. [Citations.] He is not fully compensated upon receiving his salary payments because, in addition, he has then earned certain pension benefits, the payment of which is to be made at a future date. While payment of these benefits is deferred, and is subject to the condition that the employee continue to serve for the period required by the statute, the mere fact that performance is in whole or in part dependent upon certain contingencies does not prevent a contract from arising, and the employing governmental body may not deny or impair the contingent liability any more than it can refuse to make the salary payments which are immediately due." (*Kern v. City of Long Beach, supra,* 29 Cal.2d at p. 855, see also *Miller v. State of California* (1977) 18 Cal.3d 808, 814 [135 Cal.Rptr. 386, 557 P.2d 970].) ***1222**

Under the California Constitution, a "law impairing the obligation of contracts may not be passed." (Cal. Const., art. I, § 9.) Similarly, under the federal Constitution, "No state shall ... pass any ... law impairing the obligation of contracts ...." (U.S. Const., art. I, § 10, cl. 1.) The contract clauses of the state and federal Constitutions limit the power of public entities to modify their own contracts with other parties. (*Board of Administration v. Wilson* (1997) 52 Cal.App.4th 1109, 1130 [61 Cal.Rptr.2d 207].)

In *California League, supra,* 87 Cal.App.3d 135, the court held that certain employee benefits were entitled to protection under the constitutional contract clauses. In that case, a library district unilaterally

eliminated certain fringe benefits for long-term employees, including a fifth week of vacation after ten years of service, a longevity salary increase, and a four-month paid sabbatical after six years of service. The library district took its action after "meet and confer" sessions under Government Code section 3505 et seq. had failed to lead to an MOU between the library district and the employee association. (87 Cal.App.3d at p. 137.) The court, relying substantially on *Kern*, held the fringe benefits had been important to the employees, had been an inducement for the employees to remain in service with the district, and were a form of compensation that had been earned by remaining in employment. Thus, the court concluded, the employees had fundamental vested rights to the benefits, not subject to unilateral termination by the employer. Moreover, a general salary increase did not offset the termination of the benefits, because the loss of benefits fell unequally on different classes of employees. (*California League, supra*, at p. 140; see also *Thorning v. Hollister School Dist.* (1992) 11 Cal.App.4th 1598 [15 Cal.Rptr.2d 91] [holding that retired school board members had a vested right to postretirement continuation of paid health benefits because those benefits were included in the school district's official declaration of policy pertaining to remuneration and other benefits for board members, and such benefits were important to the board members as an inducement for their continued service on the board and a factor in their decision to retire].)

In reaching its determination that the employees had vested rights in the longevity-based benefits, the trial court relied primarily on *California League*. The court in *California League* ruled that whenever benefits or conditions of employment are important to the employees, they acquire protection under the contract clause. The court's analysis leading to this conclusion is set forth in a single sentence: "While the three benefits in question may not be as important to an employee as a pension, in determining whether they are fundamental the court is to evaluate 'the effect of it in human terms and the importance of it to the individual in the life situation.' *1223 (*Bixby v. Pierno*, 4 Cal.3d 130, 144 [93 Cal.Rptr. 234, 481 P.2d 242].)" (*California League, supra*, 87 Cal.App.3d at pp. 139-140.)

The *California League* court's reliance on *Bixby* is misplaced. *Bixby* merely established a rule of judicial review applicable to adjudicatory orders or decisions of public agencies. (*Bixby v. Pierno* (1971) 4 Cal.3d 130 [93 Cal.Rptr. 234, 481 P.2d 242].) The case cannot fairly be read as establishing a new measure of substantive rights to be protected under the contract clause.

(5) For purposes of the constitutional ban on the impairment of contracts, "[a] statute will be treated as a contract with binding obligations when the statutory language and circumstances accompanying its passage clearly '... evince a legislative intent to create private rights of a contractual nature enforceable against the State.' " (*Valdes v. Cory* (1983) 139 Cal.App.3d 773, 786 [189 Cal.Rptr. 212].) There can be no impairment of a contract by a change thereof effected with the consent of one of the contracting parties. (*Mulcahy v. Baldwin* (1932) 216 Cal. 517, 525 [15 P.2d 738].)

() Here, the longevity-based benefits were provided for in collective bargaining agreements reached between the City and its bargaining groups. Those collective bargaining agreements, as implemented through previous MOU's, were of fixed duration. Once the MOU's expired under their own terms, the employees had no legitimate expectation that the longevity-based benefits would continue unless they were renegotiated as part of a new bargaining agreement. It has long been held that "public employees have no vested right in any particular measure of compensation or benefits, and that these may be modified or reduced by the proper statutory authority. [Citations.]" (*Butterworth v. Boyd* (1938) 12 Cal.2d 140, 150 [82 P.2d 434, 126 A.L.R. 838].)

In *Butterworth*, public employees contended that compulsory salary deductions to cover the cost of a medical insurance plan deprived them of due process of law. The *Butterworth* court responded that no public employee has a vested right in continued employment "except in so far as the right is conferred by statute or other valid regulation; that the employment is accepted under the terms and conditions fixed by law; and that one of the terms of the employment in the present case is the provision for the benefits of the health service system at the charge imposed therefor. The charter governs the salaries of city employees; by the amendment to the charter, in force at the time the municipal salaries were fixed for the current fiscal year, *1224 the deduction was authorized and made accordingly." (*Butterworth v. Boyd, supra*, 12 Cal.2d at p. 150.) The court further held that "[i]f salaries can be reduced it is certainly clear enough that compensation provisions may be modified by substituting for a fraction thereof the valuable protection of comprehensive medical service." (*Ibid.*)

In *Vielehr v. State of California* (1980) 104 Cal.App.3d 392 [163 Cal.Rptr. 795], the court drew a distinction between retirement rights and employment rights, and held that only the former are entitled to contract clause protections. Thus, the court ruled that a statute reducing the amount of interest paid to public employees who withdrew their pension fund contributions upon leaving public service before retirement diminished a right of employment, not a right of retirement, and therefore the statute did not violate the contract clauses. (*Id.* at pp. 395-396; see also *Miller v. State of California, supra,* 18 Cal.3d at pp. 815-817 [holding that changing mandatory retirement age did not impair any contractual obligation].)

We conclude that within the context of the Act, the collective bargaining process properly included such terms and conditions of employment as annual leave and longevity pay benefits. The benefits at issue could not have become permanently and irrevocably vested as a matter of contract law, because the benefits were earned on a year-to-year basis under previous MOU's that expired under their own terms.

Moreover, treating the annual leave and longevity pay benefits as vested would subvert the policies underlying the Act. Here, the SBPEA negotiated new MOU's that provided general salary increases and other benefits to the employees. The MOU's were negotiated with representatives of the recognized employee organizations and were submitted to and approved by the general membership of those organizations. Nonetheless, the SBPEA now attacks certain provisions of the MOU's although contending the employees were entitled to the concessions and advantages of the MOU's. The words of the California Supreme Court in *City of Glendale* bear repeating: "The Legislature designed the act ... for the purpose of resolving labor disputes. (See Gov. Code, § 3500.) But a statute which encouraged the negotiation of agreements, yet permitted the parties to retract their concessions and repudiate their promises whenever they choose, would impede effective bargaining. Any concession by a party from a previously held position would be disastrous to that party if the mutual agreement thereby achieved could be repudiated by the opposing party. Successful bargaining rests upon the sanctity and legal viability of the given word." (*City of Glendale, supra,* 15 Cal.3d at p. 336.) The Act does not permit the employees to accept the *1225 benefits of a collective bargaining agreement and reject less favorable provisions.

The SBPEA next argues that the city council acted unilaterally in adopting the MOU's. To support its position, it cites *Wright v. City of Santa Clara* (1989) 213 Cal.App.3d 1503 [262 Cal.Rptr. 395]. *Wright* is not on point. In that case, the court declared the City of Santa Clara exceeded its authority by enacting an ordinance which incorporated provisions of an agreement with its police officers' association. The agreement provided that an employee on temporary military leave must turn over his salary from military service or take approved time off to continue to receive his regular pay. The case did not turn on the City of Santa Clara's having taken a "unilateral" action; that was not even an issue in the case. Rather, the dispositive issue was that the challenged provision of the agreement directly conflicted with Military and Veterans Code section 395.01. Thus, the case merely stands for the proposition that a collective bargaining unit may not bargain away individual statutory or constitutional rights which flow from sources outside the collective bargaining agreement itself.

The SBPEA further argues that the right of representation is limited when the bargain reached significantly infringes on the constitutional or statutory rights of individual employees (*California Teachers' Assn. v. Parlier Unified School Dist.* (1984) 157 Cal.App.3d 174, 183 [204 Cal.Rptr. 20] [holding that a collective bargaining agreement could not waive benefits to which employees were statutorily entitled]; *Phillips v. State Personnel Bd.* (1986) 184 Cal.App.3d 651, 660 [229 Cal.Rptr. 502], disapproved on another ground in *Coleman v. Department of Personnel Administration* (1991) 52 Cal.3d 1102, 1123, fn. 8 [278 Cal.Rptr. 346, 805 P.2d 300] [holding that a collective bargaining agreement could not waive an employee's right to due process]), and the benefits at issue should be treated as constitutional rights of individual employees. Here, no outside statutory source gives the employees additional protection or entitlement to future benefits; therefore, the benefits are a proper subject of negotiation.

Although the case is not precisely on point, the reasoning of *Olson v. Cory* (1980) 27 Cal.3d 532 [178 Cal.Rptr. 568, 636 P.2d 532] is instructive. In that case, the court held a statute limiting annual cost-of-living increases in judicial salaries was unconstitutional as to any judge whose term began before the statute was enacted, but the statute could be applied to judges upon the commencement of new terms. The court explained, "A judge who completes

one term during which he was entitled to unlimited cost-of-living increases and elects to enter a new term has impliedly agreed to be bound by *1226 salary benefits then offered by the state for a different term." (*Id.* at p. 540.) By parity of reasoning, upon the expiration of an MOU, an employee who elects to continue employment with a public entity has impliedly agreed to be bound by the salary and benefit package provided in the new MOU. We note that the previous MOU explicitly stated that the terms and conditions of employment stated therein were to remain in force and effect during the term of that MOU.

We conclude that personal leave and longevity pay benefits are simply terms and conditions of employment subject to negotiation in the collective bargaining process.

III. *The Matter of Retiree Medical and Dental BenefitsIs Not Ripe for Review*

(6) The petition for writ of mandate challenged provisions of the MOU's that stated, "During the period of July 1, 1995 through March 31, 1996, both the City and the PBA agree to meet and confer regarding the additional incremental costs of future benefits (i.e. beyond the amount currently budgeted for the expense during the 1995/96 fiscal year), including but not limited to: scope of coverage, funding sources, and the elimination of the City's participation in the PERS Health Care Plans. The City further agrees that it will not impose the elimination of retiree health benefits or modification of the current program, contingent upon the employee's agreement to fund the cost of the program in excess of the amount currently being funded by the City, from their compensation. The amount needed to fund this benefit shall be determined pursuant to an actuarial study." The trial court noted that neither the City nor the collective bargaining units had made any decision to affect retirement medical benefits. The court stated, "The court is aware that, as of the hearing in this case, the issue was unresolved.... Nonetheless, the Court feels it is appropriate to grant the petition compelling City to refrain from reducing or eliminating the retirement medical and dental benefits unless comparable offsetting benefits are provided in their stead."

A court may not issue rulings on matters that are not ripe for review. (*Pacific Legal Foundation v. California Coastal Com.* (1982) 33 Cal.3d 158, 171 [188 Cal.Rptr. 104, 655 P.2d 306].) In this case, the City and the collective bargaining units simply agreed to meet and confer regarding retiree benefits; however, they did not agree to eliminate or modify those benefits. In granting the petition compelling the City to refrain from reducing or eliminating retirement medical and dental benefits unless offsetting *1227 benefits were provided, the trial court issued an advisory opinion. (*Carsten v. Psychology Examining Com.* (1980) 27 Cal.3d 793, 798 [166 Cal.Rptr. 844, 614 P.2d 276].)

Disposition

The judgment is reversed. Defendants shall recover costs on appeal.

Richli, Acting P. J., and Gaut, J., concurred. *1228
Cal.App.2.Dist.
San Bernardino Public Employees Assn. v. City of Fontana
67 Cal.App.4th 1215, 79 Cal.Rptr.2d 634, 98 Daily Journal D.A.R. 11,843, 160 L.R.R.M. (BNA) 2179

Briefs and Other Related Documents (Back to top)

- 1998 WL 34115083 (Appellate Brief) Supplementry Brief in Answer to Amicus Curiae Brief (Jul. 30, 1998) Original Image of this Document (PDF)
- 1998 WL 34115115 (Appellate Brief) Appellants City of Fontana and the City Manager for the City of Fontana's Answer to Amicus Curiae's Brief in Support of Appellant's Opening Brief (Jul. 30, 1998) Original Image of this Document (PDF)
- 1998 WL 34113367 (Appellate Brief) Appellants' Reply Brief (Jun. 22, 1998) Original Image of this Document (PDF)
- 1998 WL 34113146 (Appellate Brief) Amicus Curiae Brief in Support of Appellants By California Cities of Alameda; Albany; Avalon; Bakersfield; Burbank; Chino; Chowchilla; Chula Vista; Coachella; El Cajon; Eureka; Fremont; Fresno; Glendale; Grand Terrace; Gustine; Hayward; Huntington Be ach; King City; Laguna Beach; Lawndale; Livermore; Long Beach; Los Alamitos; Los Altos; Modesto; Montclair; Montebello; Monterey; Murrieta; Nevada City; Norco; Ontario; Orange; Palm Desert; Pismo Beach; Pleasant Hill; Redding; Redlands; Roseville; Sa (May. 29, 1998) Original Image of this Document (PDF)
- 1998 WL 34113147 (Appellate Brief) Petitioner-Respondent's Opposition Brief (May. 29, 1998) Original Image of this Document (PDF)
- 1998 WL 34137194 (Appellate Brief) Appellants'

Opening Brief (Apr. 30, 1998) Original Image of this Document (PDF)

END OF DOCUMENT

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM ON: Government Code Section 3547.5 as added by Chapter 1213, Statutes of 1991, and the California Department of Education Management Advisory 92-01 And filed on December 29, 1997; By the Alameda County Office of Education, Claimant.	NO. 97-TC-08 *Collective Bargaining Agreement Disclosure* STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; TITLE 2, CALIFORNIA CODE OF REGULATIONS, DIVISION 2, CHAPTER 2.5, ARTICLE 7. (Adopted on March 26, 1998)

STATEMENT OF DECISION

The attached Statement of Decision of the Commission on State Mandates is hereby adopted in the above-entitled matter.

This Decision shall become effective on April 7, 1998.

Paula Higashi, Executive Director

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM ON: Government Code Section 3547.5 as added by Chapter 1213, Statutes of 1991, and the California Department of Education Management Advisory 92-01 And filed on December 29, 1997; By the Alameda County Office of Education, Claimant.	NO. 97-TC-08 *Collective Bargaining Agreement Disclosure* STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; TITLE 2, CALIFORNIA CODE OF REGULATIONS, DIVISION 2, CHAPTER 2.5, ARTICLE 7. (Adopted on March 26, 1998)

STATEMENT OF DECISION

The Commission on State Mandates (Commission) on March 26, 1998, heard this test claim during a regularly scheduled hearing. Keith Peterson appeared for the Alameda County Office of Education and Carol Berg appeared for the Education Mandated Cost Network.

At the hearing, evidence both oral and documentary was introduced, the test claim was submitted, and the vote was taken.

The law applicable to the Commission's determination of a test claim is Government Code section 17500 et seq. and section 6, article XIII B of the California Constitution and related case law.

The Commission, by a vote of 7-0 approved this test claim.

Issue

Do the provisions of Government Code section 3547.5, as added by Chapter 1213, Statutes of 1991, and the California Department of Education's Management Advisory 92-01, impose a new program or higher level of service upon school districts within the meaning of section 6, article XIII B of the California Constitution and Government Code section 17514?

Prior Law

Before the test claim legislation, school districts were only required to publicly disclose all *initial* proposals for collective bargaining agreements. Government Code section 3547 provides in pertinent part: "[a]ll initial proposals of exclusive representatives and of public school

employers, which relate to matters within the scope of representation, shall be presented at a public meeting of the public school employer and thereafter shall be public records."

Test Claim Legislation

Chapter 1213, Statutes of 1991, added section 3547.5 to the Government Code, as follows:

> "Before a public school employer enters into a written agreement with an exclusive representative covering matters within the scope of representation, the major provisions of the agreement, including, but not limited to, the costs that would be incurred by the public school employer under the agreement for the current and subsequent fiscal years, shall be disclosed at a public meeting of the public school employer in a format established for this purpose by the Superintendent of Public Instruction."

Under section 3547.5, school districts must now publicly disclose the major provisions of all collective bargaining agreements before they enter into a written agreement. The purpose of this new legislation is to ensure that the public is aware of the costs associated with the major provisions of the tentative collective bargaining agreement before it becomes binding on the school district.

California Department of Education Management Advisory 92-01[1]

Government Code section 3547.5 requires the Superintendent of Public Instruction to establish a format for the information that is to be publicly disclosed. To this end, the California Department of Education released Management Advisory 92-01 on May 15, 1992. The Advisory specifies the minimum procedures, format, and information required to be disclosed under section 3547.5.

Commission Findings

In order for a statute, which is the subject of a test claim, to impose a reimbursable state mandated program, the statutory language (1) must direct or obligate an activity or task upon local governmental entities, and (2) the required activity or task must be new or it must create an increased or higher level of service over the former required level of service. To determine if a required activity is new or imposes a higher level of service, a comparison must be undertaken between the test claim legislation and the legal requirements in effect immediately prior to the enactment of the test claim legislation.[2] Finally, the newly required activity or increased level of service must be state mandated.[3]

The Commission found that immediately before Government Code section 3547.5 was enacted under Chapter 1231, Statutes of 1991, public school employers were under no obligation to

---

[1] California Department of Education Management Advisory 92-01 is referenced in Claimant's initial filing dated December 29, 1997.

[2] Both Keith Peterson and Carol Berg disagreed at the hearing regarding the appropriate measurement date. Carol Berg wanted this sentence stricken from the Statement of Decision, while Keith Peterson wished to lodge his formal objection to staff's use of the measurement date. However, both supported adoption of the Statement of Decision.

[3] *County of Los Angeles* v. *State of California* (1987) 43 Cal.3d 46, 56; *Carmel Valley Fire Protection Dist.* v. *State of California* (1987) 190 Cal.App.3d 521, 537; *Lucia Mar Unified School Dist.* v. *Honig* (1988) 44 Cal.3d 830, 835.

publicly report the major provisions of a collective bargaining agreement *after* discussion with an exclusive representative of an employee group prior to entering into a written agreement.

The Commission found that under prior law school districts were only required to publicly disclose all *initial* proposals for collective bargaining agreements.

The Commission found that Government Code section 3547.5, as added by Chapter 1231, Statutes of 1991, requires school districts to publicly disclose major provisions of a collective bargaining agreement *after* negotiations, but before this agreement becomes binding.

The Commission found that the California Department of Education issued its Management Advisory 92-01, dated May 15, 1992, to establish the public disclosure format for school district compliance with the test claim statute. The Commission found that the Advisory sets forth the minimum procedures, format, and information for school districts to disclose under the new public reporting requirements. Further, the Commission found that the Advisory constitutes an "executive order" under Government Code section 17516[4] and is therefore a part of the test claim.

Conclusion

The Commission concludes that that Government Code section 3547.5, as added by Chapter 1213, Statutes of 1991, and the California Department of Education Management Advisory 92-01, impose a new program or higher level of service upon local school districts and therefore are reimbursable under section 6, article XIII B of the California Constitution and Government Code section 17514.

Further, the Commission concludes that the parameters and guidelines should allow reimbursement for compliance with the minimum procedures, format, and information specified in the California Department of Education's Management Advisory 92-01, as applicable and appropriate under the test claim statute.

[4] Government Code section 17516 provides in relevant part: "Executive order means any order, plan, requirement, rule, or regulation issued by any of the following: (a) The Governor. (b) Any officer or official serving at the pleasure of the Governor. (c) *Any agency, department, board, or commission of state government.*" (Emphasis added.)

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM: Government Code Sections 3543, 3546, and 3546.3; Statutes 1980, Chapter 816; Statutes 2000, Chapter 893; Statutes 2001, Chapter 805; California Code of Regulations, Title 8, Sections 34030 and 34055 Filed on June 27, 2001, and Amended on May 15, 2002, by Clovis Unified School District, Claimant.	Case No.: 00-TC-17/01-TC-14 *Agency Fee Arrangements* STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7 (*Adopted on December 9, 2005*)

STATEMENT OF DECISION

The attached Statement of Decision of the Commission on State Mandates is hereby adopted in the above-entitled matter.

_____ _____

PAULA HIGASHI, Executive Director Date

BEFORE THE
COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

IN RE TEST CLAIM:

Government Code Sections 3543, 3546, and 3546.3;

Statutes 1980, Chapter 816; Statutes 2000, Chapter 893; Statutes 2001, Chapter 805;

California Code of Regulations, Title 8, Sections 34030 and 34055

Filed on June 27, 2001, and Amended on May 15, 2002, by Clovis Unified School District, Claimant.

Case No.: 00-TC-17/01-TC-14

Agency Fee Arrangements

STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7

(*Adopted on December 9, 2005*)

STATEMENT OF DECISION

The Commission on State Mandates ("Commission") heard and decided this test claim during a regularly scheduled hearing on December 9, 2005. Mr. Keith Petersen appeared on behalf of Clovis Unified School District, Claimant. Ms. Susan Geanacou, Senior Staff Counsel, appeared for the Department of Finance.

The law applicable to the Commission's determination of a reimbursable state-mandated program is article XIII B, section 6 of the California Constitution, Government Code section 17500 et seq., and related case law.

The Commission adopted the staff analysis to approve this test claim at the hearing by a vote of 6 to 0.

The Commission finds that Government Code section 3546, subdivisions (a) and (f), and California Code of Regulations, title 8, sections 34030, subdivision (a), and 34055, subdivision (a), impose a new program or higher level of service for K-14 school districts within the meaning of article XIII B, section 6 of the California Constitution, and impose costs mandated by the state pursuant to Government Code section 17514, for the following new activities:

- Upon receiving notice from the exclusive representative of a classified public school employee who is in a unit for which an exclusive representative has been selected, the employer shall deduct the amount of the fair share service fee authorized by this section from the wages and salary of the employee and pay that amount to the employee organization. (Gov. Code, § 3546, subd. (a).)

- School district employers of a public school employee shall provide the exclusive representative of a public employee with the home address of each member of a bargaining unit. (Gov. Code, § 3546, subd. (f).)
- Within 20 days following the filing of the petition to rescind or reinstate an organizational security arrangement, the school district employer shall file with the regional office of PERB 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. (Cal. Code Regs., tit. 8, §§ 34030, subd. (a), and 34055, subd. (a).)

BACKGROUND

The *Agency Fee Arrangements* test claim, filed by Clovis Unified School District, addresses issues within the collective bargaining process and employer-employee relations in California's K-14 public school systems. Specifically, the test claim legislation focuses on the payment of fees by non-union member (or "fair share") employees to exclusive representative organizations. In 1975, the Legislature enacted the Educational Employment Relations Act (EERA).[1] In doing so, the Legislature sought to "promote the improvement of personnel management and employer-employee relations within the public school systems in the State of California."[2] This policy aimed at furthering the public interest in "maintaining the continuity and quality of educational services."[3]

The EERA imposes on school districts the duty to "meet and negotiate" with an employee organization selected as the exclusive representative of an employee bargaining unit on matters within the scope of representation.[4] The scope of representation is limited to "matters relating to wages, hours of employment, and other terms and conditions of employment."[5] The EERA explicitly includes "organizational security" within the scope of representation.[6]

---

[1] Statutes 1975, chapter 961. Pursuant to Government Code section 3541.3, subdivision (g), the Public Employment Relations Board (PERB) is vested with the authority to "adopt... rules and regulations to carry out the provisions and effectuate the purposes and policies" of the EERA. (Government Code sections 3540 et seq.). Accordingly, in Code of Regulations, title 8, section 32001, subdivision (c), PERB has declared that "'[s]chool district' as used in the EERA means a school district of any kind or class, including any public community college district, within the state").

[2] Government Code section 3540.

[3] *San Diego Teachers Assn. v. Superior Court* (1979) 24 Cal.3d 1, 11.

[4] Government Code section 3543.3.

[5] Government Code section 3543.2.

[6] Former Government Code section 3546 provided that "organizational security... shall be within the scope of representation." (Stats. 1975, ch. 961, § 2). In 2000, former Government Code section 3546 was repealed (Stats. 2000, ch. 893), but similar language was added via the same bill to Government Code section 3540.1, subdivision (i), which now provides that

Government Code section 3540.1, subdivision (i), provides two definitions for "organizational security." The first describes organizational security as:

> [a]n arrangement pursuant to which a public school employee may decide whether or not to join an employee organization, but which requires him or her, as a condition of continued employment, if he or she does join, to maintain his or her membership in good standing for the duration of the written agreement...

Thus, such an arrangement would provide that once an employee organization has been selected by an employee bargaining unit as exclusive representative, each employee has the option of either joining or not joining the employee organization.

Alternatively, the second definition describes organizational security as:

> [a]n arrangement that requires an employee, as a condition of continued employment, either to join the recognized or certified 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 the organization for the duration of the agreement....

This type of organizational security arrangement dictates that an employee in a bargaining unit for which an employee organization has been selected as exclusive representative *must* either (a) join the employee organization, or (b) pay such organization a service fee or agency fee arrangement. The EERA explicitly declares that the "employee organization recognized or certified as the exclusive representative for the purpose of meeting and negotiating shall fairly represent each and every employee in the appropriate unit."[7]

Under prior law, organizational security arrangements were subject to the collective bargaining process. Statutes 2000, chapter 893 created a statutory organizational security arrangement -- removing the basic issue from the bargaining process.

Claimant's Position

Claimant, Clovis Unified School District, filed a test claim on June 27, 2001, alleging Government Code sections 3543 and 3546, as amended by Statutes 2000, chapter 893, impose reimbursable state-mandated activities on K-14 school districts for activities including establishing and implementing payroll procedures for collecting fair share service fees, and remitting the fees to the certified employee organization. Claimant alleges a new activity to: "Draft, approve and distribute an appropriate and neutral notice to existing non-member employees and new employees, which explains the additional payroll deduction for 'fair share services fees' for non-member employees of a certified employee organization."

Additionally, claimant alleges that Government Code section 3546.3 as added by Statutes 1980, chapter 816, requires school districts to "Establish and implement procedures to determine which employees claim a conscientious objection to the withholding of 'fair share services fees,'" and

---

"'Organizational security' is within the scope of representation... ."

[7] Government Code section 3544.9.

establish and implement payroll procedures to prevent automatic deductions from the wages of such conscientious objectors.

Claimant also alleges the California Code of Regulations, title 8, sections 34030 and 34055, requires K-14 school districts, within 20 days of a filed petition to rescind or reinstate the collective bargaining agreement, file with the regional office of the Public Employment Relations Board (PERB) an alphabetical list containing the names and job titles or classifications of the persons employed in the unit as of the last date of the payroll period immediately preceding the date the petition, and establish new payroll procedures, as needed.

On May 15, 2002, claimant filed a test claim amendment alleging the following reimbursable state-mandated activities from amendments by Statutes 2001, chapter 805:

- Establish procedures and thereafter implement such procedures to verify, at least annually, that payments to nonreligious, nonlabor charitable organizations have been made by employees who have claimed conscientious objections pursuant to Government Code section 3546.3.
- Adjust payroll withholdings for rebates or withholding reductions for that portion of fair share service fees that are not germane to the employee organization function as the exclusive bargaining representative when so determined pursuant to regulations adopted by PERB, pursuant to Government Code section 3546, subdivision (a).
- Take any and all necessary actions, when necessary, to recover reasonable legal fees, legal costs and settlement or judgment liabilities from the recognized employee organization, arising from any court or administrative action relating to the school district's compliance with the section pursuant to Government Code section 3546, subdivision (e);
- Provide the exclusive representative of a public school employee a list of home addresses for each employee of a bargaining unit, regardless of when the employees commenced employment, and periodically update and correct the list to reflect changes of address, additions for new employees and deletions of former employees, pursuant to Government Code section 3546, subdivision (f).

Claimant's complete, detailed allegations are found in the Amendment to the Test Claim Filing, pages five through nine, received May 15, 2002.

Claimant filed comments on the draft the Commission analysis on October 31, 2005. The substantive comments will be summarized in the analysis below.

Department of Finance's Position

Department of Finance filed comments on August 3, 2001, and July 30, 2002, addressing the allegations stated in the test claim and subsequent amendment. Regarding claimant's allegations that the test claim legislation mandates a variety of activities involving the establishment and maintenance of payroll procedures to account for deducting fair share service fees and transmitting those fees to the employee organization, Department of Finance contends that public school employers who did not negotiate and implement organizational security arrangements prior to the enactment of Statutes 2000, chapter 893 are justified in claiming mandated costs.

However, those employers who did negotiate and implement organizational security arrangements prior to the enactment of Statutes 2000, chapter 893 are not justified in making similar claims for reimbursement. Department of Finance argues that those employers who did negotiate and implement such arrangements prior to the 2000 amendments "would presumably have already established" such payroll procedures and those employers should not "be reimbursed for costs they voluntarily incurred."

Department of Finance has similar arguments regarding claimant's allegations on costs incurred in complying with PERB's regulations in the event a petition to rescind or reinstate an organizational security arrangement is filed.

Regarding claimant's allegation that it must draft notices explaining the fee deductions to employees paying fair share service fees, Department of Finance argues that no such mandate exists. Department of Finance relies on California Code of Regulations, title 8, section 32992 which provides that each employee "required to pay an agency fee shall receive written notice from the exclusive representative" regarding the fee deduction.

Likewise, responding to claimant's allegation that it must incur costs in taking the necessary actions in recovering legal fees from an exclusive representative under Government Code section 3546, subdivision (e), Department of Finance asserts that the subdivision, by its plain language, does not impose any duties on the public school employer.

Department of Finance's other comments and arguments will be addressed in the analysis below, where pertinent.[8]

---

[8] Claimant argues that the Department of Finance's comments are "incompetent" and should be stricken from the record since they do not comply with section 1183.02, subdivision (d), of the Commission's regulations. That regulation requires written responses to be signed at the end of the document, under penalty of perjury by an authorized representative of the state agency, with the declaration that it is true and complete to the best of the representative's personal knowledge, information, or belief. The claimant contends that the Department of Finance's response "is signed without certification" and the declaration attached to the response "simply stipulate[s] to the accuracy of the citations of law in the test claim." (Claimant's comments to draft the Commission analysis, page 1-2.)

Determining whether a statute or executive order constitutes a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution is a pure question of law. (*City of Jose, supra*, 45 Cal.App.4th at p. 1817; *County of San Diego, supra*, 15 Cal.4th at p. 109). Thus, any factual allegations raised by a party, including the Department of Finance, regarding how a program is implemented is not relied upon by the Commission at the test claim phase when recommending whether an entity is entitled to reimbursement under article XIII B, section 6. The Department's response contains comments on whether the Commission should approve this test claim and is, therefore, not stricken from the administrative record.

California Community Colleges Chancellor's Office Position

The California Community Colleges Chancellor's Office ("Chancellor's Office") filed comments regarding this test claim on July 30, 2001. The Chancellor's Office begins by noting that community colleges are subject to PERB's jurisdiction. Secondly, looking to the statutes regarding organizational security, the Chancellor's Office believes that "the provisions of Government Code [sections] 3540.1 and 3546 and the related implementing regulations in the Code of Regulations impose a mandate of specific tasks for community college district the Commission."

The Chancellor's Office concludes by stating that no funds have been appropriated for costs incurred in performing these activities, and that none of the provisions of Government Code section 17556 apply to community colleges "complying with the mandate."

FINDINGS

The courts have found that article XIII B, section 6, of the California Constitution[9] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[10] "Its purpose is to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[11] A test claim statute or executive order may impose a reimbursable state-mandated program if it orders or commands a local agency or school district to engage in an activity or task.[12] In addition, the required activity or task must be new, constituting a "new program," or it must create a "higher level of service" over the previously required level of service.[13]

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

---

[9] Article XIII B, section 6, subdivision (a), provides: (a) 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.

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

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

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

[13] *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 Dist. v. Honig* (1988) 44 Cal.3d 830, 835 (*Lucia Mar*).

policy, but does not apply generally to all residents and entities in the state.[14] 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.[15] A "higher level of service" occurs when the new "requirements were intended to provide an enhanced service to the public."[16]

Finally, the newly required activity or increased level of service must impose costs mandated by the state.[17]

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.[18] 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."[19]

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

Government Code Section 3543:

Government Code section 3543 was rewritten by Statutes 2000, chapter 893. Statutes 2001, chapter 805 amended one sentence, as indicated by underline below:

> (a) Public school employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations. If the exclusive representative of a unit provides notification, as specified by subdivision (a) of Section 3546, public school employees who are in a unit for which an exclusive representative has been selected, shall be required, as a condition of continued employment, to join the recognized employee organization or to pay the organization a fair share services fee, as required by Section 3546. If a majority

---

[14] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 874-875 (reaffirming the test set out in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; see also *Lucia Mar, supra,* 44 Cal.3d 830, 835.)

[15] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 878; *Lucia Mar, supra,* 44 Cal.3d 830, 835.

[16] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 878.

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

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

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

of the members of a bargaining unit rescind that arrangement, either of the following options shall be applicable:

(1) The recognized employee organization may petition for the reinstatement of the arrangement described in subdivision (a) of Section 3546 pursuant to the procedures in paragraph (2) of subdivision (d) of Section 3546.

(2) The employees may negotiate either of the two forms of organizational security described in subdivision (i) of Section 3540.1.

(b) Any employee may at any time present grievances to his or her employer, and have such grievances adjusted, without the intervention of the exclusive representative, as long as the adjustment is reached prior to arbitration pursuant to Sections 3548.5, 3548.6, 3548.7, and 3548.8 and the adjustment is not inconsistent with the terms of a written agreement then in effect; provided that the public school employer shall not agree to a resolution of the grievance until the exclusive representative has received a copy of the grievance and the proposed resolution and has been given the opportunity to file a response.

Before the amendment in 2000, prior law provided: "Public school employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations. Public school employees shall also have the right to refuse to join or participate in the activities of employee organizations and shall have the right to represent themselves individually in their employment relations with the public school employer, except that once the employees in an appropriate unit have selected an exclusive representative and it has been recognized pursuant to Section 3544.1 or certified pursuant to Section 3544.7, no employee in that unit may meet and negotiate with the public school employer." Current subdivision (b) is identical to prior law.

In order to be subject to article XIII B, section 6, of the California Constitution, the test claim legislation must impose a state-mandated activity on a local agency or school district.[20] Courts have adopted a "strict construction" interpretation of article XIII B, section 6.[21] Consistent with this narrow interpretation, the term "mandate" has been construed according to its commonly understood meaning as an "order" or "command."[22] Thus, the test claim legislation must require a local government entity to perform an activity in order to fall within the scope of article XIII B, section 6.

According to the well-settled rules of statutory construction, an examination of a statute claimed to constitute a reimbursable state mandate begins with the plain language of the statute, and "where the language is clear there is no room for interpretation."[23] Where the Legislature has not found it appropriate to include express requirements in a statute, it is inappropriate for a court

---

[20] *Kern High School Dist., supra*, 30 Cal.4th 727, 740.

[21] *City of San Jose, supra*, 45 Cal.App.4th 1802, 1816-17.

[22] *Long Beach Unified School Dist., supra*, 225 Cal.App.3d 155, 174.

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

to write such requirements into the statute.[24] The courts have noted that "[w]e cannot... read a mandate into language which is plainly discretionary."[25]

Beginning with the plain language of section 3543, subdivision (a), there is no activity imposed on the public school *employer*. While public school *employees* "shall be required" to either join the employee organization selected by the unit as exclusive representative or to pay such organization a service fee, there is nothing in the language of section 3543, subdivision (a), imposing upon the public school employer the obligation to perform any activities.

Government Code section 3543, subdivision (a), by its plain language, fails to impose any activities on school districts. Section 3543, subdivision (b), contains the same language found in former section 3543 and therefore is not new, nor does the plain language of subdivision (b) impose any duties upon school districts. Accordingly, the Commission finds that Government Code section 3543 is not subject to article XIII B, section 6, of the California Constitution.

Government Code Section 3546.3:

Government Code section 3546.3 was added by Statutes 1980, chapter 816, as follows:

> Notwithstanding subdivision (i) of Section 3540.1, Section 3546, or any other provision of this chapter, any employee who is a member of a religious body whose traditional tenets or teachings include objections to joining or financially supporting employee organizations shall not be required to join, maintain membership in, or financially support any employee organization as a condition of employment; except that such employee may be required, in lieu of a service fee, to pay sums equal to such service fee either to a nonreligious, nonlabor organization, charitable fund exempt from taxation under Section 501(c) (3) of Title 26 of the Internal Revenue Code, chosen by such employee from a list of at least three such funds, designated in the organizational security arrangement, or if the arrangement fails to designate such funds, then to any such fund chosen by the employee. Either the employee organization or the public school employer may require that proof of such payments be made on an annual basis to the public school employer as a condition of continued exemption from the requirement of financial support to the recognized employee organization. If such employee who holds conscientious objections pursuant to this section requests the employee organization to use the grievance procedure or arbitration procedure on the employee's behalf, the employee organization is authorized to charge the employee for the reasonable cost of using such procedure.

Claimant asserts that section 3546.3 requires school districts to establish and maintain procedures for determining which employees may claim a conscientious objection, establish procedures to ensure that fair share service fee deductions are not made from the wages of those employees claiming such objections, and to establish procedures to ensure, at least annually, that those employees are making payments to charitable organizations in lieu of service fee deductions. Claimant asserts that if section 3546.3 was determined to not impose any state-

---

[24] *Whitcomb Hotel, Inc. v. California Employment Commission* (1944) 24 Cal.App.2d 753, 757.

[25] *City of San Jose, supra*, 45 Cal.App.4th 1802, 1816.

mandated activities on school districts, then it must also be interpreted that "there is no requirement for religious objectors to pay any sum of money to either their employee organization or the specified alternative approved organizations."[26]

Department of Finance, in its August 3, 2001 comments, argues that school districts that negotiated and implemented organizational security arrangements prior to the enactment of the 2000 amendments are not justified in claiming mandated costs, but that school districts that did not negotiate such arrangements are justified in claiming mandated costs. Department of Finance's position is grounded in the discretionary nature of the collective bargaining process, and that employers who negotiated organizational security arrangements prior to the enactment of the 2000 amendments should not "be reimbursed for costs they voluntarily incurred."[27]

For the reasons below, the Commission finds that Government Code section 3546.3 is not subject to article XIII B, section 6, of the California Constitution because section 3546.3 does not impose any state-mandated activities on school districts.

In order to be subject to article XIII B, section 6, of the California Constitution, the test claim legislation must impose a state-mandated activity on a local agency or school district.[28] Courts have adopted a "strict construction" interpretation of article XIII B, section 6.[29] Consistent with this narrow interpretation, the term "mandate" has been construed according to its commonly understood meaning as an "order" or "command."[30] Thus, the test claim legislation must require a local government entity to perform an activity in order to fall within the scope of article XIII B, section 6.

According to the well-settled rules of statutory construction, an examination of a statute claimed to constitute a reimbursable state mandate begins with the plain language of the statute, and "where the language is clear there is no room for interpretation."[31] Where the Legislature has not found it appropriate to include express requirements in a statute, it is inappropriate for a court to write such requirements into the statute.[32] The courts have noted that "[w]e cannot... read a mandate into language which is plainly discretionary."[33]

Just as discussed above regarding Government Code section 3543, the plain language of Government Code section 3546.3 is also discretionary. Section 3546.3 states only that an employee holding a conscientious objection to joining or financially supporting an employee organization "*may* be required" to make payments to a nonreligious, nonlabor, charitable organization in lieu of paying a fair share service fee to such organization. (Emphasis added).

---

[26] Claimant's comments to draft the Commission analysis, page 3.

[27] Department of Finance, August 3, 2001 Comments, page 3.

[28] *Kern High School Dist., supra*, 30 Cal.4th 727, 740.

[29] *City of San Jose, supra*, 45 Cal.App.4th 1802, 1816-17.

[30] *Long Beach Unified School Dist., supra*, 225 Cal.App.3d 155, 174.

[31] *City of Merced, supra*, 153 Cal.App.3d 777.

[32] *Whitcomb Hotel, Inc., supra*, 24 Cal.App.2d 753, 757.

[33] *City of San Jose, supra*, 45 Cal.App.4th 1802, 1816.

Section 3546.3 does not impose any obligation on school districts. Section 3546.3 provides that "*[e]ither* the employee organization *or* the public school employer *may* require that proof of such payments be made on an annual basis." (Emphasis added). Section 3546.3, by its plain meaning, does not require or command school districts to perform an activity. Accordingly, the Commission finds that Government Code section 3546.3 is not subject to article XIII B, section 6, of the California Constitution.

Remaining Test Claim Legislation:

In order for the remaining test claim legislation to be subject to article XIII B, section 6 of the California Constitution, the legislation must constitute a "program." Government Code section 3546 provides, in part, that "the employer shall deduct the amount of the fair share service fee authorized by this section from the wages and salary of the employee and pay that amount to the employee organization," and that "[t]he employer of a public school employee shall provide the exclusive representative of a public employee with the home address of each member of a bargaining unit.... ." California Code of Regulations, title 8, sections 34030 and 34055 require that a school district employer 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 organizational security arrangement.

In *County of Los Angeles v. State of California*, the California Supreme Court defined the word "program" within the meaning of article XIII B, section 6 as one 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.[34] The court has held that only one of these findings is necessary.[35]

Department of Finance asserts that Government Code section 3546, subdivision (a), as it relates to rebates and reductions to the fair share service fee do not constitute a program because it neither provides a service to the public nor qualifies as a function unique to governmental entities. Department of Finance claims that the United States Supreme Court's holding in *Communication Workers v. Beck* (1988) 487 U.S. 735, which addresses fair share service fees, applies to both private and public employees. The Court in *Beck* interpreted and applied the provisions of the National Labor Relations Act (NLRA). However, the NLRA by its own terms expressly excludes public employees from its coverage. Section 2, subdivision (2), of the NLRA (29 U.S.C. § 152(2)) provides, in pertinent part, that "[t]he term 'employer' ... shall not include... any State or political subdivision thereof..." Furthermore, section 2, subdivision (3), of the NLRA (29 U.S.C. § 152(3)) provides that "[t]he term 'employee' ... shall not include any individual employed... by any... person who is not an employer as herein defined."[36]

---

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

[35] *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, 537.

[36] See *Carmen v. San Francisco Unified School District* (1997) 982 F.Supp. 1396, 1409 (concluding that "school districts are considered 'political subdivisions' of the State of California within the meaning of 29 U.S.C. § 152(2), and therefore are exempt from coverage under the NLRA").

The Commission finds that Government Code section 3546 and California Code of Regulations, title 8, sections 34030 and 34055, impose a program within the meaning of article XIII B, section 6 of the California Constitution under the second test, to the extent the test claim legislation requires school districts to engage in administrative activities solely applicable to public school administration. The test claim legislation imposes unique requirements upon school districts that do not apply generally to all residents and entities of the state.

Accordingly, the Commission finds that the remaining test claim legislation constitutes a "program" and, thus, may be subject to subvention pursuant to article XIII B, section 6 of the California Constitution if the legislation also imposes a new program or higher level of service, and costs mandated by the state.

Issue 2: Does the remaining test claim legislation impose a new program or higher level of service on school districts within the meaning of article XIII B, section 6 of the California Constitution, and impose "costs mandated by the state" within the meaning of Government Code sections 17514 and 17556?

Test claim legislation imposes a new program or higher level of service within an existing program when it compels a local agency or school district to perform activities not previously required.[37] The courts have defined a "higher level of service" in conjunction with the phrase "new program" to give the subvention requirement of article XIII B, section 6 meaning. Accordingly, "it is apparent that the subvention requirement for increased or higher level of service is directed to state-mandated increases in the services provided by local agencies in existing programs."[38] A statute or executive order imposes a reimbursable "higher level of service" when the statute or executive order, as compared to the legal requirements in effect immediately before the enactment of the test claim legislation, increases the actual level of governmental service provided in the existing program.[39]

Government Code Section 3546:

Government Code section 3546, as enacted by Statutes 2000, chapter 893, and amended by Statutes 2001, chapter 805,[40] follows:

> (a) Notwithstanding any other provision of law, upon receiving notice from the exclusive representative of a public school employee who is in a unit for which an exclusive representative has been selected pursuant to this chapter, *the employer shall deduct the amount of the fair share service fee authorized by this section from the wages and salary of the employee and pay that amount to the employee organization.* Thereafter, the employee shall, as a condition of continued employment, be required either to join the recognized employee organization or

---

[37] *Lucia Mar Unified School Dist., supra*, 44 Cal.3d 830, 836.

[38] *County of Los Angeles, supra*, 43 Cal.3d 46, 56; *San Diego Unified School District, supra*, 33 Cal.4th 859, 874.

[39] *San Diego Unified School Dist., supra*, 33 Cal.4th 859, 878; *Lucia Mar, supra*, 44 Cal.3d 830, 835.

[40] Reworded subdivision (a), and added subdivisions (e) and (f).

pay the fair share service fee. The amount of the fee shall not exceed the dues that are payable by members of the employee organization, and shall cover the cost of negotiation, contract administration, and other activities of the employee organization that are germane to its functions as the exclusive bargaining representative. Agency fee payers shall have the right, pursuant to regulations adopted by the Public Employment Relations Board, to receive a rebate or fee reduction upon request, of that portion of their fee that is not devoted to the cost of negotiations, contract administration, and other activities of the employee organization that are germane to its function as the exclusive bargaining representative.

(b) The costs covered by the fee under this section may include, but shall not necessarily be limited to, the cost of lobbying activities designed to foster collective bargaining negotiations and contract administration, or to secure for the represented employees advantages in wages, hours, and other conditions of employment in addition to those secured through meeting and negotiating with the employer.

(c) The arrangement described in subdivision (a) shall remain in effect unless it is rescinded pursuant to subdivision (d). The employer shall remain neutral, and shall not participate in any election conducted under this section unless required to do so by the board.

(d)(1) The arrangement described in subdivision (a) may be rescinded by a majority vote of all the employees in the negotiating unit subject to that arrangement, if a request for a vote is supported by a petition containing 30 percent of the employees in the negotiating unit, the signatures are obtained in one academic year. There shall not be more than one vote taken during the term of any collective bargaining agreement in effect on or after January 1, 2001.

(2) If the arrangement described in subdivision (a) is rescinded pursuant to paragraph (1), a majority of all employees in the negotiating unit may request that the arrangement be reinstated. That request shall be submitted to the board along with a petition containing the signatures of at least 30 percent of the employees in the negotiating unit. The vote shall be conducted at the worksite by secret ballot, and shall be conducted no sooner than one year after the rescission of the arrangement under this subdivision.

(3) If the board determines that the appropriate number of signatures have been collected, it shall conduct the vote to rescind or reinstate in a manner that it shall prescribe in accordance with this subdivision.

(4) The cost of conducting an election under this subdivision to reinstate the organizational security arrangement shall be borne by the petitioning party and the cost of conducting an election to rescind the arrangement shall be borne by the board.

(e) The recognized employee organization shall indemnify and hold the public school employer harmless against any reasonable legal fees, legal costs, and settlement or judgment liability arising from any court or administrative action

relating to the school district's compliance with this section. The recognized employee organization shall have the exclusive right to determine whether any such action or proceeding shall or shall not be compromised, resisted, defended, tried, or appealed. This indemnification and hold harmless duty shall not apply to actions related to compliance with this section brought by the exclusive representative of district employees against the public school employer.

(f) *The employer of a public school employee shall* provide the exclusive representative of a public employee with the home address of each member of a bargaining unit, regardless of when that employee commences employment, so that the exclusive representative can comply with the notification requirements set forth by the United States Supreme Court in *Chicago Teachers Union v. Hudson* (1986) 89 L.Ed. 2d 232. (Emphasis added.)

The test claim allegations regarding Government Code section 3546 will be analyzed in order of subdivision below.

Government Code Section 3546, Subdivision (a):

Claimant alleges that subdivision (a) of Government Code section 3546 constitutes a reimbursable state mandate in two respects by requiring school districts to (1) establish, implement, maintain and update payroll procedures to determine those employees from whose paychecks service fees must be deducted, and to make such deductions and transmit those fees to the employee organization; (2) "adjust payroll withholdings for rebates or withholding reductions" pursuant to the rebate or fee reduction provision of subdivision (a); and (3) provide notice to employees explaining the payroll deduction for the fair share service fees.

Department of Finance agrees that subdivision (a) requires school districts to deduct service fees from the wages of its employees, and then transmit those fees to the employee organization. However, Department of Finance also argues that those school districts that did establish organizational security arrangements prior to the enactment of the test claim legislation are not justified in claiming any mandated costs because those districts voluntarily chose to incur such costs, and so nothing new is mandated upon them by the test claim legislation. The Commission disagrees. Government Code section 17565 clearly provides that: "If a local agency or a school district, at its option, has been incurring costs which are subsequently mandated by the state, the state shall reimburse the local agency or school district for those costs incurred after the operative date of the mandate."

Department of Finance also argues that the rebate and fee reduction provision imposes no activities on school districts. Department of Finance asserts that PERB's regulations squarely place the burden of issuing fee rebates to employees on the employee organization.

Under prior law, a school district could voluntarily enter into organizational security arrangements with an employee organization. Organizational security has been within the scope of representation since the EERA's enactment.[41] This results in a duty upon the school district to

---

[41] Former Government Code section 3546 (added by Stats. 1975, ch. 961, and repealed by Stats. 2000, ch. 893); Gov. Code, § 3540.1, subd. (i) (as amended by Stats. 2000, ch. 893).

meet and negotiate in good faith with the exclusive representative upon request.[42] Prior to the 2000 amendments, the EERA, while imposing a duty to bargain, did not compel the parties to reach agreement on organizational security. Thus, any agreement ultimately reached through the bargaining process was entered into voluntarily by both sides.

Government Code section 3546, subdivision (a), requires what was once voluntary. Section 3546, subdivision (a), bypasses the discretion of a school district, and instead compels the district to institute an organizational security arrangement "upon receiving notice from the exclusive representative." This new requirement that school districts shall implement organizational security arrangements requires school districts to make service fee deductions from the wages of employees, and consequently transmit those fees to the employee organization. Such fee deductions and payments to the employee organization were never required immediately preceding the enactment of the test claim legislation, and thus impose a new program or higher level of service on school districts.

In addition, under prior law, certificated and classified employees could pay the service fees directly to the certificated or recognized employee organization in lieu of having the school district deduct the service fees from the employee's salary or wage order.[43] Claimant argues that Government Code section 3546, subdivision (a), expressly states that its terms apply "notwithstanding any other provision of law." Thus, claimant argues that the employee's right to pay the service fee directly to the employee organization is "nullified." Claimant contends the school districts are now required to make the service fee deductions from the wages of all employees that work in a unit for which an exclusive representative has been selected and transmit those fees to the employee organization.[44]

The Commission agrees with claimant. Government Code section 3546, subdivision (a), states the following:

> *Notwithstanding any other provision of law*, upon receiving notice from the exclusive representative of a public school employee who is in a unit for which an exclusive representative has been selected pursuant to this chapter, the employer shall deduct the amount of the fair share service fee authorized by this section from the wages and salary of the employee and pay that amount to the employee organization. (Emphasis added.)

The phrase "notwithstanding any other provision of law" has expressly been interpreted by the courts as "an express legislative intent to have the specific statute control despite the existence of other law which might otherwise govern."[45] Thus, any other provision of law that is contrary or inconsistent with the statute "is subordinated to the latter provision" containing the "notwithstanding" language.[46] In this case, the sections in the Education Code allowing the

---

[42] Government Code section 3543.3.

[43] Education Code sections 45061, 45168, 87834, and 88167.

[44] Claimant's response to draft the Commission analysis, page 4.

[45] *People v. Tillman* (1999) 73 Cal.App.4th 771, 784-785.

[46] *Id.* at page 786.

employee to directly pay the service fee to the employee organization is inconsistent with the test claim statute that requires, without exception, the employer to deduct the service fee from the wages of the employee that works in a unit for which an exclusive representative has been selected. Accordingly, the Commission finds that Government Code section 3456, subdivision (a), imposes a new program or higher level of service by requiring school districts to make service fee deductions from the wages of all certificated and classified employees that work in a unit for which an exclusive representative has been selected, and transmit those fees to the employee organization.

However, in order to be subject to the subvention requirement of article XIII B, section 6, of the California Constitution, the test claim legislation must also impose upon a local agency or school district "costs mandated by the state." Government Code section 17514 defines "costs mandated by the state" to mean "any increased costs which a local agency or school district is required to incur..."

Government Code section 17556 lists several exceptions which preclude the Commission from finding costs mandated by the state. Specifically, "The commission shall not find costs mandated by the state, as defined in Section 17514, in any claim submitted by a local agency or school district, if, after a hearing, the commission finds that: ... (d) The local agency or school district has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service."

Pursuant to Education Code sections 45061 and 87834, K-14 school districts retain the authority to levy the charges necessary to cover any costs incurred in making service fee deductions from the wages of certificated employees choosing not to join the employee organization. Education Code section 45061 applies to elementary and secondary districts, while Education Code section 87834 is for community colleges. Education Code section 45061 follows:

> The governing board of each school district when drawing an order for the salary or wage payment due to a certificated employee of the district shall, with or without charge, reduce the order for the payment of service fees to the certified or recognized organization as required by an organizational security arrangement between the exclusive representative and a public school employer as provided under Chapter 10.7 (commencing with Section 3540) of Division 4 of Title 1 of the Government Code. However, the organizational security arrangement shall provide that any employee may pay service fees directly to the certified or recognized employee organization in lieu of having such service fees deducted from the salary or wage order.
>
> If the employees of a district do not authorize the board to make a deduction to pay their pro rata share of the costs of making deductions for the payment of service fees to the certified or recognized organization, the board shall deduct from the amount transmitted to the organization on whose account the payments were deducted the actual costs, if any, of making the deduction. No charge shall exceed the actual cost to the district of the deduction. These actual costs shall be determined by the board and shall include startup and ongoing costs.

Education Code section 87834 is nearly identical, the only difference being that section 87834 substitutes the words "community college district" for the words "school district" in the first sentence of section 45061. As is evident from the plain language of sections 45061 and 87834,

school districts may deduct service fees from the wages of certificated employees "*with or without charge*." (Emphasis added).

The language of Government Code section 17556, subdivision (d), is clear and unambiguous. In *Connell v. Superior Court* (1997) 59 Cal.App.4th 382, 401, the court found that "the plain language of the statute precludes reimbursement where the local agency has the authority, i.e., the right or the power, to levy fees sufficient to cover the costs of the state-mandated program." In making such a determination, the court explicitly rejected the argument that the term "authority" should be construed as meaning "a practical ability in light of surrounding economic circumstances."[47] Accordingly, the focus is not whether a local agency or school district *chooses* to exercise an authority to levy service charges or fees, but rather whether such authority exists at all. Section 17556, subdivision (d), explicitly declares that if the local agency or school district "has the authority" to assess fees, then the commission shall be precluded from finding "costs mandated by the state." Here, school districts do possess such authority.

According to the Education Code sections, "No charge shall exceed the actual cost to the district of the deduction," but the costs for which the governing board is authorized to assess charges "shall be determined by the board and shall include startup and ongoing costs." Thus, the school district may assess charges for costs it must incur in establishing, maintaining, and adjusting its service fee deduction procedures, in addition to transmitting those fees to the employee organization.

Education Code sections 45061 and 87834 provide school districts with "the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program," within the meaning of Government Code section 17556, subdivision (d). Accordingly, the Commission finds that Government Code section 3546, subdivision (a), does not constitute a reimbursable state mandate because the test claim legislation does not impose "costs mandated by the state" as to activities regarding certificated employees.

This same fee authority does not apply for classified employees. Subdivision (b) of both Education Code sections 45168 and 88167 (for K-12 districts and community college districts, respectively), provide:

> The governing board of each [ ] district, when drawing an order for the salary or wage payment due to a classified employee of the district may, *without charge*, reduce the order … for the payment of service fees to the certified or recognized organization as required in an organizational security arrangement between the exclusive representative and a [ ] district employer as provided under Chapter 10.7 (commencing with Section 3540) of Division 4 of Title 1 of the Government Code. [Emphasis added.]

Thus, the Commission finds that Government Code section 3546, subdivision (a) imposes a new program or higher level of service upon school districts within the meaning of article XIII B, section 6 of the California Constitution, and imposes costs mandated by the state pursuant to Government Code section 17514, for the following new activity:

---

[47] *Ibid.*

- Upon receiving notice from the exclusive representative of a classified public school employee who is in a unit for which an exclusive representative has been selected, the employer shall deduct the amount of the fair share service fee authorized by this section from the wages and salary of the employee and pay that amount to the employee organization.

This activity does not apply for certificated employees; fee authority is available pursuant to Education Code sections 45061 and 87834.

Claimant further alleges that Government Code section 3546, subdivision (a), requires school districts to make payroll adjustments for service fee deductions to account for fee reductions or rebates to which the fee-paying employees may become entitled. Claimant alleges that this activity is mandated since school districts are required to report accurate payroll information to their employees and the state and federal governments.[48]

Government Code section 3546, subdivision (a), recognizes the right of employees paying fair share service fees "to receive a rebate or fee reduction upon request, of that portion of their fee" determined to be beyond the permissible scope of the employee organization's role as exclusive bargaining representative. To implement these provisions, PERB regulations require the exclusive representative to provide annual notice to nonmembers that are required to pay the fair share service fee of the amount of the service fee deduction and the calculation used to arrive at the amount of the fee.[49] If the employee disagrees with the amount of the service fee deduction, the employee may file an agency fee objection and the exclusive representative is required to administer an agency fee appeal procedure.[50] The Commission finds that the requirement imposed by Government Code section 3546, subdivision (a), on school districts to deduct the correct amount from the wages of the employee after receiving notice from the exclusive representative of the amount, applies when the agency fee objection is resolved and it is determined that the employee is entitled to a reduction of future agency fee deductions.

But there is no mandate in the statutes or regulations plead by the claimant requiring the school district to make payroll adjustments for rebates. Rather, any rebates are paid by the exclusive representative. Under PERB regulations, once an agency fee objection is filed, the exclusive representative is required to hold any disputed agency fees in an escrow account for the duration of the dispute.[51] Escrowed agency fees that are being challenged shall not be released until after there is a mutual agreement between the agency fee objector and the exclusive representative, or an impartial decisionmaker has made a decision.[52] Interest at the prevailing rate shall be paid by the exclusive representative on all rebated fees.[53]

---

[48] Claimant's response to draft the Commission analysis, page 5.

[49] California Code of Regulations, title 8, section 32992, subdivision (a).

[50] California Code of Regulations, title 8, section 32994.

[51] California Code of Regulations, title 8, section 32995, subdivision (a).

[52] California Code of Regulations, title 8, section 32995, subdivision (b).

[53] California Code of Regulations, title 8, section 32995, subdivision (c).

Finally, claimant requests reimbursement to "draft, approve, and distribute an appropriate and neutral notice to existing nonmember employees and new employees which explains the additional payroll deduction for 'fair share service fees' for nonmember employees of an employee organization." Claimant argues that these activities are "implicit in the legislation" and are necessary since the employer is responsible for changes to employee payroll amounts. Claimant asserts this activity is required since there is no statutory requirement for the exclusive representative to provide such notices to employees about these payroll adjustments.[54] Neither Government Code section 3546, nor the PERB regulations, require school districts to provide notice to its employees regarding the service fee deduction. If this test claim is approved, however, the Commission can consider claimant's request at the parameters and guidelines stage and determine whether the requested activities are a reasonable method of complying with the mandate to deduct the fair share service fee in an amount authorized by Government Code section 3546.[55]

Government Code Section 3546, Subdivisions (b) through (e):

Government Code section 3546, subdivision (b), describes the permissible costs towards which an employee organization may apply the fair share service fees. Nothing in the language of subdivision (b), imposes any activities upon school districts.

Subdivision (c) provides that the "employer shall remain neutral, and shall not participate in any election conducted under this section unless required to do so by the board." Claimant alleges that subdivision (c) requires the public school employer to supply "administrative support" as required by PERB.[56] However, PERB has not enacted any rules or regulations requiring a school district's participation in an organizational security election.[57] Therefore, subdivision (c) does not impose any required activities on school districts.

Government Code section 3546, subdivision (d), contains four subparts. Subdivisions (d)(1) and (d)(2) describe the process by which employees in a bargaining unit may either rescind or reinstate, respectively, an organizational security arrangement. Such a process includes the submission of a petition to PERB and a consequent election among the employees if the petition meets PERB's requirements as promulgated by its regulations. Claimant alleges that subdivisions (d)(1) and (d)(2) require school districts to adjust payroll procedures when the organizational security arrangement is rescinded or reinstated to comply with the requirement to deduct fair share service fees in the appropriate amount from the employee salaries. Government Code section 3546, subdivisions (d)(1) and (d)(2), however, do not impose any state-mandated

---

[54] Claimant's response to draft the Commission analysis, pages 5 and 6.

[55] California Code of Regulations, title 2, section 1183.1, subdivision (a)(4).

[56] First Amendment to the Test Claim, page 6; claimant's response to draft the Commission analysis, page 6.

[57] See California Code of Regulations, title 8, division 3, chapter 2, subchapter 2 for PERB's regulations governing organizational security arrangements under the EERA.

activities on school districts and, therefore, reimbursement is not required to comply with these subdivisions.[58]

Subdivision (d)(3) provides that PERB shall conduct a vote to either rescind or reinstate an organizational security arrangement if the required number of employee signatures on a petition have been collected. Claimant alleges that subdivision (d)(3) requires school districts to "supply any required administrative support as may be required by PERB."[59] Claimant asserts that "it can be reasonably anticipated that if, for example, the Board determines that the appropriate number of signatures have not been collected, there may be some inquiry as to the content of the list of employees the school district is required to provide to PERB pursuant to Title 8, CCR, Sections 34030 and 34055."[60] Government Code section 3546, subdivision (d)(3), however, does not require anything of school districts, thus any mandated activities related to this subdivision would only arise from an executive order. No such executive order is included in this test claim, therefore no findings can be made that school districts have reimbursable state-mandated costs to supply administrative support to PERB.

Subdivision (d)(4) states that the costs of conducting an election to rescind an organizational security arrangement "shall be borne by the board," while the costs in an election to rescind "shall be borne by the petitioning party." The Commission finds that nothing in the plain language of section 3546, subdivision (d)(4), requires school districts to perform any activities.

Finally, Government Code section 3546, subdivision (e), requires that the "recognized employee organization shall indemnify and hold the public school employer harmless against any reasonable legal fees, legal costs, and settlement or judgment liability arising from any court or administrative action relating to the school district's compliance with this section."

Claimant argues that subdivision (e) requires school districts to take any and all necessary actions... to recover reasonable legal fees... from the recognized employee organization."[61] Claimant also contends that "the right to indemnification stems from this subdivision and the cause of civil action which may result in the indemnification of the school district arises from this code section, thus making it s a source of costs mandated by the state."[62] Department of Finance rebuts this argument by asserting that the plain language of subdivision (e) does not impose any activities on school districts.

---

[58] The requirement for school districts to deduct the fair share service fees from employee wages in the appropriate amount is mandated by Government Code section 3546, subdivision (a), and not subdivision (d). Thus, the requested activity to adjust payroll procedures to the reflect the amount required to be deducted from an employee's salary because of a rescission or reinstatement of the organizational security arrangement may be considered by the Commission as a reasonable method of complying with Government Code section 3546, subdivision (a), at the parameters and guidelines stage. (Cal. Code Regs., tit. 2, § 1183.1, subd. (a)(4).)

[59] First Amendment to the Test Claim, page 6.

[60] Claimant's response to draft the Commission analysis, page 6.

[61] First Amendment to the Test Claim, page 8.

[62] Claimant's response to draft the Commission analysis, page 7.

The Commission finds that the plain language of subdivision (e) does not impose any duties on school districts. Rather, subdivision (e) imposes a requirement on the *employee organization* to indemnify and hold harmless a school district for any legal expenses incurred in complying with implementing an organizational security arrangement. If a school district asserts its legal right to indemnification, that action is a decision of the school district and not a mandate by the state.

Accordingly, the Commission finds that Government Code section 3546, subdivisions (b), (c), (d), and (e) do not mandate a program, or impose a new program or higher level of service upon school districts within the meaning of article XIII B, section 6, of the California Constitution.

Government Code Section 3546, Subdivision (f):

Statutes 2001, chapter 805 added subdivision (f) to Government Code section 3546 "so that the exclusive representative can comply with the notification requirements set forth by the United States Supreme Court in *Chicago Teachers Union v. Hudson* (1986) 89 L.Ed. 2d 232."

Claimant asserts that Government Code section 3546, subdivision (f) imposes a state-mandated activity on school districts for providing a list of employee home addresses to the exclusive representative. Department of Finance, on the other hand, claims that the activity "consists of producing a report which should readily be available through the school district's payroll system,"[63] and that any costs incurred by the claimant in providing such a list are *de minimis*, and should therefore not be reimbursable because claimant's costs would be unlikely to reach the threshold for a claim.

Government Code section 3546, subdivision (f) requires school districts to file a list of employee home addresses with an employee organization selected by an employee bargaining unit to act as exclusive representative. Prior to the enactment of Statutes 2001, chapter 805, no statutory or regulatory requirement obligated a school district to provide a list of home addresses to the exclusive representative. The requirements imposed upon school districts by Government Code section 3546, subdivision (f), impose a new program or higher level of service within the meaning of article XIII B, section 6, of the California Constitution for the following new activity:

- School district employers of a public school employee shall provide the exclusive representative of a public employee with the home address of each member of a bargaining unit.

Government Code section 3546, subdivision (f), also imposes "costs mandated by the state" upon school districts as defined in Government Code section 17514. Government Code section 17556, states, in pertinent part:

> The commission shall not find costs mandated by the state, as defined in Section 17514, in any claim submitted by a local agency or school district, if, after a hearing, the commission finds that: ...
>
> (b) The statute or executive order affirmed for the state a mandate that had been declared existing law or regulation by action of the courts.

---

[63] Department of Finance, July 30, 2002 Comments, page 3.

(c) [t]he statute or executive order imposes a requirement that is mandated by a federal law or regulation and results in costs mandated by the federal government, unless the statute or executive order mandates costs that exceed the mandate in that federal law or regulation.

However, the Commission finds that Government Code section 17556, subdivisions (b) and (c) do not apply in this case.

In *Chicago Teachers Union v. Hudson, supra*, 475 U.S. 292, 305-07, the United States Supreme Court held that employee organizations must: (1) establish procedures prior to making agency fee deductions which will ensure that the funds from such fees are not used to finance ideological activities beyond the scope of collective bargaining; (2) provide agency fee payers with the methods used for calculating the amount of the agency fee; and (3) establish an appeals process to ensure that agency fee objections are addressed in a timely and fair manner by an impartial decision maker.

In order to facilitate the exclusive representative's responsibility to provide notice to nonmember employees regarding the service fee deductions and the methods used to calculate the amount of such fees, Government Code section 3546, subdivision (f) imposes upon school districts the obligation to provide a list of employee home addresses to the exclusive representative. Although subdivision (f) aims at imposing certain notification requirements upon the employee organization in order to comply with federal case law, the requirement that school districts provide the employee organization with a list of employee home addresses goes beyond mere compliance with federal case law.

In *County of Los Angeles v. Commission on State Mandates* (1995) 32 Cal.App.4th 805, 817, the court found that Penal Code section 987.9, which requires counties to provide ancillary investigative services when providing defense services to indigent criminal defendants, constituted a federal mandate. The court determined that the right to counsel under the Sixth Amendment and the due process clause of the Fourteenth Amendment of the United States Constitution include "the right to reasonably necessary ancillary services."[64] Accordingly, Penal Code section 987.9 "merely codified these constitutional guarantees," and thus section 987.9 simply required local compliance with the federal mandate.[65]

In *San Diego Unified School District, supra*, 33 Cal.4th 859, 889, the California Supreme Court adopted the reasoning that procedural protections that are merely incidental to the codification of a federal right, and which add only a *de minimis* financial impact, constitute an implementation of federal law not reimbursable under article XIII B, section 6, of the California Constitution.

Here, however, while the notification requirements imposed on the employee organization are mandated by the United States Supreme Court's holding in *Hudson*, nothing in the *Hudson* decision imposes any required activities on school districts. Thus, because Government Code section 3546, subdivision (f) imposes a new required activity on school districts beyond compliance with federal case law, Government Code section 17556, subdivisions (b) and (c) do not apply. Nor are any other provisions of Government Code section 17556 applicable here;

---

[64] *County of Los Angeles, supra*, 32 Cal.App.4th 805, 815.

[65] *Ibid.*

therefore, the Commission finds that Government Code section 3546, subdivision (f) imposes costs mandated by the state pursuant to Government Code section 17514.

California Code of Regulations, Title 8, Sections 34030 and 34055:

PERB has enacted regulations implementing the procedures for filing petitions to either rescind or reinstate an organizational security arrangement. Title 8, section 34030, was added to the California Code of Regulations in 1980, and subsection (b) was added, operative January 1, 2001:

> (a) Within 20 days following the filing of the petition to rescind an organizational security arrangement, the employer shall file with the 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.
>
> (b) If after initial determination the proof of support is insufficient, the Board may allow up to 10 days to perfect the proof of support.
>
> (c) Upon completion of the review of the proof of support, the Board shall inform the parties in writing of the determination as to sufficiency or lack thereof regarding the proof of support.

Title 8, section 34055, was added to the California Code of Regulations, operative January 1, 2001, and is nearly identical in language to section 34030, except that it provides that the employer shall file the required list "Within 20 days following the filing of the petition *to reinstate* an organizational security provision ..."

Claimant alleges that section 34030, subdivision (a), and section 34055, subdivision (a), impose state-mandated activities on school districts to file a list of employee names and job titles with PERB. Department of Finance, on the other hand, contends that only those districts that did not negotiate and implement organizational security arrangements prior to the 2000 amendments are justified in claiming mandated costs. Department of Finance alleges that districts that did negotiate organizational security arrangements prior to the 2000 amendments should not be reimbursed for voluntarily assumed costs.

California Code of Regulations, title 8, section 34030, subdivision (a), was enacted by PERB in 1980. Prior to the enactment of Statutes 2000, chapter 893, any organizational security arrangement entered into between a school district and employee organization was the product of a voluntary agreement resulting from the collective bargaining process. Statutes 2000, chapter 893, however, required the parties to implement an organizational security arrangement.

Under prior law, a school district retained discretion on entering into an organizational security arrangement with an employee organization. Thus, the provisions of section 34030, subdivision (a), requiring school districts to file a list of names and job titles to PERB upon the submission of an employee petition to rescind an organizational security arrangement would not have been state-mandated or required. This conclusion flows from the fact that the decision to participate in the underlying program was within the school district's discretion, and thus any

downstream requirements imposed within such a program were also voluntary.[66] Accordingly, if the district did enter into an organizational security arrangement, compliance with PERB's filing requirements in section 34030, subdivision (a), did not constitute a mandate by the state until January 1, 2001, the operative date of Statutes 2000, chapter 893.

Government Code section 3546, subdivision (d)(1), as added by Statutes 2000, chapter 893, recognizes the right of public school employees in a unit for which an employee organization has been selected as exclusive representative to rescind an organizational security arrangement. Subdivision (d)(1), states that the organizational security arrangement required by subdivision (a) of section 3546 "may be rescinded by a majority vote of all the employees in the negotiating unit subject to that arrangement, if a request for a vote is supported by a petition containing 30 percent of the employees in the negotiating unit." If the organizational security arrangement is rescinded pursuant to such a vote, subdivision (d)(2) allows that "a majority of all employees in the negotiating unit may request that the arrangement be reinstated."[67]

Sections 34030 and 34055 implement the provisions of Government Code section 3546, subdivision (d). California Code of Regulations, title 8, sections 34030 and 34055 require that within 20 days of the submission of a petition to either rescind or reinstate an organizational security arrangement, the public school "employer shall file with the regional [PERB] office an alphabetical list containing the names and job titles or classifications of the persons employed in the unit described in the petition." The Commission finds that California Code of Regulations, title 8, sections 34030, subdivision (a), and 34055, subdivision (a), impose a new program or higher level of service on school districts within the meaning of article XIII B, section 6 of the California Constitution for the following new activity:

- Within 20 days following the filing of the petition to rescind or reinstate an organizational security arrangement, the school district employer shall file with the regional office of PERB 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.

None of the provisions of Government Code section 17556 are applicable; therefore, the Commission finds that California Code of Regulations, title 8, sections 34030, subdivision (a), and 34055, subdivision (a) impose costs mandated by the state pursuant to Government Code section 17514.

---

[66] *Kern High School Dist.*, *supra*, 30 Cal.4th 727, 742. The California Supreme Court addressed the issue whether legislation imposing certain notice and agenda requirements on school site councils administering various school-related educational programs constituted a reimbursable state mandate. The Court concluded that mandatory "downstream" requirements flowing from a local government entity's voluntary decision to participate in an underlying program do not constitute reimbursable state mandates.

[67] Government Code section 3546, subdivision (d)(2).

CONCLUSION

The Commission concludes that Government Code section 3546, subdivisions (a) and (f), and California Code of Regulations, title 8, sections 34030, subdivision (a), and 34055, subdivision (a), impose new programs or higher levels of service for K-14 school districts within the meaning of article XIII B, section 6 of the California Constitution, and impose costs mandated by the state pursuant to Government Code section 17514, for the following specific new activities:

- Upon receiving notice from the exclusive representative of a classified public school employee who is in a unit for which an exclusive representative has been selected, the employer shall deduct the amount of the fair share service fee authorized by this section from the wages and salary of the employee and pay that amount to the employee organization. (Gov. Code, § 3546, subd. (a).)[68]
- School district employers of a public school employee shall provide the exclusive representative of a public employee with the home address of each member of a bargaining unit. (Gov. Code, § 3546, subd. (f).)[69]
- Within 20 days following the filing of the petition to rescind or reinstate an organizational security arrangement, the school district employer shall file with the regional office of PERB 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. (Cal. Code Regs., tit. 8, §§ 34030, subd. (a), and 34055, subd. (a).)[70]

The Commission concludes that Government Code sections 3543, 3546, subdivisions (b) through (e), and 3546.3, as added or amended by Statutes 1980, chapter 816, Statutes 2000, chapter 893, and Statutes 2001, chapter 805 are not reimbursable state-mandated programs within the meaning of article XIII B, section 6, and Government Code section 17514.

---

[68] As added by Statutes 2000, chapter 893, operative January 1, 2001.

[69] As amended by Statutes 2001, chapter 805, operative January 1, 2002.

[70] As amended and operative on January 1, 2001.

Date of Hearing: August 9, 2000

ASSEMBLY COMMITTEE ON APPROPRIATIONS
Carole Migden, Chairwoman

SB 739 (Solis) - As Amended: June 6, 2000

Policy Committee:
P.E.R.&S.S.Vote:4-1

Urgency: No State Mandated Local
Program:NoReimbursable:

SUMMARY :

This bill revises the Meyers-Milias-Brown Act, the bargaining and employee relations law governing cities, counties and special districts in California. The significant provisions of the bill are as follows:

1) Extension of PERB Jurisdiction to MMB Act .

The bill transfers jurisdiction for the resolution of unfair labor practice charges and representation disputes under the MMB Act to the Public Employment Relations Board (PERB). Presently, the MMB Act provides for the resolution of labor-management disputes through procedures adopted by local collective bargaining. Parties not satisfied with local dispute resolution may seek judicial relief.

Examples of employer conduct that would be considered "unfair labor practices" subject to PERB jurisdiction under this bill include refusing to negotiate in good faith; disciplining or threatening employees for participating in union activities; and unilaterally changing the terms and conditions of employment without bargaining. Examples of employee organization conduct that would be considered unfair labor practices subject to PERB jurisdiction include threatening employees who refuse to join a union and failing to represent bargaining unit members fairly in negotiations with their employer.

2) Agency Shop

a) The bill authorizes an agency shop agreement to take effect

without a negotiated agreement between a public agency and a recognized employee organization, in contrast to current law, subject to the following conditions:

i) A petition requesting an agency shop agreement is signed by 30% of the employees in the bargaining unit.

ii) The agency shop agreement is approved by a majority of employees who cast ballots in an election held to determine the level of support for an agency fee arrangement.

b) Additionally, the bill applies these procedures to the rescission of agency shop agreements, and repeals existing limitations on the duration of "agency shop" fee agreements, authorizing agency fee deductions indefinitely beyond the expiration of collective bargaining agreements

FISCAL EFFECT :

The bill would result in General Fund costs of approximately $1.4 million annually to the PERB to resolve local agency labor disputes under the MMB Act.

COMMENTS :

1) Background. The PERB was established to resolve unfair practice charges and representation disputes under the Educational Employee Relations Act (governing K-14 school employees) the Higher Education Employee Relation Act (UC, CSU and Hastings College of Law employees) and the Ralph Dills Act (state employees). The MMB Act, enacted in 1965, predates the statutes governing labor relations for state and educational employees, and has only been substantively amended once, to allow negotiated agency shop agreements. This bill extends PERB jurisdiction to local government employees under the MMB Act.

2) Purpose . Proponents argue that the MMB Act has no effective enforcement procedures except for court action, which is time-consuming and expensive. One 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. The appropriate role for the courts is to serve as an appellate body. Additionally, proponents argue

that the agency shop election provisions of the bill are

necessary because under current law, employers may simply refuse to negotiate agency shop agreements, thereby requiring unions to represent nonmembers.

3)Opposition . City and county representatives believe that agency shop provisions of the bill would confer a significant benefit upon employee organizations that should be subject to collective bargaining. Additionally, these representatives believe that locally-determined dispute resolution procedures are adequate and more appropriate than the transfer of these responsibilities to the PERB.

4)Governor's Veto. The 2000-01 State Budget approved by the Legislature included a General Fund appropriation of $1.4 million to cover the first-year costs to the PERB of resolving local agency labor disputes under the MMB Act. The governor vetoed this appropriation, stating that he did not agree with the policy rationale of the bill.

Analysis Prepared by : Stephen Shea / APPR. / (916) 319-2081

SENATE RULES COMMITTEE
Office of Senate Floor Analyses
1020 N Street, Suite 524
(916) 445-6614 Fax: (916) 327-4478

SB 739

THIRD READING

Bill No: SB 739
Author: Solis (D), et al
Amended: 5/13/99
Vote: 21

SENATE PUBLIC EMP. & RET. COMMITTEE : 3-1, 5/10/99
AYES: Ortiz, Baca, Karnette
NOES: Lewis
NOT VOTING: Haynes

SUBJECT : Local public employees: agency shop agreement

SOURCE : Various Union Organizations -- See Support List

DIGEST : This bill revises the Meyers-Milias-Brown Act procedure for the establishment of agency shop agreements, by allowing an agency shop agreement without a negotiated agreement upon a signed petition by 30% of the employees in the applicable bargaining unit requesting an agency shop agreement and majority approval of the employees voting on the issue.

ANALYSIS : Existing law, the Meyers-Milias-Brown Act (MMBA), _ provides for "agency shop" fee agreements to be negotiated between public agencies and recognized employee organizations for the duration of the Memorandum of Understanding (MOU), or 3 years, whichever comes first.

Existing MMBA law provides that "agency shop" fee agreements shall not apply to management, confidential or supervisory employees.

CONTINUED

This bill, in addition, permits an agency shop agreement between public agencies and recognized employee organizations to take effect, without a negotiated MOU agreement, when:

1. A petition requesting an agency shop agreement is signed by 30% of the employees in the bargaining unit.

2. The agreement is approved by a majority of employees who cast ballots in an election held expressly for the purpose of determining the level of support for an agency fee arrangement.

This bill also repeals existing MMBA provisions relating to the duration of the "agency shop" fee agreements.

FISCAL EFFECT : Appropriation: No Fiscal Com.: No Local: No

SUPPORT : (Verified 5/13/99)

Service Employees International Union (co-source)
American Federation of State, County and Municipal Employees (co-source)
California Professional Firefighters (co-source)
California State Firefighters Association (co-source)
Police Officers Research Association of California (co-source)
California Independent Public Employees' Legislative Council (co-source)
California School Employees' Association (co-source)
Union of American Physicians and Dentists (co-source)
United Transportation Union (co-source)
Amalgamated Transit Union (co-source)
California Labor Federation (co-source)
California Teamsters Public Affairs Council (co-source)
California Nevada Conference of Operating Engineers (co-source)
California State Council of Laborers (co-source)
City of Chula Vista
Barstow Professional Firefighters Association

OPPOSITION : (Verified 5/13/99)

California State Association of Counties
County Sanitation Districts of Los Angeles County
Independent Cities Association
City of Los Angeles
City of Poway
League of California Cities

ARGUMENTS IN SUPPORT :

Proponents contend that:

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.

Also, the proponents have agreed to establish an ongoing discussion with all interested parties, including public agency employers, to develop as much agreement as possible. The author is willing to return the bill to this committee when additional substantial amendments are added.

ARGUMENTS IN OPPOSITION : The California State Association of Counties, in its letter of opposition to this bill, states:

"?.SB 730 undermines the basic justification for a collective bargaining law by mandating a significant union security agreement without any requirement for local collective bargaining regarding implementation of the benefit??..The collective impact of these proposed changes would be to delete a significant element of control by a board of supervisors over the terms and conditions of employment of its employees."

□

TSM:cm 5/13/99 Senate Floor Analyses

SUPPORT/OPPOSITION: SEE ABOVE

**** END ****

Office of the Attorney General
State of California

*1 Opinion No. 02-309
September 24, 2003

THE HONORABLE CHUCK CAKE
ACTING DIRECTOR OF THE DEPARTMENT OF INDUSTRIAL RELATIONS

THE HONORABLE CHUCK CAKE, ACTING DIRECTOR OF THE DEPARTMENT OF INDUSTRIAL RELATIONS, has requested an opinion on the following question:

May the Division of Conciliation of the Department of Industrial Relations conduct an agency shop election during the term of an existing memorandum of understanding between a public agency and a recognized employee organization that contains a "modified" agency shop provision?

CONCLUSION

The Division of Conciliation of the Department of Industrial Relations may conduct an agency shop election during the term of an existing memorandum of understanding between a public agency and a recognized employee organization that contains a "modified" agency shop provision if the current agency shop provision is first rescinded by the employees or first removed from the agreement by negotiation.

ANALYSIS

We are informed that a county and a union which represents certain classes of county employees have entered into an agreement that in part requires county employees of the classes represented to be either members of the union or to pay a "service fee" to the union equal to regular union membership dues. Excluded from the union membership or alternative service fee requirement are employees who were hired by the county prior to May 11, 1999.

The question presented for resolution is whether the county employees covered by the agreement may change the union membership or service fee provision while the overall agreement, known as a memorandum of understanding ("MOU"), is in force. We conclude that the employees, by majority vote, may change the provision by first rescinding the current provision or it is first removed from the MOU by negotiation between the county and the union.

The Legislature has enacted a comprehensive statutory scheme, the Meyers-Milias-Brown Act (Gov. Code, § § 3500-3511; "Act"), [FN1] governing employment relations between local public agencies and their employees. (See Service Employees Internat. Union v. City of Santa Barbara (1997) 57 Cal.App.4th 654, 657-658.) Recognized employee organizations have the right to represent their members in their employment relations with public agencies on matters relating to employment conditions, including wages, hours and other terms and conditions of employment. (§ § 3503, 3504.) Public agencies and recognized employee organizations have the mutual obligation to meet and confer in good faith in order to reach an agreement

memorialized in an MOU. (§ § 3505, 3505.1.)

Public employees have the right to join a union of their choosing and the right not to join a union. (§ 3502.) An employee who chooses not to join may be required to pay a "service fee" to the union "in an amount not to exceed the standard initiation fee, periodic dues, and general assessments of the organization." (§ 3502.5, subd. (a); see San Lorenzo Education Assn. v. Wilson(1982) 32 Cal.3d 841, 844 [" 'employees who receive the benefits of union representation [may be required to] contribute their share of financial support to such union' "].) A provision in an MOU that mandates union membership or a service fee assessment is commonly known as an "agency shop" provision. (Id. at p. 843, fn. 1.) " '[A]n 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...." (§ 3502.5, subd. (a).) An agency shop provision that excludes employees hired before a specified date is known as a "modified" agency shop provision.

*2 The focus of our analysis is upon the terms and conditions of section 3502.5, which provide:

"(a) Notwithstanding Section 3502 or 3502.6, or any other provision of this chapter, or any other law, rule, or regulation, an agency shop agreement may be negotiated between a public agency and a recognized public employee organization which has been recognized as the exclusive or majority bargaining agent pursuant to reasonable rules and regulations, ordinances, and enactments, in accordance with this chapter. As used in this chapter, '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 the organization.

"(b) In addition to the procedure prescribed in subdivision (a), an agency shop arrangement between the public agency and a recognized employee organization that has been recognized as the exclusive or majority bargaining agent 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. An election that may not be held more frequently than once a year shall be conducted by the Division of Conciliation of the Department of Industrial Relations in the event that the public agency and the recognized employee organization cannot agree within 10 days from the filing of the petition to select jointly a neutral person or entity to conduct the election. In the event of an agency fee arrangement outside of an agreement that is in effect, the recognized employee organization shall indemnify and hold the public agency harmless against any liability arising from any claims, demands, or other action relating to the public agency's compliance with the agency fee obligation.

"(c) Any employee who is a member of a bona fide religion, body, or sect that has historically held conscientious objections 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 employee may be required, in lieu of periodic dues, initiation fees, or agency shop fees, to pay

sums equal to the dues, initiation fees, or agency shop fees to a nonreligious, nonlabor charitable fund exempt from taxation under Section 501(c)(3) of the Internal Revenue Code, chosen by the employee from a list of at least three of these funds, designated in a memorandum of understanding between the public agency and the public employee organization, or if the memorandum of understanding fails to designate the funds, then to any such fund chosen by the employee. Proof of the payments 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.

*3 "(d) An agency shop provision in a memorandum of understanding that is in effect may be rescinded by a majority vote of all employees in the unit covered by the memorandum of understanding, provided that: (1) a request for such a vote is supported by a petition containing the signatures of at least 30 percent of the employees in the unit; (2) the vote is by secret ballot; (3) the vote my be taken at any time during the term of the memorandum of understanding, but in no event shall there be more than one vote taken during that term. Notwithstanding the above, the public agency and the recognized employee organization may negotiate, and by mutual agreement provide for, an alternative procedure or procedures regarding a vote on an agency shop agreement. The procedures in this subdivision are also applicable to an agency shop agreement placed in effect pursuant to subdivision (b).

"(e) An agency shop arrangement shall not apply to management, confidential, or supervisory employees.

"(f) Every recognized employee organization that has agreed to an agency shop provision or is a party to an agency shop arrangement shall keep an adequate itemized record of its financial transactions and shall make available annually, to the public agency with which the agency shop provision was negotiated, and to the employees who are members of the organization, within 60 days after the end of its fiscal year, a detailed written financial report thereof in the form of a balance sheet and an operating statement, certified as to accuracy by its president and treasurer or corresponding principal officer, or by a certified public accountant. An employee organization required to file financial reports under the federal Labor-Management Disclosure Act of 1959 (29 U.S.C. Sec. 401 et seq.) covering employees governed by this chapter, or required to file financial reports under Section 3546.5, may satisfy the financial reporting requirement of this section by providing the public agency with a copy of the financial reports." [FN2]

In examining the language of section 3502.5, we may apply well recognized principles of statutory interpretation. In construing a statute, we are " 'to ascertain the Legislature's intent so as to effectuate the purpose of the law.' " (Curle v. Superior Court (2001) 24 Cal.4th 1057, 1063.) "In determining intent, we look first to the words of the statute, giving the language its usual, ordinary meaning." (Hunt v. Superior Court (1999) 21 Cal.4th 984, 1000.) If the Legislature has provided an express definition of a term, that definition is ordinarily to be followed. (Adoption of Kelsey S. (1992) 1 Cal.4th 816, 826.) Portions of a statute are to be considered in the context of the entire statute, harmonizing and giving significance to every word, phrase, sentence and part in pursuance of the legislative purpose. (DuBois v. Workers' Comp. Appeals Bd. (1993) 5 Cal.4th 382, 388; People v. Hull (1991) 1 Cal.4th 266, 272.) "Committee reports are often useful in determining the Legislature's intent. [Citation.]" (California Teachers Assn. v. Governing Bd. of Rialto Unified School Dist. (1977) 14 Cal.4th 627, 646.) Finally, "a practical construction is preferred." (California Correctional Peace Officers Assn. v. State Personnel Bd. (1995) 10 Cal.4th 1133, 1147.)

*4 Applying these principles of statutory construction, we first note that a

"modified" agency shop provision comes within the terms of section 3502.5, meeting the definition contained in subdivision (a) of "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...." (Italics added.) Not all employees are required to join the union or pay a service fee under the statute. For example, employees are to be excluded if they object to union membership based upon religious grounds (§ 3502.5, subd. (c)) or if they are "management, confidential, or supervisory employees" (§ 3502.5, subd. (e)).

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. When section 3502.5 was amended in 2000 (Stats. 2000, ch. 901, § 3) to add subdivision (b), the purposes of the proposed legislation were stated in the legislative committee reports as follows:

"1. Some public agency employers unfairly withhold or refuse agreement on agency fee arrangements despite a significant interest demonstrated by employees.

"2. The existing [statutory] 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." (Sen. Rules Com., Office of Sen. Floor Analyses, 3d reading analysis of Sen. Bill No. 739 (1999-2000 Reg. Sess.) as amended May 13, 1999, p. 3.)

It is only after the public agency and the union have failed to reach an agreement that an employee election may be conducted by the Division of Conciliation of the Department of Industrial Relations ("Division"). (§ 3502.5, subd. (b).) Accordingly, while the Legislature has indicated its preference for collective bargaining, the employees of a public agency may nonetheless adopt unilaterally an agency shop provision when the bargaining process has proved unsuccessful.

It is evident that as long as the MOU containing an agency shop provision is in force, a conflicting agency shop provision may not be approved by the employees. However, the Legislature has authorized the employees covered by an MOU to approve a new agency shop provision after first rescinding the current provision. Rescission is accomplished "by a majority vote of all the employees in the unit covered by the memorandum of understanding." (§ 3502.5, subd. (d).) Of course, the public agency and the union may also negotiate the removal of an agency shop provision during the term of the MOU. Upon removal, a majority of the employees may approve a new agency shop provision. (§ 3502.5, subd. (b).) This procedure prevents conflicting agency shop requirements and gives substance to each of the subdivisions of section 3502.5, harmonizing them in light of the evident legislative purpose. (See Service Employees Internat. Union v. City of Santa Barbara, supra, 57 Cal.App.4th at p. 659 ["stability, peace and majority rule are preserved" by the terms of section 3502.5].)

*5 In summary, the employees of a public agency may control whether they have an agency shop provision in their MOU and what the terms and conditions of the provision should be. If they are dissatisfied with the provision negotiated on their behalf by their union, they may rescind it and adopt another provision with different terms and conditions. The only difference between a negotiated provision and an employee election provision is that in the latter situation, "the recognized employee organization shall indemnify and hold the public agency harmless against the liability arising from any claims, demands, or other action relating to the

public agency's compliance with the agency fee obligation." (§ 3502.5, subd. (b).) This indemnification requirement protects the public agency in the circumstances where it has not negotiated and agreed to the particular agency shop provision [FN3]

We conclude that the Division may conduct an agency shop election during the term of an existing MOU between a public agency and a recognized employee organization containing a "modified" agency shop provision if the current agency shop provision is first rescinded by the employees or first removed from the MOU by negotiation.

Bill Lockyer

Attorney General

Anthony S. Da Vigo

Deputy Attorney General

[FN1]. All section references hereafter are to the Government Code.

[FN2]. As previously indicated, section 3502 gives local public employees the right to join a union and the right not to join a union. There is no section 3502.6. Section 3546.5 requires financial reports to be prepared by employee organizations representing public school employees.

[FN3]. The employees may rescind an agency shop provision they have approved under subdivision (b) just as they may rescind such a provision negotiated under subdivision (a). (§ 3502.5, subd. (d).)

86 Ops. Cal. Atty. Gen. 169, 03 Cal. Daily Op. Serv. 8668, 2003 Daily Journal D.A.R. 10961, 2003 WL 22221254 (Cal.A.G.)

END OF DOCUMENT

C

Napa Valley Educators Ass'n v. Napa Valley Unified School Dist.Cal.App.1.Dist.NAPA VALLEY EDUCATORS' ASSOCIATION et al., Plaintiffs and Appellants,
v.
NAPA VALLEY UNIFIED SCHOOL DISTRICT, Defendant and Respondent
No. A035307.

Court of Appeal, First District, Division 2, California.
Aug 20, 1987.

SUMMARY

A certificated classroom teacher and an educators' association sought a writ of mandate to determine that the five-month time period for differential pay under Ed. Code, § 44977 (salary deductions during absence from duties), runs consecutively to, and not concurrently with, the period of accumulated sick leave under Ed. Code, § 44978 (sick leave of certificated employees), and the trial court denied the writ. The teacher was absent for medical reasons for an entire school year. The district paid him his full salary for the complete period of his accumulated sick leave, and counted the period of differential pay from the end of his 10 days current annual sick leave afforded by § 44978. Since he had accumulated 134 days of sick leave, the period for which he would have been entitled to differential pay was exhausted while he was receiving full pay on sick leave, and he received no compensation after that period. (Superior Court of Napa County, No. 50728, Philip A. Champlin, Judge.)

The Court of Appeal affirmed the judgment denying the writ. It held that the period for differential pay begins immediately after exhaustion of a teacher's 10 days of annual sick leave for the current year, afforded by Ed. Code, § 44978. (Opinion by Kline, P.J., with Rouse and Smith, JJ., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1) Statutes § 21--Construction--Legislative Intent.
In construing a statute, the court must ascertain the intent of the Legislature so as to effectuate the purpose of the law. *244

(2) Statutes § 38--Construction--Giving Effect to Statute--Construing Every Word.
Whenever possible in construing a statute, effect should be given to the statute as a whole, and to its every word and clause so that no part or provision will become useless or meaningless, since it is presumed that every word and provision was intended to have some meaning and function.

(3) Statutes § 39--Construction--Giving Effect to Statute--Conformation of Parts.
In construing a statute, the various parts of a statutory enactment must be harmonized by considering the particular clause or section in the context of the statutory framework as a whole.

(4) Schools § 33--Teachers and Other Employees--Sick Leave; Personal Emergency Leave--Compensation During Absence.
Sick leave under Ed. Code, § 44978 (sick leave of certificated employees), and differential pay under Ed. Code, § 44977 (salary deductions during absence from duties), are distinct, mutually exclusive concepts. The first permits no deductions from the teacher's salary during absence and continues as long as the teacher has current and accumulated sick leave. The second concept, reduced compensation, comes into play only after sick leave has been exhausted and permits the district to deduct the cost of a substitute teacher from the teacher's salary.

(5a, 5b, 5c, 5d) Schools § 33--Teachers and Other Employees--Sick Leave; Personal Emergency Leave--Time at Which Differential Pay Becomes Effective.
The provision of Ed. Code, § 44978 (sick leave), expressly precluding application of Ed. Code, § 44977 (differential pay), to the first 10 days of absence, refers to the period of current annual sick leave, not to all accumulated sick leave. The statute's history, Attorney General opinions, and longstanding administrative practice all support the view that differential pay and accumulated sick pay periods run concurrently after the first 10 days of absence. Thus, in mandamus proceedings by an educators' association and a certificated classroom teacher who exhausted his entire five-month entitlement to

differential pay during an absence covering his accumulated sick leave, the trial court properly denied plaintiffs' petition seeking a determination that the five-month period runs consecutively to, rather than concurrently with, the period of accumulated sick leave.
[See Cal.Jur.3d, Schools, § § 402, 404; Am.Jur.2d, Schools, § 147.]
(6) Statutes § 46--Construction--Presumptions--Legislative Intent--Failure to Amend Statute.
The failure of the Legislature to change *245 the law in a particular respect when the subject is generally before it and changes in other respects are made is indicative of an intent to leave the law as it stands in the aspects not amended. Hence, the fact that the provision of Ed. Code, § 44978 (sick leave), expressly precluding application of Ed. Code, § 44977 (differential pay during absence), to the first 10 days of absence, has always referred to the period of current sick leave, despite various amendments of the statute, strongly indicates the Legislature's intention that only the current sick leave period be entirely free of the application of § 44977.

(7) Statutes § 42--Construction--Aids--Opinions of Attorney General.
Opinions of the Attorney General, while not binding, are entitled to great weight in the interpretation of a statute. In the absence of controlling authority, such opinions are persuasive, since the Legislature is presumed to be cognizant of that construction of the statute.

(8) Statutes § 44--Construction--Aids--Contemporaneous Administrative Construction.
The Legislature is presumed to be aware of a longstanding administrative practice. If the Legislature makes no substantial modifications to an act, there is a strong indication that the administrative practice was consistent with the legislative intent.

COUNSEL
Franklin Silver and Beeson, Tayer, Silbert & Bodine for Plaintiffs and Appellants.
Gloria M. Beutler for Defendant and Respondent.
Louis T. Lazano, Barbara J. Booth, Breon, Galgani, Godino & O'Donnell, Joseph R. Symkowick and Barry A. Zolotar as Amici Curiae on behalf of Defendant and Respondent.
KLINE, P. J.
This appeal presents a question of interpretation of two sections of the Education Code relating to compensation of employees absent from their duties because of illness or injury. Education Code section 44977 provides that certificated employees who are absent from duty for a *246 period of five months or less because of illness or accident are to be paid at least the difference between their salary and the amount paid to the substitute who replaces them (differential pay). [FN1] Section 44978 provides that such employees are to receive 10 days of sick leave at full pay each year, which may accumulate if not taken, and that the provisions of section 44977 are not to apply to the first 10 days of absence due to illness or accident. [FN2] *247

FN1 Education Code section 44977: "When a person employed in a position requiring certification qualifications is absent from his duties on account of illness or accident for a period of five school months or less, whether or not the absence arises out of or in the course of the employment of the employee, the amount deducted from the salary due him for any month in which the absence occurs shall not exceed the sum which is actually paid a substitute employee employed to fill his position during his absence, or, if no substitute employee was employed, the amount which would have been paid to the substitute had he been employed. The school district shall make every reasonable effort to secure the services of a substitute employee. [¶] The governing board of every school district shall adopt a salary schedule for substitute employees. The salary schedule shall indicate a salary for a substitute for all categories or classes of certificated employees of the district. [¶] Excepting in a district the governing board of which has adopted a salary schedule for substitute employees of the district, the amount paid the substitute employee during any month shall be less than the salary due the employee absent from his duties. [¶] When a person employed in a position requiring certification qualifications is absent from his duties on account of illness for a period of more than five school months, or when a person is absent from his duties for a cause other than illness, the amount deducted from the salary due him for the month in which the absence occurs shall be determined according to the rules and regulations established by the governing board of the district. Such rules and regulations shall not conflict with rules and regulations of the State Board of Education.

> [¶] Nothing in this section shall be construed so as to deprive any district, city, or city and county of the right to make any reasonable rule for the regulation of accident or sick leave or cumulative accident or sick leave without loss of salary for persons acquiring certification qualifications. [¶] This section shall be applicable whether or not the absence from duty is by reason of a leave of absence granted by the governing board of the employing district."

All further statutory references will be to the Education Code unless otherwise specified.

> FN2 Section 44978: "Every certificated employee employed five days a week by a school district shall be entitled to 10 days' leave of absence for illness or injury and such additional days in addition thereto as the governing board may allow for illness or injury, exclusive of all days he is not required to render service to the district, with full pay for a school year of service. A certificated employee employed for less than five schooldays a week shall be entitled, for a school year of service, to that proportion of 10 days' leave of absence for illness or injury as the number of days he is employed per week bears to five and is entitled to such additional days in addition thereto as the governing board may allow for illness or injury to certificated employees employed for less than five schooldays a week. Pay for any day of such absence shall be the same as the pay which would have been received had the employee served during the day. Credit for leave of absence need not be accrued prior to taking such leave by the employee and such leave of absence may be taken at any time during the school year. If such employee does not take the full amount of leave allowed in any school year under this section the amount not taken shall be accumulated from year to year with such additional days as the governing board may allow. [¶] The governing board of each school district shall adopt rules and regulations requiring and prescribing the manner of proof of illness or injury for the purposes of this section. Such rules and regulations shall not discriminate against evidence of treatment and the need therefor by the practice of the religion of any well-recognized church or denomination. [¶] Nothing in this section shall be deemed to modify or repeal any provision of law contained in Chapter 3 (commencing with Section 3110) of Division 4 of the Health and Safety Code. [¶] The provisions of Section 44977 relating to compensation, shall not apply to the first 10 days of absence on account of illness or accident of any such employee employed five days a week or to the proportion of 10 days of absence to which such employee employed less than five days a week is entitled hereunder on account of illness or accident or to such additional days granted by the governing board. Any employee shall have the right to utilize sick leave provided for in this section and the benefit provided by Section 44977 for absences necessitated by pregnancy, miscarriage, childbirth, and recovery therefrom."

Appellants Napa Valley Educators' Association (NVEA) and Robert Hampel sought a writ of mandate to determine that the time period for differential pay under section 44977 runs consecutively to, rather than concurrently with, the period of accumulated sick leave under section 44978. The trial court denied the writ. We affirm, and hold that the period for differential pay begins immediately after exhaustion of a teacher's 10 days of current annual sick leave.

Statement of Facts

Robert Hampel, a classroom teacher, has been employed as a certificated employee by the Napa Valley Unified School District (District) since 1963. As of the beginning of the 1984-1985 school year, he had accumulated 134 days of sick leave. [FN3] Prior to the school year, Hampel developed a condition diagnosed as ankylosing spondylitis and, upon his physician's recommendation, requested an indefinite leave of absence. Hampel's leave lasted the entire school year; he returned to teaching duties for the 1985-1986 school year. Pursuant to policy, the District paid Hampel his full salary for the period of his accumulated sick leave and counted the period of differential pay from the end of his 10 days annual sick leave. Accordingly, the period for which Hampel would have been entitled to differential pay was exhausted while he was receiving full pay on sick leave and Hampel received no compensation after this period, which extended from April 10 until June 14, 1985.

FN3 According to the assistant superintendent of personnel services for the District, Hampel had 136.5 days of sick leave at the beginning of the school year, 10 days of current leave and 126.5 days of accumulated leave.

The collective bargaining agreement in effect between the District and NVEA provides for five months of differential pay as defined in section 44977, but also guarantees that the absent employee be paid at least 50 percent of regular salary during the period of absence. Both before and since collective bargaining, the District has maintained that the period for differential pay runs concurrently with accumulated sick leave after exhausation of the 10 days of current sick leave. Prior to 1985, this was also ***248** NVEA's understanding. On March 7, 1985, however, the executive director of NVEA received a memorandum from the legal counsel of the California Teachers' Association (CTA) indicating that under recent court decisions [FN4] teachers were entitled to a full five months of differential pay after exhaustion of *all* other sick leave. The NVEA president then wrote to the District, stating that the existing practice was not in accordance with the court decisions and requesting bargaining to determine whether the District would agree to change the interpretation of the contract to allow the differential pay period to run consecutively to accumulated sick leave. The present action was instituted because the District disagreed with NVEA's reading of the case law and refused to alter its policy.

FN4 The letter cited *Jefferson Classroom Teachers Assn. v. Jefferson Elementary School Dist.* (1982) 137 Cal.App.3d 993 [187 Cal.Rptr. 542]; *California Teachers' Assn. v. Governing Board* (1983) 145 Cal.App.3d 735 [193 Cal.Rptr. 650]; *California Teachers' Assn. v. Parlier Unified School Dist.* (1984) 157 Cal.App.3d 174 [204 Cal.Rptr. 20].

Discussion

Resolution of the question when the five-month period for differential pay begins to run requires us to interpret sections 44977 and 44978. (1) Under established principles of statutory construction, this court must ascertain the intent of the Legislature so as to effectuate the purpose of the law. (*California Teachers' Assn. v. Governing Board, supra*, 145 Cal.App.3d 735, 740; *Palos Verdes Faculty Assn. v. Palos Verdes Peninsula Unified Sch. Dist.* (1978) 21 Cal.3d 650, 658 [147 Cal.Rptr. 359, 580 P.2d 1155].) (2) "Whenever possible, effect should be given to the statute as a whole, and to its every word and clause so that no part or provision will become useless or meaningless, since it is presumed that every word and provision was intended to have some meaning and function." (*California Teachers' Assn. v. Parlier Unified School Dist., supra*, 157 Cal.App.3d 174, 179.) (3) The various parts of a statutory enactment must be harmonized by considering the particular clause or section in the context of the statutory framework as a whole. (*Id.*, at p. 179; *California Teachers' Assn. v. Governing Board, supra*, 145 Cal.App.3d at p. 740; *Palos Verdes Faculty Assn. v. Palos Verdes Peninsula Unified Sch. Dist., supra*, 21 Cal.3d at p. 659.) Although several cases have explored the relationship between sections 44977 and 44978, none have addressed the precise question before us.

(4) "Sick leave under section 44978 and differential pay under section 44977 are distinct, mutually exclusive concepts. The first permits no deductions from the teacher's salary during absence and continues as long as the teacher has current and accumulated sick leave. The second concept - reduced compensation - comes into play only after sick leave has been exhausted ***249** and permits the district to deduct the cost of a substitute teacher from the teacher's salary." (*California Teachers' Assn. v. Parlier Unified School Dist., supra*, 157 Cal.App.3d at p. 180. These statutory provisions "work together to create a unified framework governing school district compensation of certificated employees during unavoidable absences caused by accident and illness. Their obvious purpose is to provide economic security to teachers who are unable to teach because of accident or illness." (*Id.*, at p. 179.)

While section 44977 clearly establishes the duration of the period for which teachers are entitled to differential pay, it says nothing about how this period relates to the period of sick leave under section 44978. Section 44978, however, states that "the provisions of Section 44977 relating to compensation, shall not apply to the first 10 days of absence on account of illness or accident of any [certificated] employee employed five days a week or to the proportion of 10 days of absence to which such employee employed less than five days a week is entitled hereunder on account of illness or accident or to such additional days granted by the governing board." This provision of section 44978 has been

judicially seen as "a legislative attempt to 'clarify' ... that a district may not deduct the cost of a substitute teacher from the absent teacher's salary during sick leave." (*California Teachers' Assn. v. Parlier Unified School Dist., supra*, 157 Cal.App.3d at p. 183.)

The question presented in *Parlier* was whether the 10-day limitation in section 44978 meant that a teacher who had exhausted sick leave must wait 10 days before being entitled to differential pay. The court noted 2 possible interpretations of the 10-day limitation in section 44978: first, that differential compensation may not be paid during the first 10 days of absence even if a teacher has no current or accumulated sick leave; or second, that a district may not deduct the cost of a substitute teacher during the first 10 days of absence. (157 Cal.App.3d at p. 180.) The first interpretation presented a problem because it might suggest that after the first 10 days a teacher with accumulated sick leave would be entitled to *both* sick pay and differential pay. (*Id.*, at p. 181.) The second interpretation, on the other hand, presented a problem because it might suggest that a district could deduct the cost of a substitute teacher after the first 10 days of absence even though the absent teacher was due more than 10 days of sick pay because of accumulated leave. (*Ibid.*) The court found both of these potential results unacceptable and interpreted the 10-day limitation to mean that substitute teacher pay could not be deducted for as long as the absent teacher was entitled to sick leave, whether 10 days of current leave or a longer accumulated leave. (*Id.*, at pp. 182-183.) ***250**

Appellants rely heavily on the language in which *Parlier* stated its holding: "We conclude that a teacher has a statutory right to differential compensation for any absence of five months or less, such pay to commence immediately upon exhaustion of all sick leave." (*Id.*, at p. 182.) Standing alone, this language implies that the five-month period for differential pay is to begin only after exhaustion of *accumulated* sick leave. The context of the statement, however, makes clear that the court was responding to suggestions that the 10-day limitation required a waiting period before differential pay could begin or that a district might be able to deduct substitute teacher costs during the period of an absent teacher's accumulated sick leave. (*Id.*, at pp. 182-183.) *Parlier* was concerned with *payments* of differential compensation and directly precludes any detraction from the full pay due a teacher with accumulated sick leave. It did not address the question of the *timing* of the period for differential pay.

Other cases construing sections 44977 and 44978 also define some parameters of the right of differential pay without directly addressing its starting date. *Jefferson Classroom Teachers Assn. v. Jefferson Elementary School Dist., supra*, 137 Cal.App.3d 993 was concerned with the type of illness or injury which would trigger the right to differential pay rather than the time for which the right would last. The court determined that differential compensation must be paid when a teacher is absent after exhaustion of sick leave whether the absence is due to a prolonged illness or injury continuing past the time sick leave is exhausted or to an unrelated illness or injury occurring after sick leave has been exhausted. (*Id.*, at pp. 998-999.) *California Teachers' Assn. v. Governing Board, supra*, 145 Cal.App.3d at pp. 746-747 held that there is a separate entitlement to five months of differential pay for each school year, even if the absence in a later year is due to the same illness or injury as the absence in a prior year. The case did not, however, consider whether in a given year the period for differential pay overlaps with the period of accumulated sick leave.

(5a) To accept appellants' argument that the period for differential pay should run consecutively to accumulated sick leave would be to ignore the provision in section 44978 expressly precluding application of section 44977 to the first 10 days of absence due to illness or injury. This limiting provision obviously refers to the period of current annual sick leave: it states that the differential pay statute shall not apply for the first 10 days of absence due to illness or injury for a full-time employee or to the proportion of 10 days of absence to which a part-time employee is entitled, precisely the period established in section 44978 for annual sick leave. Legislative history shows that as originally enacted the sick leave statute provided for five days of sick leave per year and the limiting provision precluded application of the ***251** differential pay statute to the first five days of absence. (Stats. 1943, ch. 829, p. 2626; Stats. 1943, ch. 71, p. 579.) In subsequent amendments, the limiting provision has referred to five days when the statute provided for five days of annual sick leave and to ten days when the statute provided for ten days of such leave. (Stats. 1945, ch. 1146, § 1, p. 2186; Stats. 1947, ch. 743, § 1, p. 1798; Stats. 1953, ch. 525, § 1, p. 1777; Stats. 1955, ch. 157, § 1, p. 608; Stats. 1959, ch. 2, § 3, p. 956; Stats. 1975, ch. 914, § 2, p. 2017; Stats. 1976, ch. 1010, § 2, p. 3459; Stats. 1976, ch. 1011, p. 4581.) In all of these amendments, the statute has provided that unused annual sick leave should accumulate from

year to year. Had the Legislature intended that the differential pay statute not apply during the period of accumulated sick leave rather than only during the period of current leave, it could easily have said so. (6) The fact that the limiting provision has always referred to the period of current sick leave despite various amendments of the statute generally is a strong indication of legislative intent that only the current sick leave period is entirely free of the application of section 44977. "'The failure of the Legislature to change the law in a particular respect when the subject is generally before it and changes in other respects are made is indicative of an intent to leave the law as it stands in the aspects not amended.'" (*San Diego Union v. City Council* (1983) 146 Cal.App.3d 947, 956 [196 Cal.Rptr. 45].)

(5b) The California Attorney General has consistently interpreted sections 44977 and 44978 to run concurrently after the first 10 days of absence, concluding that the 5-month period of differential pay begins at the end of the 10 days' current sick leave but that the employee receives full pay for as long as he or she is entitled to accumulated sick leave. (29 Ops.Cal.Atty.Gen. 62, 63 (1957); 30 Ops.Cal.Atty.Gen. 307, 309 (1957-1958); 53 Ops.Cal.Atty.Gen. 111, 113 (1970).) (7) Opinions of the Attorney General, while not binding, are entitled to great weight. (*Henderson v. Board of Education* (1978) 78 Cal.App.3d 875, 883 [144 Cal.Rptr. 568]; *Lucas v. Board of Trustees* (1971) 18 Cal.App.3d 988, 991-992 [96 Cal.Rptr. 431].) In the absence of controlling authority, these opinions are persuasive "since the Legislature is presumed to be cognizant of that construction of the statute." (*Henderson v. Board of Education, supra*, at p. 883, fn. omitted.)

(5c) Longstanding administrative practice also supports the view that differential pay and accumulated sick leave periods should run concurrently. The record in this case shows that a number of school districts in California have for many years interpreted sections 44977 and 44978 to require that the differential pay period run concurrently with accumulated *252 sick leave. [FN5] The declaration of the deputy superintendent of the administration branch of the State Department of Education states the department's view that waiting to commence differential pay until certificated employees have exhausted accumulated sick leave would have a substantial negative impact on the quantity and quality of direct instructional services to pupils because less money would be available for such purposes. (8) "The Legislature is presumed to be aware of a long-standing administrative practice .... If the Legislature ... makes no substantial modifications to the act, there is a strong indication that the administrative practice was consistent with the legislative intent." (*Horn v. Swoap* (1974) 41 Cal.App.3d 375, 382 [116 Cal.Rptr. 113]; *El Dorado Oil Works v. McColgan* (1950) 34 Cal.2d 731, 739 [215 P.2d 4].)

FN5 Respondent introduced declarations from the superintendents of the Richland School District (rural), Sweetwater Union High School District (urban), and El Segundo Unified School District (urban); the personnel/payroll manager for the San Diego Unified School District (urban); the Vice Chancellor for Personnel Services for the Los Angeles Community College District (urban); and the Assistant Superintendent of Personnel Services for the Napa Valley Unified School District. The declarations indicate that these districts all count the period for differential pay concurrently with accumulated sick leave, the Sweetwater School District having done so for at least 26 years and the San Diego District for at least 16 years. The other declarations do not specify precise dates.

(5d) Appellant urges that to require the differential pay period to run concurrently with an employee's accumulated sick leave is to penalize employees with good records of attendance while rewarding those with poor records: whereas employees who have used all their sick leave will receive a full five months of differential pay if they become injured or ill, those who have used none of their sick leave will receive less than five months of differential pay or none at all. Viewed this way, the District appears to obtain a windfall when an employee suffering an extended illness has significant accumulated sick leave. Section 44977, however, is best viewed as mandating a minimum measure of protection for employees required to sustain long absences due to illness or injury. At the same time as the statute provides for five months of differential compensation, it authorizes school districts to establish rules and regulations regarding compensation for employees absent for more than five months due to illness or injury. (§ 44977.) A district may, then, provide compensation for a longer period, but the statute ensures that no district will fail to compensate employees for at least five months. [FN6] Employees with sufficient accumulated sick leave will receive compensation in the amount of full salary; those

without accumulated sick leave will receive only differential pay. There is simply nothing in *253 sections 44977 and 44978 to indicate that the Legislature meant the period for differential pay to begin after exhaustion of all accumulated sick leave.

> FN6 Indeed, a district is required to pay five months differential compensation to teachers without current or accumulated sick leave even though the absence occurs before any service has been rendered during the school year. (*Lakeside Federation of Teachers v. Board of Trustees* (1977) 68 Cal.App.3d 609, 612, 620 [137 Cal.Rptr. 517].)

The judgment is affirmed.

Rouse, J., and Smith, J., concurred. *254
Cal.App.1.Dist.
Napa Valley Educators' Assn. v. Napa Valley Unified School Dist.
194 Cal.App.3d 243, 239 Cal.Rptr. 395, 41 Ed. Law Rep. 260

END OF DOCUMENT

County Sanitation Dist. No. 2 of Los Angeles County v. Los Angeles County Employees Ass'n, Local 660Cal.COUNTY SANITATION DISTRICT NO. 2 OF LOS ANGELES COUNTY, Plaintiff and Respondent,
v.
LOS ANGELES COUNTY EMPLOYEES' ASSOCIATION, LOCAL 660, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO et al., Defendants and Appellants
L.A. No. 31850.

Supreme Court of California
May 13, 1985.

SUMMARY

The trial court, in a tort action, awarded a county sanitation district damages and prejudgment interest against a county employees' union in connection with the union's involvement in a labor strike against the district. The trial court found the strike to be unlawful and in violation of the public policy of the state. (Superior Court of Los Angeles County, No. C 166219, Charles H. Older, Judge.)

The Supreme Court reversed, holding the common law prohibition against public sector strikes should not be recognized, that strikes by public sector employees as such are neither illegal nor tortious under California common law, and that it is not unlawful for public employees to engage in a concerted work stoppage for the purpose of improving their wages or conditions of employment, unless it has been determined that the work stoppage poses an imminent threat to public health or safety. It held that the right of public employees to strike is not unlimited, and that the Legislature could conclude that certain categories of public employees perform such essential services that a strike would invariably result in imminent danger to the public health and safety, and must therefore be prohibited. It held the courts must proceed on a case-by-case basis. (Opinion by Broussard, J., with Mosk and Grodin, JJ., concurring. Separate concurring opinion by Kaus, J., with Reynoso, J., concurring. Separate concurring opinion by Bird, C. J. Separate concurring opinion by Grodin, J. Separate dissenting opinion by Lucas, J.)

HEADNOTES

Classified to California Digest of Official Reports

(1a, 1b) Labor § 47--Labor Disputes--Strikes Against Public Entity--Fire Fighters.
With the exception of fire fighters (*565Lab. Code, § 1962), no statutory prohibition against strikes by public employees exists in the state.

(2a, 2b) Labor § 47--Labor Disputes--Strikes Against Public Entity.
The fact that Gov. Code, § 3509 specifically precludes the application to public employees of Lab. Code, § 923, which has been construed to protect the right of private sector employees to strike, is not to be viewed as a general prohibition on the right of public employees to strike.

(3a, 3b, 3c) Labor § 47--Labor Disputes--Strikes Against Public Entity--Common Law Prohibition--Rationale.
The common law prohibition against public employee strikes is not supported by the four policy rationales and justifications advanced in its support, namely that a strike by public employees is tantamount to a denial of governmental authority or sovereignty; the terms of public employment are not subject to bilateral collective bargaining, as in the private sector, since they are set by the legislative body through unilateral lawmaking; that granting public employees the right to strike would afford them excessive bargaining leverage, since legislative bodies are responsible for public employment decisionmaking, and would result in distortion of the political process and an improper delegation of legislative authority; and that public employees provide the central public services which, if interrupted by strikes, would threaten the public welfare.

(4a, 4b) Courts § 32--Decisions and Orders--Power and Duty of Courts-- Rejection of Common Law Doctrine--Public Employee Strikes.
The judiciary, and not only the Legislature, can reject the common law doctrine prohibiting public employee strikes. Legislative silence is not the equivalent of positive legislation and does not

preclude judicial reevaluation of common law doctrine. Courts may modify, or even abolish the common law rule when reason or equity demand it, or when its underlying principles are no longer justifiable in light of modern society.

(5a, 5b) Courts § 32--Decisions and Orders--Power and Duty of Courts-- Legislative Inaction.
When the law governing a subject has been shaped and guided by judicial decision, legislative inaction does not necessarily constitute a tacit endorsement of the precise stage in the evolution of the law extant at the time the Legislature did nothing; it may signify that the Legislature is willing to entrust the further evolution of legal doctrine to judicial development.

(6a, 6b, 6c) Labor § 47--Labor Disputes--Strikes Against Public Entity--Common Law Prohibition.
There is no common law prohibition *566 against public sector strikes, such strikes are not tortious under California common law, and it is not unlawful for public employees to engage in a concerted work stoppage for the purpose of improving their wages or conditions of employment, unless it has been determined that the work stoppage poses an imminent threat to public health or safety. Accordingly, a county sanitation district was not entitled to damages and prejudgment interest awarded against a public employees union predicated on the premise its strike against the district was illegal under the common law prohibition.
[Labor law: Right of public employees to strike or engage in work stoppage, note, 37 A.L.R.3d 1147. See also Cal.Jur.3d, Labor, § 191; Am.Jur.2d, Labor and Labor Relations, § 1734.]
(7a, 7b) Labor § 13--Labor Unions--Fundamental Right of Workers.
The right to form and be represented by unions is a fundamental right of American workers that has been extended to public employees through constitutional adjudication as well as by statute.

(8a, 8b) Labor § 14--Labor Unions--Nature and Purpose--Economic Pressure.
Workmen may lawfully combine to exert various forms of economic pressure on an employer, provided the object sought to be accomplished thereby has a reasonable relation to the betterment of labor conditions, and they act peaceably and honestly. This right is guaranteed by the federal Constitution as an incident of freedom of speech, press and assemblage, and it is not dependent on the existence of a labor controversy between the employer and his employee.

(9a, 9b) Constitutional Law § 61--First Amendment and Other Fundamental Rights of Citizens--Governmental Regulation and Restriction of Fundamental Rights--Necessity for Specificity--Freedom of Association.
Even where a compelling state purpose is present, restrictions on the freedom of association protected by U.S. Const., 1st Amend., and made applicable to the states by U.S. Const., 14th Amend., must be drawn with narrow specificity. First Amendment freedoms are delicate and vulnerable and must be protected wherever possible. When government seeks to limit those freedoms on the basis of legitimate and substantial governmental purposes those purposes cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. Precision of regulation is required so that the exercise of precious freedoms will not be unduly curtailed except to the extent necessitated by the legitimate governmental objective. *567

COUNSEL
Geffner & Satzman, Leo Geffner and Jeffrey Paule for Defendants and Appellants.
Charles P. Scully, Donald C. Carroll, Charles P. Scully II, Jennifer Friesen, Fred Okrand, Glenn Rothner, Anthony R. Segall, Reich, Adell & Crost, Victor J. Van Bourg, Van Bourg, Allen, Weinberg & Roger, A. Eugene Huguenun, Jr., Michael R. White, Raymond L. Hansen, Charles R. Gustafson, Henry R. Fenton and Levy, Ansell & Goldman as Amici Curiae on behalf of Defendants and Appellants.
Musick, Peeler & Garrett, Stuart W. Rudnick, Steven D. Weinstein and Neil O. Andrus for Plaintiff and Respondent.
George Agnost, City Attorney (San Francisco), Philip S. Ward and Steven A. Diaz, Deputy City Attorneys, H. Jess Senecal, Jack T. Swafford, Burris, Lagerlof, Swift & Senecal, Robert E. Murphy, Robin Leslie Stewart, Kronick, Moskovitz, Tiedemann & Girard, Ronald A. Zumbrun and Anthony T. Caso as Amici Curiae on behalf of Plaintiff and Respondent.
BROUSSARD, J.
Defendants appeal from a judgment awarding plaintiff sanitation district damages and prejudgment interest in connection with defendant union's involvement in a labor strike against plaintiff. The case squarely presents issues of great import to public sector labor-management relations, namely whether all strikes by public employees are illegal and, if so, whether the striking union is liable in tort for compensatory damages. After careful review of a long line of case law and policy arguments, we

conclude that the common law prohibition against all public employee strikes is no longer supportable. Therefore, the judgment for the plaintiff finding the strike to be unlawful and awarding damages, interest and costs must be reversed.

I. *Statement of the Case.*

Defendant union (Local 660 or the union) is a labor organization affiliated with the Service Employees International Union, AFL-CIO, and has been the certified bargaining representative of the blue collar employees of the Los Angeles Sanitation District since 1973. Plaintiff is one of 27 sanitation *568 districts within Los Angeles County [FN1] and is charged with providing, operating and maintaining sewage transport and treatment facilities and landfill disposal sites throughout the county. [FN2] The District employs some 500 workers who are directly or indirectly responsible for the operation and maintenance of its facilities and who are members of, or represented by, Local 660. Since 1973, the District and Local 660 have bargained concerning wages, hours and working conditions pursuant to the Meyers-Milias-Brown Act (MMBA). (Gov. Code, § § 3500-3511.) Each year these negotiations have resulted in a binding labor contract or memorandum of understanding (MOU). (See *Glendale City Employees' Assn. v. City of Glendale* (1975) 15 Cal.3d 328 [124 Cal.Rptr. 513, 540 P.2d 609].)

FN1 Each such district is a separate and autonomous political subdivision of the State of California, authorized by Health and Safety Code section 4700 et seq. County Sanitation District No. 2 of Los Angeles County is authorized by a joint powers agreement to act on behalf of itself and the 26 other districts in numerous matters, including personnel and labor relations. (These 27 sanitation districts are hereinafter jointly referred to as the District.)

FN2 In 1976, the facilities operated by the District included 6 sanitary landfills which together received about 15,000 tons of solid waste each day, 11 treatment plants processing 450 million gallons of raw sewage per day, 4 maintenance yards, and 46 pumping stations. In maintaining these operations, the District served approximately 4 million residents of the county.

On July 5, 1976, approximately 75 percent of the District's employees went out on strike after negotiations between the District and the union for a new wage and benefit agreement reached an impasse and failed to produce a new MOU. The District promptly filed a complaint for injunctive relief and damages and was granted a temporary restraining order. The strike continued for approximately 11 days, during which time the District was able to maintain its facilities and operations through the efforts of management personnel and certain union members who chose not to strike. [FN3] On July 16, the employees voted to accept a tentative agreement on a new MOU, the terms of which were identical to the District's offer prior to the strike.

FN3 The union maintains that the strike settled on July 12, while the trial court's findings agreed with the District's contention that the strike settled on July 16. In addition, the District maintained that the strike was not entirely peaceful and had alleged various acts of vandalism were committed by the strikers. The union denied these charges in full.

The District then proceeded with the instant action for tort damages. The trial court found the strike to be unlawful and in violation of the public policy of the State of California and thus awarded the District $246,904 in compensatory damages, [FN4] prejudgment interest in the amount of $87,615.22 and costs of $874.65. *569

FN4 This figure represents the following strike-related damages: Wages and FICA payments: $304,227; earned compensatory time off valued at $16,040; miscellaneous security, equipment and meal expenses: $55,080; health care benefits paid to striking employees: $6,000; less a $134,443 set off in wages, FICA and retirement benefits that the District did not have to pay out on behalf of striking workers.

II. *The Traditional Prohibition Against Public Employee Strikes.*

Common law decisions in other jurisdictions at one time held that no employee, whether public or private, had a right to strike in concert with fellow workers. In fact, such collective action was generally

viewed as a conspiracy and held subject to both civil and criminal sanctions. [FN5] Over the course of the 20th century, however, courts and legislatures gradually acted to change these laws as they applied to private sector employees; today, the right to strike is generally accepted as indispensable to the system of collective bargaining and negotiation, which characterizes labor-management relations in the private sector. [FN6]

FN5 See *Commonwealth v. Pullis* (Mayor's Ct. Phil. 91806) reported in 3 Commons, Documentary History of American Industrial Society (1910) p. 59; *Walker v. Cronin* (1871) 107 Mass. 555; *Vegelahn v. Guntner* (1896) 167 Mass. 92 [44 N.E. 1077]; *Loewe v. Lawlor* (1908) 208 U.S. 274 [52 L.Ed. 488, 28 S.Ct. 301].

FN6 Congress gradually, through a series of legislative enactments, not only granted private sector employees a right to strike and to engage in other concerted activities, but also deprived employers of their traditional remedies of injunction and damage suits. (See 38 Stat. 730 (1914) [Clayton Antitrust Act], codified as amended at 15 U.S.C. § § 15, 17, 26 (1970), 26 (1970), U.S.C. § 52 (1970); 47 Stat. 70 (1930) [Norris-La Guardia Act], codified at 29 U.S.C. § § 101-115 (1970); 47 Stat., pt. II 577 (1926) [Railway Labor Act], codified as amended at 45 U.S.C. § § 151-188 (1970); 49 Stat. 449 (1935) [Wagner Act], codified as amended at 29 U.S.C. § § 141-197 (1970).)

By contrast, American law continues to regard public sector strikes in a substantially different manner. A strike by employees of the United States government may still be treated as a crime, [FN7] and strikes by state and local employees have been explicitly allowed by courts or statute in only 11 states. [FN8] *570

FN7 Employees of the federal government are statutorily prohibited from striking under 5 United States Code section 7311 (1976), which prohibits an individual from holding a federal position if he "participates in a strike, or asserts the right to strike against the Government of the United States ...." In *United Federation of Postal Clerks v. Blount* (D.D.C. 1971) 325 F.Supp. 879, affd., 404 U.S. 802 [30 L.Ed.2d 38, 92 S.Ct. 80] (1971), the court upheld the constitutionality of the strike prohibitions, yet declared unconstitutional the "wording insofar as it inhibits the *assertion* of the right to strike. ..." (*Id.* at p. 881 [italics in original].) In 1947, Congress originally denied federal employees the right to strike in section 305 of the Labor Management Relations Act (Taft-Hartley Act), chapter 120, 61 Statutes at Large 136 (1947). This act was repealed and ultimately replaced by section 7311.

FN8 Those 11 states are Alaska, Hawaii, Idaho, Illinois, Minnesota, Montana, Ohio, Oregon, Pennsylvania, Vermont, and Wisconsin. (See further discussion below.) Interestingly, the United States is virtually alone among Western industrial nations in upholding a general prohibition of public employee strikes. Most European countries have permitted them, with certain limitations, for quite some time as has Canada. See, e.g., Anderson, *Strikes and Impasse Resolution in Public Employment* (1969) 67 Mich.L.Rev. 943, 961-964.

Contrary to the assertions of the plaintiff as well as various holdings of the Court of Appeal, [FN9] this court has repeatedly stated that the legality of strikes by public employees in California has remained an open question. In *Los Angeles Met. Transit Authority v. Brotherhood of Railroad Trainmen* (1960) 54 Cal.2d 684, 687-688 [8 Cal.Rptr. 1, 355 P.2d 905], this court stated in dictum that "[i]n the absence of legislative authorization public employees in general do not have the right to strike ..." but proceeded to hold that a statute affording public transit workers the right "'to engage in other concerted activities for the purpose of collectively bargaining or other mutual aid or protection'" granted these employees a right to strike. However, in our very next opinion on the issue, *In re Berry* (1968) 68 Cal.2d 137 [65 Cal.Rptr. 273, 436 P.2d 273], we invalidated an injunction against striking public employees as unconstitutionally overbroad, and *expressly* reserved opinion on "the question whether strikes by public employees can be lawfully enjoined." (*Id.*, p. 151.)

FN9 See, e.g., *Stationary Engineers v. San Juan Water Dist.* (1979) 90 Cal.App.3d 796, 801 [153 Cal.Rptr. 666]; *Pasadena Unified Sch. Dist. v. Pasadena Federation of Teachers* (1977) 72 Cal.App.3d 100 [140 Cal.Rptr. 41]; *Service Employees'*

International Union, Local No. 22 v. Roseville Community Hosp. (1972) 24 Cal.App.3d 400, 408 [101 Cal.Rptr. 69]; *Trustees of Cal. State Colleges v. Local 1352, S.F. State etc. Teachers* (1970) 13 Cal.App.3d 863, 867 [92 Cal.Rptr. 134]; *City of San Diego v. American Federation of State etc. Employees* (1970) 8 Cal.App.3d 308, 310 [87 Cal.Rptr. 258]; *Almond v. County of Sacramento* (1969) 276 Cal.App.2d 32, 35 [80 Cal.Rptr. 518].

In our next opportunity to examine public employee strikes, *City and County of San Francisco v. Cooper* (1975) 13 Cal.3d 898 [120 Cal.Rptr. 707, 534 P.2d 403], which involved a suit challenging the validity of a strike settlement agreement enacted by the city, we held only that such settlement agreements are valid. After noting the Court of Appeal holdings that public employee strikes are illegal and the employees' counterargument that such strikes are impliedly authorized by statute, our unanimous opinion declared that we had no occasion to resolve that controversy in that action. (*Id.*, p. 912.)

In a similar vein, this court has carefully and explicitly reserved judgment on the issue of the legality of public employee strikes on at least three other occasions in recent years. [FN10] Indeed, our reluctance to address the issue head-on has elicited critical commentary from both dissenting and concurring ***571** opinions, which have urged us to resolve the question once and for all. [FN11] While we had ample reason for deciding the aforementioned cases without determining the broader question of the right of public employees to strike, the instant case presents us with the proper circumstances for direct consideration of this fundamental issue.

FN10 *San Diego Teachers Assn. v. Superior Court* (1979) 24 Cal.3d 1 [154 Cal.Rptr. 893, 593 P.2d 838]; *El Rancho Unified School Dist. v. National Education Assn.* (1983) 33 Cal.3d 946 [192 Cal.Rptr. 123, 663 P.2d 893]; and *International Brotherhood of Electrical Workers v. City of Gridley* (1983) 34 Cal.3d 191 [193 Cal.Rptr. 518, 666 P.2d 960].

FN11 See, e.g., dissenting opinion of Richardson, J., in *San Diego Teachers Assn. v. Superior Court, supra*, 24 Cal.3d 1 and concurring opinion of Richardson, J., in *El Rancho Unified School Dist. v. National Education Assn., supra*, 33 Cal.3d at page 962, where he stated that "[t]his court should no longer continue its hesitant, tentative ritual dance around the perimeter of this central legal principle. ..."

Before commencing our discussion, however, we must note that the Legislature has also chosen to reserve judgment on the general legality of strikes in the public sector. As Justice Grodin observed in his concurring opinion in *El Rancho Unified School Dist. v. National Education Assn., supra*, 33 Cal.3d 946, 964, "the Legislature itself has steadfastly refrained from providing clearcut guidance." (1a) With the exception of firefighters (Lab. Code, § 1962), no statutory prohibition against strikes by public employees in this state exists. [FN12] The MMBA, the statute under which the present controversy arose, does not directly address the question of strikes.

FN12 For just one example, the Winton Act (former Ed. Code, § 13080 et seq.), which governed the relationship between local school boards and teachers' unions, neither affirmed nor rejected the teachers' right to strike. In 1975 the Legislature repealed the Winton Act and added new provisions to the Government Code to establish an Education Employment Relations Board (see Gov. Code, § 3540 et seq.); the new enactment also does not prohibit strikes by teachers. It also bears mention that the California Assembly Advisory Council on Public Employee Relations in its final report of March 15, 1973, concluded that, "[s]ubject only to [certain specified] restrictions and limitations ... public employees should have the right to strike" (p. 24) and proposed a statute to carry out these goals (appen. a). However, this proposed statute was never enacted into law, perhaps further reflecting a legislative decision to leave the ultimate determination of this thorny issue to the judiciary.

The MMBA sets forth the rights of municipal and county employees in California. [FN13] (Gov. Code, § § 3500-3511.) The MMBA protects the right of such employees "to form, join, and participate in the activities of employee ***572** organizations ... for the purpose of representation on all matters of employer-employee relations." It also requires public employers to "meet and confer" in good faith with employee representatives on all issues within the

scope of representation. As explained in its preamble, one of the MMBA's main purposes is to improve communications between public employees and their employers by providing a reasonable method for resolving disputes. A further stated purpose is to promote improved personnel relations by "providing a uniform basis for recognizing the right of public employees to join organizations of their own choice." [FN14]

FN13 The MMBA revised its predecessor, the Brown Act, in 1968. The MMBA amendments, however, apply only to local government employees because the MMBA deleted reference to the "State of California" and explicitly defined "public employee" as one employed by any political subdivision of the state. (See Gov. Code, § 3501.) Presently, state employees are governed by the State Employer-Employee Relations Act (Gov. Code, § § 3512-3524).

Additional groups of employees were excepted from coverage under the Brown Act by previous legislation. These employees are consequently not covered by the MMBA. (See Pub. Util. Code, § § 25051-25052, added by Stats. 1955, ch. 1036, § 2 at pp. 1960-1961 [governing bargaining between employees of the Alameda-Contra Costa Transit District and their employers]; Pub. Util. Code, Appen. 1, § 3.6(b)-(g) [governing bargaining in the Los Angeles Metropolitan Transit Authority]; Ed. Code, § § 13080-13089 [governing educational employees].)

For a detailed discussion of the scope and purposes of the MMBA, see Grodin, *Public Employees Bargaining in California: The Meyers-Milias-Brown Act in the Courts* (1972) 23 Hastings L.J. 719; Note, *Collective Bargaining Under the Meyers-Milias-Brown Act - Should Local Employees Have the Right to Strike* (1984) 35 Hastings L.J. 523.

FN14 However, the MMBA contains no clear mechanism for resolving disputes. It merely provides that if the parties fail to reach an agreement, they *may* agree to appoint a mediator or use other impasse resolution procedures agreed upon by the parties. Additionally, the MMBA does not authorize the establishment of an administrative agency to resolve controversies arising under its provisions. In contrast, statutes governing other public employees in California authorize the Public Employee Relations Board (PERB) to resolve disputes and enforce the provisions of the legislation. (See Gov. Code, § 3541.3 (setting the powers and duties of the PERB under the Educational Employment Relations Act (EERA)); and Gov. Code, § 3513, subd. (g) [making the powers and duties of the PERB under the EERA applicable to the State Employees Relations Act].)

On its face, the MMBA neither denies nor grants local employees the right to strike. This omission is noteworthy since the Legislature has not hesitated to expressly prohibit strikes for certain classes of public employees. For example, the above-noted prohibition against strikes by firefighters was enacted nine years before the passage of the MMBA and remains in effect today. Moreover, the MMBA includes firefighters within its provisions. Thus, the absence of any such limitation on other public employees covered by the MMBA at the very least implies a lack of legislative intent to use the MMBA to enact a general strike prohibition. [FN15]

FN15 Apparently this decision was the result of political compromise and/or a desire that the courts would take the difficult first step of unambiguously indicating whether public employees generally have the right to strike. As one noted commentator explains, "The entire subject of strikes and impasse resolution procedures is avoided, except for the declaration that the parties may elect to engage a mediator. What emerges is a rather general legislative blessing for collective bargaining at the local governmental level without clear delineation of policy or means for its implementation. The courts have, on the whole, done an admirable job of exegesis, but their decisions cannot help but reflect the underlying weakness of the text." (Grodin, *op. cit. supra*, 23 Hastings L.J. at p. 761.)

(2a) Plaintiffs have suggested that section 3509 of the MMBA must be construed as a general prohibition on the right to strike because it specifically precludes the application of Labor Code section 923 [FN16] to public employees. *573 Labor Code section 923 has been construed by this court to protect the right of private sector employees to strike (see *Petri Cleaners, Inc. v. Automotive Employees, etc. Local No. 88* (1960) 53 Cal.2d 455 [2 Cal.Rptr. 470, 349 P.2d 76]); yet, an examination of other California

statutes governing public employees makes it perfectly clear that section 3509 was *not* included in the MMBA as a means for prohibiting strikes.

> FN16 Section 923 provides in pertinent part: "... the individual workman [shall] have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference ... of employers ... in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

A provision identical to section 3509 is contained in the statutes governing educational employees and firefighters. However, an explicit strike prohibition is included in the firefighters statute *in addition* to this provision. The fact that the Legislature felt it necessary to include this express strike prohibition clearly indicates that it neither intended nor expected its preclusion of section 923 to serve as a blanket prohibition against strikes. Furthermore, in *San Diego Teachers Assn. v. Superior Court, supra*, 24 Cal.3d at page 13, this court interpreted section 3549 of the EERA, a provision *identical to* section 3509 of the MMBA, as specifically *not* prohibiting strikes. Therefore, plaintiff's assertion that section 3509 must be read as a legislative prohibition of public employee strikes cannot be sustained. [FN17]

> FN17 Since the present case involves employees subject to the MMBA, we do not consider whether provisions of statutes governing other employees could be interpreted to limit the right of such employees to strike.

In sum, the MMBA establishes a system of rights and protections for public employees which closely mirrors those enjoyed by workers in the private sector. The Legislature, however, intentionally avoided the inclusion of any provision which could be construed as either a blanket grant or prohibition of a right to strike, thus leaving the issue shrouded in ambiguity. In the absence of clear legislative directive on this crucial matter, it becomes the task of the judiciary to determine whether, under the law, strikes by public employees should be viewed as a prohibited tort.

III. *The Common Law Prohibition Against Public Employee Strikes.*

(3a) As noted above, the Court of Appeal and various lower courts in this and other jurisdictions have repeatedly stated that, absent a specific statutory grant, all strikes by public employees are per se illegal. A variety of policy rationales and legal justifications have traditionally been advanced in support of this common law "rule," and numerous articles and scholarly ***574** treatises have been devoted to debating their respective merits. [FN18] The various justifications for the common law prohibition can be summarized into four basic arguments. First - the traditional justification - that a strike by public employees is tantamount to a denial of governmental authority/sovereignty. Second, the terms of public employment are not subject to bilateral collective bargaining, as in the private sector, because they are set by the legislative body through unilateral lawmaking. Third, since legislative bodies are responsible for public employment decisionmaking, granting public employees the right to strike would afford them excessive bargaining leverage, resulting in a distortion of the political process and an improper delegation of legislative authority. Finally, public employees provide essential public services which, if interrupted by strikes, would threaten the public welfare.

> FN18 Among the more notable works to appear recently on the subject of labor relations in the public sector are: Hanslowe & Acierno, *The Law and Theory of Strikes By Government Employees* (1982) 67 Cornell L.Rev. 1055; Comment, *Public Employee Legislation: An Emerging Paradox, Impact, and Opportunity* (1976) 13 San Diego L.Rev. 931; Comment, *California Assembly Advisory Council's Recommendations on Impasse Resolution Procedures and Public Employee Strikes* (1974) 11 San Diego L.Rev. 473; Comment, *The Collective Bargaining Process at the Municipal Level Lingers in Its Chrysalis Stage* (1974) 14 Santa Clara Law. 397; Grodin, *Public Employee Bargaining in California: The Meyers-Milias-Brown Act in the Courts* (1972) 23 Hastings L.J. 719; Shaw & Clark, *The Practical Differences Between Public and Private Sector Collective Bargaining* (1972) 19 UCLA

L.Rev. 867; Lev, *Strikes by Government Employees: Problems and Solutions* (1971) 57 A.B.A.J. 771; Witt, *The Public Sector Strike: Dilemma of the Seventies* (1971) 8 Cal. Western L.Rev. 102; Bernstein, *Alternatives to the Strike in Public Labor Relations* (1971) 85 Harv.L.Rev. 459; Burton & Krider, *The Role and Consequences of Strikes by Public Employees* (1970) 79 Yale L.J. 418; Wellington & Winter, *More on Strikes by Public Employees* (1970) 79 Yale L.J. 441; Kheel, *Strikes and Public Employment* (1969) 67 Mich.L.Rev. 931; Anderson, *Strikes and Impasse Resolution in Public Employment* (1969) 67 Mich.L.Rev. 943; Wellington & Winter, *The Limits of Collective Bargaining in Public Employment* (1969) 78 Yale L.J. 1107; Thorne, *The Government Employee and Organized Labor* (1962) 2 Santa Clara Law. 147; Note, *Labor Relations in the Public Service* (1961) 75 Harv.L.Rev. 391; Annot., Labor Law: Right of Public Employees to Strike or Engage in Work Stoppage (1971) 37 A.L.R.3d 1147.

Our determination of the legality of strikes by public employees necessarily involves an analysis of the reasoning and current viability of each of these arguments. The first of these justifications, the sovereignty argument, asserts that government is the embodiment of the people, and hence those entrusted to carry out its function may not impede it. [FN19] This argument was *575 particularly popular in the first half of the 20th century, when it received support from several American Presidents. [FN20]

FN19 For example, in *City of Cleveland v. Division 268 of Amal. Ass'n* (1949) 41 Ohio Ops. 236, 239 [90 N.E.2d 711, 715], the court stated that "[i]t is clear that in our system of government, the government is a servant of all of the people. And a strike against the public, a strike of public employees, has been denominated ... as a rebellion against government. The right to strike, if accorded to public employees ... is one means of destroying government. And if they destroy government, we have anarchy, we have chaos." A California case which relied on this sovereignty argument is *Nutter v. City of Santa Monica* (1946) 74 Cal.App.2d 292 [168 Cal.Rptr. 741].

FN20 Commenting on the Boston police strike, Calvin Coolidge asserted that "[t]here is no right to strike against public safety by anybody, anywhere, at any time" (quoted in *Norwalk Teachers Ass'n v. Board of Education* (1951) 138 Conn. 269, 273 [83 A.2d 482, 484, 31 A.L.R.2d 1133]). Woodrow Wilson, commenting on the same strike, stated that the strike is "'an intolerable crime against civilization'" (quoted in *id.*, at p. 273 [83 A.2d at p. 484]). In another famous pronouncement of the sovereignty argument, President Franklin Roosevelt stated: "'[M]ilitant tactics have no place in the functions of any organization of Government employees. ... [A] strike of public employees manifests nothing less than an intent on their part to prevent or obstruct the operations of Government until their demands are satisfied. Such action, looking toward the paralysis of Government by those who have sworn to support it, is unthinkable and intolerable.'" (*Id.*, at pp. 273-274 [83 A.2d at p. 484] [quoting a letter from President Roosevelt to the president of the National Federation of Federal Employees (Aug. 16, 1937)].)

The sovereignty concept, however, has often been criticized in recent years as a vague and outdated theory based on the assumption that "the King can do no wrong." As Judge Harry T. Edwards has cogently observed, "the application of the strict sovereignty notion - that governmental power can never be opposed by employee organizations - is clearly a vestige from another era, an era of unexpanded government .... With the rapid growth of the government, both in sheer size as well as in terms of assuming services not traditionally associated with the 'sovereign,' government employees understandably no longer feel constrained by a notion that 'The King can do no wrong.' The distraught cries by public unions of disparate treatment merely reflect the fact that, for all intents and purposes, public employees occupy essentially the same position vis a vis the employer as their private counterparts." (Edwards, *The Developing Labor Relations Law in the Public Sector* (1972) 10 Duq. L.Rev. 357, 359-360.) [FN21]

FN21 See also *Anderson Fed. of Teach.* v. *School City of Anderson* (1969) 252 Ind. 588 [251 N.E. 2d 15, 20, 37 A.L.R.3d 1131] (dis. opn. of DeBruler, C. J.). ("[Sovereign immunity] is not a rational argument at all but a technique for avoiding dealing with the

> merits of the issue [of whether public employees may strike] .... The conflict of real social forces cannot be solved by the invocation of magical phrases like 'sovereignty.'")

Chief Justice DeBruler also notes that where the government has discretion over the terms and conditions of employment, "[a]ny decision within this discretionary area is authorized by the government, and therefore, obviously does not deny the authority of government." (*Id.*, at p. 20.)

In recent years, courts have rejected the very same concept of sovereignty as a justification for governmental immunity from tort liability. In California, the death knell came in *Muskopf v. Corning Hospital Dist.* (1961) 55 Cal.2d 211 [11 Cal.Rptr. 89, 359 P.2d 457], where this court stated that, *576 "[t]he rule of governmental immunity for tort is an anachronism, without rational basis, and has existed only by the force of inertia." (55 Cal.2d at p. 216.) As noted by this court in *Muskopf*, perpetuation of the doctrine of sovereign immunity in tort law led to many inequities, and its application effected many incongruous results. Similarly, the use of this archaic concept to justify a per se prohibition against public employee strikes is inconsistent with modern social reality and should be hereafter laid to rest.

The second basic argument underlying the common law prohibition of public employee strikes holds that since the terms of public employment are fixed by the Legislature, public employers are virtually powerless to respond to strike pressure, or alternatively that allowing such strikes would result in "government by contract" instead of "government by law." (See *City of L.A. v. Los Angeles etc. Council* (1949) 94 Cal.App.2d 36, 46 [210 P.2d 305].) This justification may have had some merit before the California Legislature gave extensive bargaining rights to public employees. However, at present, most terms and conditions of public employment are arrived at through collective bargaining under such statutes as the MMBA.

We have already seen that the MMBA establishes a variety of rights and protections for public employees - including the right to join and participate in union activities and to meet and confer with employer representatives for the purpose of resolving disputed labor-management issues. The importance of mandating these rights, particularly the meet and confer requirement, cannot be ignored. The overall framework of the MMBA represents a nearly exact parallel to the private sector system of collective bargaining - a system which sets forth the guidelines for labor-management relations in the private sphere and which protects the right of private employees to strike. By enacting these significant and parallel protections for public employees through the MMBA, the Legislature effectively removed many of the underpinnings of the common law per se ban against public employee strikes. While the MMBA does not directly address the issue of such strikes, its implications regarding the traditional common law prohibition are significant.

This argument was eloquently explained by Justice Grodin in his concurring opinion in *El Rancho Unified Sch. Dist. v. National Education Assn.*, *supra*, 33 Cal.3d at page 963, where he pointed out that "[t]he premise underlying the court's opinion in *City of L.A.* [94 Cal.App.2d 36] - that it is necessarily contrary to public policy to establish terms and conditions of employment for public employees through the bilateral process of collective bargaining rather than through unilateral lawmaking - has since been rejected by the Legislature. The heart of the statute under consideration in *577 this case [the Educational Employment Relations Act], for example, contemplates that matters relating to wages, hours, and certain other terms and conditions of employment for teachers will be the subject of negotiation and agreement between a public school employer and organizations representing its employees. (Gov. Code, § § 3543.2, 3543.3, 3543.7.) Thus, the original policy foundation for the 'rule' that public employee strikes are illegal in this state has been substantially undermined, if not obliterated."

The remaining two arguments have not served in this state as grounds for asserting a ban on public employee strikes but have been advanced by commentators and by courts of other states. With the traditional reasons for prohibiting such strikes debunked, these additional reasons do not convince us of the necessity of a judicial ukase prohibiting all such strikes.

The first of these arguments draws upon the different roles of market forces in the private and public spheres. This rationale suggests that because government services are essential and demand is generally inelastic, public employees would wield excessive bargaining power if allowed to strike. Proponents of this argument assume that economic constraints are not present to any meaningful degree in the public sector. Consequently, in the absence of such constraints, public employers will be forced to make abnormally large concessions to workers,

which in turn will distort our political process by forcing either higher taxes or a redistribution of resources between government services. [FN22]

FN22 See e.g., *United Federation of Postal Clerks v. Blount, supra*, 325 F.Supp. 879, 884. ("In the private sphere, the strike is used to equalize bargaining power, but this has universally been held not to be appropriate when its object and purpose can only be to influence the essentially political decisions of Government in the allocation of its resources.")

For an even more extensive elaboration of this "distortion of the political process" argument, see Wellington & Winter, *The Limits of Collective Bargaining in Public Employment, supra*, 78 Yale L.J. 1107.

There are, however, several fundamental problems with this "distortion of the political process" argument. For one, as will be discussed more fully below, 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 essentially necessarily undercuts the notion that public officials will be forced to settle strikes quickly and at any *578 cost. The recent case of the air-traffic controllers' strike [FN23] 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.)

FN23 In August 1981, the Professional Air Traffic Controllers Organization (PATCO) launched a nationwide strike against the federal government. President Ronald Reagan ordered the discharge of 11,000 striking controllers who had not returned to work within a two-day grace period. Up to the time of this writing, the Administration has rejected all suggestions for a general amnesty, its position being that the strikers, by violating the federal government's prohibition on strikes and their own "no-strike" oath, have forfeited their jobs with the Federal Aviation Administration forever. Federal courts upheld the government's position in *PATCO v. Federal Labor Relations Authority* (D.C. Cir. 1982) 685 F.2d 547. For a more detailed analysis of the strike, see Meltzer & Sunstein, *Public Employee Strikes, Executive Discretion, and the Air Traffic Controllers* (1983) 50 U.Chi.L.Rev. 731.

Other factors also serve to temper the potential bargaining power of striking public employees and thus enable public officials to resist excessive demands: First, wages lost due to strikes are as important to public employees as they are to private employees. Second, the public's concern over increasing tax rates will serve to prevent the decisionmaking process from being dominated by political instead of economic considerations. A third and related economic constraint arises in such areas as water, sewage and, in some instances, sanitation services, where explicit prices are charged. Even if representatives of groups other than employees and the employer do not formally enter the bargaining process, both union and local government representatives are aware of the economic implications of bargaining which leads to higher prices which are clearly visible to the public. A fourth economic constraint on public employees exists in those services where subcontracting to the private sector is a realistic alternative. For example, Warren, Michigan resolved a bargaining impasse with an American Federation of State, County and Municipal Employees (AFSCME) local by subcontracting its entire sanitation service; Santa Monica, California, ended a strike of city employees by threatening to subcontract its sanitation operations; in fact, San Francisco has chosen to subcontract its entire sanitation system to *private* firms. If this subcontract option is preserved, wages in the public sector clearly need not exceed the rate at which subcontracting becomes a realistic alternative. [FN24] *579

FN24 See further discussion in Burton & Krider, *The Role and Consequences of Strikes by Public Employees, supra*, 79 Yale L.J. 418, 425-427.

The proponents of a flat ban on public employee strikes not only ignore such factors as the availability of subcontracting, but also fail to adequately consider public sentiment towards most strikes and assume that the public will push blindly for an early resolution at any cost. In fact, public sentiment toward a strike often limits the pressure felt by political leaders, thereby reducing the strike's effectiveness. A Pennsylvania Governor's Commission Report stressed just such public sentiment as an important reason to *grant* a limited right to strike: "[T]he limitations on the right to strike which we propose ... will appeal to the general public as so much fairer than a general ban on strikes that the public will be less likely to tolerate strikes beyond these boundaries. Strikes can only be effective so long as they have public support. *In short, we look upon the limited and carefully defined right to strike as a safety valve that will in fact prevent strikes.*" [FN25] (Italics in original.)

FN25 Governor's Commission to Revise the Public Employee Law of Pennsylvania, Report and Recommendations, reprinted in 251 Gov. Empl. Rel. Rep. (BNA) E-1, E-3 (1968). This report is discussed in detail in Hanslowe & Acierno, *The Law and Theory of Strikes by Government Employees, supra*, 67 Cornell L.Rev. 1055.

In sum, there is little, if any empirical evidence which demonstrates that governments generally capitulate to unreasonable demands by public employees in order to resolve strikes. The result of the strike in the instant case clearly suggests the opposite. During the 11-day strike, negotiations resumed, and the parties subsequently reached an agreement on a new MOU, the terms of which were *precisely the same* as the District's last offer prior to the commencement of the strike. Such results certainly do not illustrate a situation where public employees wielded excessive bargaining power and thereby caused a distortion of our political process.

The fourth and final justification for the common law prohibition is that interruption of government services is unacceptable because they are essential. As noted above, in our contemporary industrial society the presumption of essentiality of most government services is questionable at best. In addition, we tolerate strikes by private employees in many of the same areas in which government is engaged, such as transportation, health, education, and utilities; in many employment fields, public and private activity largely overlap.

In a dissenting opinion in *Anderson Fed. of Teach.* v. *School City of Anderson, supra*, Chief Justice DeBruler of Indiana observed that the source and management of most service enterprises is irrelevant to the relative essentiality of the services: "There is no difference in impact on the community between a strike by employees of a public utility and employees of *580 a private utility; nor between employees of a municipal bus company and a privately owned bus company; nor between public school teachers and parochial school teachers. The form of ownership and management of the enterprise does not determine the amount of destruction caused by a strike of the employees of that enterprise. In addition, the form of ownership that is actually employed is often a political and historical accident, subject to future change by political forces. Services that were once rendered by public enterprise may be contracted out to private enterprise, and then by another administration returned to the public sector." (251 N.E.2d at p. 21.)

Recently, the United States Supreme Court also eschewed the classic equation of public ownership of an industry with the essentiality of that industry. In an earlier case which reflected the traditional reasoning, *United States v. Mineworkers* (1947) 330 U.S. 258 [91 L.Ed. 884, 67 S.Ct. 677], the Supreme Court had held that the government's wartime seizure of private coal mines rendered those mining operations public services and changed the rights of the miners, though the function of the mines remained exactly the same. The court then approved the issuance of an injunction against striking workers, a remedy that would not have been available had the mines still been considered a private enterprise.

In the recent case of *Transportation Union v. Long Island R. Co.* (1982) 455 U.S. 678 [71 L.Ed.2d 547, 102 S.Ct. 1349], however, the court held that employees of a formerly private railroad, which had recently been acquired by a governmental entity, retained their right to strike under the Railway Labor Act. In this latter instance, the Supreme Court clearly recognized that the public takeover of the railroad did not necessarily change the rights of the employees; the court therefore suggested that the railroad became no more essential after its public acquisition. Although the decision's basis in the supremacy clause limits its direct precedential value on labor law, the ruling nevertheless signifies a major departure from the court's earlier holding in *Mineworkers, supra* - that a service becomes essential once it comes under

government control. The *Transportation Union* case thus underscores the conclusion that it is *the nature of the service provided* which determines its essentiality and the impact of its disruption on the public welfare, as opposed to a simplistic determination of whether the service is provided by public or private employees. Indeed, strikes by private workers often pose a more serious threat to the public interest than would many of those which involve public employees.

We of course recognize that there are certain "essential" public services, the disruption of which would seriously threaten the public health or safety. In fact, defendant union itself concedes that the law should still act to render ***581** illegal any strikes in truly essential services which would constitute a genuine threat to the public welfare. Therefore, to the extent that the "excessive bargaining power" and "interruption of essential services" arguments still have merit, specific health and safety limitations on the right to strike should suffice to answer the concerns underlying those arguments.

In addition to the various legal arguments advanced to persuade the courts to impose a judicial ban on public employee strikes - arguments which, as we have seen, are decidedly unpersuasive in the context of modern jurisprudence and experience - there is the broader concern that permitting public employees to strike may be, on balance, harmful to labor-management relations in the public sector. This is essentially a political argument, best addressed to the Legislature. We review the matter only to point out that the issue is not so clear cut as to justify judicial intervention, since the Legislature could reasonably conclude that recognizing public employees' right to strike may actually enhance labor-management relations.

At least 11 states have granted most of their public employees a right to strike; [FN26] and the policy rationale behind this statutory recognition further undercuts several of the basic premises relied upon by strike-ban advocates. As the aforementioned Pennsylvania Governor's Commission Report concluded: "The collective bargaining process will be strengthened if this qualified right to strike is recognized. It will be some curb on the possible intransigence of an employer; and the limitations on the right to strike will serve notice on the employee that there are limits to the hardships that he can impose." (251 Gov. Empl. Rel. Rep., *supra*, at p. E-3.)

FN26 See footnote 8, *ante*, for a list of the 11 states. Typically these statutes permit public sector strikes, unless such strikes endanger the public health, safety, or welfare. The statutes generally prohibit strikes by police and fire-protection employees, employees in correctional facilities, and those in health-care institutions. In some instances, statutes provide binding arbitration to resolve certain disputes for which strikes are proscribed. Thus, the public sector strike has begun to achieve some degree of legitimacy, despite the strong opposition of critics.

It is unrealistic to assume that disputes among public employees and their employers will not occur; in fact, strikes by public employees are relatively frequent events in California. For example, 46 strikes occurred during 1981-1983, which actually marks a significant decline when compared to the number during the 5 previous years. [FN27] Although the circumstances behind ***582** each individual strike may vary somewhat, commentators repeatedly note that much of the reason for their occurrence lies in the fact that without the right to strike, or at least a credible strike threat, public employees have little negotiating strength. This, in turn, produces frustrations which exacerbate labor-management conflicts and often provoke "illegal" strikes.

FN27 Public employee strikes in California, 1970-1983:*

1970	1971	1972	1973	1974	1975	1976
20	14	18	15	45	44	23

1977	1978	1979	1980	1981	1982	1983
59	29	87	55	20	6	20

*Source: *An Analysis of 1981-1983 Strikes in California's Public Sector* (1984) (Mar. 1984 Inst. of Ind. Rel., U.C. Berkeley) 60 Cal. Pub. Empl. Rel. 7, 9. Public employees include all workers in public agencies in California, excluding federal service and public utilities.

The noted labor mediator, Theodore W. Kheel, aptly described this process when analyzing New York's Taylor Law (which makes all public employee strikes illegal) and its resultant effect on labor relations in that state: "It would be unfair to place upon the legal machinery sole responsibility for these interruptions of critical services on which the welfare of New York depends. But the fact remains that the machinery - including the prohibition on strikes with attendant penalties and the fact-finding boards with their power to make recommendations - did not work to settle these disputes or stop the strikes, slowdowns, or threats. In fact it is probable that the Taylor Law exacerbated these conflicts. For one thing, it made subversive a form of conduct society endorsed for private workers. It encouraged unions to threaten to strike to achieve the bargaining position participants in collective bargaining must possess. It made the march to jail a martyr's procession and a badge of honor for union leaders. ... In simple point of fact, it did not and is not likely to work as a mechanism for resolving conflicts in public employment relations through joint determination, whether called collective bargaining or collective negotiations." (Kheel, *Strikes and Public Employment, supra*, 67 Mich.L.Rev. 931, 936.) [FN28] *583

FN28 Indeed the per se prohibition is notoriously ineffective. See Comment, *California Assembly Advisory Council's Recommendations on Impasse Resolution Procedures and Public Employee Strikes, supra*, 11 San Diego L.Rev. 473, 480. The council's study found that the "present laws do not deter strikes, and furthermore, that once an illegal strike is instituted the law has very little effect in compelling the strikers to return to work. Part of the reason for this is that many public employers hesitate to request an injunction because they believe that the employees would continue to strike, thereby forcing the employer to either initiate contempt proceedings and subject his employees to quasi-criminal penalties, or stand idly and ineffectually by as the illegal strike continues. Either of these alternatives, if pursued, would have a deleterious effect on future employee-management relations once the strike is settled."

See also statement of Professor Reginald Alleyne, UCLA Law School, in the Transcript of Proceedings, MMBA Hearing, California Legislative Assembly, Interim Public Employment and Retirement Committee, page 20. Professor Alleyne cited statistics which supported his view that "In 99 and 9/10 of the cases in the private sector they succeed and reach an agreement."
See also Cebulski, *An Analysis of 22 Illegal Strikes and California Law* (1973) 18 Cal. Pub. Empl. Rel. 2, 9 (chart showing that strikes in which public sector employers imposed legal sanctions lasted *twice as long* as strikes in which the employers did not attempt to impose sanctions).

It is universally recognized that in the private sector, the bilateral determination of wages and working conditions through a collective bargaining process, in which both sides possess relatively equal strength, facilitates understanding and more harmonious relations between employers and their employees. In the absence of some means of equalizing the parties' respective bargaining positions, such as a credible strike threat, both sides are less likely to bargain in good faith; [FN29] this in turn leads to unsatisfactory and acrimonious labor relations and ironically to more and longer strikes. Equally as important, the possibility of a strike often provides the best impetus for parties to reach an agreement at the bargaining table, because *both* parties lose if a strike actually comes to pass. Thus by providing a clear incentive for resolving disputes, a credible strike threat may serve to avert, rather than to encourage, work stoppages.

FN29 See, e.g., *Timberlane Reg. Sch. Dist. v. Timberlane Reg. Ed. Ass'n* (1974) 114 N.H. 245 [317 A.2d 555, 557].

Theodore Kheel has explained this argument very well: "[W]e should acknowledge the failure of unilateral determination, and turn instead to true collective bargaining, even though this must include the possibility of a strike. We would then clearly understand that we must seek to improve the bargaining process and the skill of the negotiators to prevent strikes. ... With skillful and responsible negotiators, no machinery, no outsiders, and no fixed rules are needed to settle disputes. For too long our attention has been directed to the mechanics and penalties rather than to the participants in the process. It is now time to change that, to seek to prevent strikes by encouraging collective bargaining to the fullest extent possible." [FN30]

FN30 Kheel, *op. cit. supra*, 67 Mich.L.Rev. at pages 940-941.

A final policy consideration in our analysis addresses a more philosophical issue - the perception that the right to strike, in the public sector as well as in the private sector, represents a basic civil liberty. [FN31] The widespread acceptance ***584** of that perception leads logically to the conclusion that the right to strike, as an important symbol of a free society, should not be denied unless such a strike would substantially injure paramount interests of the larger community.

FN31 Another interesting and related policy argument in support of granting a right to strike to public employees rests on a recognition of the changing shape and values of the American economic system itself. In essence, it focuses on the fact that our market economy has evolved from its classical model into an increasingly mixed and pluralistic form. In this process of increased government intervention, the line between public and private enterprise has become increasingly blurred. At the same time, a concomitant blurring has occurred between traditional political and economic activity, and it is this latter overlap which renders a flat ban on all public sector strikes so difficult to defend.

The argument then analogizes the deviation of the American system from classical economic models and the corresponding reevaluation of public strike prohibitions to the Solidarity-inspired developments in Poland prior to the latest military crackdown. Ironically, the traditional common law argument that public sector bargaining and striking is antidemocratic and inimical to our political process, closely mirrors the Polish government's view that unions and strikes are antisocial - indeed revisionist and reactionary - conduct in a system operated purportedly for the benefit of all. Deviations from classical models and beliefs thus confront both ideological viewpoints. The argument for a right to strike for public employees in a capitalist system clearly gains strength as society evolves away from the classical ideal of a pure market economy where the public and private sectors are clearly separated. Similarly, the case for a right to strike in a socialist system grows stronger as that society deviates from the classical ideals of the socialist model. For a more detailed analysis of this theory, see Hanslowe & Acierno, *supra*, 67 Cornell L.Rev. at pages 1072-1073.

(4a) Plaintiff's argument that only the Legislature can reject the common law doctrine prohibiting public employee strikes flies squarely in the face of both logic and past precedent. Legislative silence is not the equivalent of positive legislation and does not preclude judicial reevaluation of common law doctrine. If the courts have created a bad rule or an outmoded one, the courts can change it.

This court has long recognized the need to redefine, modify or even abolish a common law rule "when reason or equity demand it" or when its underlying principles are no longer justifiable in light of modern society. (See *Rodriguez v. Bethlehem Steel Corp.* (1974) 12 Cal.3d 382, 394 [115 Cal.Rptr. 765, 525 P.2d 669]; *Muskopf v. Corning Hospital Dist.* (1961) 55 Cal.2d 211, 216 [11 Cal.Rptr. 89, 359 P.2d 457]; *Green v. Superior Court* (1974) 10 Cal.3d 616, 629 [111 Cal.Rptr. 704, 517 P.2d 1168]; *Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804, 808 [119 Cal.Rptr. 858, 532 P.2d 1226, 78 A.L.R.3d 393].)

This court's history provides numerous examples of this principle. In *Li v. Yellow Cab Co., supra*, 13 Cal.3d at page 812, when this court first adopted a rule of comparative negligence, we expressly rejected the contention that any change in the law of contributory negligence was exclusively a matter for the Legislature, and overturned more than a century of precedent. In *Rodriguez v. Bethlehem Steel Corp., supra*, 12 Cal.3d 382, we directly repudiated the assertion that recognition of a spousal action for loss of consortium required legislative action (see pp. 393-395) and reversed numerous prior decisions in endorsing that cause of action. (5a) Furthermore, "[w]hen the law governing a subject has been shaped and guided by judicial decision, legislative inaction does not necessarily constitute a tacit endorsement of the precise stage in the evolution of the law extant at the time when the Legislature did nothing; it may signify that the Legislature is willing to entrust the further evolution of legal doctrine to judicial development." ***585** (*People v. Drew* (1978) 22 Cal.3d 333, 347, fn. 11 [149 Cal.Rptr. 275, 583 P.2d 1318].)

(6a) For the reasons stated above, we conclude that the common law prohibition against public sector strikes should not be recognized in this state. Consequently, strikes by public sector employees in this state as such are neither illegal nor tortious under California common law. We must immediately caution, however, that the right of public employees to strike is by no means unlimited. Prudence and concern for the general public welfare require certain restrictions.

The Legislature has already prohibited strikes by firefighters under any circumstance. It may conclude that other categories of public employees perform such essential services that a strike would invariably result in imminent danger to public health and safety, and must therefore be prohibited. [FN32]

FN32 See, e.g., Minnesota Statutes Annotated section 179.63(11) (1981) (firefighters, peace officers, guards at correctional facilities), Oregon Revised Statutes section 243.736 (1979) (firefighters, police officers and guards at correctional or mental health institutions); Pennsylvania Statutes Annotated, title 43, section 1101.1001 (guards at correctional or mental health institutions and employees necessary to the functioning of the courts). For a further discussion of these provisions, see Hanslowe & Acierno, *The Law and Theory of Strike by Government Employees, supra*, 67 Cornell L.Rev. 1055, 1079-1083.

See also Burton & Kinder, *supra*, 79 Yale L.J. at page 437 (advocating a presumption of illegality in strikes involving truly essential services, thereby relieving the state of the burden to demonstrate the elements necessary for an injunction).

While the Legislature may enact such specific restrictions, the courts must proceed on a case-by-case basis. Certain existing statutory standards may properly guide them in this task. As noted above, a number of states have granted public employees a limited right to strike, and such legislation typically prohibits strikes by a limited number of employees involved in clearly essential services. In addition, several statutes provide for injunctive relief against other types of striking public employees when the state clearly demonstrates that the continuation of such strikes will constitute an imminent threat or "clear and present danger" to public health and safety. [FN33] Such an ***586** approach guarantees that essential public services will not be disrupted so as to genuinely threaten public health and safety, while also preserving the basic rights of public employees.

FN33 See, e.g., Alaska Statutes section 23.40.200(c) (strikes by most public employees may not be enjoined unless it can be shown that it has begun to threaten the health, safety and welfare of the public); Oregon Revised Statutes section 243.726(3)(a) (injunctive relief available when strike creates a clear and present danger or threat to the health, safety or welfare of the public); Pennsylvania Statutes Annotated, title 43, section 1101.1003 (injunctive relief available when strike creates a clear and present danger or threats to the health, safety or welfare of the public); Wisconsin Statutes Annotated section 111.70(7m)(b) (injunctive relief available if strike poses an imminent threat to the public health or safety). See also *School District for City of Holland v. Holland Educ. Ass'n* (1968) 348 Mich. 314 [157 N.W.2d 206, 210] (Mich. Supreme Ct., in teachers strike cases, declaring state's policy is not "to issue injunctions in labor disputes absent a showing of violence, irreparable injury, or breach of the peace"); *Timberlane Reg. Sch. Dist. v. Timberlane Reg. Ed. Ass'n* (1974) 114 N.H. 245 [317 A.2d 555, 559] (N.H. Supreme Ct. refused to rule on the legality of teachers' strikes but stated that in determining whether to issue a strike injunction, a court should consider "whether the public health, safety and welfare will be substantially harmed if the strike is allowed to continue."). The Federal Labor Management Relations Act of 1947 (29 U.S.C. § § 141-187), follows a similar approach with respect to private sector strikes. It empowers the President to direct the Attorney General to enjoin a threatened or actual strike if it affects an industry involved in interstate commerce and if permitted to occur or continue would imperil the national health or safety. (29 U.S.C. § § 176-180.)

After consideration of the various alternatives before us, we believe the following standard may properly guide courts in the resolution of future disputes in this area: strikes by public employees are not unlawful at common law unless or until it is clearly demonstrated that such a strike creates a substantial and imminent threat to the health or safety of the public. This standard allows exceptions in certain essential areas of public employment (e.g., the prohibition against firefighters and law enforcement personnel) and also requires the courts to determine on a case-by-case basis whether the public interest overrides the basic right to strike.

Although we recognize that this balancing process may impose an additional burden on the judiciary, it is neither a novel nor unmanageable task. [FN34] Indeed, an examination of the strike in the instant case affords a good example of how this new standard should be applied. The 11-day strike did not involve public employees, such as firefighters or law enforcement personnel, ***587** whose absence from their duties would clearly endanger the public health and safety. Moreover, there was no showing by the District that the health and safety of the public was at any time imminently threatened. That is not to say that had the strike continued indefinitely, or had the availability of replacement personnel been insufficient to maintain a reasonable sanitation system, there could not have been at some point a clear showing of a substantial threat to the public health and welfare. [FN35] However, such was not the case here, and the legality of the strike would have been upheld under our newly adopted standard. [FN36]

FN34 Legislation in several states already requires the courts to make this precise determination. (See, e.g., the relevant statutory provisions in Alaska, Ore., Pa. and Wis.) For just one example, under the Pennsylvania Public Employee Relations Act, public employees are not prohibited from striking after they have submitted to mediation and fact finding, unless or until such a strike creates a clear and present danger or threat to the health, safety and welfare of the public. (Pa. Stat. Ann., tit. 43, § 1101.1003.) In such cases, the employer may petition for equitable relief, including injunctions, and is entitled to relief if the court finds that the strike creates the danger or threat. (*Id.*) The Pennsylvania courts have applied this standard to several classes of public employees. (See, e.g., *Bethel Park Sch. v. Bethel Park Fed. of Tchrs. 1607, Am. Fed'n of Teachers* (1980) 54 P. Commw. 49, 52 [420 A.2d 18] (teacher's strike constituted a clear and present danger to the public's health, safety and welfare and school district entitled to back-to-work order in view of potential losses of state subsidies, instructional days vocational job, higher education opportunities, counseling, social and health services, extracurricular enrichment programs and employees' work opportunities and wages); *Bristol Township Education Ass'n v. School District* (1974) 14 Pa. Commw. 463, 468-470 [322 A.2d 767] (school district entitled to injunction against teacher's strike under similar circumstances); *Highland Sewer and Water Auth. v. Local Union 459, I.B.E.W.* (1973) 67 Pa. D. & C.2d 564, 565-567 (sewer and water authority not entitled to injunction forcing striking employees back to work since there was no clear and present danger in view of the fact that the services provided by the authority could still be performed during the strike, apparently by supervisors, with relatively little inconvenience).

FN35 Had such a showing been made, the trial court would then have had the authority to issue an injunction and declare the strike illegal. In cases involving sanitation strikes, it is often the *length* of the strike which will ultimately require issuance of an injunction. (See, e.g., *Highland Sewer and Water Auth. v. Local Union 459, I.B.E.W., supra*, 67 Pa. D. & C.2d 564, 565-567.) In addition, if particular jobs performed by striking sanitation or other public employees require unique skills and training, it is conceivable that a public agency might be unable to find adequate replacements. In the instant matter, however, replacement personnel adequately maintained needed sanitation services without any significant threat of harm to the public. Further, the District's allegations of vandalism by the strikers (see fn. 4, *ante*), while perhaps citing individual illegal acts, were by no means enough to render the entire strike illegal or even a substantial public threat.

FN36 The trial court in this matter had no reason to make a finding regarding the threat to public health and safety posed by the strike. The court merely relied on prior Court of Appeal opinions, which had held that public employee strikes were per se illegal in the absence of a specific statutory grant. In the future, trial courts will clearly be required to make such a finding. In these cases, the scope of appellate review will ordinarily be limited to determining whether reasonable grounds existed for the trial court's decision.

Defendant union has also urged this court to find that a per se prohibition of all public employee strikes violates the California Constitution's guarantees of freedom of association, free speech, and equal protection. They do not contend that such a constitutional infringement is present when a court exercises its equitable authority to enjoin a strike based on a showing that the strike represents a substantial and imminent danger to the public health or safety. Instead, the union argues that in the absence of such a showing, per se prohibition is constitutionally unsupportable.

(7a) The right to form and be represented by unions is a fundamental right of American workers that has been extended to public employees through constitutional adjudication [FN37] as well as by statute; in this case, it is ***588** specifically mandated by the provisions of the MMBA itself. (8a) In addition, "'[i]t is now settled law that workmen may lawfully combine to exert various forms of economic pressure upon an employer, provided the object sought to be accomplished thereby has a reasonable relation to the betterment of labor conditions, and they act peaceably and honestly. (Citations) This right is guaranteed by the federal Constitution as an incident of freedom of speech, press and assemblage, (citations) and it is not dependent upon the existence of a labor controversy between the employer and his employee.'" (*In re Blaney* (1947) 30 Cal.2d 643, 648 [184 P.2d 892], quoting *Steiner v. Long Beach Local No. 128* (1942) 19 Cal.2d 676, 682 [123 P.2d 20].)

FN37 In upholding the National Labor Relations Act against constitutional attack, the United States Supreme Court recognized that the right of employees to organize for the purpose of collective bargaining is fundamental. (*Labor Board v. Jones & Laughlin* (1937) 301 U.S. 1, 33 [81 L.Ed. 893, 909, 57 S.Ct. 615, 108 A.L.R. 1352].)

It is also axiomatic that employees form and join labor organizations to protect their interests in labor disputes, and the United States Supreme Court has long recognized that "[i]n the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution. [Citations.]" (*Thornhill v. Alabama* (1940) 310 U.S. 88, 102 [84 L.Ed. 1093, 1102, 60 S.Ct. 736].) In addition, whenever a labor organization undertakes a concerted activity, its members exercise their right to assemble, and organizational activity has been held to be a lawful exercise of that right. (*Thomas v. Collins* (1945) 323 U.S. 516 [89 L.Ed. 430, 65 S.Ct. 315].)

The freedoms of speech and assembly are applicable to the states through the Fourteenth Amendment (*Hague v. C. I. O.* (1939) 307 U.S. 496 [83 L.Ed. 1493, 59 S.Ct. 954]), and may be exercised in an economic context. As explained by the United States Supreme Court in *N.A.A.C.P. v. Alabama*: "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly. [Citations.] It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech. [Citations.] Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." (*N.A.A.C.P. v. Alabama, supra*, 357 U.S. 449, 460 [2 L.Ed.2d 1488, 1498, 78 S.Ct. 1163].)

As the union contends, however, the right to unionize means little unless it is accorded some degree of protection regarding its principal aim - effective collective bargaining. For such bargaining to be meaningful, employee groups must maintain the ability to apply pressure or at least threaten its application. A creditable right to strike is one means of doing so. As yet, however, the right to strike has not been accorded full constitutional protection, the prevailing view being that "[t]he right to strike, because of its more serious impact upon the public interest, is more vulnerable to regulation than the right to organize and select representatives for lawful purposes of collective bargaining which this Court has characterized as a 'fundamental right ....'" (*Auto. Workers v. Wis. Board* (1949) 336 U.S. 245, 259 [93 L.Ed. 651, 666, 69 S.Ct. 516].)

Further, the federal ban on public employee strikes has been specifically upheld as constitutionally permissible. (See *United Federation of Postal Clerks v. Blount, supra*, 325 F.Supp. 879, 884; affd. *589 (1971) 404 U.S. 802 [30 L.Ed.2d 38, 92 S.Ct. 80].) In the absence of any explicit constitutional protection of the right to strike, the *Blount* court reasoned that the law prohibiting only public employees from striking need only have a rational basis to avoid offending constitutional guarantees. The court then easily found that the common law policy justifications (discussed in detail above) did indeed provide a rational basis for the per se prohibition. (See, *United Federation of Postal Clerks* v. *Blount, supra*, at p. 883.)

Thoughtful judges and commentators, however, have questioned the wisdom of upholding a per se prohibition of public employee strikes. They have persuasively argued that because the right to strike is so inextricably intertwined with the recognized fundamental right to organize and collectively bargain, some degree of constitutional protection should be extended to the act of striking in both the public and private sectors.

As Judge J. Skelly Wright declared in his concurrence in *United Federation of Postal Clerks v. Blount, supra*, "[i]f the inherent purpose of a labor organization is to bring the workers' interests to bear on management, the right to strike, is historically and practically, an important means of effectuating that purpose. A union that never strikes, or which can make no credible threat to strike, may wither away in ineffectiveness. That fact is not irrelevant to the constitutional calculations. Indeed, in several decisions, the Supreme Court has held that the First Amendment right of association is at least concerned with essential organizational activities which give the particular association life and promote its fundamental purposes. ... [Citations.] I do not suggest that the right to strike is co-equal with the right to form labor organizations. ... But I do believe that the right to strike is, at least, within constitutional concern and should not be discriminatorily abridged without substantial or 'compelling' justification." (325 F.Supp. 879, 885.)

Chief Justice Roberts of the Rhode Island Supreme Court offered similar sentiments in a case involving a teachers' strike in that state: "Obviously, the right to strike is essential to the viability of a labor union, and a union

which can make no credible threat of strike cannot survive the pressures in the present-day industrial world. If the right to strike is fundamental to the existence of a labor union, that right must be subsumed in the right to organize and bargain collectively. ... The collective bargaining process, if it does not include a constitutionally protected right to strike, would be little more than an exercise in sterile ritualism. ... I cannot agree that every strike by public employees necessarily threatens the public welfare and governmental paralysis. ... The fact is that in many instances strikes by private employees pose the far more serious threat to the public interest ***590** than would many of those engaged in by public employees. ... In short, it appears to me that to deny all public employees the right to strike because they are employed in the public sector would be arbitrary and unreasonable." (*School Committee v. Westerly Teachers Ass'n* (1973) Ill R.I. 96 [299 A.2d 441, 447-449], dis. opn.)

We are not persuaded that the personal freedoms guaranteed by the United States and California Constitutions confer an *absolute right* to strike, [FN38] but the arguments above may merit consideration at some future date. If the right to strike is afforded some constitutional protection as derivative of the fundamental right of freedom of association, then this right cannot be abridged absent a substantial or compelling justification.

FN38 As stated in the United States Supreme Court in *Dorchy v. Kansas*: "Neither the common law nor the Fourteenth Amendment confers the absolute right to strike." (*Dorchy v. Kansas* (1926) 272 U.S. 306, 311 [71 L.Ed. 248, 269, 47 S.Ct. 86].) Similarly, we do not find that the comparable personal freedoms guaranteed by the California Constitution confer an absolute right to strike. (See, e.g., *In re Porterfield* (1946) 28 Cal.2d 91, 114 [168 P.2d 706, 167 A.L.R. 675].)

(9a) As this court stated in *Vogel v. County of Los Angeles* (1967) 68 Cal.2d 18, 22 [64 Cal.Rptr. 409, 434 P.2d 961], which invalidated a loyalty oath requirement for public employees in this state, "even where a compelling state purpose is present, restrictions on the cherished freedom of association protected by the First Amendment and made applicable to the states by the Fourteenth Amendment must be drawn with narrow specificity. First Amendment freedoms are delicate and vulnerable and must be protected wherever possible. When government seeks to limit those freedoms on the basis of legitimate and substantial governmental purposes ... those purposes cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. Precision of regulation is required so that the exercise of our most precious freedoms will not be unduly curtailed except to the extent necessitated by the legitimate governmental objective. (*Keyishian v. Board of Regents, supra*, 385 U.S. 589, 602-603; *Elfbrandt v. Russell*, 384 U.S. 11, 15, *et seq.*; *N.A.A.C.P. v. Button*, 371 U.S. 415, 432-433; *Shelton v. Tucker*, 364 U.S. 479, 488; *Bagley v. Washington Township Hospital Dist., supra*, 65 Cal.2d 499, 506-509; *Fort v. Civil Service Com., supra*, 61 Cal.2d 331, 337-338.)"

(3b) As discussed at length above, the traditional justifications espoused in favor of a per se prohibition cannot withstand a significant degree of judicial scrutiny. Indeed, since not all public employee services are essential and many private employees perform services more vital to the public health ***591** and safety than do their counterparts in the public sector, the simplistic public/private dichotomy does not constitute a "compelling" justification for a per se prohibition of public employee strikes. Thus the constitutional arguments of defendant union and several amici cannot easily be dismissed, particularly since we will retain the limitation that public strikes may be prohibited when they threaten the public health or safety. [FN39]

FN39 Contrary to the characterization of our dissenting colleague, we neither applaud nor disapprove of strikes by public employees as a matter of social policy, for in the present state of the law that is not our function. The old rule in this state, to the effect that strikes by public employees are unlawful, rested expressly upon the premise that wages and conditions of employment for public employees may only be set by unilateral action of the public employer, and that collective bargaining for such employees in itself was contrary to public policy. *It is the Legislature which has removed the underpinnings from the old rule, by sanctioning a system of collective bargaining for local government employees.* At the same time, the Legislature has maintained a stony silence regarding the status of public employee strikes under the new statutory scheme. To the extent that we examine alternative justifications which have been asserted in support of a ban on such strikes, we do so only to determine whether there are any such justifications which are so compelling as to require acceptance by the courts even in the absence of legislative action. We find an affirmative answer only as regards those strikes which imperil public health or safety. As

to other strikes, we conclude that the policy questions involved are highly debatable, and best left to the legislative branch in the first instance.

We find nothing in the dissenting opinion which detracts from this logic. The "cogent analysis" upon which the dissent relies for "the various rationales underlying the 'no strike' rule" (*post*, p. 610) refers nakedly to "differences in the employment relationship" between public and private sectors, and to "the preservation of a system of government in the ambit of public employment and the proscription of practices not compatible with the public employer-employee relationship." (*Id.*, at p. 611.) What the significant differences are which require a different rule, or why strikes are incompatible with the employer-employee relationship in the public sector, we are not told. Surely judicial intervention in so complex an arena requires greater justification than that.

The dissent decries also what it perceives to be the ambiguity in our rule prohibiting strikes which threaten public safety or health, and states a preference for those statutes which clearly define classes of employees who may or may not strike. The formulation we have adopted, however, is in accord with the rule in several states (*ante*, p. 585), and the dissent points to no evidence that such a rule is incapable of effective judicial administration. On the contrary, such a rule, which depends upon an assessment of public detriment from a particular strike, is entirely in accord with the traditional role of courts in equity. If the Legislature wishes to adopt a different rule, of course it may do so.

Since we have already concluded that the traditional per se prohibition against public employee strikes can no longer be upheld on common law grounds, we do not find it necessary to reach the issue in constitutional terms. Although we are not inclined to hold that the right to strike rises to the magnitude of a fundamental right, it does appear that associational rights are implicated to a substantial degree. As such, the close connection between striking and other constitutionally protected activity adds further weight to our rejection of the traditional common law rationales underlying the per se prohibition. (Cf. *592*Environmental Planning & Information Council v. Superior Court* (1984) 36 Cal.3d 188, 195 [203 Cal.Rptr. 127, 680 P.2d 1086].)

(6b) We conclude that it is not unlawful for public employees to engage in a concerted work stoppage for the purpose of improving their wages or conditions of employment, unless it has been determined that the work stoppage poses an imminent threat to public health or safety. Since the trial court's judgment for damage in this case was predicated upon an erroneous determination that defendants' strike was unlawful, the judgment for damages cannot be sustained. [FN40]

FN40 The trial court relied upon *Pasadena Unified Sch. Dist. v. Pasadena Federation of Teachers* (1977) 72 Cal.App.3d 100 [140 Cal.Rptr. 41], which held that the conduct of an illegal strike was a tort for which damages may be recovered. Since we have held that the strike in this case was not illegal, we need not consider the correctness of that decision.

The judgment is reversed.

Mosk, J., and Grodin, J., concurred.

KAUS, J.

I concur in the judgment insofar as it holds that a peaceful strike by public employees does not give rise to a tort action for damages against the union. I am aware of nothing in the Meyers-Milias-Brown Act which suggests that the Legislature intended that common law tort remedies should be applied in this context, and without such legislative endorsement I believe it is improper to import tort remedies that were devised for different situations into this sensitive labor relations arena. As this court noted in *City and County of San Francisco v. Cooper* (1975) 13 Cal.3d 898, 917 [120 Cal.Rptr. 707, 534 P.2d 403]: "The question as to what sanctions should appropriately be imposed on public employees who engage in illegal strike activity is a complex one which, in itself, raises significant issues of public policy. In the past, several states have attempted to deter public employee strikes by imposing mandatory draconian statutory sanctions on striking employees; experience has all too frequently demonstrated, however, that such harsh, automatic sanctions do not prevent strikes but instead are counterproductive, exacerbating employer-employee friction and prolonging work stoppages." In the absence of a determination by the Legislature that a tort action, resulting in a money damage award determined by a jury many years after the strike, is the appropriate method for dealing with public employee strikes, I do not believe the judiciary should, on its own, embrace this "solution" to the problem. (See, e.g., *Lamphere Sch. v. Lamphere Fed. of Teachers* (1977) 400 Mich. 104 [252 N.W.2d 818, 827-832, 84 A.L.R.3d 314]; *City of Fairmont v. Retail, Wholesale, etc.* (W.Va. 1980) 283 S.E.2d 589, 592-595; contra *593*State v. Kansas City Firefighting Local 42* (Mo.App. 1984) 672 S.W.2d 99, 107-116.) I would therefore disapprove the contrary holding in *Pasadena Unified Sch. Dist. v. Pasadena Federation of Teachers* (1977) 72 Cal.App.3d 100, 111-114 [140 Cal.Rptr. 41].

In concluding that a common law tort action does not lie in these circumstances, it is not necessary to determine whether such a strike is "legal" or "illegal" in an abstract

sense, or whether, and under what circumstances, such a strike could properly be enjoined. The question of injunctive relief presents significantly different considerations than the propriety of a tort action, and it is not before us in this case. We should await the facts of a concrete dispute before we attempt to resolve it.

Finally, I believe it is equally unwise to venture an opinion on potential constitutional challenges to future legislative action in this field. In my view, we should - if anything - be encouraging the Legislature to attempt to deal with the difficult public policy questions in this area, not frightening it away with premature warnings of possible constitutional minefields.

Reynoso, J., concurred.
BIRD, C. J.,
Concurring.

(1b), (2b), (3c), (4b), (5b), (6c), (7b), (8b), (9b) I write separately because I believe it is only fair to give the Legislature some guidance in an area filled with constitutional problems. To prompt the Legislature to enter this field without such guidance [FN1] not only invites error but encourages it. Such a practice is not only disingenuous, it is disrespectful to the litigants and knowingly misleads the public.

> FN1 See concurring opinions of Grodin, J. and Kaus, J. See also *In re Misener* (1985) *ante*, page 543 [213 Cal.Rptr. 569, 698 P.2d 637] and its antecedent, *People v. Collie* (1981) 30 Cal.3d 43 [177 Cal.Rptr. 458, 634 P.2d 534, 23 A.L.R.4th 776], which graphically illustrate this very problem.

Today's decision brings the law of public employee strikes into the 20th century and makes the common law contemporary. As the court has explained, the flat prohibition against such strikes was grounded in outmoded notions of sovereignty and unreasoned fears of free labor organization.

It is appropriate that today's affirmation of the right to strike should come so soon after the tragic events surrounding the strike of Solidarity, the Polish labor union. The Solidarity strikers proclaimed that the rights to organize collectively and to strike for dignity and better treatment on the job were fundamental human freedoms. When the Polish government declared martial law and suppressed the union in December 1981, Americans especially mourned the loss of these basic liberties. *594

The public reaction to the Solidarity strike revealed the strength of the American people's belief that the right to strike is an essential feature of a free society. In an economy increasingly dominated by large-scale business and governmental organizations, the right of employees to withhold their labor as a group is an essential protection against abuses of employer power. (See, e.g., *Amer. Foundries v. Tri-City Council* (1921) 257 U.S. 184, 209 [66 L.Ed. 189, 199, 42 S.Ct. 72, 27 A.L.R. 360].) Hence, it is widely presumed that "we have the right as free men to refuse to work for just grievances: the strike is an unalienable weapon of any citizen." (Reagan & Hubler, Where's the Rest of Me? (1965) p. 138.)

The majority opinion suggests that the right to strike may have constitutional dimensions. (Maj. opn., *ante*, at pp. 589-591.) I write separately to elaborate on this point. Although the right to strike has a long history in American jurisprudence, its textual and theoretical foundations have eluded a comprehensive analysis. Instead, the courts have danced a minuet around the issue. The time has come to make explicit that which has so frequently been presumed. If the right to strike does indeed differentiate this country from those that are not free, then it must be given substance and enforced.

The constitutional right to strike rests on a number of bedrock principles: (1) the basic personal liberty to pursue happiness and economic security through productive labor (U.S. Const., 5th and 14th Amends.; Cal. Const., art. I, § § 1, 7, subd. (a)); (2) the absolute prohibition against involuntary servitude (U.S. Const., 13th Amend.; Cal. Const., art. I, § 6); and (3) the fundamental freedoms of association and expression (U.S. Const., 1st Amend.; Cal. Const., art. I, § § 2, subd. (a), 3).

It is beyond dispute that the individual's freedom to withhold personal service is basic to the constitutional concept of "liberty." Without this freedom, working people would be at the total mercy of their employers, unable either to bargain effectively or to extricate themselves from an intolerable situation. Such a condition would make a mockery of the fundamental right to pursue life, liberty and happiness by engaging in the common occupations of the community. (See *Sail'er Inn, Inc. v. Kirby* (1971) 5 Cal.3d 1, 17 [95 Cal.Rptr. 329, 485 P.2d 529, 46 A.L.R.3d 351]; see also *Nash v. City of Santa Monica* (1984) 37 Cal.3d 97, 110 [207 Cal.Rptr. 285, 688 P.2d 894] (conc. and dis. opn. of Bird, C. J.) [right to withhold personal service as a landlord is a constitutionally protected liberty interest]; *id.*, at p. 114 (dis. opn. of Mosk, J.) [same]; cf. U.S. Const., 13th Amend. [prohibiting involuntary servitude]; Cal. Const., art. I, § 6 [same].)

Nevertheless, in the early years of this country, the

concerted withholding of labor was outlawed under the doctrine of "criminal conspiracy." (See *595 Frankfurter & Greene, The Labor Injunction (1930) pp. 2-3, and cases cited.) Although workers - with the exception of chattel slaves - enjoyed the right to leave employment as individuals, they were prohibited from doing so as a group. (*Ibid.*) Apparently, the courts assumed that working people could adequately protect their liberty interests by exercising their personal right to terminate employment and compete as individuals in the labor market.

As Archibald Cox has written, "[s]ome of the major problems of constitutional law ... arise from the necessity of shaping guarantees born of an individualistic society to the conditions resulting from the solidarity of organized groups." (Cox, *Strikes, Picketing and the Constitution* (1951) 4 Vand.L.Rev. 574, 579 [hereafter Cox].) The recognition of group rights for laborers trailed behind the legal acceptance of the modern business corporation, a group form of property ownership. [FN2]

> FN2 The modern form of corporate organization, which grants the corporate management broad powers to act on behalf of shareholders, emerged in the latter part of the 19th century. (See generally, Berle & Means, The Modern Corporation and Private Property (1939) pp. 127-152.) During the 1890's, the United States Supreme Court ruled that corporations possess constitutional rights. (See, e.g., *Chicago, &c. Railway Co. v. Minnesota* (1890) 134 U.S. 418 [33 L.Ed. 970, 10 S.Ct. 462] ["liberty"]; *Smyth v. Ames* (1898) 169 U.S. 466 [42 L.Ed. 819, 18 S.Ct. 418] ["property"].)

The right to strike was initially regarded as labor's counterpart to the massive economic power concentrated in the corporation. With the rise of monolithic business enterprises, it could no longer be maintained that employees' freedom to compete in the labor market as individuals would be sufficient to protect their liberty interests. In a famous dissenting opinion, Justice Oliver Wendell Holmes observed: "One of the eternal conflicts out of which life is made up is that between the effort of every man to get the most he can for his services, and that of society, disguised under the name of capital, to get his services for the least possible return. Combination on the one side is patent and powerful. Combination on the other is the necessary and desirable counterpart, if the battle is to be carried on in a fair and equal way." (*Vegelahn v. Guntner* (Mass. 1896) 44 N.E. 1077, 1081 (dis. opn. of Holmes, J.).)

In Holmes's view, the right to strike was integral to this latter combination: "If it be true that workingmen may combine with a view, among other things, to getting as much as they can for their labor, just as capital may combine with a view to getting the greatest possible return, it must be true that, when combined, they have the same liberty that combined capital has, to support their interests by argument, persuasion, and the bestowal or refusal *596 of those advantages which they otherwise lawfully control." (*Vegelahn v. Guntner, supra*, 44 N.E. at p. 1081.)

This theoretical foundation was later adopted by the United States Supreme Court. In an opinion by Chief Justice Taft, the court declared: "[Unions] were organized out of the necessities of the situation. A single employee was helpless in dealing with an employer. He was dependent ordinarily on his daily wage for the maintenance of himself and family. If the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and to resist arbitrary and unfair treatment. Union was essential to give laborers opportunity to deal on equality with their employer. They united to exert influence upon him and to leave him in a body, in order, by this inconvenience, to induce him to make better terms with them. They were withholding their labor of economic value to make him pay what they thought it was worth. The right to combine for such a lawful purpose has, in many years, not been denied by any court." (*Amer. Foundries v. Tri-City Council, supra*, 257 U.S. at p. 209 [66 L.Ed. at p. 199].)

A few years later the high court, with Chief Justice Hughes writing, asserted that the right of employees to engage in "collective action" was "not to be disputed." (*Texas & N. O. R. Co. v. Ry. Clerks* (1930) 281 U.S. 548, 570 [74 L.Ed. 1034, 1046, 50 S.Ct. 427].) Finally, the court proclaimed that employees' rights of self-organization were "fundamental" in nature. (*Labor Board v. Jones & Laughlin* (1937) 301 U.S. 1, 33 [81 L.Ed. 893, 909, 57 S.Ct. 615, 108 A.L.R. 1352].)

Though these forceful statements suggest that the Supreme Court included the right to strike among those liberties protected by the Constitution, that proposition was never squarely asserted. Instead, a federal district court was the first to define the right in unambiguous terms: "The right to peaceably strike or to participate in one, to work or refuse to work, and to choose the terms and conditions under which one will work, like the right to make a speech, are fundamental human liberties which the state may not condition or abridge in the absence of grave and immediate danger to the community." (*Stapleton v. Mitchell* (D.Kan. 1945) 60 F.Supp. 51, 61, app. dism. by stip., 326 U.S. 690 [90 L.Ed. 406, 66 S.Ct.

172] [invalidating a Kansas law that prohibited various labor activities, including strikes]; see also *Alabama State Federation of Labor* v. *McAdory* (1944) 246 Ala. 1 [18 So.2d 810, 827-828] [striking down Alabama law that prohibited all strikes not endorsed by a majority of the struck employer's employees].)

The status of the right to strike as a constitutionally protected "liberty" arises not only from the considerations of fairness set forth by Justice *597 Holmes and Chief Justices Taft and Hughes, but also from the inherent nature of work. In the words of Justice Felix Frankfurter, "[t]he coming of the machine age tended to despoil human personality. It turned men and women into 'hands.' The industrial history of the early Nineteenth Century demonstrated the helplessness of the individual employee to achieve human dignity in a society so largely affected by technological advances. Hence the trade union made itself increasingly felt, not only as an indispensable weapon of self-defense on the part of workers but as an aid to the well-being of a society in which work is an expression of life and not merely the means of earning subsistence." (*A.F. of L. v. American Sash Co.* (1949) 335 U.S. 538, 542-543 [93 L.Ed. 222, 225, 69 S.Ct. 258, 6 A.L.R.2d 481] (conc. opn. of Frankfurter, J.).)

Perhaps in response to this concern, some courts - including a California Court of Appeal - adopted an absolutist position, recognizing no distinction whatever between the rights of employees to quit work as individuals or in a group: "It is the right of every man to engage to work for or to deal with, or to refuse to work for or to deal with, any man or class of men as he sees fit, whatever his motive or whatever the resulting injury, without being held in any way accountable therefor. [Citations.] These rights may be exercised in association with others so long as they have no unlawful object in view. " (*Overland P. Co. v. Union L. Co.* (1922) 57 Cal.App. 366, 370-371 [207 P. 412]; see also Tobriner, *The Organizational Picket Line: Lawful Economic Pressure* (1951) 3 Stan.L.Rev. 423, 426, fn. 16 [in spite of four separate opinions, the decision of this court in *Parkinson Co. v. Bldg. Trades Council* (1908) 154 Cal. 581 [98 P. 1027] rests on the absolute right of a labor union to strike].)

It has been argued that constitutional protection for strike activities would intrude on the legislative function. The courts have exercised restraint in applying the constitutional guarantee of "liberty" to legislative determinations of economic policy. This restraint reflects the fear that the diffuse concept of liberty could be employed as a device for the imposition of judicial policy judgments. (See *Lochner* v. *New York* (1905) 198 U.S. 45, 74-76 [49 L.Ed. 937, 948-949, 25 S.Ct. 539] (dis. opn. of Holmes, J.).)

Nevertheless, the mere fact that an enactment covers economic matters does not insulate it from scrutiny where an important constitutional guarantee is implicated. The Constitution expressly protects certain rights of "property." (U.S. Const., 5th and 14th Amends.; Cal. Const., art. I, § § 1, 7, subd. (a).) As Professor Cox has observed, "[a] constitution which assures the owner of property an opportunity to obtain a reasonable return on his capital must recognize the worker's interest in the conditions under *598 which he labors and the price he receives for his work." (Cox, *supra*, 4 Vand.L.Rev. at p. 580.)

Furthermore, recognition of the right to strike does not require an unconstrained judicial construction of the term "liberty." The courts can find constitutional guidance in the close nexus between the right to strike and a specific constitutional provision: the ban on involuntary servitude. (U.S. Const., 13th Amend.; Cal. Const., art. I, § 6.) Though this provision might not by itself guarantee the right to strike, it does provide clear support for the proposition that the strike is an exercise of constitutionally protected liberty.

Justice Brandeis once declared, in a case involving a peaceful, concerted refusal to work: "If, on the undisputed facts of this case, refusal to work can be enjoined, Congress [has] created ... an instrument for imposing restraints upon labor which reminds of involuntary servitude." (*Bedford Co. v. Stone Cutters Assn.* (1927) 274 U.S. 37, 65 [71 L.Ed. 916, 928, 47 S.Ct. 522, 54 A.L.R. 791] (dis. opn. of Brandeis, J., joined by Holmes, J.); see also *France Packing Co.* v. *Dailey* (3d Cir. 1948) 166 F.2d 751, 758 (dis. opn. of O'Connell, J.) [construing War Labor Disputes Act to permit voluntary strikes in view of the constitutional ban on involuntary servitude].) Some courts have invalidated antistrike restrictions as inconsistent with the ban on involuntary servitude. (See e.g., *Henderson v. Coleman* (1942) 150 Fla. 185 [7 So.2d 117, 121]; *United States v. Petrillo* (N.D.Ill. 1946) 68 F.Supp. 845, 849, revd. (1947) 332 U.S. 1 [91 L.Ed. 1877, 67 S.Ct. 1538].) [FN3]

FN3 In *Petrillo*, the Supreme Court reversed the district court's holding as to involuntary servitude solely on the ground that the restriction at issue did not - on its face - prohibit strike activities. (*United States* v. *Petrillo, supra*, 332 U.S. at pp. 12-13 [91 L.Ed. at pp. 1885-1886].)

The close connection between the right to strike and the prohibition against involuntary servitude derives from the purposes of the 13th Amendment. That amendment

guarantees the freedom to terminate employment not for its own sake, but in order to "prohibit[] that control by which the personal service of one man is disposed of or coerced for another's benefit which is the essence of involuntary servitude." (*Bailey v. Alabama* (1911) 219 U.S. 219, 241 [55 L.Ed. 191, 201, 31 S.Ct. 145].)

Accordingly, the amendment is concerned not merely with the formal right to quit, but also with the *practical ability of working people to protect their interests in the workplace*: "[I]n general the defense against oppressive hours, pay, working conditions, or treatment is the right to change employers. ***599** When the master can compel and the laborer cannot escape the obligation to go on, there is no power below to redress and no incentive above to relieve a harsh overlordship or unwholesome conditions of work. " (*Pollock v. Williams* (1944) 322 U.S. 4, 18 [88 L.Ed. 1095, 1104, 64 S.Ct. 792]; see generally, Cox, *supra*, 4 Vand.L.Rev. at p. 576.)

As courts and commentators universally acknowledge, the group right to strike has replaced the individual right to "change employers" as the principal defense of working people against oppressive conditions. The rise of multinational corporations and large-scale government has produced a corresponding decrease in the practical significance of the right to quit for the individual. To withdraw the right to strike is to deprive the worker of his or her only effective bargaining power. (See maj. opn., *ante*, at pp. 589-590; see also Burton & Krider, *The Role and Consequences of Strikes by Public Employees* (1970) 79 Yale L.J. 418, 419-420, and sources cited.) This undeniable fact is reflected in the intensity of the public reaction to the suppression of the Solidarity strike.

Over 30 years ago, the question of whether the 13th Amendment protects the right to strike was termed "momentous" by two justices of the United States Supreme Court. (*A.F. of L. v. American Sash Co., supra*, 335 U.S. at p. 559 [93 L.Ed. at p. 234] (conc. opn. of Rutledge, J., joined by Murphy, J.) [expressly reserving judgment on the question].) Yet, that court has never squarely addressed the issue. [FN4]

> FN4 The court came closest to confronting the issue in *Auto. Workers v. Wis. Board* (1949) 336 U.S. 245 [93 L.Ed. 651, 69 S.Ct. 516]. In that case, a union had conducted a series of "union meetings" at irregular times during work hours. The Wisconsin Employment Relations Board issued an order prohibiting any "concerted effort to interfere with production of the complainant *except by leaving the premises in an orderly manner for the purpose of going on strike.*" (*Id.*, at p. 250 [93 L.Ed. at p. 661], italics added.) The court sustained the order against a 13th Amendment challenge. Whatever the merits of this conclusion (see *id.*, at p. 269 [93 L.Ed. at p. 671] (dis. opn. of Murphy, J.) [the majority find the union's tactic objectionable only because it is effective]), it is clear that the court did not decide the general question of whether the 13th Amendment guaranteed the right to strike: "Our only question is ... whether it is beyond the power of the State to prohibit the particular course of conduct described." (*Id.*, at p. 251 [93 L.Ed. at p. 661].)

The notion of a 13th Amendment right to strike has been rejected by some lower federal courts and state courts. These courts have relied on two lines of reasoning. First, some have suggested that the prohibition against involuntary servitude protects only the right of employees to withhold personal services as individuals. (See, e.g., *Western Union Tel. Co. v. International B. of E. Workers* (N.D.Ill. 1924) 2 F.2d 993, 994-995, affd. (7th Cir. 1925) 6 F.2d 444 [46 A.L.R. 1538].) However, as explained above, this line of ***600** argument cannot justify the total nonprotection of strike activities in an economy dominated by large and powerful employers. (See *ante*, at p. 598-599.)

Other courts have held that the 13th Amendment does not protect a *temporary* withholding of labor. (See, e.g., *Dayton Co. v. Carpet, Linoleum and Resilient Fl. D., etc.* (1949) 229 Minn. 87 [39 N.W.2d 183, 197-198], app. dism., (1950) 339 U.S. 906 [94 L.Ed. 1334, 70 S.Ct. 570].) However, in view of the purposes of the prohibition on involuntary servitude, "can it matter whether the worker quits permanently or merely leaves the establishment until conditions are changed? In the former case he may be said to be exercising the right to sell his services to the highest bidder, leaving others to take his former job, while in the latter case he is seeking to injure the employer by cutting off the supply of labor. But this reasoning scarcely justifies a constitutional distinction, for in either case the improvement of employment conditions ultimately depends upon a withholding of labor from marginal employers until they offer more. ... [T]he temporary or permanent character of the quitting seems irrelevant." (Cox, *supra*, 4 Vand.L.Rev. at pp. 576-577.)

More fundamentally, it is not suggested here that the prohibition on involuntary servitude standing alone necessarily guarantees the right to strike. That provision does, however, provide ample support for the proposition that the right to strike must be counted among those constitutionally protected "liberties" that are essential to

human freedom.

The concerted withholding of labor warrants protection not only as an exercise of personal liberty, but also as an incident of the fundamental freedoms of association and expression. (U.S. Const., 1st Amend.; Cal. Const., art. I, § § 2, 3.) As the majority point out, the right of workers to combine and exert "'various forms of economic pressure'" on employers is constitutionally protected. (Maj. opn., *ante*, at p. 588, quoting *In re Blaney* (1947) 30 Cal.2d 643, 647-648 [184 P.2d 892].)

Working people enjoy the constitutional right to form and join unions. (See, e.g., *Orr v. Thorpe* (5th Cir. 1970) 427 F.2d 1129, 1131; *American Federation of State, Co., & Mun. Emp. v. Woodward* (8th Cir. 1969) 406 F.2d 137, 139-140.) Without a constitutionally protected right to strike, the use of these freedoms would be "little more than an exercise in sterile ritualism. " (*School Committee v. Westerly Teachers Ass'n* (1973) 111 R.I. 96 [299 A.2d 441, 448] (dis. opn. of Roberts, C. J.); see also *United Federation of Postal Clerks v. Blount* (D.D.C. 1971) 325 F.Supp. 879, 885 (conc. opn. of Wright, J.), affd. mem. 404 U.S. 802 [30 L.Ed.2d 38, 92 S.Ct. 80].) ***601**

Recent decisions concerning consumer boycotts provide persuasive authority for the protection of strikes under the guarantees of free association and expression. [FN5] Consumer boycotts were, like strikes, originally prohibited at common law. (See generally, Note, *Political Boycott Activity and the First Amendment, supra*, 91 Harv.L.Rev. at pp. 676-677.)

> FN5 A boycott is an organized refusal to deal. (See Note, *Political Boycott Activity and the First Amendment* (1978) 91 Harv.L.Rev. 659.) A strike is one form of boycott - i.e., an organized refusal by workers to provide labor.

However, in a series of cases involving consumer boycotts by civil rights advocates, the courts began to recognize that such boycotts, like strikes, provide a necessary counterweight to entrenched economic power. In 1948, Justice Roger Traynor observed that "[i]n their struggle for equality the only effective economic weapon Negroes have is the purchasing power they are able to mobilize to induce employers to open jobs to them. ... Only a clear danger to the community would justify judicial rules that restrict the peaceful mobilization of a group's economic power to secure economic equality. " (*Hughes v. Superior Court* (1948) 32 Cal.2d 850, 868 [198 P.2d 885] (dis. opn. of Traynor, J.), affd. (1950) 339 U.S. 460 [94 L.Ed. 985, 70 S.Ct. 718]; see also *Garner v. Louisiana* (1961) 368 U.S. 157, 201 [7 L.Ed.2d 207, 239, 82 S.Ct. 248] (conc. opn. of Harlan, J.) [the First and Fourteenth Amendments protect sit-ins called to protest the racial practices of private businesses].)

In *NAACP v. Claiborne Hardware Co.* (1982) 458 U.S. 886, 907-915 [73 L.Ed.2d 1215, 1232-1238, 102 S.Ct. 3409] (hereafter *Claiborne Hardware*), the United States Supreme Court held that a peaceful, politically motivated boycott constituted an exercise of the constitutional freedoms of association and expression. In that case, black citizens of Port Gibson, Mississippi, boycotted white-owned businesses to pressure those businesses and elected public officials to implement policies of racial equality. (*Id.*, at pp. 898-900 [73 L.Ed.2d at pp. 1226-1228]; *N. A. A. C. P. v. Claiborne Hardware Co.* (Miss. 1980) 393 So.2d 1290, 1295-1297.) The Mississippi Supreme Court affirmed the trial court's holding that the boycotted businesses were entitled to injunctive and monetary relief. (*Id.*, at pp. 1293, 1302.)

The United States Supreme Court reversed. (*Claiborne Hardware, supra*, 458 U.S. at p. 934 [73 L.Ed.2d at p. 1249].) The court rejected the common law view that boycotts were devoid of constitutional value by virtue of their coercive nature. "Speech does not lose its protected character ... simply because it may embarrass others or coerce them into action." (***602***Id.*, at p. 910 [73 L.Ed.2d at p. 1234].) On the contrary, the boycott was entitled to protection as an effective and nonviolent means of bringing about political, social, and economic change. (*Id.*, at pp. 907-915 [73 L.Ed.2d at pp. 1232-1238].) Accordingly, "[t]he right of the States to regulate economic activity could not justify a complete prohibition" against the boycott. (*Id.*, at p. 914 [73 L.Ed.2d at p. 1237].) [FN6]

> FN6 The court's analysis covered both the boycott itself and the expressive activities used to sustain and expand it. (*Claiborne Hardware, supra*, 458 U.S. at pp. 907-912 [73 L.Ed.2d at pp. 1232-1236].) A boycott is at once a form of association and a means of expression. The decision to boycott results from processes of assembly and debate. (See, e.g., *id.*, at p. 907 [73 L.Ed.2d at p. 1232].) Once commenced, the boycott is a form of symbolic expression. Most obviously, it forcefully communicates the participants' views to the target. Further, as a newsworthy event, the boycott provides the participants with a platform for explaining and advocating their views to the public. They pay for this platform by foregoing the benefits of trade or employment. (Compare *Citizens Against Rent Control v. Berkeley* (1981) 454 U.S. 290,

296 [70 L.Ed.2d 492, 498-499, 102 S.Ct. 434] [the contribution and expenditure of money are essential to effective advocacy since the means for communicating with the public are costly].) In short, the boycott is a nonviolent method of conveying not only the content but also the intensity of the participants' views.

This court has recently had occasion to apply the principles announced in *Claiborne Hardware*. In *Environmental Planning & Information Council v. Superior Court* (1984) 36 Cal.3d 188 [203 Cal.Rptr. 127, 680 P.2d 1086] (hereafter *Environmental Planning*), an environmental group sought to influence a newspaper's editorial policies by boycotting businesses that advertised in the newspaper. The newspaper's publisher brought suit claiming tortious interference with an economic relationship.

This court rejected the publisher's argument that only civil rights boycotts should be accorded constitutional protection: "As in *Claiborne Hardware*, ... [the boycotters'] activities constitute a 'politically motivated boycott designed to force governmental and economic change' (458 U.S. at p. 914 []), and the fact that the change which they seek bears upon environmental quality rather than racial equality, can hardly support a different result. " (*Environmental Planning, supra*, 36 Cal.3d at p. 197.) Applying common law principles in light of federal and state constitutional guarantees, the court held that the environmental group was engaging in lawful activity. (*Id.*, at pp. 197-198.)

I see no principled basis for granting protection to "politically motivated " consumer boycotts while withdrawing protection from labor boycotts. In *Environmental Planning*, this court expressly reserved the question whether *Claiborne Hardware's* apparent distinction between political and labor boycotts reflects the dictates of the California Constitution. (36 Cal.3d at p. 198, fn. 9.) The prior decisions both of this court and of the United **603 States Supreme Court indicate that labor boycotts should be entitled to full constitutional protection.

Differential treatment of political and labor activity runs afoul of the well-established principle of judicial impartiality among speakers and messages. "Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." (*N. A. A. C. P. v. Alabama* (1958) 357 U.S. 449, 460-461 [2 L.Ed.2d 1488, 1498-1499, 78 S.Ct. 1163], quoted by the majority, *ante*, at p. 587, fn. 37; see also *Environmental Planning, supra*, 36 Cal.3d at p. 197.)

Similarly, labor unions are entitled to no less protection than civil rights organizations and environmental groups. "The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual. " (*First National Bank of Boston v. Bellotti* (1978) 435 U.S. 765, 777 [55 L.Ed.2d 707, 718, 98 S.Ct. 1407].)

If these principles of judicial neutrality held sway without qualification, the political-labor distinction could be rejected without further discussion. However, as this court has recognized, "commercial" expression is accorded a lowered level of protection. (See *Environmental Planning, supra*, 36 Cal.3d at p. 197; accord *Bolger v. Youngs Drug Products Corp.* (1983) 463 U.S. 60, 64 [77 L.Ed.2d 469, 476, 103 S.Ct. 2875, 2879].)

The United States Supreme Court has defined commercial speech alternately as " speech which does 'no more than propose a commercial transaction'" (*Va. Pharmacy Bd. v. Va. Consumer Council* (1976) 425 U.S. 748, 762 [48 L.Ed.2d 346, 358, 96 S.Ct. 1817]) or "expression related solely to the economic interests of the speaker and its audience" (*Central Hudson Gas & Elec. v. Public Serv. Comm'n* (1980) 447 U.S. 557, 561 [65 L.Ed.2d 341, 348, 100 S.Ct. 2343]). Labor expression cannot be reduced to such narrow concerns. It should not be relegated to the lowered protection accorded commercial expression.

Labor disputes cover a broad range of issues, many of which involve basic concerns of liberty. "A collective bargaining agreement is an effort to erect a system of industrial self-government." (*Steelworkers v. Warrior & Gulf Co.* (1960) 363 U.S. 574, 580 [4 L.Ed.2d 1409, 1416, 80 S.Ct. 1347].) For the bulk of each day, working people are subject to the codes of conduct that govern their workplaces. Those codes - whether embodied in collective **604 bargaining agreements, employer rule books, or informal practices - govern matters ranging from race relations to permission to use the bathroom. (See generally, Shulman, *Reason, Contract, and Law in Labor Relations* (1955) 68 Harv.L.Rev. 999, 1002-1008 [hereafter Shulman]; Cox, *Reflections Upon Labor Arbitration* (1959) 72 Harv.L.Rev. 1482, 1490.) While on the job, working people feel the force of these rules more immediately and directly than those of the government.

Herein lies the link between the guarantee of personal liberty, as informed by the ban on involuntary servitude, and the freedoms of association and expression. The issues that arise in the workplace rival those addressed in

the political process in their actual impact on the breadth of liberty enjoyed by working people. The strike is an essential weapon in the worker's defense against "that control by which the personal service of one man is disposed of or coerced for another's benefit ...." (*Bailey v. Alabama, supra*, 219 U.S. at p. 241 [55 L.Ed. at p. 201]; see *ante*, at pp. 598-599. And, it is a weapon that employs the constitutionally favored methods for promoting change: peaceful association and expression. (See *ante*, at p. 602 & fn. 6.) Surely, the Constitution protects the efforts of working people to preserve and expand their liberties by means of nonviolent - albeit outspoken and impolite - forms of association and expression. (Cf. *Claiborne Hardware, supra*, 458 U.S. at pp. 907-912 [73 L.Ed.2d at pp. 1232-1236].)

As the Polish strikers discovered, a free labor organization cannot coexist with political tyranny. The converse is no less true: "Collective bargaining is today, as Brandeis pointed out, the means of establishing industrial democracy as the essential condition of political democracy, the means of providing for the workers' lives in industry the sense of worth, of freedom, and of participation that democratic government promises them as citizens." (Shulman, *supra*, 68 Harv.L.Rev. at p. 1002.) [FN7]

FN7 The Constitution does not mandate collective bargaining. Whatever the particular system of labor relations, a degree of liberty in the employment relationship is essential to democracy.

The fact that unions and their members seek increased compensation as well as greater liberty does not lower the expression of their grievances to the level of commercial speech. In the words of Congress, "[t]he labor of a human being is not a commodity or article of commerce." (15 U.S.C. § 17.) Unlike the sale of a commodity, the sale of labor gives rise to rights of control over a person's time and activity. The employer obtains not only the product of the employee's labor, but also considerable power to dictate when and how the work will be performed. (See generally, Dept. of Health, *605 Ed. & Welf., Work in America (1973) [hereafter HEW Report].) The amount of compensation is, in part, a tradeoff for personal subordination. This feature of wages and benefits explains why the 13th Amendment, a guarantee of personal liberty, is concerned with "the defense against oppressive hours, pay [and] working conditions. " (*Pollock v. Williams, supra*, 322 U.S. at p. 18 [88 L.Ed. at p. 1104].) [FN8]

FN8 Over a century ago, John Stuart Mill eloquently expressed a view of liberty in the employment relation: "Human nature is not a machine to be built after a model, and set to do exactly the work prescribed for it, but a tree, which requires to grow and develop itself on all sides, according to the tendency of the inward forces which make it a living thing." (Mill, On Liberty (Shields edit. 1956) p. 72.) More recently, it has been widely recognized that issues relating to authority and work content are of central importance in labor relations. (See, e.g., HEW Report; Hill, Competition and Control at Work (1982) pp. 16-44; Hirszowicz, Industrial Sociology (1982); Work in America: The Decade Ahead (Kerr & Rosow edits. 1979); Martin, Contemporary Labor Relations (1979) pp. 125-129; Tepperman, Not Servants Not Machines: Office Workers Speak Out (1976); Case Studies on the Labor Process (Zimbalist edit. 1979).) Whatever one's views on the question of personal liberty in the workplace, it is clear that debate and controversy over that issue cannot be reduced to the status of purely " commercial" speech.

In short, the asserted political-labor distinction provides no basis for denying to working people and unions the protection afforded civil rights activists and environmentalists. Accordingly, a restraint on the right to strike should be upheld under the California Constitution only if it serves a compelling state interest by the least restrictive means. [FN9] *606

FN9 The notion that the United States Constitution protects the right to strike was rejected by a two-judge majority in *United Federation of Postal Clerks v. Blount, supra*, 325 F.Supp. 879, affd. mem. 404 U.S. 802 [30 L.Ed.2d 38, 92 S.Ct. 80] (hereafter *Blount*). However, the California Constitution possesses independent vitality. (See, e.g., *Serrano v. Priest* (1976) 18 Cal.3d 728, 764-766 [135 Cal.Rptr. 345, 557 P.2d 929].) Hence, *Blount* is not binding authority as to the state constitutional claim. Nor did the *Blount* court provide any persuasive reasoning in support of its holding. First, the *Blount* court erroneously suggested that since the common law provided no protection for strikes, neither did the United States Constitution. (*Blount, supra*, 325 F.Supp. at p. 882.) The court did not have the benefit of the *Claiborne Hardware* decision, which held that a consumer boycott was constitutionally protected in spite of the fact that such boycotts had been prohibited under the common law. (458 U.S. at pp. 907-915 [73 L.Ed.2d at

pp. 1232-1238].) Moreover, this court today overturns the common law ban on public employee strikes in this state.

Next, the court asserted that the right to strike was fully protected for the first time by section 7 of the National Labor Relations Act (NLRA). (*Blount, supra*, 325 F.Supp. at p. 882.) However, as the Chief Justice of the Rhode Island Supreme Court has explained, the NLRA presumed that working people already possessed the right to strike: "The fact is that § 7 of that act makes no mention of the right to strike. In § 13 thereof reference is made to the right to strike as follows: 'Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.' Obviously, § 13 is a rule of construction. [Citation.] It is my opinion that the NLRA recognized the rights which labor already had and was intended to afford those rights extensive legislative protection." (*School Committee v. Westerly Teachers Ass'n, supra*, 299 A.2d at p. 447 (dis. opn. of Roberts, C. J.).)

Nowhere did the *Blount* court address the concerns set forth in the present opinion.

Other federal authorities are no more persuasive. In two cases decided prior to *Claiborne Hardware, supra*, 458 U.S. 886, the Supreme Court summarily rejected First Amendment claims by labor unions. (See *NLRB v. Retail Store Employees* (1980) 447 U.S. 607, 616 [65 L.Ed.2d 377, 385-386, 100 S.Ct. 2372] [upholding restriction on peaceful consumer boycott picketing]; *Longshoremen v. Allied International, Inc.* (1982) 456 U.S. 212, 226-227 [72 L.Ed.2d 21, 32, 102 S.Ct. 1656] [upholding prohibition against longshoremen refusing to handle cargo bound to or from the Soviet Union].) However, in each case, the court provided only one paragraph of explanation, relying mainly on the "coercive" nature of boycott activities. The subsequent decision in *Claiborne Hardware* undercut this reasoning. Peaceful boycott activities were held protected in spite of their coercive aspects. (458 U.S. at p. 910 [73 L.Ed.2d at p. 1234].) Clearly, there is no principled basis for refusing to apply this approach in the labor context. (See *ante*, at pp. 602-605; see also Pope, *The Three-Systems Ladder of First Amendment Values: Two Rungs and a Black Hole* (1984) 11 Hastings Const. L.Q. 189, 232-246; Getman, *Labor Law and Free Speech: The Curious Policy of Limited Expression* (1984) 43 Maryland L.Rev. 4, 12-19; Harper, *The Consumer's Emerging Right to Boycott: NAACP v. Claiborne Hardware and Its Implications for American Labor Law* (1984) 93 Yale L.J. 409 [hereafter Harper]; Note, *Labor Picketing and Commercial Speech: Free Enterprise Values in the Doctrine of Free Speech* (1982) 91 Yale L.J. 938; Note, *Peaceful Labor Picketing and the First Amendment* (1982) 82 Colum.L.Rev. 1469.)

The right to strike must be guaranteed to public and private employees alike. In accepting public employment, individuals do not thereby sacrifice their constitutional rights. (See, e.g., *Bagley v. Washington Township Hospital Dist.* (1966) 65 Cal.2d 499, 503-505 [55 Cal.Rptr. 401, 421 P.2d 409].) The constitutional guarantees of personal liberty, freedom of association, and freedom of expression are no less important to public workers than to other working people.

At one time, the ban on public employee strikes might have been described as a limited exception to the general right to strike. However, between 1930 and 1970, public employees increased from about 3.2 million to more than 13 million. As a percentage of the work force, public employment rose from approximately 6.5 percent to over 15 percent, with state and local workers accounting for most of the increase. [FN10] There would be an obvious inconsistency were this court to recognize that the right to strike is essential to a free society while denying that right to a significant proportion of the working population.

FN10 These figures were compiled from United States Department of Commerce's Statistical Abstract of the United States, page 303, table No. 487 (1984) [hereafter Statistical Abstract]; 1 United States Department of Commerce, Bureau of the Census, Historical Statistics of the United States, Colonial Times to 1970 (1975) Series D 11-25, page 127; 2 United States Department of Commerce, Bureau of the Census, Historical Statistics of the United States, Colonial Times to 1970, *supra*, Series Y 272-289, page 1100, Series Y 308-317, page 1102, Series Y 332-334, page 1104.

It has been argued that public employee strikes lack constitutional protection since they enable public workers to exercise a disproportionate influence *607 on the political process. In this view, the principles announced in *Claiborne Hardware* should apply only to consumer boycotts. The power to withhold patronage is said to be less dangerous than the power to withhold labor because consumer power is more widely dispersed. (See generally Harper, *supra*, 93 Yale L.J. at pp. 426-427.)

However, as the present majority opinion explains, the coercive potential of public employee strikes is sharply limited by economic and political conditions. Many government services can be foregone over substantial periods without serious harm. Others can be contracted out to private industry. Where services are financed by user fees, the users can exert effective pressure against the strikers. Last but not least, the taxpaying public in general

frequently mounts effective opposition to public employee strikes. (See maj. opn., *ante*, at pp. 578-579.)

On a deeper level, the constitutional considerations behind the right to strike are, if anything, more compelling than those supporting the right to withhold patronage. Consumer boycotts, unlike strikes, do not implicate either the fundamental liberty to pursue happiness through labor or the prohibition against involuntary servitude. (See *ante*, at pp. 596-600.)

Furthermore, the argument of "disproportionate" political influence is untenable in view of the United States Supreme Court's treatment of monetary wealth, perhaps the most concentrated form of economic power. [FN11] Restrictions on political expenditures and contributions are subject to strict judicial scrutiny. (*Buckley v. Valeo* (1976) 424 U.S. 1, 15-19, 58-59 [46 L.Ed.2d 659, 685-688, 710, 96 S.Ct. 612].) Corporations as well as individuals enjoy the right to employ concentrated wealth in the political process. (*First National Bank of Boston v. Bellotti, supra*, 435 U.S. at pp. 777, 789-792 [55 L.Ed.2d at pp. 725-728].)

> FN11 As of 1972, 1 percent of the population held over 20 percent of the nation's personal wealth. (See *Statistical Abstract, supra*, at p. 487, table No. 794.) Some 218,000 individuals possessed estates worth over $10 million each. (*Id.*, at p. 479, table No. 791.) As this court has recognized, such wealth can enable the possessor to exercise a disproportionate influence on the political process. (*Citizens Against Rent Control v. City of Berkeley* (1980) 27 Cal.3d 819, 826-827 [167 Cal.Rptr. 84, 614 P.2d 742], revd. *sub nom. Citizens Against Rent Control v. Berkeley, supra*, 454 U.S. 290 [70 L.Ed.2d 492, 102 S.Ct. 434].)

In *Citizens Against Rent Control v. City of Berkeley, supra*, 27 Cal.3d 819, this court addressed the constitutionality of a Berkeley city ordinance that prohibited contributions of more than $250 per person to committees formed to support or oppose a ballot measure. The court held that the ordinance was necessary to serve the compelling governmental interest in ***608** preventing well-financed special interest groups from dominating the referendum process. (*Id.*, at pp. 825-829, 832.)

The United States Supreme Court reversed. (*Citizens Against Rent Control v. Berkeley, supra*, 454 U.S. 290 [hereafter *CARC*].) The high court reasoned that the pooling of financial resources was essential to effective advocacy because of the rising costs of advertising and direct mail. (*Id.*, at p. 296, fn. 5 [70 L.Ed.2d at p. 499]; accord *Federal Election Commission* v. *National Conservative Political Action Committee* (1985) ___ U.S. ___ [84 L.Ed.2d 455, 467-468, 105 S.Ct. 1459, 1467-1468].) Further, the court rejected this court's view that the city could restrict the use of concentrated wealth by special interest groups in order to assure others an equal voice in the political process. (*CARC, supra*, 454 U.S. at pp. 295-296 [70 L.Ed.2d at pp. 498-499].)

In *Claiborne Hardware, supra*, 458 U.S. 886, the high court made clear that its concern for effective advocacy was not limited to the expenditure of money, a form of economic power that is possessed primarily by the wealthy. Instead, the court extended the reasoning of *CARC* to cover the collective withholding of patronage, a form of economic influence available to ordinary consumers. (*Id.*, at pp. 907-915 [73 L.Ed.2d at pp. 1232-1238].)

The strike, a combination for the purpose of withholding labor, is no less essential to working people than was the pooling of wealth to the landlords in *CARC* or the collective withholding of purchasing power to the civil rights activists in *Claiborne Hardware*. While working people cannot compete with wealthy individuals or corporations in paying for access to mass communications, they can bring their causes to the public's attention by withholding the one asset that they possess in abundance - the capacity to engage in productive labor.

This court can scarcely deny to working people the protections that are accorded the forms of economic power possessed by other groups. As Justice Traynor once observed, the courts "should not impose ideal standards on one side [of a conflict among groups in society] when they are powerless to impose similar standards upon the other." (*Hughes v. Superior Court, supra*, 32 Cal.2d at p. 868 (dis. opn. of Traynor, J.).)

It remains only to determine whether the common law's flat prohibition on public employee strikes is necessary to serve a compelling state interest. The majority have convincingly refuted the traditional justifications for that ban. (See maj. opn., *ante*, at pp. 573-580.) Although the state has a compelling ***609** interest in averting immediate and serious threats to the public health and safety, a flat ban on public employee strikes is by no means the least restrictive method for accomplishing that end. (See *id.*, at p. 580.) Accordingly, today's holding is compelled not only by common law principles but also by the California Constitution.

GRODIN, J.,

Concurring.

Though I have signed Justice Broussard's plurality opinion, I write separately in response to the concerns expressed in the concurring opinion by Justice Kaus.

I suggest there is little merit in attempting to distinguish, with regard to strikes by employees covered by the Meyers-Milias-Brown Act, between the availability of an injunction at common law and the availability of a damage action. If an injunction is violated, the violation can give rise to a proceeding in contempt for which monetary sanctions may be imposed. The underlying legal question is whether there exists a common law predicate for either remedy. The plurality opinion holds, and I agree, that the Meyers-Milias-Brown Act has removed the principal theoretical justification which had been advanced in this state for the proposition that all strikes by local government employees are tortious. Finding no alternative justification sufficiently compelling to require acceptance by the courts in the absence of legislative action, except as regards strikes which imperil public health or safety, the opinion properly places the ball in the Legislature's court, where it belongs. (*Ante*, p. 591, fn. 39.)

Other states and countries have developed a wide range of policies for dealing with public employee strikes, and the arena is clearly one in which experimentation should be encouraged. Consequently, I share Justice Kaus' concern that we should not attempt to prejudge the constitutionality of any particular legislative response. The plurality opinion explicitly finds it unnecessary to reach the issue in constitutional terms (*ante*, p. 591), and as I understand it discusses the Constitution only in order to demonstrate that were we to adopt the district's position - that there exists an absolute common law ban on public employee strikes in the context of the present statutory scheme - substantial questions of constitutional dimension would arise. (*Ibid.*) It is with that understanding that I join in the opinion.

LUCAS, J.

I respectfully dissent. In my view, public employees in this state neither have the right to strike, nor should they have that right. In any event, in light of the difficulty in fashioning proper exceptions to the basic "no strike " rule, and the dangers to public health and safety arising from even a *temporary* cessation of governmental services, the courts should defer to the Legislature, a body far better equipped to create such exceptions. ***610**

The majority paints a glowing picture of the public strike weapon as a means of "enhanc[ing] labor-management relations" (*ante*, p. 581), "equalizing the parties' respective bargaining positions," (p. 583), assuring "good faith " collective bargaining (*ibid.*), and "providing a clear incentive for resolving disputes" (*ibid.*). Indeed, so enamored is the majority with the concept of the public strike that it elevates this heretofore *illegal* device to a "basic civil liberty." (*Ibid.*) Though wholly unnecessary to its opinion, the majority in dictum even suggests that public employees may have a *constitutional* right to strike which cannot be legislatively abridged absent some "substantial or compelling justification." (P. 590.)

Thus, in the face of an unbroken string of Court of Appeal cases commencing nearly 35 years ago which hold that public strikes are illegal, we suddenly announce our finding that public strikes are not only lawful in most cases, but indeed they may constitute a panacea for many of the social and economic ills which have long beset the public sector. One may wonder, as I do, why we kept that revelation a secret for all these years. (See *El Rancho Unified School Dist. v. National Education Assn.* (1983) 33 Cal.3d 946, 962 [192 Cal.Rptr. 123, 663 P.2d 893] [conc. opn. by Richardson, J.].)

Despite the majority's encomiums, the fact remains that public strikes may devastate a city within a matter of days, or even hours, depending on the circumstances. For this reason, among many others, the courts of this state (and the vast majority of courts in other states and the federal government) have declared *all* public strikes illegal. As indicated above, until today the California Courts of Appeal uniformly had followed that rule. (See, e.g., *Stationary Engineers v. San Juan Suburban Water Dist.* (1979) 90 Cal.App.3d 796, 801 [153 Cal.Rptr. 666]; *Pasadena Unified Sch. Dist. v. Pasadena Federation of Teachers* (1977) 72 Cal.App.3d 100, 105-107 [140 Cal.Rptr. 41], hg. den.; *Los Angeles Unified School Dist. v. United Teachers* (1972) 24 Cal.App.3d 142, 145-146 [100 Cal.Rptr. 806], hg. den.; *Trustees of Cal. State Colleges v. Local 1352 S.F. State etc. Teachers* (1970) 13 Cal.App.3d 863, 867 [92 Cal.Rptr. 134], hg. den.; *City of San Diego v. American Federation of State etc. Employees* (1970) 8 Cal.App.3d 308, 310 [87 Cal.Rptr. 258], hg. den.; *Almond v. County of Sacramento* (1969) 276 Cal.App.2d 32, 35-36 [80 Cal.Rptr. 518], hg. den.; *Pranger v. Break* (1960) 186 Cal.App.2d 551, 556 [9 Cal.Rptr. 293], hg. den.; *Newmarker v. Regents of Univ. of Cal.* (1958) 160 Cal.App.2d 640, 646 [325 P.2d 558]; *City of L.A. v. Los Angeles etc. Council* (1949) 94 Cal.App.2d 36, 46-47 [210 P.2d 305], hg. den.)

Justice Coughlin's opinion in the *City of San Diego* case offers a cogent analysis of the various rationales underlying the "no strike" rule. He observed ***611** that "This California common law rule is the generally accepted common law rule in many jurisdictions.

[Citations, including cases from 24 states.]

"The common law rule has been adopted or confirmed statutorily by 20 states and the federal government." [Citations.]

"... The common law rule [that] public employees do not have the right to bargain collectively or to strike is predicated expressly on the necessity for and lack of statutory authority conferring such right. Where a statute authorizes collective bargaining and strikes it includes them within the methods authorized by law for fixing the terms and conditions of employment. *Those who advocate the right of public employees to strike should present their case to the Legislature.* [Italics added.]

"

. . . . . .

"Wherever the issue has been raised, it has been held laws governing the rights of public employees to engage in union activities, collective bargaining, strikes and other coercive practices, not equally applicable to private employees, and vice versa, are premised on a constitutionally approved classification; and, for this reason, are not violative of the constitutional guarantee of equal protection of the law. [Citations.] [¶] The reasons for the law denying public employees the right to strike while affording such right to private employees are not premised on differences in types of jobs held by these two classes of employees but upon differences in the employment relationship to which they are parties. The legitimate and compelling state interest accomplished and promoted by the law denying public employees the right to strike is not solely the need for a particular governmental service but the preservation of a system of government in the ambit of public employment and the proscription of practices not compatible with the public employer-employee relationship. [Citation.]" (8 Cal.App.3d at pp. 311-315.)

The decision to allow public employee strikes requires a delicate and complex balancing process best undertaken by the Legislature, which may formulate a comprehensive regulatory scheme designed to avoid the disruption and chaos which invariably follow a cessation or interruption of governmental services. The majority's own proposal, to withhold the strike weapon only where "truly essential" services are involved (p. 580) and a "substantial and imminent threat" is posed (p. 586), will afford little guidance to our trial courts who must, on a "case-by-case" basis (*ibid.*), decide such issues. Nor will representatives of labor or management be able to *612 predict with any confidence or certainty whether a particular strike is a lawful one or, being lawful at its inception, will become unlawful by reason of its adverse effects upon the public health and safety. In short, the majority's broad holding will prove as unworkable as it is unwise.

Of the few states that permit strikes by public employees, virtually all do so by comprehensive statutory provisions. Some of the statutory schemes begin by creating classifications of employees, distinguishing, for example, workers whose services are deemed essential (e.g., police, firefighters), those whose services may be interrupted for short periods of time (e.g., teachers), and those whose services may be omitted for an extended time (e.g., municipal golf course attendants). [FN1] These schemes typically define various prerequisites to the exercise of the right to strike for those categories of workers permitted that option. The prerequisites include a period of mandatory mediation [FN2] as well as advance notice to the employer. [FN3] In addition, some statutory schemes lay out the ground rules for binding arbitration. [FN4]

FN1 See Alaska Statutes section 23.40.200(a) (1972) (categorizing, first, all police, fire, correctional, and hospital workers; second, public utility, snow removal, sanitation, and education employees; and third, all other public workers). See also Minnesota Statutes Annotated section 179A.03 (West Supp. 1985) (defining "essential" workers, etc.).

FN2 E.g., Alaska Statutes section 23.40.200(c) (1972) (mediation required); Illinois Public Act 83-1012, section 17 (1983) (Ill. Legis. Serv. 6781, to be codified at Ill. Ann. Stat. ch. 48, § 1617) (mediation required); Minnesota Statutes Annotated section 179A.18, subdivisions 1, 2 (West Supp. 1985) (mediation required for 45 days, 60 days in case of teachers); Pennsylvania Statutes Annotated, title 43, section 1101.1003 (Purden Supp. 1984) (mediation required); Wisconsin Statutes Annotated section 111.70(4)(cm) (West Supp. 1983) (mediation-arbitration required).

FN3 E.g., Illinois Public Act 83-1012, section 17 (5 days' notice required); Minnesota Statutes Annotated section 179A.18, subdivision 3 (West Supp. 1985) (10 days); Wisconsin Statutes Annotated section 111.70(4)(cm) (West Supp. 1983) (10 days).

FN4 E.g., Minnesota Statutes Annotated section 179A.16 (West Supp. 1985); Wisconsin Statutes

Annotated section 111.70(4)(jm) (West Supp. 1983).

In contrast, the majority's new California rule is hopelessly undefined and unstructured. In addition to the breadth of the majority's "truly essential" standard, the statutes presently provide no systematic classification of employees according to the nature of their work and the degree to which the public can tolerate work stoppages. Only firefighters are expressly prohibited from striking and giving recognition to picket lines. (Lab. Code, § 1962.) Moreover, the four principal statutory schemes regulating other public employees establish widely differing approaches to labor relations for different types and levels of employees. (Compare Gov. Code, § § 3500-3510 [Meyers-Milias-Brown Act, covering local government employees]; 3512-3524 [State Employer-Employee Relations Act, covering state employees]; *613 3540-3549.3 [Ed. Employment Relations Act, covering public school employees]; 3560-3599 [governing employment in higher education].) Thus, these statutes produce inconsistent results when, as here, the right to strike is given recognition almost across the board.

The Meyers-Milias-Brown Act, for example, provides "no clear mechanism for resolving disputes" between local governments and their workers. (*Ante*, p. 572, fn. 14.) In the absence of an administrative agency to settle charges of unfair labor practices and compel such remedies as mediation, presumably all strike-related issues will go to the courts in the first instance, but the courts are poor forums for the resolution of such issues. On the other hand, issues arising out of work stoppages by public school employees are to be resolved by the Public Employee Relations Board (PERB) on the basis of PERB's own set of remedies. Of course, this anomalous situation is in large part the product of this court's tolerance of strikes by teachers (*El Rancho Unified Sch. Dist. v. National Ed. Assn., supra*, 33 Cal.3d 946; *San Diego Teachers Assn. v. Superior Court* (1979) 24 Cal.3d 1 [154 Cal.Rptr. 893, 593 P.2d 838]) and PERB's correlative expansion of its authority so that it may compel mediation or adopt other remedies in labor disputes in public education (see Cal. Admin. Code, tit. 8, § 32000 et seq.).

Finally, nothing in PERB's explicit statutory powers (Gov. Code, § 3541.3) extends to mandatory arbitration, for example, so it remains to be established whether state employees, also under PERB's jurisdiction (*id.*, § 3513, subd. (g)), will be governed by the same ground rules as educational employees, or whether some of them, perhaps deemed "truly essential," will be subject to binding arbitration under rules that do not now exist.

I would affirm the judgment.

Respondent's petition for a rehearing was denied June 27, 1985. *614

Cal.
County Sanitation Dist. No. 2 v. Los Angeles County Employees' Assn.
38 Cal.3d 564, 699 P.2d 835, 214 Cal.Rptr. 424, 119 L.R.R.M. (BNA) 2433, 53 USLW 2578

END OF DOCUMENT

RESPONSE TO COMMENTS BY DEPARTMENT OF FINANCE

Local Government Employment Relations

CSM-01-TC-30

By

County of Sacramento

The County of Sacramento disagrees with the contention of the Department of Finance that the activities of: "Follow Public Employment Relations Board (PERB) procedures in responding to charges and appeals filed with PERB by an entity other than the local public agency employer" are discretionary and do not create reimbursable state mandated costs.

First of all, when a charge or appeal is filed with the PERB, the local governmental entity has no choice other than to respond. To do otherwise can result in being found having committed an unfair labor practice, which may not, in fact, have occurred. Additionally, management must respond to unfair practice charges as part of its duty to address labor issues.

Furthermore, it is not cheaper, as contended by the Department of Finance, to have labor matters heard before the PERB. First of all, before the test claim legislation, the only thing which occurred was a writ of mandate. It was more expeditious and less costly to proceed by writ of mandate. Now, with the processes and procedures established by the test claim legislation, rather than a simple writ of mandate, there is a substantially longer and more cumbersome administrative process which must be pursued, with its various appeals.

Additionally, because it does not cost anything to file a complaint with the PERB, we have seen an increase in actions filed before the PERB than we did under the prior law. This was not the situation when the unions were forced to file a writ of mandate with the courts.

As a result, this test claim legislation has not resulted in cost savings, but in substantial expenditures of time and money.

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration is executed this 16th day of November, 2006, at Sacramento, California.

Krista C. Whitman

KRISTA C. WHITMAN
Supervising Deputy County Counsel
County of Sacramento

PROOF OF SERVICE BY MAIL

I, Rebecca Beich, declare:

I am a citizen of the United States, over the age of 18 years, and not a party to the above-entitled action. I am employed in the County of Sacramento and my business address is 700 H Street, Suite 2650, Sacramento, California 95814.

I am readily familiar with the business practices of the collection and processing of correspondence for mailing with the United States Postal Service, and correspondence so collected and processed is deposited with the United States Postal Service on the same date in the ordinary course of business. On November 16, 2006, I served a copy of the following:

Response To Comments By Department of Finance

on the parties interested in said action by placing a true copy thereof enclosed in an envelope or envelopes addressed as follows:

See attached service list

and then by sealing each envelope and depositing it in the United States Postal Service following ordinary business practices.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on November 16, 2006, at Sacramento, California.

Rebecca Beich

Rebecca Beich

Service list:

The Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

Legislative Analyst's Office
Attention: Marianne O'Malley
925 L Street, Suite 1000
Sacramento, CA 95814

Leonard Kaye, Esq.
County of Los Angeles
Department of Auditor-Controller
500 West Temple St., Suite 525
Los Angeles, CA 90012

Wellhouse & Associate
9175 Kiefer Boulevard, Suite 121
Sacramento, CA 95826

Mr. Steve Keil
California State Association of Counties
1100 K Street, Suite 101
Sacramento, CA 95814

Ginny Brummels
State Controller's Office
Division of Accounting and Reporting
3301 C Street, Room 500
Sacramento, CA 95816

Mr. Allan Burdick
Maximus, Inc.
4320 Auburn Blvd., Suite 2000
Sacramento, CA 95841

Bonnie TerKeurst
County of San Bernardino
Auditor-Controller/Recorder's Office
222 West Hospitality Lane, Fourth Floor
San Bernardino, CA 92415-0018

Mr. Jim Spano
State Controller's Office
Division of Audits
300 Capitol Mall, Suite 518
Sacramento, CA 95814

Dee Contreras
City of Sacramento
915 I Street, Fourth Floor
Sacramento, CA 95814

Mr. J. Bradley Burgess
Public Resource Management Group
1380 Lead Hill Blvd., Suite 106
Roseville, CA 95661

Mr. Robert Thompson
Public Employment Relations Board
General Counsel
1031 18th Street
Sacramento, CA 95814

Mr. Glen Everroad
Revenue Manager
City of Newport Beach
P.O. Box 1768
Newport Beach, CA 92659

Director
Department of Industrial Relations
770 L Street
Sacramento, CA 95814

Executive Director
Public Employment Relations Board
1031 18th Street
Sacramento, CA 95814

Ms. Annette Chinn
Cost Recovery Systems, Inc.
705-2 East Bidwell Street, Suite 294
Folsom, CA 95630

Ms. Carla Casteneda
Department of Finance
915 L Street, Suite 1280
Sacramento, CA 95814

Ms. Susan Geanacou
Department of Finance
915 L Steet, Suite 1280
Sacramento, CA 95814

w:\deptrans\finance\2006\response to comments pos.doc