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Paula Higashi, Executive Director
Commission on State Mandates
U.S. Bank Plaza Building
980 Ninth Street, Suite 300
Sacramento, California 95814

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COMMISSION ON
STATE MANDATES

Re: Test Claim 02-TC-27
Santa Monica Community College District
Employment of College Faculty and Administrators

Dear Ms. Higashi:

I have received the comments of the Chancellor's Office of the California Community Colleges ("CCC") dated March 11¹, 2004, to which I now respond on behalf of the test claimant.

A. The Comments of CCC are Incompetent and Should be Excluded

Test claimant objects to the comments of CCC, in total, as being legally incompetent and move that they be excluded from the record. Title 2, California Code of Regulations, Section 1183.02(d) requires that any:

"...written response, opposition, or recommendations and supporting documentation shall 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 or information or belief."

Furthermore, test claimant objects to any and all assertions or representations of fact made in the response since CCC has failed to comply with Title 2, California Code of Regulations, Section 1183.02(c)(1) which requires:

¹ Although dated March 11, 2004, these comments were received by e-mail on March 16, 2004, along with comments for 13 other test claims.

"If assertions or representations of fact are made (in a response), they must be supported by documentary evidence which shall be submitted with the state agency's response, opposition, or recommendations. All documentary evidence shall be authenticated by declarations under penalty of perjury signed by persons who are authorized and competent to do so and must be based on the declarant's personal knowledge or information or belief."

The comments of CCC do not comply with these essential requirements. Since the Commission cannot use unsworn comments or comments unsupported by declarations, but must make conclusions based upon an analysis of the statutes and facts supported in the record, test claimant requests that the comments and assertions of CCC not be included in the Staff's analysis.

Part I
Arguments Repeated More Than Once

CCC repeats the following comments more than once when responding to individual Education Code sections and Title 5, California Code of Regulations. These replies to those arguments will not be repeated each time when made, but will be deemed included on such occasions by this reference.

B. Legal Compulsion is not Necessarily Required for a Finding of a Mandate

In its comments to requirements of more than one statute or regulation, CCC argues that community college districts are not required to comply and cites *Department of Finance v. Commission on State Mandates* (2003) 30 Cal.4th 727² (hereinafter, "*Kern*") and argues that the Supreme Court "found that no mandates exist where a district voluntarily participates in a program." There is no such "finding" in *Kern*!

A finding of legal compulsion is not an absolute prerequisite to a finding of a reimbursable mandate. The controlling case law on the subject of legal compulsion *vis-a-vis* non-legal compulsion is still *Sacramento II*.

(1) Sacramento II Facts:

² CCC uses an unofficial citation, i.e., 134 Cal.Rptr. 237, without citation to specific page numbers. This response will use official citations and will cite page numbers when appropriate.

The adoption of the Social Security Act of 1935 provided for a Federal Unemployment Tax ("FUTA"). FUTA assesses an annual tax on the gross wages paid by covered private employers nationwide. However, employers in a state with a federally "certified" unemployment insurance program receive a "credit" against the federal tax in an amount determined as 90 percent of contributions made to the state system. A "certified" state program also qualifies for federal administrative funds.

California enacted its unemployment insurance system in 1935 and has sought to maintain federal compliance ever since.

In 1976, Congress enacted Public Law number 94-566 which amended FUTA to require, for the first time, that a "certified" state plan include coverage of public employees. States that did not alter their unemployment compensation laws accordingly faced a loss of both the federal tax credit and the administrative subsidy.

In response, the California Legislature adopted Chapter 2, Statutes of 1978 (hereinafter chapter 2/78), to conform to Public Law 94-566, and required the state and all local governments to participate in the state unemployment insurance system on behalf of their employees.

(2) Sacramento / Litigation

The City of Sacramento and the County of Los Angeles filed claims with the State Board of Control seeking state subvention of the costs imposed on them by chapter 2/78. The State Board denied the claim. On mandamus, the Sacramento Superior Court overruled the Board and found the costs to be reimbursable. In City of Sacramento v. State of California (1984) 156 Cal.App.3d 182 (hereinafter Sacramento I) the Court of Appeal affirmed, concluding, *inter alia*, that chapter 2/78 imposed state-mandated costs reimbursable under section 6 of article XIII B. It also held, however, that the potential loss of federal funds and tax credits did not render Public Law 94-566 so coercive as to constitute a "mandate of the federal government" under Section 9(b).³ (Opinion, at pages 194-199)

In other words, Sacramento I concluded, *inter alia*, that the loss of federal funds and tax

³ Section 1 of article XIII B limits annual "appropriations". Section 9(b) provides that "appropriations subject to limitation" do not include "appropriations required to comply with mandates of the courts or the federal government which, without discretion, require an expenditure for additional services or which unavoidably make the provision of existing services more costly."

credits did not amount to “compulsion.”

(3) Sacramento II Litigation

After remand, the case proceeded through the courts again. In Sacramento II, the Supreme Court held that the obligations imposed by chapter 2/78 failed to meet the “program” and “service” standards for mandatory subvention because it imposed no “unique” obligation on local governments, nor did it require them to provide new or increased governmental services to the public. The Court of Appeal decision, finding the expenses reimbursable, was overruled. (Opinion, at pages 66-70)

However, the court also overruled that portion of Sacramento I which held that the loss of federal funds and tax credits did not amount to “compulsion.” (Opinion, at pages 70-74)

(4) Sacramento II “Compulsion” Reasoning

Plaintiffs argued that the test claim legislation required a clear legal compulsion not present in Public Law 94-566. Defendants responded that the consequences of California’s failure to comply with the federal “carrot and stick” scheme were so substantial that the state had no realistic “discretion” to refuse.

In disapproving Sacramento I, the court explained:

“If California failed to conform its plan to new federal requirements as they arose, its businesses faced a new and serious penalty - full, double unemployment taxation by both state and federal governments.” (Opinion, at page 74)

Plaintiffs argued that California was not compelled to comply because it could have chosen to terminate its own unemployment insurance system, leaving the state’s employers faced only with the federal tax. The court replied to this suggestion:

“However, we cannot imagine the drafters and adopters of article XIII B intended to force the state to such draconian ends. (¶) ...The alternatives were so far beyond the realm of practical reality that they left the state ‘without discretion’ to depart from federal standards.” (Opinion, at page 74, emphasis supplied)

In other words, terminating its own system was not an acceptable option because it was so far beyond the realm of practical reality so as to be a draconian response, leaving

the state without discretion. The only reasonable alternative was to comply with the new legislation, since the state was practically “without discretion” to do otherwise.

The Supreme Court in Sacramento II concluded by stating that there is no final test for a determination of “mandatory” versus “optional”:

“Given the variety of cooperative federal-state-local programs, we here attempt no final test for ‘mandatory’ versus ‘optional’ compliance with federal law. A determination in each case must depend on such factors as the nature and purpose of the federal program; whether its design suggests an intent to coerce; when state and/or local participation began; the penalties, if any, assessed for withdrawal or refusal to participate or comply; and any other legal and practical consequences of nonparticipation, noncompliance, or withdrawal.” (Opinion, at page 76)

(5) The “Kern” Case Did Not Change the Standard

In Kern, at page 736, the supreme court first made it clear that the decision did not hold that legal compulsion was necessary in order to find a reimbursable mandate:

“For the reasons explained below, although we shall analyze the legal compulsion issue, we find it unnecessary in this case to decide whether a finding of legal compulsion is necessary in order to establish a right to reimbursement under article XIII B, section 6,⁴ because we conclude that even if there are some circumstances in which a state mandate may be found in the absence of legal compulsion, the circumstances presented in this case do not constitute such a mandate.” (Emphasis in the original, underlining added)

After concluding that the facts in Kern did not rise to the standard of non-legal compulsion, the court reaffirmed that either double taxation or other draconian consequences could result in non-legal compulsion:

“In sum, the circumstances presented in the case before us do not constitute the type of non-legal compulsion that reasonably could

⁴ This Kern disclaimer that “we find it unnecessary in this case to decide whether a finding of legal compulsion is necessary in order to establish a right to reimbursement” refutes CCC’s interpretation of Kern that legal compulsion is always necessary for a finding of a mandate.

constitute, in claimants' phrasing, a 'de facto' reimbursable state mandate. Contrary to the situation that we described in (*Sacramento II*), a claimant that elects to discontinue participation in one of the programs *here at issue* does not face 'certain and severe...penalties' such as 'double...taxation' or other 'draconian' consequences (citation), but simply must adjust to the withdrawal of grant money along with the lifting of program obligations." (*Opinion, at page 754, emphasis supplied to illustrate holding is limited to facts presented*)

The test for determining the existence of a mandate is whether compliance with the test claim legislation is a matter of true choice, that is, whether participation is truly voluntary. *Hayes v. Commission on State Mandates*, (1992) 11 Cal.App.4th 1564, 1582

The process for such a determination is found in *Sacramento II*, that is, the determination in each case must depend on such factors as the nature and purpose of the program; whether its design suggests an intent to coerce; when district participation began; the penalties, if any, assessed for withdrawal or refusal to participate or comply; and any other legal and practical consequences of nonparticipation, noncompliance, or withdrawal." (*Kern*, at page 76)

C. The Annual Appropriation Argument Has Been Anticipated

CCC argues that several test claim code sections were added by Chapter 973, Statutes of 1988, that the funding was then built into Claimant's base and, therefore, Claimant has already been reimbursed for these activities.

This argument was anticipated and answered in the test claim, at pages 53-57:

"AB 1725," Statutes of 1988, Chapter 973 Programs

"Several of the duties included in this test claim were initially established by "AB 1725," Statutes of 1988, Chapter 973. At Section 70 (an uncodified section), subdivision (b) (2), states: "It is the intent of the Legislature that moneys appropriated during Phase II fully fund any state mandate created pursuant to this section." At subdivision (e): "Based on estimates provided . . . , the Legislature finds and declares that its estimate of this funding amount is seventy million dollars (\$70,000,000), in addition to the seventy million dollars (\$70,000,000) estimated under subdivision (d) [for Phase I]."

"The appropriations referenced in the Section 70 intent language are assigned to

specific priorities in Education Code section 84755⁵ (added by Statutes of 1988,

⁵ Education Code section 84755, as added by Chapter 973/88, Section 21.7

“(a) The Legislature finds and declares that program-based funding, once implemented, will more adequately and accountably fund the costs of providing quality community college education. Given that program-based funding will not be implemented until fiscal year 1991-92, given that community colleges will be entering a period of major reform and incurrence of new state mandates commencing in January 1989, and given that community colleges will be entering this period of reform having lost purchasing power since the 1977-78 fiscal year, the Legislature recognizes the need to create a transitional funding mechanism for program improvement and mandate funding that can operate until program-based funding is implemented.

(b) For the purpose of improving the quality of community college educational programs and services, for the purpose of reimbursing state-mandated local program costs imposed by this act, and for the purposes of initially implementing specified reforms, the board of governors shall, from amounts appropriated for purposes of this section, allocate program improvement revenues to each district on the basis of an amount per unit of average daily attendance funded in the prior fiscal year. However, this amount shall be increased or decreased to provide for equalization in a manner determined by the Board of Governors, consistent with Sections 84703 to 84705, inclusive.

Each community college district shall use its allocation to initially reimburse state-mandated local program costs, and then to implement specified reforms and make authorized program and service improvements as follows:

- (1) Developing articulated programs provided for in Section 69 of Chapter 973 of the Statutes of 1988 with school districts and campuses of the University of California and California State University.
- (2) Applying minimum qualifications to all newly hired faculty and administrators, including candidates for these positions as required by Section 87356.
- (3) Developing and administering a process for waiver of minimum qualifications as required by Section 87359.
- (4) Establishing and applying local hiring criteria as required by Section 87360.
- (5) Establishing and applying faculty service areas and competency criteria as required by Sections 87743 to 87743.5, inclusive.
- (6) Evaluating temporary employees, instituting peer review evaluation, and widely distributing evaluation procedures as required by Section 87663.

- (7) Establishing and applying new processes for tenure evaluation required by Section 87610.1.
 - (8) Establishing and applying the tenure denial grievance procedure required by Section 87610.1.
 - (9) Establishing and applying a process for moving administrators into faculty positions as required by Sections 87454 to 87458, inclusive.
 - (10) Publishing and distributing a report on the affirmative action success rate as required by Section 87102.
 - (11) Improving instruction by reducing the ratio of full-time equivalent students to full-time equivalent instructors.
 - (12) Improving instruction by increasing the hiring of full-time instructors and limiting the practice of hiring part-time instructors.
 - (13) Augmenting budgets for college libraries and learning resources.
 - (14) Augmenting budgets for plant maintenance and operations.
 - (15) Adding new courses or programs to serve community need.
 - (16) Making progress towards affirmative action goals and timetables established by the district.
 - (17) Developing and maintaining programs and services authorized by Section 78212.5.
 - (18) Augmenting budgets for student services in the areas of greatest need.
 - (19) Providing for release time for faculty and staff as deemed appropriate by the governing board of each community college district, to enable faculty and staff participation in implementing reforms.
- (c) Except as provided by Section 87482.6, and except as necessary to reimburse the costs of new state mandates, district governing boards shall have full authority to expend program improvement allocations for any or all of the authorized purposes specified in subdivision (b).
- (d) As required by the board of governors, the governing board of each community college district shall submit to the board of governors a plan for using the resources allocated pursuant to this section. The board of governors shall review each plan to ensure that proposed expenditures are consistent with the listing of authorized expenditures provided in this section, and the board of governors shall approve all plans to the full extent that expenditures are authorized by this section. To the extent that a community college district expends its program improvement allocation consistent with its plan, the board of governors shall include the district's allocation as part of the district's base budget for subsequent years.
- (e) The board of governors, through the annual systemwide budget submitted pursuant to paragraph (5) of subdivision (b) of Section 70901, shall request necessary

Chapter 973, Section 21.7), including Section 87610.1 which is referenced at subdivision (b), items (7) and (8). However, in a preamble, subdivision (b) states that the new funds will be allocated to "each district on the basis of an amount per unit of average daily attendance funded in the prior fiscal year," but only after the amount is "increased or decreased to provide for equalization." This effectively negates any concept of cost reimbursement, which is the actual cost of the increased level of service, it is merely a general funding device disguised as a mandate reimbursement apportionment.

"Notwithstanding, this funding scenario, to the extent actually implemented, does not meet the Government Code section 17556, subdivision (e) exception to a finding of "costs mandated by the state," since the statute (Chapter 973/88) did not provide for offsetting savings to local agencies or school districts which result in no net costs to the local agencies or school districts, or *include 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 funding, to the extent it actually was later provided, was provided by *subsequent* legislation, and *the sufficiency* of the funding remains a question of fact (note that Section 70 declares that it is an "estimate"). More to the point, at Section 67 of Chapter 973, Statutes of 1988, the Legislature leaves it to the Commission on State Mandates to determine if there are any reimbursable mandated costs.

"To the extent that funding was made available, and continues to be made available each subsequent year, such funding might reduce the reimbursable costs, but does not preclude an initial determination of whether a reimbursable mandate exists. The test claimant is informed and believes that the Chancellor of the California Community Colleges on or about 1991 prepared a AB 1725 cost questionnaire to obtain from each community college the cost of implementing the provisions of AB 1725, that the cost data was specific to each new program enacted, that most of the community colleges provided this data to the Chancellor, and that the Chancellor is in possession of this information. This information can be utilized to establish base-period cost and revenue information."

D. Consultations with the Academic Senate

resources for the purposes of this section. It is the intent of the Legislature that the appropriation and allocation of program improvement money not otherwise provided pursuant to subdivision (b) shall be accomplished through the annual state budget process beginning with the 1989-90 fiscal year. After June 30, 1991, if Section 84750 is implemented, it is the intent of the Legislature to fund the ongoing operations of community college districts pursuant to Section 84750."

On several occasions, CCC asserts that the section requires the faculty's exclusive representative to consult with the academic senate, not the district, prior to collective bargaining.

This is a matter of first impression to be determined by the Commission at a hearing, not by the interpretation of the CCC. The referenced sections require the faculty's exclusive representative to consult with the academic senate prior to engaging in collective bargaining on certain procedures. The issue of whether or not the costs associated with the activities of the members and staff of the academic senate are, or are not, reimbursable has not yet been determined by the Commission.

Part II
Other Arguments, Not Repeated

E. Education Code Section 70901(b)(1)(B)

(1) The Section Does Apply to Community College Districts

CCC claims that the section does not apply to local districts, only to actions to be taken by the Board of Governors. CCC is wrong. The subdivision provides:

“(b) Subject to, and in furtherance of, subdivision (a), and in consultation with community college districts and other interested parties as specified in subdivision (e), the board of governors shall provide general supervision over community college districts, and shall, in furtherance thereof, perform the following functions:...” (Emphasis provided)

Therefore, when the Board is taking those actions, it must do so in consultation with community college districts. Consultation is a two way street, districts must participate and will incur costs when doing so.

(2) The Activities of the Section Have Been Expanded Since 1975

CCC argues that section 70901(b)(1)(B) was originally enacted in 1969 as section 200.11 and subsequently became section 70901(b)(1)(B) “without any change in the language.” CCC is wrong.

Former section 200.11 as recodified and renumbered by Chapter Chapter 1010, Statutes of 1976, Section 2, as section 71068 provided:

“The board of governors shall establish minimum standards for the

employment of academic and administrative staff in community colleges.”⁶

As added by Chapter 973, Statutes of 1998, Section 8, 70901⁷ now reads, in part.:

“(a) The Board of Governors of the California Community Colleges shall provide leadership and direction in the continuing development of the California Community Colleges...The work of the board of governors shall at all times be directed to maintaining and continuing, to the maximum degree permissible, local authority and control in the administration of the California Community Colleges.

(b) Subject to, and in furtherance of, subdivision (a), and in consultation with community college districts and other interested parties as specified in subdivision (e), the board of governors shall provide general supervision over community college districts, and shall, in furtherance thereof, perform the following functions:

(1) Establish minimum standards as required by law, including, but not limited to, the following:

(A)...

(B) Minimum standards for the employment of academic and administrative staff in community colleges....” (Emphasis supplied)

Prior to 1975, the Board of Governors was directed to establish minimum standards for the employment of academic and administrative staff. Since 1975, the legislature has directed the Board to provide its leadership and direction to the maximum degree permissible maintaining and continuing local authority and control. Subdivision (b), for the first time, requires the Board to consult with community college districts. Consultation is a two way street, districts must participate and will incur costs when doing so.

F. Education Code Section 87356

CCC argues that nothing in the section requires any conduct by the community college districts. Test claimant agrees.

⁶ Former Education Code Section 71068 was repealed by Chapter 973, Statutes of 1988, Section 12.9.

⁷ Section 70901 was amended again by Chapter 1023, Statutes of 1998, Section 1, to add a new subdivision (b)(15) which allow contracting for the procurement of goods and services, which is not relevant to this test claim. The chapter also renumbered former subdivision (b)(15) as (b)(16).

Test claimant has not alleged any additional duties are required by the section. The new test claim duties mandated by statute are found in the test claim at pages 42-49. Section 87356 is not mentioned. The section is mentioned in the narrative portion of the test claim for purposes of context at pages 16-17⁸, but no duties are alleged.

G. Education Code Section 87357(a)(1)

Subdivision (a)(1) of Education Code Section 87357 requires the Board of Governors to consult with named representatives and other statewide representatives regarding minimum qualifications of faculty.

CCC contends that the section imposes activity on the Board of Governors, none of which involves community college districts.

In view of the direction of Education Code Section 70901 that the work of the board of governors shall at all times be directed to maintaining and continuing, to the maximum degree permissible, local authority and control in the administration of the California Community Colleges and that the board is to consult with community college districts when setting minimum standards for the employment of academic and administrative staff, test claimant contends when the Board is directed in Section 87357(a)(1) to rely primarily on the advice and judgment of, the statewide Academic Senate; and rely primarily on the advice and judgment of, an appropriate statewide organization of administrators and rely primarily on the advice and judgment of, appropriate apprenticeship teaching faculty and labor organization representatives; and in each case, the board of governors shall provide a reasonable opportunity for comment by other statewide representative groups, it cannot be said that the Board will not consult with a wide range of community college districts. When it does so, the costs of those district activities shall be reimbursable.

H. Education Code Section 87357(a)(2)

Subdivision (a)(2) of Education Code Section 87357 requires the Board of Governors to establish a process to review at least every three years the continued appropriateness of the minimum conditions and the adequacy of the means by which they are administered.

CCC argues that this section only applies to the Board of Governors and other groups of which "Claimant is none of these."

⁸ The repeal of the section and its re-enactment is also reported at page 34.

Education Code Section 87357(a)(2) requires the board of governors to establish a process to review the continued appropriateness of the minimum qualifications, and the adequacy of the means by which they are administered. The subdivision goes on to require:

“...The process shall provide for the appointment of a representative group of community college faculty, administrators, students, and trustees to conduct or otherwise assist in the review,...In addition, the group shall be broadly representative of academic and vocational programs in the curriculum from both urban and rural districts, and representative of ethnic minority communities.”

The section clearly requires community college districts to “conduct or otherwise assist” in the review.

In this regard, CCC also asserts “If Claimant is asked to participate, it has the option to decline.” When applying the test for non-legal compulsion, *Sacramento II* has advised:

“...the determination in each case must depend on such factors as the nature and purpose of the...program; whether its design suggests an intent to coerce; when (district) participation began; the penalties, if any, assessed for withdrawal or refusal to participate or comply; and any other legal and practical consequences of nonparticipation, noncompliance, or withdrawal.” (“*Sacramento II*”, at page 76)

When community college districts are “asked to participate” by the Chancellor or the Board of Governors, the “legal and practical consequences of nonparticipation” must be seriously considered.

I. Education Code Section 87358

Education Code Section 87358 requires the Board of Governors to periodically designate a team of community college faculty, administrators, and trustees to review each community college district’s application of minimum qualifications to faculty and administrators.

CCC suggests that the section does not require Claimant’s participation, but “[A]ny cost associated with the section depends on when and if the Board of Governors requires Claimant to verify its use of minimum qualifications...Claimant would have to cooperate in the review. However, our office has no record that the Board of Governors has ever

conducted a review of Claimant with respect to this issue.” (Emphasis supplied)

This argument is irrelevant for test claim determinations. There is no statutory or regulatory requirement that a test claimant must actually have experienced every element of a test claim.

A test claimant acts in a representative capacity for every school district or community college district in the state. Any one district may experience a test claim activity one year, but may not in the next. In fact, the statute only requires a review “periodically”.

J. Education Code Sections 87359, 87360

The comments of CCC as to these sections do not present any new issues not previously discussed.

K. Education Code Section 87610.1(b) and (d)

(1) Subdivision (b)

Subdivision (b) of Education Code Section 87610.1 provides that certain actions of a community college district shall be classified and procedurally addressed as grievances. And, if there is no contractual grievance procedure resulting in arbitration, the grievance shall proceed to hearing in accordance with Section 87740.

CCC argues that subdivision (b) provides an optional mechanism for addressing the decisions to discontinue the service of probationary faculty, and that the requirement was included in section 87740⁹.

For the first time, subdivision (b) requires that allegations that the community college district, in a decision to grant tenure, made a negative decision that to a reasonable person was unreasonable, or violated, misinterpreted, or misapplied, any of its policies and procedures concerning the evaluation of probationary employees shall be classified and procedurally addressed as grievances. “Shall be addressed as grievances” is not optional.

For the first time, subdivision (b) requires that allegations that the community college district in a decision to reappoint a probationary employee violated, misinterpreted, or

⁹ This reply will not discuss the origins and content of section 87740 at this point, but will reply to the section itself, *infra*.

misapplied any of its policies and procedures concerning the evaluation of probationary employees shall be classified and procedurally addressed as grievances. "Shall be addressed as grievances" is not optional.

Subdivision (b) then concludes "[I]f there is no contractual grievance procedure resulting in arbitration, these allegations shall proceed to hearing in accordance with Section 87740." "Shall proceed to hearing in accordance with Section 87740" is not optional.

Finally, CCC argues that the decision to come under section 87610.1 is voluntary since districts "choose to collectively bargain a grievance procedure". Test claimant requests the Commission to take notice that it has already determined that collective bargaining is a mandated activity, not an optional activity.

(2) Subdivision (d)

CCC here argues that nothing mandates that Claimant take improper action against an employee, so the State is not responsible for the Claimant's conduct in this regard.

Test claimant agrees. Test claimant has not alleged any additional duties are required by the subdivision. The new test claim duties derived from statute are found in the test claim at pages 42-49. Subdivision (d) of Section 87610.1 is not mentioned. The section is mentioned in the narrative portion of the test claim for purposes of context at pages 24-25, but no duties are alleged.

L. Education Code Section 87611

Education Code Section 87611 provides:

"A final decision reached following a grievance or hearing conducted pursuant to subdivision (b) of Section 87610.1 shall be subject to judicial review pursuant to Section 1094.5 of the Code of Civil Procedure."

CCC contends that since Section 1094.5 of the Code of Civil Procedure existed prior to 1975, the requirements of Education Code Section 87611 can not be "new".

As noted above, for the first time, subdivision (b), of Education Code Section 87610.1 requires that allegations that the community college district, in a decision to grant tenure, made a negative decision that to a reasonable person was unreasonable, or violated, misinterpreted, or misapplied, any of its policies and procedures concerning the evaluation of probationary employees shall be classified and procedurally

addressed as grievances.

And for the first time, subdivision (b) of Education Code Section 87610.1 requires that allegations that the community college district in a decision to reappoint a probationary employee violated, misinterpreted, or misapplied any of its policies and procedures concerning the evaluation of probationary employees shall be classified and procedurally addressed as grievances.

Since these new requirements were mandated after 1975, they are "new" grounds for which a petition for writ of mandate may be granted, and could not have been subject to judicial review prior to 1975.

CCC also argues that section 87611 makes no mention of any costs, it merely indicates that these decisions can be judicially reviewed. Any argument that responding to legal proceedings and judicial hearings does not result in costs is specious.

M. Education Code Section 87663

(1) Subdivisions (c), (d) and (e)

Subdivisions (c) and (d) require that evaluations shall include a peer review process and describes the peer review process.

CCC finds no fault with the mandated activities of subdivisions (c) and (d) with the reservation that subdivision (e) requires that faculty evaluation procedures may be negotiated as part of the collective bargaining process.

Even if there is a collective bargaining agreement, it may, or may not, encompass faculty evaluation procedures. The inclusion of subdivision (e) in the test claim will allow the parameters and guidelines to provide for reimbursement for these faculty evaluation procedures, with the exception of if, or when, they are part of the district's collective bargaining agreement.

(2) The Requirements of Section 87663 Have Been Greatly Expanded Since 1975

Prior to 1975, former section 13481 provided that:

"Contract employees shall be evaluated at least once in each academic year. Regular employees shall be evaluated at least once in every two academic years.

Whenever an evaluation is required of a certificated employee by a

community college district, the evaluation shall be conducted in accordance with the standards and procedures established by the rules and regulations of the governing board of the employing district.”

Education Code Section 13481, as added by Chapter 1654, Statutes of 1971, Section 4

Former section 13481 was recodified and renumbered as section 87663 by Chapter 1010, Statutes of 1976, Section 2. Section 87663 was amended substantially by Chapter 973, Statutes of 1988, Section 51. As amended, the section read:

“(a) Contract employees shall be evaluated at least once in each academic year. Regular employees shall be evaluated at least once in every three academic years. Temporary employees shall be evaluated within the first year of employment. Thereafter, evaluation shall be at least once every six regular semesters, or once every nine regular quarters, as applicable.

(b) Whenever an evaluation is required of a certified teacher¹⁰ by a community college district, the evaluation shall be conducted in accordance with the standards and procedures established by the rules and regulations of the governing board of the employing district.

(c) Evaluations shall include, but not be limited to, a peer review process.

(d) The peer review process shall be on a departmental or divisional basis, and shall address the forthcoming demographics of California, and the principles of affirmative action. The process shall require that the peers reviewing are both representative of the diversity of California and sensitive to affirmative action concerns, all without compromising quality and excellence in teaching.

(e) The Legislature recognizes that faculty evaluation procedures may be negotiated as part of the collective bargaining process.

(f) In those districts where faculty evaluation procedures are collectively bargained, the faculty's exclusive representative shall consult with the academic senate prior to engaging in collective bargaining regarding those procedures.

(g) It is the intent of the Legislature that faculty evaluation include, to the extent practicable, student evaluation.

¹⁰ Chapter 1302, Statutes of 1990, Section 114, later substituted “required of a faculty member” for “required of a certificated teacher”.

(h) A probationary faculty member shall be accorded the right to be evaluated under clear, fair, and equitable evaluation procedures locally defined through the collective bargaining process where the faculty has chosen to elect an exclusive representative. Those procedures shall ensure good-faith treatment of the probationary faculty member without according him or her de facto tenure rights.

(l) Governing boards shall establish and disseminate written evaluation procedures for administrators. It is the intent of the Legislature that evaluation of administrators include, to the extent possible, faculty evaluation.

CCC does not mention this major 1988 revision of section 87663 which not only changed the frequency of evaluation for contract employees¹¹ but added all of subdivisions (c) through (l). Instead, CCC diverts our attention to former section 1009¹², which provided:

“The governing board of any school district shall adopt and cause to be printed and made available to each certificated employee of the district reasonable rules and regulations providing for the evaluation of the performance of certificated employees in their assigned duties.”

CCC claims that the existence of this statute proves that “the obligation of districts to provide for the evaluation of faculty and administrators...preceded the January 1, 1975, reimbursement date.” The argument is of no avail, as the requirement to adopt, print and distribute rules and regulations is not the same as the requirements of subdivisions (c) through (l) of section 87663, such as: valuations including a peer review process on a departmental or divisional basis, addressing the forthcoming demographics of California, the principles of affirmative action, student evaluations, and special consideration of probationary teachers.

N. Education Code Section 87714

¹¹ For the purposes of this article "Contract employee" or "probationary employee" means an employee of a district who is employed on the basis of a contract in accordance with Section 87605, subdivision (b) of Section 87608, or subdivision (b) of Section 87608.5. Education Code Section 87661(b)

¹² Former section 1009 was recodified and renumbered as section 72208 by Chapter 1010, Statutes of 1976, Section 2. It was later repealed by Chapter 1372, Statutes of 1990, Section 318.

CCC asserts that section 87714 did not originate in 1981 but was preceded by former section 13566¹³ which, as last amended prior to 1975, stated:

“Each city or district superintendent of schools shall make an annual report of the schools under his jurisdiction to the county superintendent of schools..., which report shall include an affidavit that all employees in positions requiring certification qualifications were properly certified for the work performed.” (Emphasis supplied)

Section 87714, as added by Chapter 470, Statutes of 1981, Section 382.5, and last amended by Chapter 1302, Statutes of 1990, Section 122, requires the chief executive officer of each community college district to provide an affidavit to the board of governors, that all academic employees of the district possessed the required minimum qualifications for the work they performed.

Therefore, section 87714 mandates a new program or higher level of service.
Government Code Section 17514

CCC also cites former section 939 and its 1976 successor section 72413 for its argument that the obligations to verify that employees were qualified for their position existed since 1964. Subdivision (e) of section 939 did require the superintendent of each school district to:

“Determine that each employee of the district in a position requiring certification qualification has a valid certificated document registered as required by law authorizing him to serve in the position to which he is assigned.”

Since the additional activity alleged in the test claim is the section 87713 requirement to provide affidavits to the board of governors, the citation to former section 939 is irrelevant.

O. Education Code Section 87740(c)

Education Code Section 87740 provides for due process hearings when a probationary employee is not reemployed. CCC argues that these due process requirements were

¹³ Former section 13566 was recodified and renumbered as section 87714 by Chapter 1010, Statutes of 1976, Section 2. It was later repealed by Chapter 470, Statutes of 1981, Section 382.

originally added in former Education Code Section 13443 which was added by the statutes of 1965. Former section 13443 was recodified and renumbered as section 87740 by Chapter 1010, Statutes of 1976, Section 2. The differences between the current version of section 87740 is not "how" the proceedings are conducted, but "when" they are conducted.

Both subdivisions (b) of former section 13443 and section 87740 allow an employee to request a hearing to determine if there is "cause" for not reemploying him or her for the ensuing year. Both subdivisions (d) of former sections 13443 and 87740 require the determination not to reemploy a probationary employee to be "for cause."

Where the two sections differ is that section 87740 is now triggered by Education Code Section 87610.1 where, for the first time, subdivision (b) requires:

(1) that allegations that the community college district, in a decision to grant tenure, made a negative decision that to a reasonable person was unreasonable, or violated, misinterpreted, or misapplied, any of its policies and procedures concerning the evaluation of probationary employees shall be classified and procedurally addressed as grievances, and

(2) that allegations that the community college district in a decision to reappoint a probationary employee violated, misinterpreted, or misapplied any of its policies and procedures concerning the evaluation of probationary employees shall be classified and procedurally addressed as grievances.

Therefore, section 87740, as triggered by section 87610.1 goes far beyond the pre-1975 requirements that the determination was only to determine if there was "cause." As coupled with section 87610.1, "cause" has been expanded and defined.

P. Education Code Section 87743.2

Section 87743.2 requires the establishment of faculty service areas "not later than July 1, 1990." The test claim alleges that these faculty service areas need to be modified and updated from time to time. CCC argues that there is no "express" updating requirement.

However, the next two sentences of section 87743.2 go on to say:

"The establishment of faculty service areas shall be within the scope of

meeting and negotiating pursuant to Section 3543.2¹⁴ of the Government Code. The exclusive representative shall consult with the academic senate in developing its proposals.”

The section states that the establishment of faculty service areas shall be within the scope of meeting and negotiating during the collective bargaining process. Since collective bargaining agreements are renegotiated from time to time, it would also be necessary for the updating of service areas when the process of collective bargaining requires it. The fact that the reference is made to proposals (in the plural) also implies that this is an ongoing process.

Q. Education Code Section 87743.3 and 87743.4

The comments of CCC as to these sections do not present any new issues not previously discussed.

R. Education Code Section 87743.5

Section 87743.5. requires each community college district to establish competency criteria for faculty members employed by the district not later than July 1, 1990.

CCC contends that nothing in this section refers to updating since the section mandated certain conduct by July 1, 1990.

The section goes on to state, however, that the development and establishment of such competency criteria shall be within the scope of meeting and negotiating pursuant to Section 3543 of the Government Code. Since collective bargaining agreements are renegotiated from time to time, it would also be necessary to revise competency criteria from time to time to allow for changes made pursuant to the collective bargaining process.

S. Title 5, California Code of Regulations Sections

(1) Title 5, California Code of Regulations Section 53130

CCC asserts that Title 5, California Code of Regulations Section 53130 is not a new program because the mandates contained therein were contained in former pre-1975

¹⁴ Government Code Section 3543.2 is part of the collective bargaining process and covers the scope of representation and requests to meet and negotiate.

Education Code Section 1009. CCC then incorrectly concludes that “the requirements that currently appear in section 53130 have existed without lapse since before January 1, 1975.”

Former Education Code Section 1009 was recodified and renumbered as section 72208 by Chapter 1010, Statutes of 1976, Section 2.

Former Education Code Section 72208 was repealed by Section 318 of Chapter 1372, Statutes of 1990. The statute directed that the section “is repealed.” It did not say “may be repealed.” It did not say “might be repealed” if (a subsequent event occurs). It states the section “is repealed.” It was repealed and became inoperative on January 1, 1991.

Section 708 of Chapter 1372, Statutes of 1990, directed the Board of Governors of the California Community Colleges to “initially” adopt and put into effect regulations which incorporate the text of repealed sections. Since an “initial” adoption was anticipated, the section only permitted grammatical or technical changes, renumbering or reordering of sections, removal of outdated terms or references to inapplicable or repealed statutory authorities, and the correction of gender references. This “initial” cut-and-paste operation was ordered to be done “[P]rior to January 1, 1991.”

While it is recognized that subdivision (2) of Section 708 contains exculpatory language, the “intent” of the legislature cannot undo the clear language that the section “is repealed.”

The Board of Governors did not obey the directive until March 4, 1991 (operative April 3, 1991). Therefore Section 55602.5 of Title 5, California Code of Regulations is a new regulation and is subject to reimbursement. (Government Code Section 17514)

(2) Title 5, California Code of Regulations Section 53403

The first paragraph of Title 5, California Code of Regulations Section 53403 provides that, notwithstanding changes that may be made to minimum qualifications, or to the implementing discipline lists adopted by the Board of Governors, a community college district may continue to employ a person to teach in a discipline or render a service subject to minimum qualification, if he or she, at the time of initial hire, was qualified to teach in that discipline or render that service under the minimum qualifications or disciplines lists then in effect.

The test claim alleges the following activity:

“Pursuant to Title 5, California Code of Regulations, Section 53403, to establish and implement policies to recognize faculty who were qualified to teach in their respective discipline under the minimum qualifications when he or she was employed.” (Test Claim, page 49, lines 13-16)

CCC argues that the Title 5 section merely permits a district to “grandfather” employees and there is no mandate involved.

While admitting the “grandfathering” provision, CCC does not describe who, how or when this should be done. The test claim merely recognizes the need to establish and implement policies that allow implementation of the “grandfather” provision.

(3) Title 5, California Code of Regulations Section 53430

CCC, in response to Title 5, California Code of Regulations Section 53430, admits that the section requires a new program or higher level of service:

“AB 1725 partially changed the way academic employees...were deemed to be eligible for employment with districts. Prior to AB 1725, the Chancellor’s Office issued credentials...Individuals who were interested in academic service would apply to the Chancellor’s Office, and this office would review applicant’s education and experience to determine if they were eligible for a credential.”

“The focus partially shifted with AB 1725...minimum qualifications were to be assessed by individual districts...Instead of this office reviewing education and experience and issuing a credential, districts would review education and experience according to state regulations that set minimum qualifications.”¹⁵

CCC then offers amelioration by noting that some individuals are able to be employed under the former system when CCC was doing the evaluations and issuing the credentials (via a “grandfather” clause); and that community college districts have always assessed individuals to teach classes for adults. It even offers an old Title 5 section (52600, which no longer exists) which purportedly¹⁶ dealt with district verification

¹⁵ These state regulations that set the minimum qualifications are activities alleged in the test claim. See test claim, at pages 49-52.

¹⁶ The statement by CCC is unsworn and unverified.

for teachers of classes for adults. These exceptions do nothing to deny a finding that the Title 5 section creates a new program or higher level of service.

When CCC mentions "classes for adults" it parenthetically converts this phrase (without citation of any authority) as being equal to "noncredit classes" and argues that districts are not entitled for reimbursement "because districts have been continually required to assess qualifications for noncredit faculty." This argument has absolutely no merit. It is no more than an unsworn and unverified statement without the citation of any authority.

CERTIFICATION

I certify by my signature below, 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 own personal knowledge or information or belief.

Sincerely,



Keith B. Petersen

C: Per Mailing List Attached

DECLARATION OF SERVICE

RE: Employment of College Faculty and Administrators 02-TC-27
CLAIMANT: Santa Monica Community College District

I declare:

I am employed in the office of SixTen and Associates, which is the appointed representative of the above named claimant(s). I am 18 years of age or older and not a party to the within entitled matter.

On the date indicated below, I served the attached: letter of April 16, 2004, addressed as follows:

Paula Higashi
Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814
FAX: (916) 445-0278

AND per mailing list attached



U.S. MAIL: I am familiar with the business practice at SixTen and Associates for the collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at SixTen and Associates is deposited with the United States Postal Service that same day in the ordinary course of business.



FACSIMILE TRANSMISSION: On the date below from facsimile machine number (858) 514-8645, I personally transmitted to the above-named person(s) to the facsimile number(s) shown above, pursuant to California Rules of Court 2003-2008. A true copy of the above-described document(s) was(were) transmitted by facsimile transmission and the transmission was reported as complete and without error.



OTHER SERVICE: I caused such envelope(s) to be delivered to the office of the addressee(s) listed above by:



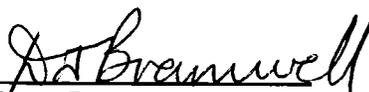
A copy of the transmission report issued by the transmitting machine is attached to this proof of service.

_____(Describe)



PERSONAL SERVICE: By causing a true copy of the above-described document(s) to be hand delivered to the office(s) of the addressee(s).

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on 4/19/04, at San Diego, California.


Diane Bramwell

Commission on State Mandates

Original List Date: 6/26/2003

Mailing Information: Other

Last Updated:

List Print Date: 10/17/2003

Mailing List

Claim Number: 02-TC-27

Issue: Employment of College Faculty and Administrators

TO ALL PARTIES AND INTERESTED PARTIES:

Each commission mailing list is continuously updated as requests are received to include or remove any party or person on the mailing list. A current mailing list is provided with commission correspondence, and a copy of the current mailing list is available upon request at any time. Except as provided otherwise by commission rule, when a party or interested party files any written material with the commission concerning a claim, it shall simultaneously serve a copy of the written material on the parties and interested parties to the claim identified on the mailing list provided by the commission. (Cal. Code Regs., tit. 2, § 1181.2.)

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