

**COMMISSION ON STATE MANDATES**

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January 14, 2016

Ms. Elizabeth Pianca  
County of Santa Clara  
70 West Hedding Street, 9th Floor, East Wing  
San Jose, CA 95110-1770

Ms. Jill Kanemasu  
State Controller's Office  
Accounting and Reporting  
3301 C Street, Suite 700  
Sacramento, CA 95816

*And Parties, Interested Parties, and Interested Persons (See Mailing List)*

Re: **Draft Proposed Decision, Schedule for Comments, and Notice of Hearing**  
*Peace Officers Procedural Bill of Rights (POBOR), 10-4499-I-01*  
Government Code Sections 3301, 3303, 3304, 3305, and 3306  
Statutes 1976, Chapter 465; Statutes 1978, Chapters 775, 1173, 1174, and 1178;  
Statutes 1979, Chapter 405; Statutes 1980, Chapter 1367; Statutes 1982, Chapter 994;  
Statutes 1983, Chapter 964; Statutes 1989, Chapter 1165; Statutes 1990, Chapter 675  
Fiscal Years: 2003-2004, 2004-2005, and 2005-2006  
County of Santa Clara, Claimant

Dear Ms. Pianca and Ms. Kanemasu:

The draft proposed decision for the above-named matter is enclosed for your review and comment.

**Written Comments**

Written comments may be filed on the draft proposed decision by **February 4, 2016**. You are advised that comments filed with the Commission on State Mandates (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. However, this requirement may also be satisfied by electronically filing your documents. Please see <http://www.csm.ca.gov/dropbox.shtml> on the Commission's website for instructions on electronic filing. (Cal. Code Regs., tit. 2, § 1181.3.)

If you would like to request an extension of time to file comments, please refer to section 1187.9(a) of the Commission's regulations.

**Hearing**

This matter is set for hearing on **Friday, March 25, 2016**, at 10:00 a.m., State Capitol, Room 447, Sacramento, California. The proposed decision will be issued on or about March 11, 2016. 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 1187.9(b) of the Commission's regulations.

Sincerely,

A handwritten signature in black ink, appearing to read "Heather Halsey".

Heather Halsey  
Executive Director

**ITEM \_\_**  
**INCORRECT REDUCTION CLAIM**  
**DRAFT PROPOSED DECISION**

Government Code Sections 3301, 3303, 3304, 3305, and 3306  
Statutes 1976, Chapter 465; Statutes 1978, Chapters 775, 1173, 1174, and 1178;  
Statutes 1979, Chapter 405; Statutes 1980, Chapter 1367;  
Statutes 1982, Chapter 994; Statutes 1983, Chapter 964;  
Statutes 1989, Chapter 1165; Statutes 1990, Chapter 675

*Peace Officers Procedural Bill of Rights*

Fiscal Years 2003-2004, 2004-2005, and 2005-2006

10-4499-I-01

County of Santa Clara, Claimant

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**EXECUTIVE SUMMARY**

**Overview**

This analysis addresses an incorrect reduction claim (IRC) filed by the County of Santa Clara (claimant) regarding reductions made by the State Controller's Office (Controller) to reimbursement claims for costs incurred during fiscal years 2003-2004 through 2005-2006 under the *Peace Officers Procedural Bill of Rights (POBOR)* program.

The reductions in dispute pertain to the Controller's finding that claimed costs were beyond the scope of reimbursement outlined in the parameters and guidelines.<sup>1</sup>

POBOR provides a series of rights and procedural safeguards to peace officers employed by local agencies and school districts that are subject to investigation or discipline. Generally, POBOR prescribes certain procedural protections that must be afforded officers during interrogations that could lead to punitive action against them; gives officers the right to review and respond in writing to adverse comments entered in their personnel files; and gives officers the right to an administrative appeal when any punitive action, as defined by statute, is taken against them, or they are denied promotion on grounds other than merit.

On November 30, 1999, the Commission adopted the *POBOR* Statement of Decision, CSM 4499. The Commission found that certain procedural requirements under POBOR were not new and were already required under the due process clause of the United States and California Constitutions. Thus, the Commission denied the procedural requirements of POBOR that were already required by law because they did not impose a new program or higher level of service, or did not impose costs mandated by the state pursuant to Government Code section 17556(c), since

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<sup>1</sup> Exhibit A, IRC 10-4499-I-01, pages 39-62.

they were mandated by federal law. The Commission approved the activities required by POBOR that exceeded the requirements of pre-existing state and federal law.

On July 27, 2000, the Commission adopted parameters and guidelines that authorized reimbursement, beginning July 1, 1994, to counties, cities, a city and county, school districts, and special districts that employ peace officers for the ongoing activities summarized below:

- Developing or updating policies and procedures.
- Training for human resources, law enforcement, and legal counsel.
- Updating the status of cases.
- Providing the opportunity for an administrative appeal for permanent, at-will, and probationary employees that were subject to certain disciplinary actions that were not covered by the due process clause of state and federal law.
- When a peace officer is under investigation, or becomes a witness to an incident under investigation, and is subjected to an interrogation by the employer that could lead to certain disciplinary actions, the following costs and activities are eligible for reimbursement: compensation to the peace officer for interrogations occurring during off-duty time; providing prior notice to the peace officer regarding the nature of the interrogation and identification of investigating officers; tape recording the interrogation; providing the peace officer employee with access to the tape prior to any further interrogation at a subsequent time or if any further specified proceedings are contemplated; and producing transcribed copies of any notes made by a stenographer at an interrogation, and copies of complaints of reports or complaints made by investigators.
- Performing certain activities, specified by the type of local agency or school district, upon the receipt of an adverse comment against a peace officer employee.

Statutes 2005, chapter 72, section 6 (AB 138) added section 3313 to the Government Code to direct the Commission to “review” the *POBOR* Statement of Decision to clarify whether the test claim statutes imposed a mandate consistent with California Supreme Court Decision in *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859 and other applicable court decisions.

On April 26, 2006, the Commission reviewed its original findings and adopted a Statement of Decision on reconsideration, 05-RL-4499-01. The Statement of Decision on reconsideration became final on May 1, 2006. On review of the claim, the Commission found that the *San Diego Unified School Dist.* case supports the Commission’s 1999 Statement of Decision, which found that the POBOR legislation constitutes a state-mandated program within the meaning of article XIII B, section 6 of the California Constitution for counties, cities, school districts, and special districts identified in Government Code section 3301 that employ peace officers.

The Commission further found that the *San Diego Unified School Dist.* case supports the Commission’s 1999 Statement of Decision that the test claim legislation constitutes a partial reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514 for all activities previously approved by the Commission *except* the following:

- The activity of providing the opportunity for an administrative appeal to probationary and at-will peace officers (except when the chief of police is removed) pursuant to Government Code section 3304 is no longer a reimbursable state-mandated activity because the Legislature amended Government Code section 3304 in 1998. The amendment limited the right to an administrative appeal to only those peace officers “who successfully completed the probationary period that may be required” by the employing agency and to situations where the chief of police is removed. (Stats. 1998, ch. 786, § 1.)
- The activities of obtaining the signature of the peace officer on the adverse comment or noting the officer’s refusal to sign the adverse comment, pursuant to Government Code sections 3305 and 3306, when the adverse comment results in a punitive action protected by the due process clause does not constitute a new program or higher level of service and does not impose costs mandated by the state pursuant to Government Code section 17556, subdivision (c).

The statement of decision adopted by the Commission on reconsideration applies to costs incurred and claimed beginning July 1, 2006 and does not apply to this IRC.

### **Procedural History**

On September 16, 2010, the claimant filed this IRC.<sup>2</sup> On December 2, 2014, the Controller filed late comments on the IRC.<sup>3</sup> On December 5, 2014, the claimant requested an extension of time to rebut, which was approved. On December 18, 2014, the Controller filed additional late comments on the IRC.<sup>4</sup> On March 5, 2015, the claimant filed rebuttal comments.<sup>5</sup> On January 14, 2016, Commission staff issued the draft proposed decision.<sup>6</sup>

### **Commission Responsibilities**

Government Code section 17561(b) authorizes the Controller to audit the claims filed by local agencies and school districts and to reduce any claim for reimbursement of state-mandated costs that the Controller determines is excessive or unreasonable.

Government Code Section 17551(d) requires the Commission to hear and decide a claim that the Controller has incorrectly reduced payments to the local agency or school district. If the Commission determines that a reimbursement claim has been incorrectly reduced, section 1185.9 of the Commission’s regulations requires the Commission to send the decision to the Controller and request that the costs in the claim be reinstated.

The Commission must review questions of law, including interpretation of parameters and guidelines, de novo, without consideration of legal conclusions made by the Controller in the

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<sup>2</sup> Exhibit A, IRC 10-4499-I-01.

<sup>3</sup> Exhibit B, Controller’s Late Comments on IRC.

<sup>4</sup> Exhibit B, Controller’s Additional Late Comments on IRC. Note that the Additional Late Comments relate to the initial comments, correcting page references in that document. Therefore they are included in one exhibit.

<sup>5</sup> Exhibit C, Claimant’s Rebuttal Comments.

<sup>6</sup> Exhibit D, Draft Proposed Decision.

context of an audit. 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.<sup>7</sup> The Commission must also interpret the Government Code and implementing regulations in accordance with the broader constitutional and statutory scheme. 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.”<sup>8</sup>

With regard to the Controller’s audit decisions, the Commission must determine whether they were arbitrary, capricious, or entirely lacking in evidentiary support. This standard is similar to the standard used by the courts when reviewing an alleged abuse of discretion of a state agency.<sup>9</sup>

The Commission must also review the Controller’s audit in light of the fact that the initial burden of providing evidence for a claim of reimbursement lies with the claimant.<sup>10</sup> In addition, section 1185.1(f)(3) and 1185.2(c) of the Commission’s regulations requires that any assertions of fact by the parties to an IRC must be supported by documentary evidence. The Commission’s ultimate findings of fact must be supported by substantial evidence in the record.<sup>11</sup>

**Claims**

The following chart provides a brief summary of the claims and issues raised and staff’s recommendation.

Issue	Description	Staff Recommendation
Salaries and benefits for the Sheriff’s Department, claimed under the category of administrative activities, totaling \$8,463, plus related indirect costs. <sup>12</sup>	Claimant sought reimbursement for preparing the file, logging the initial case information, and interviewing the complainant. The Controller determined that these activities were beyond the scope of the mandate. Parameters and guidelines provide for reimbursement <i>only</i> for	<i>Correct</i> –the activities described are beyond the scope of the mandate.

<sup>7</sup> *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331-334; Government Code sections 17551, 17552.

<sup>8</sup> *County of Sonoma v. Commission on State Mandates* (2000), 84 Cal.App.4th 1264, 1280, citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817.

<sup>9</sup> *Johnston v. Sonoma County Agricultural* (2002) 100 Cal.App.4th 973, 983-984. See also *American Bd. of Cosmetic Surgery, Inc. v. Medical Bd. of California* (2008) 162 Cal.App.4th 534, 547.

<sup>10</sup> *Gilbert v. City of Sunnyvale* (2005) 130 Cal.App.4th 1264, 1274-1275.

<sup>11</sup> Government Code section 17559(b), which provides that a claimant or the state may commence a proceeding in accordance with the provisions of section 1094.5 of the Code of Civil Procedure to set aside a decision of the Commission on the ground that the Commission’s decision is not supported by substantial evidence in the record.

<sup>12</sup> Exhibit A, IRC 10-4499-I-01, page 39.

	developing or updating policies, specific mandate-related training, and updating the status of <i>POBOR</i> cases.	
Salaries and benefits for the Probation Department, claimed under the category of administrative activities, totaling \$35,490, plus related indirect costs. <sup>13</sup>	Claimant sought reimbursement for certain training of internal affairs staff; and for reviewing investigation reports for approval or correction; visiting other IA offices during establishment of IA office at the department; conducting interviews for an open position; reviewing progress on the development of an IA database; reviewing complaints, response letters, Merit System Rules, and assigning cases; and reviewing training schedule for the unit. Parameters and guidelines provide for reimbursement <i>only</i> for developing or updating policies, specific mandate-related training, and updating the status of <i>POBOR</i> cases.	<i>Correct</i> – the activities described are beyond the scope of the mandate.
Salaries and benefits of \$1,388 for the Sheriff’s Department, and \$985 for the Probation Department, claimed under the category of administrative appeals, plus related indirect costs. <sup>14</sup>	Claimant sought reimbursement for activities related to due process in administrative appeals. The Controller determined that no hearings were held for the cases included in the claims for the Sheriff’s Department; and for the Probation Department the resulting disciplinary actions (suspension and letter of reprimand) fell under existing due process requirements. Parameters and guidelines provide for reimbursement of certain protections in administrative appeals only in limited	<i>Correct</i> –there was no administrative appeal for the Sheriff’s Department, and the circumstances of the appeals at issue for the Probation Department fell under pre-existing state and federal due process requirements that are beyond the scope of the mandate.

<sup>13</sup> Exhibit A, IRC 10-4499-I-01, pages 39-40.

<sup>14</sup> Exhibit A, IRC 10-4499-I-01, pages 40-42.

	circumstances, and only for certain employees.	
Salaries and benefits of \$61,350 for the Sheriff's Department, \$130,236 for the Probation Department, and \$16,350 for the District Attorney's Office, plus related indirect costs, claimed under the category of interrogations. <sup>15</sup>	Claimant sought reimbursement for gathering reports and reviewing complaints; investigation time; preparing questions for interviews; interviewing witnesses during work hours; reviewing tape and transcribing statements; conducting pre-interrogation meetings; traveling to interview witnesses; transcribing witness tapes; interviewing accused officers during normal work hours; preparing a summary report of the agency complaint as part of the case file preparation; and reviewing interview tapes. Parameters and guidelines provide for reimbursement only for providing notice of the nature of the interrogation, tape recording the interrogation, providing access to the tape or transcription, as specified; and compensating an officer for an investigation that occurs during off-duty time, where necessitated by the seriousness of the investigation.	<i>Correct</i> – the activities claimed pertain to investigating complaints (e.g., gathering reports and preparing interview questions); providing transcriptions of witness tapes (not required unless the witness is also the subject of the investigation); and overtime hours for investigators to conduct interrogations during officers' normal work hours; these activities are beyond the scope of the mandate.
Salaries and benefits totaling \$43,291 for the Sheriff's Department, \$26,108 for the Probation Department, and \$860 for the District Attorney's Office, plus related indirect costs, claimed under the category of adverse comment. <sup>16</sup>	Claimant sought reimbursement for reviewing the circumstances of the complaint to determine the level of investigation; documenting the complaint or allegation and reviewing it for accuracy; summarizing the investigation in a case summary report; preparing interview questions; preparing the	<i>Correct</i> – the activities described pertain to the investigation of a complaint that may lead to an adverse comment; these activities are beyond the scope of the mandate.

<sup>15</sup> Exhibit A, IRC 10-4499-I-01, pages 42-44.

<sup>16</sup> Exhibit A, IRC 10-4499-I-01, pages 44-46.

	<p>investigation summary and reviewing it with the supervisor; and preparing the final case report. The Controller determined that these activities were beyond the scope of the mandate. The parameters and guidelines provide for reimbursement only to provide notice and an opportunity to respond to an adverse comment (if not already required by existing due process requirements), to obtain the signature of the officer on an adverse comment, and review of circumstances or documentation leading to adverse comment by supervisor, command staff, human resources staff or counsel, including determination of whether same constitutes an adverse comment; preparation of comment and review for accuracy; notification and presentation of adverse comment to officer and notification concerning rights regarding same; review of response to adverse comment, attaching same to adverse comment and filing.</p>	
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**Staff Analysis**

**Reductions of Salaries and Benefits Under Finding 1 and Travel and Training Costs Under Finding 5 Are Correct as a Matter of Law.**

The May 14, 2008 final audit report for fiscal years 2003-2004 through 2005-2006 allowed \$222,086, out of \$748,888 claimed over the audit period, resulting in a net reduction of \$526,802. These reductions are based on five findings made by the Controller. The claimant accepts Findings 3 and 4 in the audit report, regarding understatements in the claims.<sup>17</sup> And in rebuttal comments, the claimant withdraws its challenge on Finding 2 regarding the inclusion of training hours and break time within the productive hourly rate calculation.<sup>18</sup> The claimant

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<sup>17</sup> Exhibit A, IRC 10-4499-I-01, pages 60-61.

<sup>18</sup> Exhibit C, Claimant’s Rebuttal Comments, pages 6-8.



continues to dispute Findings 1 and 5, pertaining to activities disallowed on the basis of the Controller's interpretation of the scope of the mandate.

The parties do not dispute that the July 27, 2000 parameters and guidelines control for this IRC which includes claim years 2003-2004 through 2005-2006.<sup>19</sup> However, the parties dispute the interpretation of the reimbursable activities identified in the parameters and guidelines. The claimant continues to argue that the July 27, 2000 parameters and guidelines are subject to a more flexible interpretation of reimbursable activities, and that the Controller's reductions are really based on the later-amended parameters and guidelines, which are somewhat more specific in their description of approved reimbursable activities.<sup>20</sup> The Controller asserts that its audit is based on the parameters and guidelines adopted July 27, 2000 and the staff analysis of those parameters and guidelines, and that "[a]ny references to the revised parameters and guidelines...were made solely to point out to county staff that reimbursable and non-reimbursable activities of the mandated program are spelled out more clearly in the revised parameters and guidelines."<sup>21</sup>

Pursuant to Government Code section 17557 and the Commission's regulations, parameters and guidelines are required to identify the activities the Commission finds to be mandated by the state, and those additional activities proposed by the claimant that the Commission finds and approves, based on substantial evidence in the record, to be reasonably necessary to comply with the state-mandated program.<sup>22</sup> Under the rules of interpretation, when the language of an administrative agency's rule, such as the parameters and guidelines, is plain, the provisions are required to be enforced according to the terms of the document.<sup>23</sup> Plain provisions of the administrative rule may not be disregarded or enlarged, nor may the interpretation go beyond the meaning of the words used when the words are clear and unambiguous. The parties are prohibited from writing into an administrative rule, by implication, express requirements that are not there.<sup>24</sup> The Commission's decisions on test claims and parameters and guidelines are quasi-judicial decisions that are binding on the parties.<sup>25</sup>

Moreover, later clarification of existing law, including the Commission's decision on reconsideration of this program, which clarified its original decision regarding the scope of the mandated activities, is not considered a retroactive application of a new rule, but is merely a

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<sup>19</sup> These parameters and guidelines were in effect when the costs were incurred. (*Clovis Unified School Dist. v. Chiang* (2010) 188 Cal.App.4th 794, 809, fn. 5.)

<sup>20</sup> Exhibit C, Claimant Rebuttal Comments, pages 3-4.

<sup>21</sup> Exhibit B, Controller's Late Comments on IRC, page 12.

<sup>22</sup> Government Code sections 17557 and 17559; California Code of Regulations, title 2, section 1183.7; Former California Code of Regulations, title 2, section 1183.1 (Register 96, No. 30).

<sup>23</sup> *Estate of Griswold* (2001) 25 Cal.4th 904, 910-911.

<sup>24</sup> *Whitcomb v. California Employment Commission* (1944) 24 Cal.2d 753, 757.

<sup>25</sup> *California School Boards Assoc. v. State of California* (2009) 171 Cal.App.4th 1183, 1200, which stated the following: "[U]nless a party to a quasi-judicial proceeding challenges the agency's adverse findings made in that proceeding, by means of a mandate action in superior court, those findings are binding in later civil actions." [Citation omitted.]

statement of what the law has always been from the time it was enacted.<sup>26</sup> Accordingly, the later decision adopted by the Commission on reconsideration may be used to aid in understanding the original parameters and guidelines.

Finding 1 of the audit report includes reductions in salaries and benefits for activities that the Controller determined were beyond the scope of the mandate. The reductions include unallowable activities, and related indirect costs, in the categories (as articulated in the parameters and guidelines) of Administrative Activities; Administrative Appeals; Interrogation; and Adverse Comment. The specific activities disallowed differ for each category and for each unit claiming costs within the county. However, the denied activities are primarily in the nature of investigating officer misconduct, or procedural requirements that fall under pre-existing state and federal due process protections that were not approved for reimbursement in the test claim and parameters and guidelines. In addition, Finding 5 disallows travel and training costs that the Controller held were unrelated to the mandated activities.

The *POBOR* mandate is very narrow, and only includes those due process procedural protections extended to public safety employees under sections 3301, 3303, 3304, 3305, and 3306 of the Government Code which exceed the due process protections of the state and federal constitutions. Reimbursement is not required for activities undertaken by investigators to determine whether to pursue disciplinary action; interrogating officers during normal work hours; establishing an Internal Affairs investigative unit; training Internal Affairs staff (except the training specifically related to *POBOR* activities); or for procedural due process requirements that fall under existing law. Travel and training costs, to be reimbursable, must be related to the due process requirements of the mandate, not the investigation of alleged misconduct or the general operations of an internal affairs unit within the agency.

Staff finds that the activities in dispute in this IRC are beyond the scope of the mandate, and the Controller's reductions are correct as a matter of law.

### **Conclusion**

Staff finds the Controller's reductions of costs claimed are correct as a matter of law.

### **Staff Recommendation**

Staff recommends that the Commission adopt the proposed decision to deny the IRC, and authorize staff to make any technical, non-substantive changes following the hearing.

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<sup>26</sup> *McClung v. Employment Development Dept.* (2004) 34 Cal.4th 467, 471.

BEFORE THE  
 COMMISSION ON STATE MANDATES  
 STATE OF CALIFORNIA

**IN RE INCORRECT REDUCTION CLAIM  
 ON:**

Government Code Sections 3301, 3303, 3304, 3305, and 3306

Statutes 1976, Chapter 465; Statutes 1978, Chapters 775, 1173, 1174, and 1178; Statutes 1979, Chapter 405; Statutes 1980, Chapter 1367; Statutes 1982, Chapter 994; Statutes 1983, Chapter 964; Statutes 1989, Chapter 1165; Statutes 1990, Chapter 675

Fiscal Years 2003-2004, 2004-2005, and 2005-2006

County of Santa Clara, Claimant

Case No.: 10-4499-I-01

*Peace Officers Procedural Bill of Rights*

**DECISION PURSUANT TO  
 GOVERNMENT CODE SECTION  
 17500 ET SEQ.; TITLE 2, CALIFORNIA  
 CODE OF REGULATIONS, DIVISION 2,  
 CHAPTER 2.5. ARTICLE 7**

*(Adopted March 25, 2016)*

**DRAFT PROPOSED DECISION**

The Commission on State Mandates (Commission) heard and decided this incorrect reduction claim (IRC) during a regularly scheduled hearing on March 25, 2016. [Witness list will be included in the adopted decision.]

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/modified] the proposed decision to [approve/partially approve/deny] the IRC at the hearing by a vote of [vote count will be included in the adopted decision]. The Commission voted as follows:

<b>Member</b>	<b>Vote</b>
Ken Alex, Director of the Office of Planning and Research	
Richard Chivaro, Representative of the State Controller, Vice Chairperson	
Mark Hariri, Representative of the State Treasurer	
Sarah Olsen, Public Member	
Eraina Ortega, Representative of the Director of the Department of Finance, Chairperson	
Carmen Ramirez, City Council Member	
Don Saylor, County Supervisor	

## **Summary of the Findings**

This analysis addresses the IRC filed by the County of Santa Clara (claimant) regarding reductions made by the State Controller's Office (Controller) to reimbursement claims for costs incurred during fiscal years 2003-2004 through 2005-2006 under the *Peace Officers Procedural Bill of Rights* program. Over the three fiscal years in question, reductions totaling \$526,802 were made based on alleged unallowable services claimed.

The Commission finds that the Controller properly reduced costs claimed for activities that go beyond the scope of the mandate. The Commission, therefore denies this IRC, finding that the Controller's reductions are correct as a matter of law.

## **COMMISSION FINDINGS**

### **I. Chronology**

- |            |  |
|------------|--|
| 09/16/2010 | Claimant filed the IRC. <sup>27</sup>  |
| 12/02/2014 | Controller filed late comments on the IRC. <sup>28</sup>                                     |
| 12/05/2014 | Claimant filed a request for an extension of time to rebut which was granted for good cause. |
| 12/18/2014 | Controller filed additional late comments on the IRC. <sup>29</sup>                          |
| 03/05/2015 | Claimant filed rebuttal comments. <sup>30</sup>  |
| 01/14/2016 | Commission staff issued the draft proposed decision. <sup>31</sup>                           |

### **II. Background**

#### **The Peace Officers' Procedural Bill of Rights Program**

The Peace Officers' Procedural Bill of Rights (POBOR)<sup>32</sup> provides a series of rights and procedural safeguards to peace officers when the officer is subject to investigation or discipline

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<sup>27</sup> Exhibit A, IRC 10-4499-I-01, page 1.

<sup>28</sup> Exhibit B, Controller's Late Comments on IRC.

<sup>29</sup> Exhibit B, Controller's Additional Late Comments on IRC. Note that the Additional Late Comments relate to the initial comments, correcting page references in that document. Therefore they are included in one exhibit.

<sup>30</sup> Exhibit C, Claimant Rebuttal Comments.

<sup>31</sup> Exhibit D, Draft Proposed Decision.

<sup>32</sup> The Peace Officers' Procedural Bill of Rights has been abbreviated "POBRA," by the courts (See *Department of Finance v. Commission* (2009) 170 Cal.App.4th 1355); and as "POBAR," by the Commission in parameters and guidelines (Exhibit X, Parameters and Guidelines, corrected August 17, 2000) and on many other occasions the Commission and others have employed the acronym "POBOR," and this decision will follow suit. The correct acronym is of course POPBOR (for Peace Officers' Procedural Bill of Rights) or PSOBOR (for Public Safety Officers Procedural Bill of Rights Act- which is in fact the title of the act), but no one likes the sound of those.

by their employer. On November 30, 1999, the Commission adopted the *Peace Officers Procedural Bill of Rights (POBOR)* Statement of Decision, CSM 4499, approving the claim for those activities that exceeded the requirements of the due process clauses of the United States and California Constitutions.<sup>33</sup> On July 27, 2000, the Commission adopted parameters and guidelines that authorized reimbursement, beginning July 1, 1994, for the ongoing activities summarized below:

- Developing or updating policies and procedures.
- Training for human resources, law enforcement, and legal counsel.
- Updating the status of POBOR cases.
- Providing the opportunity for an administrative appeal for permanent, at-will, and probationary employees that were subject to certain disciplinary actions that were not covered by the due process clause of state and federal law.
- When a peace officer is under investigation, or becomes a witness to an incident under investigation, and is subjected to an interrogation by the employer that could lead to certain disciplinary actions, the following costs and activities are eligible for reimbursement: compensation to the peace officer for interrogations occurring during off-duty time; providing prior notice to the peace officer regarding the nature of the interrogation and identification of investigating officers; tape recording the interrogation; providing the peace officer employee with access to the tape prior to any further interrogation at a subsequent time or if any further specified proceedings are contemplated; and producing transcribed copies of any notes made by a stenographer at an interrogation, and copies of complaints or reports or complaints made by investigators.
- Performing certain activities, specified by the type of local agency or school district, upon the receipt of an adverse comment against a peace officer employee. These activities include providing notice to the officer, an opportunity for the officer to review and respond to the adverse comment, and obtaining the signature of the officer or noting the officer's refusal to sign the adverse comment.<sup>34</sup>

The parameters and guidelines analysis adopted by the Commission on July 27, 2000, also clarified the scope of the mandate and the activities that are *not* eligible for reimbursement. For example, the Commission determined that “[b]efore the test claim legislation was enacted, local law enforcement agencies were conducting investigations, issuing disciplinary actions, and maintaining files for those cases” and, thus, those activities were not reimbursable.<sup>35</sup> The Commission also found that defending a lawsuit attacking the validity of the final administrative

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<sup>33</sup> Exhibit X, Adopted Test Claim Decision, November 30, 1999, page 10 [For example, the Commission found: “in some circumstances, the due process clause requires the same administrative hearing as the test claim legislation. However, as reflected by the table below, the Commission found that the test claim legislation is broader than the due process clause and applies to additional employer actions that have not previously enjoyed the protections of the due process clause.”].

<sup>34</sup> Exhibit X, Statement of Decision on Reconsideration, April 26, 2006, page 7.

<sup>35</sup> Exhibit X, Staff Analysis adopted by the Commission on July 27, 2000, page 5.

decision went beyond the scope of the mandate and was not eligible for reimbursement.<sup>36</sup> The Commission further recognized that Government Code section 3303(a) addresses only the compensation and timing of an interrogation, and does not require local agencies to investigate an allegation, prepare for the interrogation, conduct the interrogation, or review the responses given by the officers and/or witnesses.<sup>37</sup> And the Commission found that compensating local agencies for the officer's time in responding to an adverse comment is not mandated by the state and not eligible for reimbursement.<sup>38</sup>

Statutes 2005, chapter 72, section 6 added section 3313 to the Government Code to direct the Commission to "review" the *POBOR* test claim Statement of Decision to clarify whether the test claim statutes imposed a mandate consistent with California Supreme Court Decision in *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859 and other applicable court decisions.

On April 26, 2006, the Commission reviewed its original findings and adopted a Statement of Decision on reconsideration, 05-RL-4499-01. On review of the claim, the Commission found that the *San Diego Unified* case did not alter the decision, which found that the test claim statutes imposed a partially reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514. The reconsideration decision did, however, clarify the scope of the mandate, making clear that the test claim statute does not require an employer to investigate an officer's conduct, interrogate an officer, take punitive action against the officer, or place an adverse comment in an officer's personnel file; the *POBOR* mandate is about new procedures governing peace officer labor relations, and investigations of misconduct or malfeasance are beyond the scope of the mandate.<sup>39</sup> The Commission thereafter adopted amended parameters and guidelines for costs incurred beginning July 1, 2006, for all activities previously approved by the Commission *except* the following:

- The activity of providing the opportunity for an administrative appeal to probationary and at-will peace officers (except when the chief of police is removed) pursuant to Government Code section 3304 is no longer a reimbursable state-mandated activity because the Legislature amended Government Code section 3304 in 1998. The amendment limited the right to an administrative appeal to only those peace officers "who successfully completed the probationary period that may be required" by the

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<sup>36</sup> *Id.*, page 7.

<sup>37</sup> *Id.*, page 16.

<sup>38</sup> *Id.*, page 20.

<sup>39</sup> Exhibit X, Statement of Decision on Reconsideration, April 26, 2006, pages 38-39; see also page 15, where the Commission found that:

The [POBOR] rights are not triggered, however, until the employing agency decides to interrogate an officer, take punitive action against the officer, or place an adverse comment in an officer's personnel file. These initial decisions are not mandated by the state, but are governed by local policy, ordinance, city charter, or a memorandum of understanding.

employing agency and to situations where the chief of police is removed. (Stats. 1998, ch. 786, § 1.)

- The activities of obtaining the signature of the peace officer on the adverse comment or noting the officer's refusal to sign the adverse comment, pursuant to Government Code sections 3305 and 3306, when the adverse comment results in a punitive action protected by the due process clause does not constitute a new program or higher level of service and does not impose costs mandated by the state pursuant to Government Code section 17556, subdivision (c).<sup>40</sup>

The parameters and guidelines on reconsideration also restate and further clarify the activities that are eligible for reimbursement and those activities that are not eligible for reimbursement.<sup>41</sup>

#### The Controller's Audit and Summary of the Issues

The May 14, 2008 final audit report for the County of Santa Clara's annual reimbursement claims for fiscal years 2003-2004 through 2005-2006 allowed \$222,086, out of \$748,888 claimed over the audit period, resulting in a net reduction of \$526,802. These reductions are based on five findings made by the Controller. The claimant accepts Findings 3 and 4 in the audit report, regarding understatements in the claims.<sup>42</sup> And in rebuttal comments, the claimant withdraws its challenge on Finding 2 regarding the inclusion of training hours and break time within the productive hourly rate calculation.<sup>43</sup> The claimant continues to dispute Findings 1 and 5, pertaining to activities disallowed on the basis of the Controller's interpretation of the scope of the mandate.

In Finding 1, the Controller disallowed \$324,521 in salaries and benefits based on activities that were beyond the scope of the mandate, including activities categorized by the claimant under the components of Administrative Activities, Administrative Appeals, Interrogation, and Adverse Comment. The majority of the denied activities, which are more specifically explained below, were related to the investigation of POBOR cases, or maintaining of files and records of POBOR cases, or procedural requirements that were required by existing due process protections. The Controller held these activities were not related to the procedural due process requirements approved in the parameters and guidelines and disallowed these costs. Related indirect costs for these disallowed activities totaled \$184,518.<sup>44</sup>

In Finding 5, the Controller disallowed travel and training costs not related to the mandate. Only POBOR-related training is reimbursable, and the Controller found that \$1,521 in travel and

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<sup>40</sup> Exhibit X, Amended Statement of Decision on Reconsideration, Pursuant to *Department of Finance v. Commission on State Mandates* (2009) 170 Cal.App.4th 1355, amended July 31, 2009, page 5.

<sup>41</sup> See Exhibit X, Corrected Parameters and Guidelines, August 17, 2000, pages 3-8; Adopted Parameters and Guidelines Amendment, December 6, 2006, pages 5-11 [describing reimbursable activities in greater detail].

<sup>42</sup> Exhibit A, IRC 10-4499-I-01, pages 60-61.

<sup>43</sup> Exhibit C, Claimant's Rebuttal Comments, pages 6-8.

<sup>44</sup> Exhibit A, IRC 10-4488-I-01, pages 37-54.

training costs claimed for fiscal year 2004-2005 was not related to the *POBOR* mandate activities.<sup>45</sup>

### **III. Positions of the Parties**

#### County of Santa Clara

The claimant continues to dispute the following reductions, alleging that they are incorrect:

#### Finding 1

- Unallowable salaries and benefits for the Sheriff's Department, under the category of administrative activities, totaling \$8,463, plus related indirect costs, for preparing the file, logging the initial case information, and interviewing the complainant.<sup>46</sup>
- Unallowable salaries and benefits for the Probation Department, under the category of administrative activities, totaling \$35,490, plus related indirect costs, for certain training of internal affairs staff that the Controller found was not mandate-related; and for reviewing investigation reports for approval or correction; visiting other IA offices during establishment of IA office at the department; conducting interviews for an open position; reviewing progress on the development of an IA database; reviewing complaints, response letters, Merit System Rules, and assigning cases; and reviewing training schedule for the unit.<sup>47</sup>
- Unallowable salaries and benefits for the Sheriff's Department, under the category of administrative appeals, totaling \$1,388, plus related indirect costs, for ineligible activities related to due process.<sup>48</sup>
- Unallowable salaries and benefits for the Probation Department, under the category of administrative appeals, totaling \$985, plus related indirect costs, for ineligible activities related to due process.<sup>49</sup>
- Unallowable salaries and benefits for the Sheriff's Department, under the category of interrogations, totaling \$61,350 plus related indirect costs, for gathering reports and reviewing complaints; investigation time; preparing questions for interviews; interviewing witnesses during work hours; reviewing tape and transcribing statements; conducting pre-interrogation meetings; and interviewing accused officers during normal work hours.<sup>50</sup>
- Unallowable salaries and benefits for the Probation Department, under the category of interrogations, totaling \$130,236 plus related indirect costs, for gathering reports, logs, and evidence; reviewing complaints, reports, and evidence; interviewing witnesses;

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<sup>45</sup> Exhibit A, IRC 10-4499-I-01, page 61.

<sup>46</sup> Exhibit A, IRC 10-4499-I-01, page 39.

<sup>47</sup> Exhibit A, IRC 10-4499-I-01, pages 39-40.

<sup>48</sup> Exhibit A, IRC 10-4499-I-01, pages 40-42.

<sup>49</sup> Exhibit A, IRC 10-4499-I-01, pages 40-42.

<sup>50</sup> Exhibit A, IRC 10-4499-I-01, pages 42-43.



traveling to interview witnesses; transcribing witness tapes; reviewing tapes and making corrections; preparing interview questions; conducting pre-interrogation meetings; and interviewing accused officers during normal working hours.<sup>51</sup>

- Unallowable salaries and benefits for the District Attorney’s Office, under the category of interrogations, totaling \$16,350 plus related indirect costs, for gathering reports, log sheets; reviewing complaints, reports, and evidence; preparing interview questions; interviewing witnesses during normal working hours; conducting pre-interrogation meetings; interviewing accused officers during normal working hours; preparing a summary report of the agency complaint as part of the case file preparation; and reviewing interview tapes.<sup>52</sup>
- Unallowable salaries and benefits for the Sheriff’s Department, under the category of adverse comment, totaling \$43,291 plus related indirect costs, for reviewing the circumstances of the complaint to determine the level of investigation; documenting the complaint or allegation and reviewing it for accuracy; summarizing the investigation in a case summary report; and preparing interview questions.<sup>53</sup>
- Unallowable salaries and benefits for the Probation Department, under the category of adverse comment, totaling \$26,108 plus related indirect costs, for preparing the investigation summary and reviewing it with the supervisor; and preparing the final case report.<sup>54</sup>
- Unallowable salaries and benefits for the District Attorney’s Office, under the category of adverse comment, totaling \$860 plus related indirect costs, for preparing the case summary report.<sup>55</sup>

With respect to these reductions, the claimant argues that the Controller is relying on the greater specificity of reimbursable activities provided by the amended parameters and guidelines, which were not effective until the 2006-2007 fiscal year.<sup>56</sup> The claimant argues that it cannot be held to the later parameters and guidelines of which it had no notice.<sup>57</sup> In addition, the claimant argues that the earlier parameters and guidelines are “sufficiently flexible as to allow local government to adapt them to its own method of implementing the mandate.”<sup>58</sup> Specifically, the claimant argues that costs claimed for visiting other internal affairs units while establishing its own was a reasonable method of compliance with the approved activity of developing or updating internal policies, procedures, manuals and other materials. With respect to training costs that were disallowed, the claimant argues that “[f]or a mandate as complex and pervasive as POBOR,

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<sup>51</sup> Exhibit A, IRC 10-4499-I-01, pages 42-44.

<sup>52</sup> Exhibit A, IRC 10-4499-I-01, pages 42-44.

<sup>53</sup> Exhibit A, IRC 10-4499-I-01, pages 44-45.

<sup>54</sup> Exhibit A, IRC 10-4499-I-01, pages 44-46.

<sup>55</sup> Exhibit A, IRC 10-4499-I-01, pages 44-46.

<sup>56</sup> Exhibit A, IRC 10-4499-I-01, page 14.

<sup>57</sup> Exhibit A, IRC 10-4499-I-01, page 14.

<sup>58</sup> Exhibit A, IRC 10-4499-I-01, page 15.

however, such limitations are not proper.” The claimant argues that *POBOR* “properly encompasses issues of labor relations, confidentiality issues, investigation errors, first amendment-related conduct, key mistakes in workplace investigations, and assessing credibility, to name a few.”<sup>59</sup> In addition, the claimant argues that costs claimed for conducting interrogations while the officer was on duty *and* those costs for compensating the officer when the interrogation was performed during off-duty hours are reimbursable based on the original test claim statement of decision.<sup>60</sup> And, with respect to activities pertaining to adverse comment, the claimant simply disagrees with the Controller’s interpretation of the parameters and guidelines.<sup>61</sup>

#### Finding 5

- Travel and training costs totaling \$1,521 related to ineligible training activities that were not mandate-related.<sup>62</sup>

With respect to travel and training costs disallowed under Finding 5, the claimant reiterates that the parameters and guidelines are worded broadly, and that the Controller “cannot use the audit process to place limitations on the program that the Commission did not see fit to include.”<sup>63</sup>

#### State Controller’s Office

The Controller’s reductions are broadly based on activities that the Controller finds are beyond the scope of the mandate. For example, under the category of Administrative Activities, which includes developing or updating policies and procedures, attending “specific training for human resources, law enforcement, and legal counsel regarding the requirements of the mandate,” and updating the status of *POBOR* cases, the Controller allowed costs for updating *POBOR* case records and training for Internal Affairs staff. However, the Controller found that costs claimed for “[p]reparing the file,” “[l]ogging initial case information into the system and assign the case,” and interviewing the complainants, were beyond the scope of the mandate, as approved by the Commission and described in the parameters and guidelines.<sup>64</sup> Similarly, while the parameters and guidelines provide for “specific training...regarding the requirements of the mandate,” the claimant’s Probation Department claimed costs for training hours that the Controller found were not related to the *POBOR* mandate, including, for example “Budgeting implications” and “Juvenile Justice Reforms.”<sup>65</sup> And finally, under Finding 5, the Controller disallowed travel and training costs attributed to training hours that the Controller found to be beyond the scope of the mandate, in accordance with Finding 1.<sup>66</sup>

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<sup>59</sup> Exhibit A, IRC 10-4499-I-01, page 16.

<sup>60</sup> Exhibit A, IRC 10-4499-I-01, pages 17-19 [quoting at length from the test claim statement of decision CSM-4499].

<sup>61</sup> Exhibit A, IRC 10-4499-I-01, pages 19-20; 25.

<sup>62</sup> Exhibit A, IRC 10-4499-I-01, pages 61-62.

<sup>63</sup> Exhibit A, IRC 10-4499-I-01, page 25.

<sup>64</sup> Exhibit A, IRC 10-4499-I-01, page 39.

<sup>65</sup> Exhibit A, IRC 10-4499-I-01, pages 39-40.

<sup>66</sup> Exhibit A, IRC 10-4499-I-01, pages 61-62.

With respect to costs disallowed under the category of Administrative Appeals, the Controller determined that the POBOR cases for which costs were claimed were unallowable because the disciplinary actions resulting therefrom implicated existing due process protections and therefore fell outside the scope of state-mandated reimbursement.<sup>67</sup>

Addressing costs claimed under Interrogation, the Controller notes that the officer's salary is reimbursable only when the interrogation is conducted during the officer's off-duty time and results in overtime pay to the officer. In addition, the costs incurred to conduct interrogations were never included in the Interrogations cost component as a reimbursable activity.<sup>68</sup>

Reimbursement is also authorized for providing notice of an interrogation, tape recording the interrogation, and providing certain documents to the employee. Consequently, the Controller disallowed costs claimed for the claimant's Sheriff's Department and Probation Department to gather reports and evidence, interview witnesses during normal working hours, transcribe witness tapes, and interrogate accused officers during normal working hours.<sup>69</sup>

With respect to costs claimed under the category of Adverse Comment, the Controller notes that the parameters and guidelines provide only for notice of the adverse comment; opportunity to review and sign the adverse comment; opportunity to respond; and noting an officer's refusal to sign. The Controller disallowed costs related to investigating a complaint, preparing interview questions, and preparing a case summary report.<sup>70</sup>

Answering the claimant's argument that the disputed reductions were based on the more specific amended parameters and guidelines, the Controller states:

The county's comment that the audit was based on the revised parameters and guidelines for the POBOR program (adopted by CSM on December 4, 2006) appears frequently in its response to the draft report. During the audit exit conference, the county's SB 90 coordinator asked us several times whether the audit was based on the original parameters and guidelines or on the revised parameters and guidelines adopted on December 4, 2006. On each occasion, We responded that the audit was based on our understanding of the original parameters and guidelines adopted by CSM and that the revised parameters and guidelines apply to claims filed for FY 2006-07 and subsequent years.

Any references to the revised parameters and guidelines adopted on December 4, 2006, made during the exit meeting or in any discussion during the audit process were made solely to point out that reimbursable and non-reimbursable activities of the mandated program are spelled out more clearly in the revised parameters and guidelines. Except for changes to allowable activities for the cost components of Administrative Appeal for probationary and at-will peace officers (pursuant to amended Government Code Section 3304) and Adverse Comment (for punitive actions protected by the due process clause), reimbursable activities

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<sup>67</sup> Exhibit A, IRC 10-4499-I-01, pages 40-42.

<sup>68</sup> Exhibit B, Controller's Late Comments on IRC, page 18.

<sup>69</sup> Exhibit A, IRC 10-4499-I-01, pages 42-44.

<sup>70</sup> Exhibit A, IRC 10-4499-I-01, pages 44-46.

did not change from the original parameters and guidelines. In addition, our understanding of allowable and unallowable activities per the original parameters and guidelines did not change as a result of the CSM amending them on December 4, 2006.

The draft audit report and this final report state that the audit was based on parameters and guidelines adopted by the CSM on July 27, 2000, and corrected on August 17, 2000. The language in the audit report and in the SCO response to the county's comments emanates either from the original parameters and guidelines, the original statement of decision, or from the CSM staff analysis of the originally proposed parameters and guidelines for this mandate program.<sup>71</sup>

#### **IV. Discussion**

Government Code section 17561(b) authorizes the Controller to audit the claims filed by local agencies and school districts and to reduce any claim for reimbursement of state mandated costs that the Controller determines is excessive or unreasonable.

Government Code Section 17551(d) requires the Commission to hear and decide a claim that the Controller has incorrectly reduced payments to the local agency or school district. If the Commission determines that a reimbursement claim has been incorrectly reduced, section 1185.9 of the Commission's regulations requires the Commission to send the statement of decision to the Controller and request that the costs in the claim be reinstated.

The Commission must review questions of law, including interpretation of the parameters and guidelines, de novo, without consideration of legal conclusions made by the Controller in the context of an audit. 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.<sup>72</sup> The Commission must also interpret the Government Code and implementing regulations in accordance with the broader constitutional and statutory scheme. 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."<sup>73</sup>

With regard to the Controller's audit decisions, the Commission must determine whether they were arbitrary, capricious, or entirely lacking in evidentiary support. This standard is similar to the standard used by the courts when reviewing an alleged abuse of discretion of a state agency.<sup>74</sup> Under this standard, the courts have found that:

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<sup>71</sup> Exhibit A, IRC 10-4499-I-01, pages 62-63.

<sup>72</sup> *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331-334; Government Code sections 17551, 17552.

<sup>73</sup> *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264, 1280, citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817.

<sup>74</sup> *Johnston v. Sonoma County Agricultural* (2002) 100 Cal.App.4th 973, 983-984. See also *American Bd. of Cosmetic Surgery, Inc. v. Medical Bd. of California* (2008) 162 Cal.App.4th 534, 547.

When reviewing the exercise of discretion, “[t]he scope of review is limited, out of deference to the agency’s authority and presumed expertise: ‘The court may not reweigh the evidence or substitute its judgment for that of the agency. [Citation.]’” ... “In general ... the inquiry is limited to whether the decision was arbitrary, capricious, or entirely lacking in evidentiary support. . . .” [Citations.] When making that inquiry, the “ ‘court must ensure that an agency has adequately considered all relevant factors, and has demonstrated a rational connection between those factors, the choice made, and the purposes of the enabling statute.’ ”<sup>75</sup>

The Commission must review the Controller’s audit in light of the fact that the initial burden of providing evidence for a claim of reimbursement lies with the claimant.<sup>76</sup> In addition, section 1185.1(f)(3) and 1185.2(c) of the Commission’s regulations requires that any assertions of fact by the parties to an IRC must be supported by documentary evidence. The Commission’s ultimate findings of fact must be supported by substantial evidence in the record.<sup>77</sup>

### **Reductions of Salary and Benefit Costs Under Finding 1 and Travel and Training Costs Under Finding 5, Are Correct as a Matter of Law.**

The Commission first adopted parameters and guidelines for the *POBOR* mandate on July 27, 2000.<sup>78</sup> Those parameters and guidelines were amended pursuant to legislative direction following the Commission’s reconsideration of the program on December 4, 2006, with a period of reimbursement beginning July 1, 2006.<sup>79</sup> The audit at issue here governs earlier claim years 2003-2004 through 2005-2006, and therefore the prior parameters and guidelines, adopted July 27, 2000, are applicable.<sup>80</sup> The parties do not dispute this conclusion.

Pursuant to Government Code section 17557 and the Commission’s regulations, parameters and guidelines are required to identify the activities the Commission finds to be mandated by the state, and those additional activities proposed by the claimant that the Commission finds and approves, based on substantial evidence in the record, to be reasonably necessary to comply with the state-mandated program.<sup>81</sup> Parameters and guidelines are regulatory in nature and are

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<sup>75</sup> *American Bd. of Cosmetic Surgery, Inc. v. Medical Board of California* (2008) 162 Cal.App.4th 534, 547-548.

<sup>76</sup> *Gilbert v. City of Sunnyvale* (2005) 130 Cal.App.4th 1264, 1274-1275.

<sup>77</sup> Government Code section 17559(b), which provides that a claimant or the state may commence a proceeding in accordance with the provisions of section 1094.5 of the Code of Civil Procedure to set aside a decision of the Commission on the ground that the Commission’s decision is not supported by substantial evidence in the record.

<sup>78</sup> Exhibit X, Final Staff Analysis, Proposed Parameters and Guidelines, adopted July 27, 2000.

<sup>79</sup> Exhibit X, Adopted Parameters and Guidelines Amendment, December 6, 2006.

<sup>80</sup> These parameters and guidelines were in effect when the costs were incurred. (*Clovis Unified School Dist. v. Chiang* (2010) 188 Cal.App.4th 794, 809, fn. 5.)

<sup>81</sup> Government Code sections 17557 and 17559; California Code of Regulations, title 2, section 1183.7; Former California Code of Regulations, title 2, section 1183.1 (Register 96, No. 30).

interpreted the same as regulations and statutes.<sup>82</sup> Interpretation of an administrative agency's rule, including those found in the Commission's parameters and guidelines, is a question of law.<sup>83</sup>

Under the rules of interpretation, when the language of an administrative agency's rule, such as the parameters and guidelines, is plain, the provisions are required to be enforced according to the terms of the document. The California Supreme Court determined that:

In statutory construction cases, our fundamental task is to ascertain the intent of the lawmakers so as to effectuate the purpose of the statute. We begin by examining the statutory language, giving the words their usual and ordinary meaning. If the terms of the statute are unambiguous, we presume the lawmakers meant what they said, and the plain meaning of the language governs. [Citations omitted.]<sup>84</sup>

The language of the parameters and guidelines must be construed in the context of the Commission's decisions and adopted analyses on the test claim and parameters and guidelines, so that every provision may be harmonized and have effect.<sup>85</sup> Under these rules, plain provisions of the administrative rule may not be disregarded or enlarged, nor may the interpretation go beyond the meaning of the words used when the words are clear and unambiguous. Thus, the parties are prohibited from writing into an administrative rule, by implication, express requirements that are not there.<sup>86</sup> The Commission's decisions on test claims and parameters and guidelines are quasi-judicial decisions that are binding on the parties.<sup>87</sup>

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<sup>82</sup> *Clovis Unified School Dist. v. Chiang* (2010) 188 Cal.App.4th 794, 799.

<sup>83</sup> *Culligan Water Conditioning v. State Board of Equalization* (1976) 17 Cal.3d 86, 93; see also, *County of San Diego v. State* (1997) 15 Cal.4th 68, 81; 109, where the court held that the determination whether reimbursement is required pursuant to article XIII B, section 6 is a question of law.

<sup>84</sup> *Estate of Griswold* (2001) 25 Cal.4th 904, 910-911.

<sup>85</sup> *City of Merced v. State of California* (1984) 153 Cal.App.3d 777, 781-782; see also, Government Code sections 17514 (defining "costs mandated by the state"), 17550 (providing that "reimbursement ... for costs mandated by the state shall be provided pursuant to this chapter"), 17551 (requiring the Commission to hear and decide a claim that a local agency is entitled to be reimbursed by the state for costs mandated by the state as required by article XIII B, section 6 of the California Constitution), 17552 (providing that this chapter shall be the sole and exclusive procedure by which a local agency may claim reimbursement for costs mandated by the state), 17557 (governing the adoption of parameters and guidelines after the Commission determines there are costs mandated by the state), and 17558 (providing that the Controller's claiming instructions must be derived from the Commission's test claim decision and adopted parameters and guidelines).

<sup>86</sup> *Whitcomb v. California Employment Commission* (1944) 24 Cal.2d 753, 757.

<sup>87</sup> *California School Boards Assoc. v. State of California* (2009) 171 Cal.App.4th 1183, 1200, which stated the following: "[U]nless a party to a quasi-judicial proceeding challenges the

Moreover, later clarification of existing law, including the Commission's decision on reconsideration of this program, which clarified its original decision regarding the scope of the mandated activities, may be applied to reimbursement claims for costs that predate the 2006 parameters and guidelines amendment. Under these circumstances, the Commission's clarification is not considered a retroactive application of a new rule, but is merely a statement of what the law has always been from the time it was enacted.<sup>88</sup> Accordingly, the later decision adopted by the Commission on reconsideration may be used to aid in understanding the original parameters and guidelines.

Finding 1 of the audit report includes reductions in salaries and benefits for activities that the Controller determined were beyond the scope of the mandate. The reductions include unallowable activities, and related indirect costs, in the categories (as articulated in the parameters and guidelines) of Administrative Activities; Administrative Appeals; Interrogation; and Adverse Comment. Finding 5 of the audit report reduces travel and training costs on the basis that the purpose for the travel and training went beyond the scope of the mandate. The specific activities disallowed differ for each category and for each unit claiming costs within the county, and therefore reductions are analyzed as they were claimed, separated by the categories provided in the parameters and guidelines, and attributed to either the Sheriff's Department, Probation Department, or District Attorney's Office.

A. Salaries and Benefits Claimed for Administrative Activities Performed by Claimant's Sheriff's Department Are Beyond the Scope of the Mandate.

The Controller disallowed costs claimed under the category of Administrative Activities for the claimant's Sheriff's Department to prepare files; log initial case information into "the system;" assign the case; and interview complainants.<sup>89</sup> The claimant argues that the disallowance is based on the amended parameters and guidelines, which do not apply to the audit years.<sup>90</sup> The Controller asserts that its audit finding is based on the original parameters and guidelines.<sup>91</sup> The Controller argues that preparing files, logging initial case information, and interviewing complainants are beyond the scope of the mandate.

The Commission finds that the reductions are correct as a matter of law. The parameters and guidelines in effect during the audit period provide for reimbursement only for "[u]pdating the status of the [POBOR] cases." The activities claimed to prepare files, log initial case information, and interview complainants were not approved by the Commission for reimbursement. Only the activities approved by the Commission are eligible for reimbursement.<sup>92</sup>

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agency's adverse findings made in that proceeding, by means of a mandate action in superior court, those findings are binding in later civil actions." [Citation omitted.]

<sup>88</sup> *McClung v. Employment Development Dept.* (2004) 34 Cal.4th 467, 471.

<sup>89</sup> Exhibit A, IRC 10-4499-I-01, page 39.

<sup>90</sup> Exhibit A, IRC 10-4499-I-01, pages 14; 69.

<sup>91</sup> Exhibit A, IRC 10-4499-I-01, page 48.

<sup>92</sup> Government Code section 17557; Code of Regulations, title 2, section 1183.7 [Parameters and guidelines shall contain "[a] description of the specific costs and types of costs that are

Moreover, the analysis for the parameters and guidelines adopted by the Commission on July 27, 2000, analyzed the proposed activity and determined that it was too broad, as follows:

The Department of Finance states that the component “maintenance of the systems to conduct the mandated activities” is too ambiguous. Staff agrees.

Before the test claim legislation was enacted, local law enforcement agencies were conducting investigations, issuing disciplinary actions, and maintaining files for those cases...Accordingly, staff has modified this component to provide that claimants are eligible for reimbursement for “updating the status report of the POBAR cases.”

Therefore, the Commission’s adopted decision on parameters and guidelines reflects its consideration that prior to the *POBOR* mandate, local agencies were already investigating complaints and maintaining case files.<sup>93</sup> The mandated program is limited to the new procedural requirements imposed by the state; investigation and discipline activities conducted by the internal affairs unit of a police department are not eligible for reimbursement. As the Commission clarified on reconsideration:

The [POBOR] rights are not triggered, however, until the employing agency decides to interrogate an officer, take punitive action against the officer, or place an adverse comment in an officer's personnel file. These initial decisions are not mandated by the state, but are governed by local policy, ordinance, city charter, or a memorandum of understanding.<sup>94</sup>

Thus, the activity of “updating the status of POBOR cases” was intended to be interpreted narrowly. The Controller’s disallowance of preparing files and logging files into “the system,” and interviewing complainants, is consistent with a narrow interpretation of the parameters and guidelines.

Based on the foregoing, the Commission finds that the Controller’s reduction of costs claimed under Administrative Activities for claimant’s Sheriff’s Department to prepare files, log initial case files, and interview complainants, are correct as a matter of law.

B. Salaries and Benefits and Travel and Training Expenses Claimed for Training and Other Administrative Activities Performed by Claimant’s Probation Department Are Beyond the Scope of the Mandate.

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reimbursable, including one-time costs and ongoing costs, and reasonably necessary activities required to comply [with the mandated program.]:” Former Code of Regulations, title 2, section 1183.1 (Register 96, No. 30).

<sup>93</sup> See Exhibit X, Final Staff Analysis on Proposed Parameters and Guidelines, adopted July 27, 2000, page 16 [“Government Code section 3303, subdivision (a), addresses only the compensation and timing of the interrogation. It does not require local agencies to investigate an allegation, prepare for the interrogation, conduct the interrogation, and review the responses given by the officers and/or witnesses, as implied by the claimant’s proposed language. Certainly, local agencies were performing these investigative activities before POBAR was enacted.”].

<sup>94</sup> Exhibit X, Statement of Decision on Reconsideration (April 26, 2006), page 15.



The Controller disallowed costs claimed under the category of Administrative Activities for claimant's Probation Department to review investigation reports to approve or make corrections; visit other Internal Affairs units during establishment of the unit; conduct interviews for an Internal Affairs Management Analyst position; review the progress of development of an Internal Affairs database; review complaints, response letters, Merit System Rules, and assign cases; and to review the training schedule for the unit. The Controller also partially adjusted the costs claimed for training activities not related to the mandate, and the associated costs relating to the unallowable training.<sup>95</sup> Specifically, the Controller disallowed training and travel costs for training on the following topics:

- Labor relations
- Unionized vs. non-unionized employees
- Private and public employees
- Handling sexual harassment issues
- Confidentiality issues
- Investigation errors
- Ethical issues in probation
- Budgeting implications
- Juvenile Justice Reforms
- Discrimination issues
- Electronic research
- First Amendment related conduct
- Preparing investigation reports
- Key mistakes in workplace investigations
- Assessing credibility
- Types of lawsuits
- Representation and indemnification
- Supervisory liability of failure to train
- Minimizing exposure to liability<sup>96</sup>

The applicable parameters and guidelines, under the heading "Administrative Activities," provide for reimbursement as follows:

1. Developing or updating internal policies, procedures, manuals and other materials pertaining to the conduct of the mandated activities
2. Attendance at specific training for human resources, law enforcement and legal counsel regarding the requirements of the mandate.<sup>97</sup>

The Commission finds that the activities of reviewing investigation reports to approve or make corrections; visiting other Internal Affairs units during establishment of the unit; conducting interviews for an Internal Affairs Management Analyst position; reviewing the progress of development of an Internal Affairs database; reviewing complaints, response letters, Merit

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<sup>95</sup> Exhibit A, IRC 10-4499-I-01, pages 39-40.

<sup>96</sup> Exhibit A, IRC 10-4499-I-01, pages 39-40.

<sup>97</sup> Exhibit X, Parameters and Guidelines, CSM-4499, Corrected August 17, 2000.

System Rules, and assigning cases; and reviewing the training schedule for the unit, are not included as reimbursable activities in the parameters and guidelines.<sup>98</sup>

The claimant asserts, however, that salaries and benefits claimed for visiting other internal affairs units while establishing its own constitutes “developing or updating internal policies, procedures, manuals and other materials...” as provided for in the parameters and guidelines. The claimant asserts that visiting other departments’ internal affairs units could save time and money by borrowing from other counties, rather than spending time developing new policies and procedures, and thus this activity constitutes “a reasonable method of compliance...” with the mandate.<sup>99</sup> However, the reimbursable activity of developing policies and procedures applies only to those policies and procedures that are necessary to implement the *POBOR* mandate. Developing policies and procedures for a new internal affairs unit or database might be appropriate or necessary to *establish and operate* an internal affairs office and to effectively perform investigations, but these activities go beyond the scope of the mandate and are not reimbursable. Only the activities specifically approved by the Commission are eligible for reimbursement.<sup>100</sup>

The claimant also argues that training costs should not be adjusted proportionally, but rather allowed entirely if related to the mandate. The claimant argued in response to the draft audit report: “We cannot go through the training with a microscope on this issue and we disagree with the audit’s negative approach to training.”<sup>101</sup> In its IRC narrative, the claimant more clearly states:

The SCO pared the list of covered topics to those it believes relate to the mandate. For a mandate as complex and pervasive as POBOR, however, such limitations are not proper. Training on POBOR properly encompasses issues of labor relations, confidentiality issues, investigation errors, first amendment- related conduct, key mistakes in workplace investigations, and assessing credibility, to name a few. While the County appreciates the SCO's attempt to include some costs rather than give a full disallowance, the SCO did not allow for some legitimate costs.<sup>102</sup>

As indicated above, the parameters and guidelines in effect during the audit period state that reimbursement is required for “[a]ttendance at specific training for human resources, law enforcement and legal counsel *regarding the requirements of the mandate.*”<sup>103</sup> The later-

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<sup>98</sup> Exhibit A, IRC 10-4499-I-01, pages 39-40.

<sup>99</sup> Exhibit A, IRC 10-4499-I-01, page 15.

<sup>100</sup> Government Code section 17557; Code of Regulations, title 2, section 1183.7 [Parameters and guidelines shall contain “[a] description of the specific costs and types of costs that are reimbursable, including one-time costs and ongoing costs, and reasonably necessary activities required to comply [with the mandated program.]”; Former Code of Regulations, title 2, section 1183.1 (Register 96, No. 30).

<sup>101</sup> Exhibit A, IRC 10-4499-I-01, page 70.

<sup>102</sup> Exhibit A, IRC 10-4499-I-01, pages 15-16.

<sup>103</sup> Exhibit X, Corrected Parameters and Guidelines, August 17, 2000, page 3 [Emphasis added].

amended parameters and guidelines further emphasized that “training *must relate* to mandate-reimbursable activities.”<sup>104</sup> The parameters and guidelines do not authorize reimbursement for issues of labor relations, confidentiality issues, investigation errors, first amendment-related conduct, key mistakes in workplace investigations, and assessing credibility. Such topics go beyond the scope of the mandate to comply with the new procedural requirements imposed by the test claim statutes. Thus, the reduction is correct as matter of law.

In addition, the Controller proportionally reduced training costs to the extent training time was spent on activities beyond the scope of the mandate. The claimant has not provided any evidence to rebut the Controller’s pro rata findings; instead, the claimant argues that training costs should be allowed even if a training course includes other topics. The claimant states: “We cannot go through the training with a microscope on this issue and we disagree with the audit’s negative approach to training.” The burden is on the claimant to establish whether costs are mandate-related in the context of the IRC, and the titles of the training modules that the Controller cites are facially unrelated to the mandate.<sup>105</sup> Thus, there is no evidence that the Controller’s pro rata reduction of training costs is incorrect as a matter of law, or that the calculation of the proportion of allowable costs is arbitrary, capricious, or entirely lacking in evidentiary support.

Based on the foregoing, the Commission finds that the Controller’s reductions for salaries and benefits, travel, training, and administrative expenses claimed by the Probation Department are correct as a matter of law.

C. Salaries and Benefits Claimed for Administrative Appeals for the Sheriff’s Department and Probation Department Are Beyond the Scope of the Mandate.

The Controller reduced \$1,388 in salaries and benefits for the claimant’s Sheriff’s Department and \$985 in salaries and benefits for the claimant’s Probation Department, plus related indirect costs, under the category of Administrative Appeals, finding that the costs claimed were for ineligible appeals which were part and parcel of pre-existing due process requirements and therefore outside the scope of *POBOR*.<sup>106</sup> The claimant argues that the costs claimed represent *POBOR* administrative appeal hearings authorized for reimbursement in the parameters and guidelines under the “catch-all” category of “[o]ther actions against permanent employees or the Chief of Police that result in disadvantage, harm, loss or hardship and impact the career opportunities of the employee.”<sup>107</sup> Therefore, the dispute between the claimant and Controller turns on whether the administrative appeals for which costs were claimed fall within the catch-all category.

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<sup>104</sup> Exhibit X, Amended Parameters and Guidelines, December 4, 2006, page 5 [Emphasis added].

<sup>105</sup> Government Code sections 17560, 17561(d); *Advanced Choices, Inc. v. Department of Health Services* (2010) 182 Cal.App.4th 1661, 1669.

<sup>106</sup> Exhibit A, IRC 10-4499-I-01, pages 16; 40-41.

<sup>107</sup> Exhibit A, IRC 10-4499-I-01, pages 16-17 [citing Statement of Decision on Parameters and Guidelines, adopted July 27, 2000, pages 11-12 (located here within Exhibit X)].

The Commission, in its test claim decision, analyzed the scope of the administrative appeal mandate in depth, and with respect to all levels of peace officer employees entitled to POBOR protections. The Commission found that a public service employee's rights are protected by pre-existing procedural due process safeguards defined by case law, some of which were also provided in Government Code section 3304. To the extent an administrative appeal or hearing is required by pre-existing law, then providing such an appeal under POBOR does not constitute a reimbursable new program or higher level of service, since it is not new. Accordingly, the Commission recognized that "permanent" employees, who can only be dismissed or subjected to other disciplinary measures for "cause," have a legitimate claim of entitlement to their job and thus, possess a property interest in continued employment, which is protected by the pre-existing due process clauses of the United States Constitution and the California Constitution.<sup>108</sup> The Commission further found that California courts require employers to comply with due process when a permanent employee is dismissed,<sup>109</sup> demoted,<sup>110</sup> suspended,<sup>111</sup> receives a reduction in salary,<sup>112</sup> or receives a written reprimand.<sup>113</sup> However, the Commission found that an employee does *not* enjoy the rights prescribed by the due process clause when the employee is transferred.<sup>114</sup> In addition, the Commission analyzed the rights of probationary and at-will employees, finding that although such employees can be dismissed without cause, and do not have a property interest in their employment, the employee may have a liberty interest affected by a dismissal and protected by existing due process laws, when the charges supporting the dismissal damage the employee's reputation and impair the employee's ability to find other employment. Accordingly, the Commission found that the due process clauses of the United States and California Constitutions, apply when the charges supporting the dismissal of a

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<sup>108</sup> *Slochower v. Board of Education* (1956) 350 U.S. 551 [U.S. Supreme Court found that tenured college professor dismissed from employment had property interest in continued employment safeguarded by due process clause.]; *Gilbert v. Homar* (1997) 520 U.S. 924 [U.S. Supreme Court found that police officer employed as a permanent employee by a state university had property interest in continued employment and suspension without pay implicated due process protections.]; *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194 [California Supreme Court held a permanent civil service employee of the state has a property interest in continued employment and cannot be dismissed without due process of law.].

<sup>109</sup> *Skelly, supra*, 15 Cal.3d 194.

<sup>110</sup> *Ng v. State Personnel Board* (1977) 68 Cal.App.3d 600.

<sup>111</sup> *Civil Service Assn. v. City and County of San Francisco* (1978) 22 Cal.3d 552, 558-560.

<sup>112</sup> *Ng, supra*, 68 Cal.App.3d 600, 605.

<sup>113</sup> *Stanton v. City of West Sacramento* (1991) 226 Cal.App.3d 1438.

<sup>114</sup> *Runyon v. Ellis* (1995) 40 Cal.App.4th 961 [The court found that the employee was entitled to an administrative hearing under the due process clause as a result of a transfer *and an accompanying reduction of pay*. The court did not address the situation where the employee receives a transfer alone.]; *Howell v. County of San Bernardino* (1983) 149 Cal.App.3d 200, 205 ["Although a permanent employee's right to continued employment is generally regarded as fundamental and vested, an employee enjoys no such right to continuation in a particular job assignment."].

probationary or at-will employee damage the employee's reputation and impair the employee's ability to find other employment.<sup>115</sup>

The Commission concluded that the administrative appeal requirements of POBOR constitute a mandated new program or higher level of service, above and beyond that required by the United States and California Constitutions due process clauses, only in the following circumstances:

- Dismissal, demotion, suspension, salary reduction or written reprimand received by probationary and at-will employees whose liberty interest *are not* affected (i.e.; the charges do not harm the employee's reputation or ability to find future employment);
- Transfer of permanent, probationary and at-will employees for purposes of punishment;
- Denial of promotion for permanent, probationary and at-will employees for reasons other than merit; and
- Other actions against permanent, probationary and at-will employees that result in disadvantage, harm, loss or hardship and impact the career opportunities of the employee.<sup>116</sup>

The Controller states that for the Sheriff's Department, "[o]ur review of claimed costs under this cost component revealed that no administrative hearings were held for the cases included in the claims." And, the Controller states "Even if the hearings had taken place for the two cases in question, they would have resulted from unallowable disciplinary actions (letter of reprimand and suspension) that fall under due process."<sup>117</sup> For the Probation Department, the Controller found that the appeals in issue resulted from letters of reprimand and suspension actions, for permanent employees.<sup>118</sup>

As indicated above, the Commission determined that due process requirements triggered by a written reprimand of a permanent employee are not new state-mandated activities and are not eligible for reimbursement.<sup>119</sup> The claimant does not dispute the type of disciplinary action taken, and does not directly answer whether appeals were taken in the case of the Sheriff's Department costs claimed. Instead claimant argues that the claimed costs fall within the catch-all category of "other actions against permanent employees..."<sup>120</sup> But a catch-all category does not undermine the other specific provisions and limitations of the parameters and guidelines and Commission decisions on this mandate; where a statute (or, as here, parameters and guidelines, which are regulatory)<sup>121</sup> contains both general and specific provisions, the more specific

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<sup>115</sup> Exhibit X, Statement of Decision, CSM-4499, adopted November 30, 1999, pages 7-8.

<sup>116</sup> Exhibit X, Statement of Decision, CSM-4499, adopted November 30, 1999, pages 10-12.

<sup>117</sup> Exhibit A, IRC 10-4499-I-01, pages 41-42; Exhibit B, Controller's Late Comments on IRC, page 14.

<sup>118</sup> Exhibit A, IRC 10-4499-I-01, pages 41-42; Exhibit B, Controller's Late Comments on IRC, page 14.

<sup>119</sup> Exhibit X, Statement of Decision, CSM-4499, adopted November 30, 1999, pages 4-7.

<sup>120</sup> Exhibit A, IRC 10-4499-I-01, page 17.

<sup>121</sup> *Clovis Unified School Dist. v. Chiang* (2010) 188 Cal.App.4th 794, 799.

provisions control.<sup>122</sup> In addition, an interpretation of law that would render some parts of a statute or regulation surplusage should be avoided.<sup>123</sup> Here, the type of disciplinary actions at issue in the appeals claimed were found by the Commission to fall under pre-existing due process requirements, and thus were not reimbursable, since they were not new or were mandated by the federal government and not the state. Therefore, to interpret “other actions...” as broadly as the claimant suggests would be inconsistent with the limited nature of this mandated program, and would go beyond the scope of the mandate.

Therefore, the Commission finds that the Controller’s reduction of salary and benefit costs for administrative appeals claimed for the Sheriff’s Department and Probation Department is correct as a matter of law.

D. Salaries and Benefits Claimed for Activities Related to Interrogations Performed by Claimant’s Sheriff’s Department, Probation Department, and District Attorney’s Office Are Beyond the Scope of the Mandate.

The Controller reduced \$61,350 in salaries and benefits for the claimant’s Sheriff’s Department, \$130,236 in salaries and benefits for the claimant’s Probation Department, and \$16,350 in salaries and benefits for the claimant’s District Attorney’s Office, plus \$120,026 in related indirect costs, under the category of Interrogation, finding that the costs claimed were for ineligible investigation activities outside the scope of the mandate.<sup>124</sup> The claimant argues that the Controller interprets the reimbursement provisions of the parameters and guidelines incorrectly, and that the activities claimed do not fall under existing due process requirements, and exceed the requirements of an investigation prior to POBOR.<sup>125</sup>

With regard to interrogations, the parameters and guidelines provide reimbursement for certain activities “only when a peace officer is under investigation, or becomes a witness to an incident under investigation, and is subjected to an interrogation...that could lead to dismissal, demotion, suspension, reduction in salary, written reprimand, or transfer for purposes of punishment.” In addition, the parameters and guidelines expressly state that reimbursement is not required “when an interrogation of a peace officer is in the normal course of duty, counseling, instruction, or informal verbal admonishment by, or other routine or unplanned contact with, a supervisor or any other public safety officer.” In addition, POBOR rights do not extend to civilian witnesses;<sup>126</sup> POBOR does not require local agencies to investigate an allegation or prepare for or conduct an interrogation;<sup>127</sup> and providing the employee access to a tape or transcription of an interrogation is reimbursable only when not otherwise required by due process.<sup>128</sup> And,

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<sup>122</sup> *People v. Ahmed* (2011) 53 Cal.4th 156, 163.

<sup>123</sup> *Lopez v. Superior Court* (2010) 50 Cal.4th 1055, 1066.

<sup>124</sup> Exhibit A, IRC 10-4499-I-01, page 42.

<sup>125</sup> Exhibit A, IRC 10-4499-I-01, pages 51-52.

<sup>126</sup> Exhibit X, Staff Analysis on Parameters and Guidelines, adopted July 27, 2000, page 12.

<sup>127</sup> Exhibit X, Staff Analysis on Parameters and Guidelines, adopted July 27, 2000, pages 15-16.

<sup>128</sup> Exhibit X, Staff Analysis on Parameters and Guidelines, adopted July 27, 2000, page 18.

reimbursement is not required when the investigation is “concerned solely and directly with alleged criminal activities.”<sup>129</sup>

The parameters and guidelines authorize reimbursement for only the following activities:

- Compensating a peace officer for interrogations occurring during off-duty time in accordance with regular department procedure, when required by the seriousness of the investigation. Preparation and review of the officer’s overtime compensation request made as a result of the off-duty interrogation is also reimbursable;
- Providing prior notice to the officer regarding the nature of the interrogation and identification of investigating officers (this includes reviewing a complaint to prepare the notice, and possibly redacting confidential information);
- Tape recording the interrogation when the employee records the interrogation, including transcribing the tape;
- Providing the employee access to the tape prior to any further interrogation, as specified;
- Producing transcribed copies of any notes made by a stenographer at an interrogation, and copies of reports or complaints made by investigators or other persons, except those that are deemed confidential.

The staff analysis on the parameters and guidelines that was adopted by the Commission clarifies that the costs of transcription and tape recording are only reimbursable where disciplinary action results, and when that disciplinary action does not involve “a pre-existing due process right” to the tape or transcription.<sup>130</sup>

Here, the disallowed activities and costs include gathering reports and reviewing complaints as part of investigating the allegations, investigation time, preparing questions for interviews, interviewing witnesses during normal working hours (claimed for investigators’ time), reviewing tape and summarizing/transcribing witnesses’ statements, conducting pre-interrogation meetings, interviewing accused officers during normal working hours (also claimed for investigators’ time), traveling to interview witnesses, preparing a summary report of the agency complaint, and reviewing interview tapes.<sup>131</sup>

As noted throughout this analysis, the *POBOR* mandate does not provide reimbursement for investigative activities, or for due process protections arising from peace officer misconduct except those above and beyond the due process protections required by the state and federal constitutions. The activities described under the Interrogations component of the parameters and guidelines, like all other activities, must be read and interpreted narrowly and in context with the Commission’s decision.

The parameters and guidelines do provide, under the activity of providing prior notice of the nature of the interrogation: “Included in the foregoing is the review of agency complaints or other documents to prepare the notice of interrogation, determination of the investigating

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<sup>129</sup> Exhibit X, Corrected Parameters and Guidelines, August 17, 2000.

<sup>130</sup> Exhibit X, Staff Analysis on Parameters and Guidelines, adopted July 27, 2000, page 18.

<sup>131</sup> Exhibit A, IRC 10-4499-I-01, pages 42-44.

officers, redaction of the agency complaint for names of the complainant or other accused parties or witnesses...” And, the parameters and guidelines provide for a similar review for redaction under the activity of “[p]roducing transcribed copies of any notes made...at an interrogation, and copies of reports or other complaints made by investigators or other persons, except those that are deemed confidential...” However, in both of these cases, the “gathering” of complaints is for review and redaction of confidential information, and not, as described by the claimant, for “gathering” or “reviewing” reports and complaints “as part of investigating the allegations.”

Similarly, the claimed activities of “[c]onducting pre-interrogation meetings” and “[p]reparing interview questions” are investigative activities that are not reimbursable under the *POBOR* mandate. And, interviewing witnesses and “traveling to interview witnesses” are clearly activities that benefit the investigation and are not eligible for reimbursement. These activities are beyond the scope of the *POBOR* mandate.

In addition, the claimant sought reimbursement for reviewing tape and transcribing or summarizing a witness or a witness officer’s statement, while the parameters and guidelines only provide reimbursement for the cost of tape recording an interrogation with an officer, and only because the officer has the right to record. Testimony at the hearing on the test claim indicated that the officer almost always will record the interrogation, and thus the Commission approved the cost incurred by the employer to tape record as a reasonably necessary cost.<sup>132</sup> There is no provision in the parameters and guidelines for reviewing tape and transcribing or summarizing a witness or a witness officer’s statement. Moreover, tape recording an interrogation or interview with a witness, including an officer-witness, is not eligible for reimbursement unless that officer “becomes a witness to an incident under investigation, and is subjected to an interrogation by the commanding officer, or any other member of the employing public safety department, that could lead to dismissal, demotion, suspension, reduction in salary, written reprimand, or transfer for purposes of punishment.”<sup>133</sup>

And finally, the claimant reported costs for interviewing witnesses and accused officers during normal working hours, for which the audit report indicates “investigators’ time” was claimed. The parameters and guidelines provide only for reimbursement as follows: “When required by the seriousness of the investigation, compensating *the peace officer* for interrogations occurring during off-duty time in accordance with regular department procedures.” The parameters and guidelines do not authorize reimbursement to interrogate and, thus, an investigator’s time is not reimbursable. The staff analysis adopted by the Commission for the parameters and guidelines expressly held that Government Code section 3303(a) addresses only the compensation and timing of an interrogation, and does not require local agencies to investigate an allegation, prepare for the interrogation, conduct the interrogation, or review the responses given by the

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<sup>132</sup> Exhibit X, Test Claim Statement of Decision, CSM-4499, November 30, 1999, pages 13-14.

<sup>133</sup> Exhibit X, Corrected Parameters and Guidelines, August 17, 2000, page 4.



officers and/or witnesses.<sup>134,135</sup> These decisions of the Commission are binding on the parties.<sup>136</sup> Thus, the costs claimed for investigators' time go beyond the scope of the mandate.

Based on the foregoing, the Controller's reductions under the Interrogation component are correct as a matter of law.

E. Salaries and Benefits Claimed for Activities Related to an Adverse Comment Performed by Claimant's Sheriff's Department, Probation Department, and District Attorney's Office Are Beyond the Scope of the Mandate.

The Controller reduced \$43,291 in salaries and benefits for the claimant's Sheriff's Department, \$26,108 in salaries and benefits for the claimant's Probation Department, and \$860 for the claimant's District Attorney's Office, plus related indirect costs, under the category of Adverse Comment, finding that the costs claimed were for ineligible investigation activities outside the scope of the mandate.<sup>137</sup>

The parameters and guidelines, under the component Adverse Comment, state separately the reimbursable activities for school districts, counties, and cities and special districts, respectively. For purposes of this IRC, only the reimbursable activities provided for counties are relevant. The parameters and guidelines provide three conditional statements, pertaining to the potential consequences of the adverse comment, and provide for different reimbursable activities in each case, depending on the existing requirements of due process or other law that are not reimbursable under the test claim decision:

- If an adverse comment results in dismissal, suspension, demotion, reduction in pay, or written reprimand for a permanent employee peace officer, or harms the officer's reputation and opportunity to find future employment, then a county is entitled to reimbursement for obtaining the officer's signature on the adverse comment, or noting the officer's refusal to sign the adverse comment and obtaining the signature or initials of the officer.
- If an adverse comment is related to a possible criminal offense, a county is entitled to reimbursement for providing notice of the adverse comment; providing an opportunity to review and sign the adverse comment; providing an opportunity to respond within 30 days; and noting an officer's refusal to sign and obtaining a signature or initials under such circumstances.
- If an adverse comment is not related to a possible criminal offense, a county is entitled to reimbursement for providing notice of the adverse comment; obtaining the signature of the officer; or noting the officer's refusal to sign and obtaining a signature or initials.

The parameters and guidelines also authorize reimbursement for the following activities found to be reasonably necessary to comply with the mandates associated with adverse comments:

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<sup>134</sup> Exhibit X, Parameters and Guidelines Decision adopted July 27, 2000, page 16.

<sup>135</sup> Exhibit X, Corrected Parameters and Guidelines, page 4.

<sup>136</sup> *California School Boards Assoc.*, *supra*, 171 Cal.App.4th 1183, 1200.

<sup>137</sup> Exhibit A, IRC 10-4499-I-01, pages 45-46.

Included in the foregoing are review of circumstances or documentation leading to adverse comment by supervisor, command staff, human resources staff or counsel, including determination of whether same constitutes an adverse comment; preparation of comment and review for accuracy; notification and presentation of adverse comment to officer and notification concerning rights regarding same; review of response to adverse comment, attaching same to adverse comment and filing.<sup>138</sup>

However, as discussed throughout this analysis, the reimbursable activities pertaining to an adverse comment do not include investigative activities, including reviewing a complaint to determine whether and to what extent to investigate.<sup>139</sup>

Accordingly, the Controller denied the following activities:

For the Sheriff's Department:

- Reviewing the circumstances of the complaint *to determine the level of investigation* prior to starting the case investigation process (to determine whether the case will be investigated at the Internal Affairs or division level).
- Documenting the complaint/allegation and reviewing it for accuracy during the initial complaint intake *prior to starting the investigation*.
- *Summarizing the investigation* in a case summary report and having Internal Affairs review the summary report to ensure proper procedures were followed.
- Preparing interview questions.

For the Probation Department:

- *Preparing the investigation summary and reviewing it* with the supervisor prior to closing the case.
- Preparing the final case report.

And for the District Attorney's Office:

- Preparing the case summary report.<sup>140</sup>

These activities are not reimbursable and go beyond the scope of the mandate. The plain language of the parameters and guidelines pertaining to adverse comment is focused almost entirely on obtaining the officer's signature for an adverse comment, or an acknowledgement of the officer's refusal to sign. Likewise, in the test claim statement of decision, the Commission found that if an adverse comment would result in dismissal, suspension, demotion, or other deprivation of employment, notice to the officer and the opportunity to review and respond to the adverse comment would already be required by existing due process law.<sup>141</sup> Government Code

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<sup>138</sup> See Exhibit X, Corrected Parameters and Guidelines, August 17, 2000, pages 6-8.

<sup>139</sup> Exhibit X, Final Staff Analysis, Parameters and Guidelines, adopted July 27, 2000, page 5.

<sup>140</sup> Exhibit A, IRC 10-4499-I-01, pages 45-46.

<sup>141</sup> Exhibit X, Adopted Test Claim Decision, CSM-4499, November 30, 1999, page 19 [citing *Hopson v. City of Los Angeles* (1983) 139 Cal.App.3d 347, 354].

sections 3305 and 3306 only constitute a new program or higher level of service only with respect to the requirements to obtain an officer's signature or note the officer's refusal to sign the adverse comment.<sup>142</sup> The activity to review the circumstances or documentation was included in the parameters and guidelines because the Commission recognized that the adverse comment could be considered a written reprimand or could lead to other punitive actions taken by the employer, both of which are already protected by the due process clause.

The Controller has disallowed costs for activities that, by their own terms, pertain to the investigation surrounding an adverse comment, and not to obtaining a signature, or acknowledging a refusal to sign. As noted above, the parameters and guidelines do state that "review of circumstances or documentation...including determination of whether same constitutes an adverse comment,"<sup>143</sup> is included within the activities stated. Under such circumstances, the Commission found that the notice requirements of Government Code sections 3305 and 3306 do not constitute a new program or higher level of service pursuant to article XII1 B, section 6 of the California Constitution.<sup>144</sup> Thus, the activity to review the circumstances or documentation cannot be read to include, as was claimed "reviewing the circumstances of the complaint to determine the level of investigation..." or "summarizing the investigation in a case summary report..."<sup>145</sup> These activities clearly pertain to investigative activities, which, as has been stated throughout this analysis, are not a reimbursable activity under the *POBOR* mandate. And, the parameters and guidelines do provide for "preparation of comment and review for accuracy," but that activity is related to the notice and opportunity to respond, and to obtaining an officer's signature, not to "the initial complaint intake prior to starting the investigation," as was claimed.

The *POBOR* mandate is very narrow, and as determined by the Commission, local law enforcement agencies were conducting investigations and issuing disciplinary actions before the *POBOR* statutes were enacted and, thus, those activities were not reimbursable.<sup>146</sup> The Commission's decision on reconsideration further clarifies the intended scope of the mandate, including and especially making clear that the test claim statute does not require an employer to investigate an officer's conduct or place an adverse comment in an officer's personnel file; the *POBOR* mandate is about new procedures governing peace officer labor relations, and

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<sup>142</sup> Exhibit X, Adopted Test Claim Decision, CSM-4499, November 30, 1999, page 19.

<sup>143</sup> Exhibit X, Corrected Parameters and Guidelines, page 8.

<sup>144</sup> Exhibit X, Adopted Test Claim Decision, CSM-4499, November 30, 1999, page 19.

<sup>145</sup> Exhibit A, IRC 10-4499-I-01, page 45.

<sup>146</sup> Exhibit X, Staff Analysis adopted by the Commission on July 27, 2000, page 5.

investigations of misconduct or malfeasance are beyond the scope of the mandate.<sup>147</sup> These decisions are binding on the parties.<sup>148</sup>

Based on the foregoing, the Commission finds that the Controller's reduction of costs claimed under the Adverse Comment component are correct as a matter of law.

## **V. Conclusion**

Based on the foregoing analysis, the Commission finds that the Controller's reductions of costs claimed are correct as a matter of law. Therefore, the Commission denies this IRC.

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<sup>147</sup> Exhibit X, Statement of Decision on Reconsideration, April 26, 2006, pages 38-39; see also page 15, where the Commission found that:

The [POBOR] rights are not triggered, however, until the employing agency decides to interrogate an officer, take punitive action against the officer, or place an adverse comment in an officer's personnel file. These initial decisions are not mandated by the state, but are governed by local policy, ordinance, city charter, or a memorandum of understanding.

<sup>148</sup> *California School Boards Assoc.*, *supra*, 171 Cal.App.4th 1183, 1200.

**DECLARATION OF SERVICE BY EMAIL**

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.

On January 14, 2016, I served the:

**Draft Proposed Decision, Schedule for Comments, and Notice of Hearing**  
*Peace Officers Procedural Bill of Rights (POBOR)*, 10-4499-I-01  
Government Code Sections 3301, 3303, 3304, 3305, and 3306  
Statutes 1976, Chapter 465; Statutes 1978, Chapters 775, 1173, 1174, and 1178;  
Statutes 1979, Chapter 405; Statutes 1980, Chapter 1367; Statutes 1982, Chapter 994;  
Statutes 1983, Chapter 964; Statutes 1989, Chapter 1165; Statutes 1990, Chapter 675  
Fiscal Years: 2003-2004, 2004-2005, and 2005-2006  
County of Santa Clara, Claimant

by making it available on the Commission's website and providing notice of how to locate it to the email addresses provided on the attached mailing list.

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 January 14, 2016 at Sacramento, California.

  
\_\_\_\_\_  
Jill L. Magee  
Commission on State Mandates  
980 Ninth Street, Suite 300  
Sacramento, CA 95814  
(916) 323-3562

# COMMISSION ON STATE MANDATES

## Mailing List

**Last Updated:** 1/11/16

**Claim Number:** 10-4499-I-01

**Matter:** Peace Officers Procedural Bill of Rights (POBOR)

**Claimant:** County of Santa Clara

### TO ALL PARTIES, INTERESTED PARTIES, AND INTERESTED PERSONS:

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, § 1181.3.)

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