

ITEM 11
FINAL STAFF ANALYSIS
REQUEST TO AMEND PARAMETERS AND GUIDELINES

Government Code Sections 3300 through 3310

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; and Statutes 1990, Chapter 675

Peace Officer's Procedural Bill of Rights (POBOR)

05-PGA-07 (CSM 4499)

Department of Finance, Requestor

EXECUTIVE SUMMARY

This is the Department of Finance's (DOF) request to amend the parameters and guidelines by removing school districts as eligible claimants.

Summary of the Mandate

1999 Decision

The test claim statutes, known as the Peace Officer Procedural Bill of Rights (POBOR) provide procedural protections to specified peace officers employed by local agencies and school districts when a peace officer is subject to an interrogation by the employer, is facing punitive action or receives an adverse comment in his or her personnel file.

On November 30, 1999, the Commission on State Mandates (Commission) adopted its Statement of Decision that the test claim statutes constitute a partial reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514.

Cities, counties, school districts, community college districts and special districts identified in Government Code section 3301 that employ peace officers were determined to be eligible claimants for this program.

2006 Decision

Statutes 2005, chapter 72 (AB 138) directed the Commission to "review" the POBOR Statement of Decision, to clarify whether the subject 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 found that the *San Diego Unified School Dist.* case supports the Commission's 1999 Statement of Decision, which found that the POBOR statutes constitute a state-mandated program within the meaning of article XIII B, section 6 of the California Constitution.

The Commission further found that the *San Diego Unified School Dist.* case supports the Commission's 1999 Statement of Decision that the test claim statutes constitute a partial reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514

Again, the Commission determined that cities, counties, school districts, community college districts and special districts that employ peace officers, as identified in Government Code section 3301 continued to be eligible claimants for this program.

Department of Finance's Proposed Amendments

In previous Commission decisions, based on the Supreme Court's holding in *Kern High School Dist.*, school districts were not entitled to reimbursement for activities required by the state when the activities are triggered by the discretionary local decision to employ peace officers. Based on these past decisions, on September 14, 2005, DOF requested that the parameters and guidelines for the POBOR program be amended to remove school districts as eligible claimants for this program.

Discussion

The Commission has determined, under the original test claim decision and upon reconsidering that decision as directed by the Legislature, that school districts and community college districts are eligible claimants for this program.

It is a well-settled principle of law that an administrative agency does not have jurisdiction to retry a question that has become final. If a prior decision is retried by the agency, that decision is void.¹ The Commission's original Statement of Decision became final when it was mailed or served on December 1, 1999, and the Commission's Statement of Decision on reconsideration became final when it was mailed or served on May 1, 2006. (Cal. Code Regs, tit. 2, section 1188.2, subd. (b).)

Therefore, DOF's request to remove school districts and community college districts as eligible claimants should be denied because the Commission does not have jurisdiction to retry this issue once it made its determination that POBOR constituted a state-mandated program for school districts and community college districts that employ peace officers.

Staff Recommendation

For the reasons stated above, staff recommends that DOF's request to amend the parameters and guidelines for the POBOR program be denied.

¹*Heap v. City of Los Angeles* (1936) 6 Cal.2d 405, 407; *City and County of San Francisco v. Ang* (1979) 97 Cal.App.3d 673, 697; and *Save Oxnard Shores v. California Coastal Commission* (1986) 179 Cal.App.3d 140, 143.

STAFF ANALYSIS

Requestor

Department of Finance (DOF)

Chronology

12/21/95	Claimant files test claim with the Commission on State Mandates (Commission)
11/30/99	Commission adopts statement of decision for POBOR program
07/27/00	Commission adopts Parameters and Guidelines
08/17/00	Commission issues Corrected Parameters and Guidelines
10/15/03	Bureau of State Audits issues audit report on POBOR
07/19/05	Statutes 2005, chapter 72 becomes effective and directs the Commission to “review” the Statement of Decision on POBOR
09/14/05	DOF requests that parameters and guidelines be amended
04/26/06	Commission adopts Statement of Decision on POBOR on Reconsideration
08/11/06	Draft staff analysis issued
09/08/06	Final staff analysis issued

Summary of the Mandate

1999 Decision

In order to ensure stable employer-employee relations and effective law enforcement services, the Legislature enacted Government Code sections 3300 through 3310, known as the Peace Officers Procedural Bill of Rights (POBOR).

The test claim statutes provide procedural protections to peace officers employed by local agencies and school districts when a peace officer is subject to an interrogation by the employer, is facing punitive action or receives an adverse comment in his or her personnel file. The protections required by the test claim legislation apply to peace officers classified as permanent employees, peace officers who serve at the pleasure of the agency and are terminable without cause (“at-will” employees), and peace officers on probation who have not reached permanent status.

On November 30, 1999, the Commission adopted its Statement of Decision that the test claim statutes constitute 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 the following activities:

- 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.

Cities, counties, school districts, community college districts and special districts identified in Government Code section 3301 that employ peace officers were determined to be eligible claimants for this program.

2006 Decision

Statutes 2005, chapter 72, section 6 (AB 138) added section 3313 to the Government Code to direct the Commission to “review” the Statement of Decision, adopted in 1999, on the *Peace Officer Procedural Bill of Rights* test claim (commonly abbreviated as “POBOR”) to clarify whether the subject 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, on review of this claim pursuant to Government Code section 3313, the Commission found that the *San Diego Unified School Dist.* case supports the Commission’s 1999 Statement of Decision, which found that the POBOR statutes constitute a state-mandated program within the meaning of article XIII B, section 6 of the California Constitution.

The Commission further found that the *San Diego Unified School Dist.* case supports the Commission’s 1999 Statement of Decision that the test claim statutes constitute 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 clause² 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 Commission determined that cities, counties, school districts, community college districts and special districts that employ peace officers, as identified in Government Code section 3301 continued to be eligible claimants for this program.

Department of Finance's Proposed Amendments

In previous Commission decisions, based on the Supreme Court's holding in *Kern High School Dist.*, school districts were not entitled to reimbursement for activities required by the state when the activities are triggered by the discretionary local decision to employ peace officers. Based on these past decisions, on September 14, 2005, DOF requested that the POBOR program be amended to remove school districts as eligible claimants for this program.

DOF states in its request:

Education Code Sections 38000 and 72330 permit K-12 school and community college districts to establish police departments, but do not require it. Therefore, forming a police department is a discretionary activity on the part of these districts, and pursuant to case law and consistent with other Commission decisions regarding school and community college district law enforcement activities, the consequences of participation in a discretionary program cannot be found to be reimbursable.

Therefore, DOF requested that the parameters and guidelines for the POBOR mandate be amended to: 1) delete school districts and community college districts as eligible claimants; and 2) delete any reimbursable activities associated with school districts and community college districts.

Commission staff issued its draft staff analysis on this matter on April 11, 2006. No comments were filed on the analysis; therefore, no changes were made to staff's recommendation.

² Due process attaches when a permanent employee is dismissed, demoted, suspended, receives a reduction in salary, or receives a written reprimand. Due process also attaches when the charges supporting a dismissal of a probationary or at-will employee constitute moral turpitude that harms the employee's reputation and ability to find future employment and, thus, a name-clearing hearing is required.

Issue: Does the Commission have jurisdiction to retry this issue once it made its determination that POBOR constituted a state-mandated program for school districts and community college districts identified in Government Code section 3301 that employ peace officers?

On November 30, 1999,³ and again on April 26, 2006,⁴ the Commission determined that the POBOR program constituted a state-mandated program for school districts and community college districts identified in Government Code section 3301. Thus, the Commission has determined, under the original test claim decision and upon reconsidering that decision as directed by the Legislature, that school districts and community college districts are eligible claimants for this program.

It is a well-settled principle of law that an administrative agency does not have jurisdiction to retry a question that has become final. If a prior decision is retried by the agency, that decision is void. (*Heap v. City of Los Angeles* (1936) 6 Cal.2d 405, 407, where the court held that the civil service commission had no jurisdiction to retry a question and make a different finding at a later time; *City and County of San Francisco v. Ang* (1979) 97 Cal.App.3d 673, 697, where the court held that whenever a quasi-judicial agency is vested with the authority to decide a question, such decision, when made, is res judicata, and as conclusive of the issues involved in the decision as though the adjudication had been made by the court; and *Save Oxnard Shores v. California Coastal Commission* (1986) 179 Cal.App.3d 140, 143, where the court held that in the absence of express statutory authority, an administrative agency may not change a determination made on the facts presented at a full hearing once the decision becomes final.) The Commission's original Statement of Decision became final when it was mailed or served on December 1, 1999, and the Commission's Statement of Decision on reconsideration became final when it was mailed or served on May 1, 2006. (Cal. Code Regs, tit. 2, section 1188.2, subd. (b).)

Conclusion

DOF's request to remove school districts and community college districts as eligible claimants should be denied because the Commission does not have jurisdiction to retry this issue once it made its determination that POBOR constituted a state-mandated program for school districts and community college districts identified in Government Code section 3301 that employ peace officers.

Staff Recommendation

For the reasons stated above, staff recommends that DOF's request to amend the parameters and guidelines for the POBOR program be denied.

³ Exhibit A; 1999 Statement of Decision.

⁴ Exhibit B; 2006 Statement of Decision.