EXHIBIT D

KATHLEEN CONNELL
Controller of the State of California

December 5, 2000

Ms. Shirley Opie
Assistant Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
U.S. Bank Plaza Building
Sacramento, CA 95814

Re: Incorrect Reduction Claim of the County of Los Angeles
CSM 00-9635802-I-01
Government Code section 53646
Statutes of 1995, Chapter 783
Investment Reports

Dear Ms. Opie:

This letter is in response to the Incorrect Reduction Claim noted above. The State Controller's Office believes that costs associated with the implementation of the local governmental agencies investment policies (i.e. daily tracking), are not a part of the reimbursable state mandate.

The costs of daily tracking are not reimbursable for two distinct reasons; first, the statute in question simply does not require that the local governmental agency conduct daily tracking, second, if there is a requirement to conduct daily tracking, it comes from other sources. Section 53646 does not require daily tracking, it merely requires that the agency submit a quarterly report on the status of its investments. This should simply involve pulling together information, which the agency has already collected, formatting it in the form of a quarterly report, including analysis of the data. The county attempts to convert the statute into a state subsidy of its investment expenditures by noting that subdivision (b)(2) requires a statement as to the compliance of the agency with its own investment policies. This is an attempt to stretch the requirement that they report whether or not they are in compliance, to a requirement of compliance itself, thus converting their local

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policies into state mandates. This is a not so subtle attempt, to cloak optional expenses under the rubric of a "state mandate".

The dispute essentially comes down to a single phrase in the parameters and guidelines, "accumulate and compile." Notably this phrase is not to be found in either the statute or the Statement of Decision. The problematic word in this phrase is "accumulate." Webster's defines accumulate as to "gather or pile up." Unfortunately, this definition does not eliminate the ambiguity. One could take it to mean gathering up what is already one's, or it could be taken to mean gathering up that which is not currently under one's control. The first interpretation would support an analysis that daily tracking is not reimbursable, while the later would support the contrary conclusion. Under the first approach it would mean that to accumulate would be to pull together the information already under the control of the treasurer, i.e. access the database and pull out relevant information. Under the second approach accumulate would mean to gather the data from outside parties as the transactions occur, i.e. when banks, brokers, or other entities pay into the treasury or accept disbursements from it. To determine which approach is appropriate we must look to the constitutional and statutory framework that embraces the issue of state mandates.

The foundation of the state mandates analysis is the State constitution. Article XIIIB, § 6 provides that the state shall provide a subvention of funds to local agencies for expenditures mandated by the state. Pursuant to Article XIIIB, § 6 the Legislature enacted Government Code sections 17500 et. seq.. Section 17514 provides in part that the state shall reimburse local agencies for expenses they are required by the state to incur. Against the backdrop of the need for the expenses to be required, we have the statute in question. In regards to the quarterly report, the statute requires inclusion of certain data concerning the state of the investments of the agency, such as type of investment and maturity. In addition, under the statute the agency shall state whether or not they are in compliance with their own investment policies, and whether they can meet their obligations for the next six months. Conspicuously missing from these duties is the requirement to engage in daily tracking. The claimant points to no legislative history, or other source that supports the assertion that daily tracking was a contemplated component of the statute. In fact, no period for tracking is stated at all, except of course for the quarterly requirement itself. The fact that the county policy may require daily tracking, does not elevate that requirement to a state mandate.

The approach of the county also disregards the fact that daily tracking, or its equivalent was, and is required by other sources. The primary source of that requirement is the Government Code itself. Government Code sections 27000 et. seq. set forth the duties of a county treasurer. Government Code sections 26900-26922, 29740-29749 and 29803-29804 address the duties of a county auditor-controller. Although Los Angeles County is a charter county, it has accepted the applicable government code sections as governing

the duties of its treasurer and auditor in its Charter, Article IV, section 14. There are over ten sections out of the above listed that deal with record keeping and reports concerning county funds[1]. All of these sections date back to 1907 and were originally a part of the Political Code. Up until 1995, the Code explicitly required that the treasurer report daily on investments to the auditor-controller. To do so the county clearly must have had in place a system to track investments daily. Other sections on point include 27002, which requires that the treasurer shall keep an account of the receipt and expenditure of all money received or paid out in books provided for the purpose. That section also requires that the treasurer must note the "amount, the time, from whom, and on what account all money was received, and the warrant number, the amount, time and what account all disbursements were made." These may very well be the subsidiary ledgers, which the statute allows to be used in the quarterly report. Several of the sections also address reports that must be rendered to other county officers. Specifically, section 27063 requires that no later than the 25th of each month the treasurer or the auditor shall file with the board of supervisors a detailed report of all money received and disbursed during the preceding month. When one looks at the breadth and detail required by these code sections it is clear that an on going tracking system was contemplated. Therefore, any requirement to conduct daily tracking comes from pre-existing law.

Also of interest is a letter from the auditor controller of Los Angeles County, prepared by Mr. John Naimo, Chief of the Accounting Division (see attachment). This letter was sent to Mr. Jeff Yee of the State Controller's Office, Division of Accounting and Reporting. In the letter, Mr. Naimo notes that the investment policy of the County, adopted by the board of supervisors, requires monthly reporting. Mr. Naimo claims that under Government Code section 53607, monthly reporting is required. However, he fails to note that the monthly reporting requirement only applies because the county ***chose*** to delegate its investment authority to the treasurer. Section 53607 provides the option to delegate, but does not require it. Therefore, the county has incurred the optional expense of monthly reports. If they must already perform monthly reports, it seems that a quarterly report would not require much more effort to prepare.

It also seems from the claim that the issue of daily tracking is really one of timing. If the county weren't required to do daily tracking, how often would they do it? At some point in time, one would think that transactions would have to be entered into their computer system. If not, how could they effectively track their money and balance their books? Even if the statute requires daily tracking, all that is changes is to require the data entry to be conducted on a daily basis rather than some other basis. Nevertheless, the time required would remain essentially the same, because the same information must be entered. In the letter Mr. Naimo states that the majority of the costs are incurred running the county's ADS Treasury Management System. The activities include daily transaction

[1] Government Code sections 26905, 26920, 27000, 27002, 27009, 27061, 27062, 27063, 27100, and 27101.

and input accounting, data processing, printing reports, and research and correction of discrepancies. Mr. Naimo also notes that these costs would be incurred regardless of whether the reporting basis was monthly or quarterly. These activities seem to be the sort that a county treasurer would have to conduct on some regular basis, whether or not the reporting law existed.

In addition, there are the obligations of a fiduciary, which require that the treasurer exercise care in the handling of the public's money. If the treasurer doesn't track transactions as they occur how can he make wise investment choices, or ensure that their own policy regarding limits on the percentage of available money in certain types of investments are not exceeded? When you are dealing with nine billion dollars how can one stay on top of the balance sheet if daily tracking is not conducted? Mr. Naimo himself states that a quarterly basis is not sufficient for Los Angeles County to meet its fiduciary duties. If the reporting law didn't exist would it be acceptable for the treasurer to wait for monthly, or quarterly statements from the entities in which money is invested? Would that satisfy a prudent investor standard? That seems doubtful, especially given the comments of Mr. Naimo.

The ability to access certain markets also depends on the quality of control a treasurer exercises over county funds. The Governmental Accounting Standards Board (GASB) issued Statement 31 in 1997 establishing new accounting and financial reporting standards for all investments held in county investment pools. Among other items, Statement 31 requires governments to report on their balance sheet (or other statement of financial condition) the fair market value of their investments, investment income, and the equity position of each fund in the pool. Although GASB standards are not law, compliance is usually necessary for local governmental agencies to access the capital markets.

Given the lack of a statutory requirement, and the overarching requirements placed on county funds, daily tracking is not a reimbursable component of Government Code section 53646.

Sincerely,

Shawn D. Silva

SHAWN D. SILVA
Staff Counsel

Cc: Leonard Kaye

OFFICE OF THE STATE CONTROLLER
300 Capitol Mall, Suite 1850
Sacramento, CA 94250
Telephone No.: (916) 445-6854

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

INCORRECT REDUCTION CLAIM ON: *Investment Reports* Government Code section 53646 Statutes of 1995, Chapter 783 COUNTY OF LOS ANGELES, Claimant	No.: CSM 00-9635802-I-01 AFFIDAVIT OF CUSTODIAN

I, Virginia Brummels make the following declarations:

1) I am an employee of the State Controller's Office and am over the age of 18 years.

2) I am currently employed as an Accounting Administrator I Supervisor, and have been so for the past ten months. Before that I was employed as a Staff Management Auditor-Specialist, Accounting Administrator I Specialist for 13 years.

3) As a supervisor in the Department of Accounting & Reporting I have access to, and am involved in, the intake and processing of claims for reimbursement for expenditures mandated by the state.

4) I am a duly authorized custodian of records or other qualified witness with authority to certify such records.

5) Any attached copies of records are true copies of records as retained at our place of business.

6) The records were prepared or received by the personnel of our office in the ordinary course of business at or near the time of the act, condition, or event.

I do declare that the above declarations are made under penalty of perjury and are true and correct to the best of my knowledge, and that such knowledge is based on personal observation, information, or belief.

Date: December 5, 2000

OFFICE OF THE STATE CONTROLLER

By: Virginia Brummels
Virginia Brummels
Supervising Auditor

COUNTY OF LOS ANGELES
DEPARTMENT OF AUDITOR-CONTROLLER

KENNETH HAHN HALL OF ADMINISTRATION
500 WEST TEMPLE STREET, ROOM 525
LOS ANGELES, CALIFORNIA 90012
PHONE: (213) 974-8301 FAX: (213) 626-5427

ALAN T. SASAKI
AUDITOR-CONTROLLER

July 16, 1998

Mr. Jeff Yee
Local Reimbursement Section
Division of Accounting and Reporting
State Controller's Office
P.O. Box 942850
Sacramento, CA 94250-5875

Attention: Mr. Peter Cianchetta

Dear Mr. Yee:

Los Angeles County - Investment Reporting (Chapter 783/95) Claims
Desk Review of 1995-96 Claim ($2,201) and 1996-97 Claim ($308,252)
Requested Information

This is to provide information, requested by your office on June 26, 1998, concerning the two (subject) reimbursement claims. We enclose copies of Los Angeles County's "investment policies", investment reports, and source documents. A brief report is also included.

Both Leonard Kaye, at (213) 974-8564, and Delia Gomez, at (213) 893-0792, are available to answer any questions you may have about this submission. Thank You.

Sincerely,

Alan Sasaki,
Auditor-Controller

By
John Naimo, Chief
Accounting Division

PTM:LK
Enclosures

Los Angeles County - Investment Reporting (Chapter 783/95) Claims
Desk Review of 1995-96 Claim ($2,201) and 1996-97 Claim ($308,252)

Report

This report provides information, requested by Mr. Peter Cianchetta, Fiscal Analyst, Local Reimbursement Section, Division of Accounting and Reporting, State Controller's Office, on June 26, 1998, pursuant to his desk review of Los Angeles County's Investment Reporting (Chapter 783/95) reimbursement claims for $2,021 (1995-96), attached in Tab 1, and $308,252 (1996-97), attached in Tab 2.

Mr. Cianchetta asked for copies of Los Angeles County's "Investment Policies" and source documents supporting the County's claimed labor charges. The County's investment policies for 1995-96 are included in Tab 3. Investment policies for 1996-97 are included in Tab 4.

Source documents supporting the County's investment policy development labor charges for 1995-96 are included in Tab 5. It should be noted that the "unit code" of 5110-905 on the attached time sheets was used to record time spent on investment reporting activities, a small subset of treasury management expense charges. Only time sheets of those involved in the mandated investment reporting process have been provided.

Source documents supporting the County's investment policy development labor charges for 1996-97 are included in Tab 6. A summary schedule of time charged to the subject 1996-97 reimbursement claim, based on (the attached) time sheets used to record time spent on investment reporting activities, is also included.

A description of job duties of employees performing mandated investment reporting activities, as well as an investment reporting and transactions flow chart, is included in Tab 7.

A mandated investment reporting transaction item count (for 1996-97) is included in Tab 8. A sample, mandated (Chapter 783/95) investment report, adopted by the Los Angeles County Board of Supervisors, is included in Tab 9.

It should be noted that the subject investment policy, adopted by the Los Angeles County Board of Supervisors, requires that the "Treasurer and Tax Collector shall provide the Board of Supervisors and the Los Angeles County Treasury Oversight Committee with a monthly report". While Government Code section 53646(b)(1) requires, in pertinent part, that "the treasurer or chief fiscal officer shall render a quarterly report to the chief executive officer, the internal auditor, and the legislative body of the local agency", the local agency, according to Government Code section 53646(d), "may elect to require the report .... on a monthly basis instead of quarterly". However, where a legislative body has delegated investment authority to its treasurer, as is the case in Los Angeles County, monthly investment reporting is not an option but is State-mandated. Specifically, Government Code section 53607, included in Tab 10, states:

"The authority of the legislative body to invest or to reinvest funds of a local agency, or to sell or exchange securities so purchased, may be delegated for a one-year period by the legislative body to the treasurer of the local agency, who shall thereafter assume full responsibility for those transactions until the delegation of authority is revoked or expires, and shall make a monthly report of those transactions to the legislative body. Subject to review, the legislative body may renew the delegation of authority pursuant to this section each year." [Emphasis added.]

Therefore, the Los Angeles County Board of Supervisors, in conforming to (the above) State law, requires monthly investing reporting.

Further, in order to perform its fiduciary duties with due diligence, quarterly investment reporting is not adequate for the Los Angeles County whose Treasury Pool varies from $6 billion to $9 billion, and is one of the largest in the State..

The majority of costs incurred under the subject program is incurred in running the County's ADS Treasury Management System. The majority of time spent by County staff is spent on daily transaction and input accounting, required for investment reporting pursuant to the subject law. Data is processed, reports are printed, securities are market priced, maturities are calculated, transactions are reconciled to custody reports, and discrepancies are researched and corrected. These costs will be incurred regardless of whether reporting is on a monthly or quarterly basis.

In addition, the costs of preparing the investment report itself, covering all the State-mandated disclosures of all the investment transactions during a period, will not be appreciably affected by the reporting period. Here, four quarterly investment reports will have about the same number of pages as twelve monthly reports; and, these reports would cost about the same to produce.

Therefore, even if the frequency of the investment reporting periods could be decreased, from a monthly basis to a quarterly basis, reimbursable costs, authorized under the subject program, would not decrease.

EXHIBIT E

COUNTY OF LOS ANGELES
DEPARTMENT OF AUDITOR-CONTROLLER

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J. TYLER McCAULEY
AUDITOR-CONTROLLER

January 16, 2001

Ms. Paula Higashi
Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, California 95814

Dear Ms. Higashi:

Review of State Controller's Office [SCO] Comments
County of Los Angeles Incorrect Reduction Claims
1997/98: $327,512 Claimed - $327,187 Reduction
1996/97: $308,252 Claimed - $301,750 Reduction
Investment Reporting, Chapter 783, Statutes of 1995

We submit and enclose herein our review of SCO comments on the subject incorrect reduction claim.

Leonard Kaye of my staff is available at (213) 974-8564 to answer questions you may have concerning this submission.

Very truly yours,

J. Tyler McCauley
Auditor-Controller

JTM:JN:LK
Enclosures

CC: Shawn D. Silva, SCO Staff Counsel

Review of State Controller's Office Comments
County of Los Angeles Incorrect Reduction Claims
1997/98: $327,512 Claimed - $327,187 Reduction
1996/97: $308,252 Claimed - $301,750 Reduction
Investment Reporting, Chapter 783, Statutes of 1995

On September 1, 2000, the County of Los Angeles [County] filed an incorrect reduction claim [IRC] with the Commission on State Mandates [Commission] based on the subject *Investment Reporting* program.

On September 6, 2000, the Commission ruled that the County's IRC was timely filed and complete. The Commission then sent the County's [three volume] IRC to the State Controller's Office (SCO) for their "response and supporting documentation".

SCO's Response

SCO's response consists of a four page letter, prepared by Shawn D. Silva, staff counsel, a two page "affidavit of custodian" signed by Ms. Virginia Brummels, SCO's Supervising Auditor, and a copy of County's July 16, 1998 letter to Mr. Jeff Yee [to the attention Mr. Peter Cianchetta] without County's ten attachments.

County's letter [above], and ten attachments, was submitted in response to SCO concerns that County's claimed investment reporting duties were not supported by sufficient documentation and, also, that such duties need not be performed in complying with Government Code section 53646, subdivisions (a), (b) and (e) as added by Chapter 783, Statutes of 1995 and amended by Chapters 156 and 749, Statutes of 1996 [the subject law].

SCO provides its first response to County's 1998 letter [above]. Mr. Silva does not challenge the documentation, sent to SCO in 1998, as being insufficient. Rather, Mr. Silva is concerned that "not much more" is required [under the subject law] than is required elsewhere. [Silva letter, page 3.]

SCO's issue, then, is simply whether other law requires the County to perform duties mandated under the subject law. We believe it does not for the following reasons.

Unique Requirements

The subject law imposes unique mandatory investment reporting duties on the County. While Mr. Silva suggests otherwise, he does not indicate where such duties are repeated in other law.

For example, the subject law, in Government Code Section 53646(b)(3) requires that the "quarterly report shall include a statement denoting the ability of the local agency to meet its pool's expenditure requirements for the next six months, or provide an explanation as to why sufficient money shall, or may, not be available".

The unique Section 53646(b)(3) requirement was introduced by the California Legislature in the wake of the Orange County bankruptcy. The problem the Legislature was correcting was the fact, that Orange County could not meet its pool's expenditure requirements for the next six months, was not disclosed until it was too late.

If the Section 53646(b)(3) disclosure requirement had been mandated in other law, as claimed by SCO, Orange County's nondisclosure would have been unlawful. It wasn't. The Legislature changed that. Now it is, and so is reimbursement for this additional work.

Arbitrary Reductions

SCO's specific reductions of County's claim are not addressed by Mr. Silva and appear to be arbitrary. For example, SCO's 32 hour per person per year limit on labor costs is not found in Commission's Investment Reporting parameters and guidelines [Ps&Gs] or in SCO's claiming instructions. To date, SCO has not provided any basis for imposing this funding limitation or, so to speak, promulgating this 'underground regulation'.

Further, Mr. Silva does not address SCO's arbitrary reduction of essentially all claimed costs. In fact, only $361[1] was reimbursed the County for 1997/98 even though $327,512 was claimed. Even Mr. Silva admits, on page 3 of his letter, that "more" investment reporting, although not much more, is required, than under prior law. However, Mr. Silva does not quantify his conclusion. He does not state that

[1] This payment amount was also erroneously computed by SCO review staff. On form INR-1, line (05)(f) of the 1997-98 claim, included in Tab 4 of County's Incorrect Reduction Claim filed on August 31, 2000, SCO staff added $278 to $78 to incorrectly obtain $278.

$361 is reasonable and proper reimbursement for the County's annual $32 Billion investment reporting duties under the subject law. Clearly, $361 is not.

Data Base Costs are Reimbursable

Mr. Silva states that data base costs are reimbursable but does not recommend reinstating data base cost reductions. According to Mr. Silva, reimbursable costs may be incurred "to pull together the information already under the control of the treasurer, i.e. access the data base and pull out relevant information". [Silva memo, page 2, emphasis added.]

Mr. Silva further indicates that reimbursable data base costs include costs incurred to access, format, analyze, and report information on the County's investments, such as: type of investment and maturity, compliance with the investment policy and detailed cash flow projections to meet future obligations. [Silva memo, page 2.]

However, Mr. Silva does not recommend reinstatement of any of the County's data base and related costs, including $27,772.63 of software costs incurred in 1996/97 and $44,027.09 of such costs incurred in 1997/98. Further, Mr. Silva does not dispute that the amounts of such costs are reasonable and proper. Indeed, such costs are very small considering the size of the County's investment program: $32 Billion.

Therefore, reimbursement for the 'reasonable and proper' data base costs claimed by the County is now required.

Reimbursable Continuing Costs

In addition to data base costs [above], the County claimed other reimbursable continuing costs. For example, in order to report on "compliance of the portfolio to the statement of investment policy, or [to disclose the] manner in which the portfolio is not in compliance" pursuant to Government Code Section 53646(b)(2), such compliance must be monitored throughout the reporting period, not just on the last day.

According to Mr. Joseph H. Spillane, Los Angeles County's Assistant Treasurer and Tax Collector, in his declaration of August 28, 2000, attached as Tab 1 of the County's IRC, Government Code Section 53646 requires reporting of securities held throughout the reporting period. To conclude otherwise, one would have to

believe that the Legislature was only concerned with investment activities four days per year. Each report must contain a statement of compliance and exceptions to the investment policy for transactions held throughout the reporting period.

Since the code permits local agencies to comply with quarterly reporting requirements in a monthly reporting format, the preparation of monthly reports in lieu of quarterly reports is also reimbursable.[2]

In addition, Government Code Section 53646(b)(3) requires a determination that expenditure requirements could be met for six months. Without a comprehensive cash flow analysis, it would be impossible to determine if expenditure requirements could be met for six months.

Therefore, costs incurred in performing mandated duties [as specified above] throughout the reporting period are reimbursable.

Balance Sheet Reporting is Insufficient

Balance sheet reporting, or providing investment information pertaining to a specific point in time or balance sheet date, is insufficient to meet the [above] requirements for including information on investment activity throughout the reporting period.

For each investment transaction occurring throughout the reporting period, investment type, maturity and compliance with the investment policy must be reported. In the County's case, $32 Billion of reportable investment transactions occur each year.

It should also be noted that, at any point in time, the County has $9 Billion, or so, of investments on its balance sheet. So, if the County were only required to report on the $9 Billion of investments, other required information [on the total $32 Billions of investments made throughout the reporting period] would not be provided, even though it is required under the subject law.

[2] Mr. Silva's position is that the County needs to prepare quarterly reports in addition to monthly reports. In this regard he finds, on page 2 of his letter, that "... it seems that a quarterly report would not require much more effort to prepare". However, Mr. Silva provides no discussion of what additional effort would be required and what additional costs would then be reimbursable.

Mr. Silva erroneously finds balance sheet reporting to be a sufficient method of implementing the subject law. Clearly, it is not. Nevertheless, Mr. Silva argues, on page 4 of his letter, that "Governmental Accounting Standards Board (GASB) Statement 31, [issued] in 1997, establishing new accounting and financial reporting standards for all investment pools ... requires governments to report on their balance sheet (or other statement of financial condition) the fair market value of their investments, investment income, and the equity position of each fund in the pool". Mr. Silva then notes that "...compliance is usually necessary for local governmental agencies to access the capital markets"[3] [emphasis added].

However, as previously noted, balance sheet reporting is not a sufficient method of implementing the subject law.

Projecting Cash Flow: A Year-Round Requirement

According to Mr. Joseph H. Spillane, Los Angeles County's Assistant Treasurer and Tax Collector, in his declaration of August 28, 2000, attached as Tab 1 of the County's IRC, Government Code Section 53646(b)(3) requires a determination that expenditure requirements could be met for six months. Without a comprehensive cash flow analysis, it would be impossible to determine if expenditure requirements could be met for six months.

The cash flow projection requirement [above] is unique and year-round, not found in GASB Statement 31, discussed by Mr. Silva, or elsewhere[4].

The cash flow projection requirement was mandated by the Legislature in the wake of the Orange County bankruptcy. The problem the Legislature was addressing was not that counties were misstating their investment balance sheets but that

[3] It should be noted that Mr. Silva does not provide evidence for his assertions that GASB 31's accounting and financial reporting duties are the same as those required under the test claim legislation. In addition, Mr. Silva does not provide any foundation for introducing his 'expert' declaration that "compliance is usually necessary for local government agencies to access the capital markets".

[4] Mr. Silva appears to argue, on page 4 of his letter, that such cash flow projections are necessary for the County to "satisfy [the] prudent investor standard". However, this standard only requires the County to act as a prudent investor and does not include any requirements to perform the cash flow projections, explicitly mandated under the subject law. Indeed, before the subject law, counties were prudent investors without having to perform the subject cash flow projections.

counties were not always preparing year-round cash flow projections to meet the needs of the investment pool members throughout the year.

Now, under the test claim legislation, such cash flow projections must be prepared year-round. For the County, this means 4,000, or so, investment sales and purchases must be planned to use the cash available for investments and the cash required for disbursements throughout the year for 1,400 of so fund entities. Considering that only a portion of six County staff assigned such responsibilities were claimed for performing cash flow and other reporting duties, SCO's complete reduction of all claimed costs is entirely unjustified.

Detailed Reporting is No Longer Optional

Mr. Silva claims that the County, prior to the enactment of the subject law, performed detailed reporting duties at its option. [Silva letter, page 3] However, as previously discussed, detailed reporting is no longer optional. As such, reimbursement is due the County for performing this now mandated duty - even though the County may have been performing such duties voluntarily. In this regard, Government Code Section 17565 requires that:

> "If a local agency or school district, at its option, has been incurring costs which are subsequently mandated by the state, the state shall reimburse the local agency or school district for those costs incurred after the operative date of the mandate".

Accordingly, the argument of Mr. Silva, that the County chose to perform detailed investment reporting duties prior to the time that they were state mandated cannot be used to defeat the County's claim, requiring reimbursement for explicit duties mandated only under the subject law.

The new mandates, according to Mr. Joseph H. Spillane, Los Angeles County's Assistant Treasurer and Tax Collector, in his declaration of August 28, 2000, attached as Tab 1 of the County's IRC, require detailed investment reporting. Government Code Section 53646 is very specific as to the requirements imposed by the Legislature.

Government Code Section 53646(b)(1) requires that the Treasurer prepare a quarterly report of investments that includes the type of investment, issuer, date of maturity, par and cost amounts of all securities held by the local agency.

Government Code Section 53646(b)(2) requires that the investment report shall state compliance of the portfolio to the statement of investment policy or manner in which the portfolio is not in compliance.

Government Code Section 53646 requires reporting of securities held throughout the reporting period.

Each report must contain a statement of compliance and exceptions to the investment policy for transactions held throughout the reporting period.

Conclusion

In sum, the County's investment reporting claims of $327,512 for 1997/98 and $308,252 for 1996/97 included only those costs unavoidably incurred to comply with the specific and unique mandatory requirements imposed under the subject law. Such costs are also reasonable and proper considering the level of effort to report on the County's $32 Billion investment program.

Therefore, reinstatement of all claimed County costs is required.

COUNTY OF LOS ANGELES
DEPARTMENT OF AUDITOR-CONTROLLER

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J. TYLER McCAULEY
AUDITOR-CONTROLLER

Celebrating Los Angeles County 150TH 1850-2000

Review of State Controller's Office Comments
County of Los Angeles Incorrect Reduction Claims
1997/98: $327,512 Claimed - $327,187 Reduction
1996/97: $308,252 Claimed - $301,750 Reduction
Investment Reporting, Chapter 783, Statutes of 1995

Declaration of Leonard Kaye

Leonard Kaye makes the following declaration and statement under oath:

I, Leonard Kaye, SB90 Coordinator, in and for the County of Los Angeles, am responsible for filing test claims , reviews of State agency comments, Commission staff analyses, and for proposing parameters and guidelines (Ps&Gs) and amendments thereto, and for filing incorrect reduction claims, all for the complete and timely recovery of costs mandated by the State. Specifically, I have prepared the attached review of State Controller's Office comments on the subject Incorrect Reduction Claim, seeking reinstatement of the $327,187 reduction of the County's 1997/98 reimbursement claim and of the $301,750 reduction of the County's 1996/97 reimbursement claim.

Specifically, I declare that I have examined the County's State mandated duties and resulting costs, in implementing the subject law, and find that such costs as set forth in the attached document, are, in my opinion, reimbursable "costs mandated by the State", as defined in Government Code section 17514:

> " ' Costs mandated by the State' means any increased costs which a local agency or school district is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution."

I am personally conversant with the foregoing facts and if so required, I could and would testify to the statements made herein.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct of my own knowledge, except as to the matters which are therein stated as information or belief, and as to those matters I believe them to be true.

1/16/01; Los Angeles, CA — Leonard Kaye

Date and Place — Signature

COUNTY OF LOS ANGELES
DEPARTMENT OF AUDITOR-CONTROLLER

KENNETH HAHN HALL OF ADMINISTRATION
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J. TYLER McCAULEY
AUDITOR-CONTROLLER

DECLARATION OF SERVICE

STATE OF CALIFORNIA, County of Los Angeles:

Hasmik Yaghobyan states: I am and at all times herein mentioned have been a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen years and not a party to nor interested in the within action; that my business address is 603 Kenneth Hahn Hall of Administration, City of Los Angeles, County of Los Angeles, State of California;

That on the 16th day of January, 2001, I served the attached:

Documents: Review of State Controller's Office [SCO] Comments, County of Los Angeles Incorrect Reduction Claims, 1997/98: $327,512 Claimed - $327,187 Reduction, 1996/97: $308,252 Claimed - $301,750 Reduction, Investment Reporting, Chapter 783, Statutes of 1995, *including a 1 page letter dated 1/16/01, a 7 page narrative, and a 1 page declaration of Leonard Kaye, all pursuant to Review of State Controller's Office [SCO] Comments , County of Los Angeles Incorrect Reduction Claims* 1997/98: $327,512 Claimed - $327,187 Reduction, 1996/97: $308,252 Claimed - $301,750 Reduction, Investment Reporting, Chapter 783, Statutes of 1995, *CSM 00-9635802-I-01, now* pending before the Commission on State Mandates.

upon all Interested Parties listed on the attachment hereto and by

[X] by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date: Commission on State Mandates and State Controller's Office- FAX as well as mail of originals.

[ ] by placing [ ] true copies [ ] original thereof enclosed in a sealed envelope addressed as stated on the attached mailing list.

[X] by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as set forth below.

[ ] by personally delivering the document(s) listed above to the person(s) as set forth below at the indicated address.

PLEASE SEE ATTACHED MAILING LIST

That I am readily familiar with the business practice of the Los Angeles County for collection and processing of correspondence for mailing with the United States Postal Service; and that the correspondence would be deposited within the United States Postal Service that same day in the ordinary course of business. Said service was made at a place where there is delivery service by the United States mail and that there is a regular communication by mail between the place of mailing and the place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 16th day of January, 2001, at Los Angeles, California.

Hasmik Yaghobyan

Paula Higashi
Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

Mr. Shawn D. Silva
Staff Counsel
State Controller's Office
300 Capitol Mall, Suite 1850
Sacramento, CA 95814

EXHIBIT F

KATHLEEN CONNELL
Controller of the State of California

January 17, 2001

Ms. Shirley Opie
Assistant Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
U.S. Bank Plaza Building
Sacramento, CA 95814

Re: **Incorrect Reduction Claim of the County of Los Angeles**
CSM 00-9635802-I-01
Government Code section 53646
Statutes of 1995, Chapter 783
Investment Reports

Dear Ms. Opie:

This letter is a supplement to our original response to the Incorrect Reduction Claim noted above, dated December 5, 2000. Due to scheduling difficulties, we were unable to retain an expert in the field of business management in time to include his opinion in the original response. However, since his analysis is germane, and he possesses a unique perspective, we felt that it was important to include his opinions in the administrative record for this IRC.

After review of a substantial amount of material submitted by Los Angeles County Professor Tootelian came to a conclusion concerning what would be appropriate business practices in respect to the County's investments. Professor Tootelian concluded that transactions should be entered not less than once a week, and preferably two to three times per week. He was also of the opinion that the investment position of the County should be reviewed no less than once a month, preferably once a week, a frequency far greater than that imposed by Section 53646 (See Enclosure 1, original included in response to proposed amendment to Ps&Gs). As a public officer the treasurer is a trustee of the public weal, and therefore must conduct his office in accordance with prudent business practices. This is a duty and obligation that is separate and distinct from the

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statute in question. This provides yet another independent requirement for frequent if not daily tracking of investments.

In addition, the request to amend the Parameters and Guidelines recently came to our attention. It contains two declarations which appear to be relevant to this IRC. Although they involve different local governmental agencies, since this IRC is really a question of law, as opposed to fact, they help shed light on the issues we are addressing. The declarations are included as Enclosure 2 (declaration of Dick Kurth) and Enclosure 3 (declaration of Vee-Jay Brann). Dick Kurth is Deputy Director of Administrative Services for the City of Newport Beach and Mr. Brann is the Treasurer of Kings County. The operations of their offices bear similarity to those of Los Angeles County, and it is clear from both declarations that investment concerns, and not reporting concerns, create the need for frequent data input and analysis. It seems unimaginable that an entity whose budget involves millions (or billions) of dollars, and frequent investment transactions, could effectively operate without frequent data entry. Since the necessity for daily tracking comes from business concerns, and not Section 53646, daily tracking is not a reimbursable activity.

Sincerely,

Shawn D. Silva

SHAWN D. SILVA
Staff Counsel

Cc: Leonard Kaye
Ginny Brummels, DAR

Enclosure 1

OFFICE OF THE STATE CONTROLLER
300 Capitol Mall, Suite 1850
Sacramento, CA 94250
Telephone No.: (916) 445-6854

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

INCORRECT REDUCTION CLAIM ON: *Investment Reports* Government Code section 53646 Statutes of 1995, Chapter 783 COUNTY OF LOS ANGELES, Claimant	No.: CSM 00-9635802-I-01 DECLARATION OF DENNIS TOOTELIAN

I, Dennis Tootelian make the following declarations:

1) I am a resident of Sacramento County and am currently employed by C.S.U. Sacramento as a professor of marketing.

2) Attachment 1 is a true and correct representation of my professional opinion as expressed therein.

3) Attachment 2 is a true and correct copy of my Curriculum Vitae.

4) Attachment 3 is a true and correct copy of a list of my past and/or present clients.

I do declare that the above statements are made under penalty of perjury and are true and correct to the best of my knowledge,

and that such knowledge is based on personal observation, information, or belief.

Date: January 3, 2001

DECLARANT

By: Dennis Tootelian

Dennis Tootelian
Professor of Marketing
C.S.U. Sacramento

Attachment 1

DENNIS H. TOOTELIAN, Ph.D.
College of Business Administration
California State University, Sacramento
(916) 278-6203

December 28, 2000

MEMORANDUM

TO: Shawn Silva
California State Controller's Office

FROM: Dennis H. Tootelian, Ph.D.
Professor of Marketing
Director, Center for Small Business

SUBJECT: Data Entry And Monitoring Practices For Business Operations

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I have now had an opportunity to review the materials you sent me, and to formulate opinions as to what would constitute appropriate management practices with respect to entering data and monitoring the "investment operations" undertaken by counties in California. Presented below are descriptions of the Scope Of The Analysis, Materials Reviewed, Key Operations Issues, Situation Assessment, and Conclusions As To Appropriate Data Entry And Monitoring Practices.

Scope Of The Analysis

It is understood that counties (hereafter "organizations) in California engage in a business activity of providing services to the public, which includes managing their own funds and making investments for themselves and constituent agencies. These organizations undertake the purchase and sale of a range of investments including, but not limited to, securities issued by Federal agencies (e.g., Federal Home Loan Banks, Federal National Mortgage Association, Government National Mortgage Association, Federal Farm Credit Banks), corporate notes, bankers' acceptances, certificates of deposit, commercial paper, and repurchase agreements.

The scope of this analysis was to address the issues of what would constitute good business practices with respect to the frequency for entering and monitoring data

pertaining to an investment business. Since transactions occur on a daily basis, of particular concern is how frequently should the organization enter information regarding the transaction into its database so that individual and collective tracking can take place by the organization's management.

It is important to note that the scope of this analysis did not include any possible legal requirements that might exist for such data entry and monitoring. Furthermore, it did not include any consideration of the current effectiveness of the investment operations undertaken by particular organizations.

Materials Reviewed

Various documents were supplied by the California State Controller's Office as background information. The materials provided insights into the general range and magnitude of investments undertaken by the organizations, as well as the overall issues associated with investment reporting activities.

Two sets of documents were supplied. Title pages for the sets were "County of Los Angeles Incorrect Reduction Claims 1997/8: $327,512 Claimed - $327,187 Reduction 1996/97: $308,252 Claimed - $301,750 Reduction Investment Reporting, Chapter 783, Statues of 1995 VOLUME TWO" (tabs 1 through 6), and "County of Los Angeles Incorrect Reduction Claims 1997/8: $327,512 Claimed - $327,187 Reduction 1996/97: $308,252 Claimed - $301,750 Reduction Investment Reporting, Chapter 783, Statues of 1995 VOLUME THREE" (tabs 1 through 10).

Key Operations Issues

Nearly every business, when reduced to its essential elements is one of input-processing-output. In this instance, the organization's "business" is one of making investments (input), scheduling and monitoring the investments to ensure that appropriate cash flows and risk-return ratios are being maintained (processing), and selling investments either before or upon their maturing (output).

Within any type of business, too, there are key operational issues that affect its success. In this case, some of the issues include ensuring the security of the investments, maximizing returns on investments for acceptable levels of risk, and timing investments with market opportunities to achieve maximum returns and asset security.

In order to address the operating issues, the organization's management must be aware of the market opportunities that exist for making and selling investments, and the resources available to make such transactions. This means having up-to-date information on what investments are currently within the organization's portfolio, when each investment will mature, how secure each investment is, and how good of return is being generated on the

investment given alternate market opportunities that might exist with commensurate levels of risk.

Because of this, entering data pertaining to investment transactions is a critical internal element of overall business operations. Until the data is processed, it may not be in a useable form for management review and decision-making.

Situation Assessment

Although the material used for this analysis provides information for only an instant in time, several factors seem reasonably clear. First, the business operation is sizable in that it involves investing billions of dollars (e.g., as of October 31, 1999, the investment balance was $8.95 billion). Therefore, control over transaction activities is important given the large sums of money being invested.

Second, the portfolio appears to contain a range of investments with varying degrees of risk and returns. The material reviewed showed that investments are made in such products as Federal securities, certificates of deposit, commercial paper, and unsecured corporate notes. Because some are more subject to risk than are others, monitoring the investments on a frequent basis would be important to ensuring appropriate risk-return ratios are maintained and opportunities to improve the organization's financial position are evaluated.

Third, there appears to be continual investment activity. Based on the data reviewed, approximately 10.98% of the investment portfolio matures within one to thirty days. Given the $8.95 billion portfolio, this translates to $982.8 million maturing within thirty days, or $32.8 million per day assuming an equal distribution over the time period. Because much of the portfolio matures within a very short time period, data input needs to be undertaken quickly in order to maintain a clear picture of total operations so investments can be appropriately balanced to maximize return and minimize risk.

Fourth, based on estimates of a two-month period (i.e., September and October, 1999), it appears there are about 337.5 transactions made per month. Assuming 21.7 working days per month, this equates to an average of 15.55 transactions per workday. While "batch processing" (i.e., accumulating transactions into sufficiently large quantities so they can be processed with an efficient use of personnel hours) of transaction data might, in some instances, be desirable, volume efficiency should be reached in a relatively small number of days.

Conclusions As To Appropriate Data Entry And Monitoring Practices

The conclusions expressed below are based on a review of the information provided coupled with what is believed to be sound practices for managing an organization's

business operations. As previously indicated, the perspective taken for this analysis is that the business is one of making investments to yield returns that are commensurate with acceptable levels of risk.

Accordingly, it seems appropriate to conclude that transaction data should be entered at least two to three times per week, and preferably daily. Furthermore, monitoring of investment operations should be undertaken at least monthly, and preferably on a weekly basis.

With respect to entering data, there are at least four reasons for the conclusion that entry should occur daily or at least two to three times per week. First, the dollar magnitude of the investments is substantial and contains varying degrees of risk. To effectively manage a somewhat diverse portfolio, data needs to be readily available to ensure that proper allocations are made to secured versus unsecured products, fixed income versus variable income products, and short-term verses long-term products. Unless transaction data is entered in an expeditious manner, it will be more difficult to gain a clear perspective of the investment portfolio, including the risks that are being sustained, and how well the investments are performing vis-à-vis other market opportunities. Even though it is assumed that policies and procedures govern investment decisions, it is still prudent to have the fullest set of information possible available on a "real-time" basis.

Second, the volume of investments that mature each day should create opportunities to achieve economies of batch processing in a relative short period of time, if such a process is deemed desirable and cost effective. While it would be best to enter each transaction the day the activity occurs, workload balance may achieve economies with batch processing two to three times per week.

Third, from a strictly control perspective, it is best to have transaction data entered into a management database as soon as possible. This helps ensure that appropriate security is maintained over the full portfolio.

Fourth, the organization must maintain an operating fund balance that allows it to meet its financial obligations (i.e., pay its bills), but not keep an excessively large balance which would not optimize its returns. In order to keep an appropriate balance for making payments, the organization needs to know what investments are coming due and what is being placed in new investments.

With respect to monitoring the investment operations, there are at least two reasons for the conclusion that monitoring should occur on a weekly or at least monthly basis. First, the magnitude of the dollars involved in this operation make it important that close controls be maintained. What might appear to be minor market fluctuations in investment rates can yield substantial dollar returns. Evaluating the portfolio vis-à-vis

market opportunities is a basic component of good business practices since investments constitute the organization's business operations.

Second, with a portfolio that contains a mix of degrees of risk and return, maintaining an appropriate balance in the asset allocation requires close monitoring as market conditions and risk levels for unsecured products shift. Even relatively conservative investments are subject to some variations in the risk-return ratios, and these need to be evaluated at least monthly, especially given that sizable portions of the portfolio mature every thirty days.

Attachment 2

market opportunities is a basic component of good business practices since investments constitute the organization's business operations.

Second, with a portfolio that contains a mix of degrees of risk and return, maintaining an appropriate balance in the asset allocation requires close monitoring as market conditions and risk levels for unsecured products shift. Even relatively conservative investments are subject to some variations in the risk-return ratios, and these need to be evaluated at least monthly, especially given that sizable portions of the portfolio mature every thirty days.

Attachment 2

RESUME

Dennis H. Tootelian
6000 J Street
Sacramento, CA 95819-6088
Area Code (916), Telephone 971-4096

EDUCATION

Ph.D. Arizona State University, January 1973
Major Field: Marketing
Minor Fields: Management and Managerial Accounting
Cumulative Grade Point: 3.95

M.B.A. California State University, Sacramento, 1969
Major: Marketing
Cumulative Grade Point: 3.75

B.S. California State University, Sacramento, 1968
Major: Marketing
Minor: Economics
Cumulative Grade Point: 3.92

MEMBERSHIPS

Member, Advisory Board to the California Senate Select Committee on Small Business Enterprises, 1986.

Chairman of the Advisory Board to the California Senate Select Committee on Small Business Enterprises, 1979.

Member of the Executive Committee, California Chamber of Commerce Committee on Small Business, 1977-1979.

Member, Mayor's Small Business Advisory Committee, Sacramento, California, 1990-1993.

Member, Mayor's Women and Minority Business Enterprise Task Force, Sacramento California, 1989-1993.

Chairman, Board of Directors, Methodist Hospital of Sacramento, 1994-1997.

Member, Board of Directors, Mercy Healthcare Sacramento, 1994-Present.

Board of Trustees, Valley Health Care Corporation, Sacramento, California, 1986-1993.

Board of Directors, Krelitz Industries, Inc., Minneapolis, Minnesota, 1988-1993.

MEMBEERSHIPS (CONTINUED)

Board of Directors, Physician's Clinical Lab, Incorporated, Sacramento, California, 1994-1996.

Member, Advisory Board, Greater Sacramento Small Business Development Center.

President, American Marketing Association (Sacramento Valley Chapter), 1978-1979.

Member, Editorial Advisory Committee, *Journal of Hospital Marketing*.

Member, Editorial Advisory Committee, *Journal of Professional Services Marketing*.

Member, Editorial Review Board, *Journal of Small Business Management*, 1990-1993.

Member, Editorial Review Board, *Journal of Customer Services in Marketing and Management*.

Member, Editorial Advisory Board, *Health Marketing Quarterly*.

Member Governance Forum, California Healthcare Association, 1998-2000.

HONORS

Phi Kappa Phi (National Honor Society), initiated 1968.

Beta Gamma Sigma (National Business Honor Society), initiated 1968.

Delta Sigma Pi "Scholarship Key" (graduated top of the 1968 class in Business Administration), 1968.

Associated Students of California State University, Sacramento Outstanding Student Award, in 1969.

Sigma Iota Epsilon (Scholastic Honor Society in Management), initiated 1971.

Delta Sigma Pi, initiated Spring 1973.

Outstanding Alumnus, School of Business and Public Administration, California State University, Sacramento, 1984.

Distinguished Faculty Award, California State University, Sacramento, 1993.

Order of the Hornet, California State University, Sacramento, 1993.

OCCUPATIONAL EXPERIENCE

September 1978 to Present--Professor of Marketing, California State University, Sacramento

Primary Teaching Areas

Marketing Management
Research Methodology
Marketing Principles
Business Policy
Small Business Management

September 1992 to 1996--Director, Center for Management Services, Sacramento State University, Sacramento

June 1975 to Present--Director, Center for Small Business, California State University, Sacramento

September 1975 to August 1978--Associate Professor of Marketing, California State University, Sacramento

February 1973 to August 1975--Assistant Professor of Marketing, California State University, Sacramento

September 1970 to January 1973--Teaching Assistant, Principles of Marketing, Arizona State University

September 1969 to June 1970--Research Assistant to the Director of Graduate Studies in Business, University of Iowa

June 1969 to September 1969--Researcher, Research and Statistics Division, California Department of Corrections

September 1968 to June 1969--Research Assistant, California State University, Sacramento

TEXTBOOKS

Cases and Classics in Marketing Management. Coauthor: Ralph M. Gaedeke, Harcourt Brace and Jovanovich. Publication date: February 1986.

Essentials of Pharmacy Management. Coauthor: Ralph M. Gaedeke, Mosby-Yearbook Inc. Publication date: January 1993.

Marketing Management, Readings and Cases. Coauthors: Ralph R. Gaedeke, Leete A. Thompson. Scott, Foresman, & Company. Publication date: January 1980.

TEXTBOOKS (CONTINUED)

Marketing Principles and Applications. Coauthor: Ralph M. Gaedeke. West Publishing Company. Publication date: February 1983.

Small Business Management. Coauthor: Ralph M. Gaedeke. Scott, Foresman, & Company. Publication dates: January 1980 (1st edition), January 1985 (2nd edition), January 1991 (3rd edition, Allyn & Bacon).

Small Business Management--Operations and Profiles. Coauthors: Ralph M. Gaedeke, Bank of America. Scott, Foresman & Company. Publication dates: February 1978 (1st edition); January 1985 (2nd edition).

MONOGRAPHS

Pharmacy Management in a Hospital Setting, Mosby-Yearbook, Inc., 1995. A series of three monographs:

- *Planning For a Changing Role in Healthcare Delivery*, Mosby-Yearbook, Inc., 1995 (44 pages).
- *The Future Role of Pharmacy*, Mosby-Yearbook, Inc., 1995 (39 pages).
- *The Pharmacy Management Process in Hospital Settings*, Mosby-Yearbook, Inc. 1995 (50 pages).

PUBLICATIONS

A Basic Guide to Pharmacy Leases, California Pharmacists Association, 1982.

"*A Pharmacy Lease: It Can Make All the Difference*," *California Pharmacist*, July 1988, Vol. XXXV, No. 13, pp. 22-24, 26-27.

"*A Comparison of Business Experience and Ethical Theory Orientation in the Evaluation of Marketing Practices and Code of Ethics*," *Journal of Professional Services Marketing*, 1995, Vol. 11, No. 2, pp. 127-138. Coauthors: Ralph M. Gaedeke and Craig A. Kelley.

"*Alternative Medicine Among College Students*," *Journal of Hospital Marketing*, Vol. 13 No. 1, 1998, Coauthors: Ralph M. Gaedeke and Cynthia Holst.

"*American Park Golf Center*," a case presented at the Intercollegiate Case Clearing House (ICCH) workshop, December 1976. Part of the ICCH offering.

PUBLICATIONS (CONTINUED)

"*An Annual Survey Can Help Retain Your Current Customers*," The Business Journal, November 12, 1990, p. 16. Coauthor: Ralph M. Gaedeke.

"*An Exploratory Analysis of Entrepreneurial Attitudes Toward Small Business Administration Programs*," Small Business Institute Directors Association Annual Meeting. October 1989.

"*An Examination of the Buying Considerations and Purchase Feelings of Low and Middle Income Apartment Dwellers and College Seniors Toward Single Family Dwelling Units*," California Department of Real Estate, 1975.

"*An Examination of the Potential Impact of the 'Cooling-Off' Law of Direct-To-Home Selling*," The Journal of Retailing, Vol. 51, No. 1, Spring 1975, pp. 61-70, 114.

"*Are University Students a Viable Market for Private Health Care Services?*" Marketing News, July 23, 1990, p. 26. Coauthor: Ralph M. Gaedeke.

"*Attitudinal and Cognitive Readiness: Key Dimension for Consumer Legislation*," Journal of Marketing, Vol. 39, No. 3, July 1975, pp.61-64.

"*Authors of Articles in Major Business Journals: Some Findings on Their Characteristics*," AIDS Proceedings and Abstracts, 1978, pp. 367-369. Coauthor: Burton F. Schaffer.

"*Banking on College Students*," Research Alert, October 21, 1988, p. 6. Coauthored with Ralph Gaedeke.

"*Basic Guide to Effective Cash Management*," California Pharmacist, April 1982, Vol. XXXII, No. 1, pp. 27-28, 31-33, 36.

"*Basic Guides to Increasing Pharmacy Profits*," California Pharmacist, July 1984, pp. 10-15.

"*Branded Versus Generic Prescription Drugs: Perceptions of Risk, Efficacy, Safety, and Value*," Journal of Health Care Marketing, September, 1988, Vol. 8, No. 3, pp. 26-29. Coauthored with Ralph Gaedeke and John Schlacter.

"*Budgeting: Maybe Not for Fun, But for Profits*," California Pharmacist, September 1982, pp. 16, 18-21, 23-24.

"*Building a Stronger Pharmacy During Periods of Instability*," California Pharmacist, August 1991, pp. 36-40.

PUBLICATIONS (CONTINUED)

"*Business Educators' Use of Basic Faculty Development Resources*," *Journal of Education for Business*, August 1992, Vol. 67, No. 6, pp. 366-370. Coauthor: Ronald F. Bush and Bruce C. Stern.

"*Business Students' Perceptions of Ethics in Marketing*," *Journal of Education for Business*," July/August 1992. Coauthors: Ralph M. Gaedeke and Craig A. Kelley.

"*Building Profitability in Turbulent Times: Increasing Pharmacy Sales and Profits*," a monograph published by *National Association of Retail Druggists*, 1988, 15 pages.

"*Careers in Marketing*," *Marketing News*, August 1983. Coauthors: Ralph M. Gaedeke and Burton F. Schaffer.

"*Consumerism in the United States*," *Werbung Publicite*, September 1971, p. 64.

"*Cost Containment: A Key to Survival in All Pharmacy Settings*," *California Pharmacist*, August 1985, Vol. XXXIII, No. 2, pp. 22-24, 28-29, 32-34, 36-37.

Cost Management: Are You Spending Too Much? Or Too Little?, California Pharmacists Association, 1983.

"*Developing a Business Plan for Your Pharmacy*," *California Pharmacist*, June 1980, pp. 38-43.

"*Developing a Competitive Profile to Position Your Pharmacy*," *California Pharmacist*, July 1987, Vol. XXXVI, No. 1, pp. 34-39.

Developing a Policy and Procedure Manual, California Pharmacists Association, 1980.

"*Economic and Social Impact of the Arizona Home Solicitations Act*," *Arizona Business*, Vol. XXI, No. 4, April 1974, pp. 17-22. Coauthor: Robert F. Gwinner.

"*Effective Business Planning For Owning A Pharmacy*," *California Pharmacist*, July 1986, Vol. XXXIV, No. 1, pp. 30-32, 34-37.

"*Employers Want Motivated Communicators for Entry-Level Marketing Positions: Survey*," *Marketing News*, August 5, 1983, Section 2, p. 1. Coauthors: Ralph Gaedeke and Burton Schaffer.

"*Employers Rate Enthusiasm and Communication as Top Job Skills*," *Marketing News*, March 27, 1989, p. 14. Coauthored with Ralph Gaedeke.

PUBLICATIONS (CONTINUED)

"*Era of Increased Competition Spurs Need for 'Niche' Marketing in 90s,*" *Hospital Economics*, July 1990, pp. 9, 11. Reprinted from a speech.

"*Evaluating Your Pharmacy's Financial Position,*" *California Pharmacist*, September 1979, pp. 6, 8, 10, 12, 14, 16, 18.

Evaluating Your Pharmacy's Financial Position, California Pharmacists Association, 1980.
"*Financial Institutions Aren't Targeting College Market for Banking Services,*" *Marketing News*, June 20, 1988, p. 7. Coauthored with Ralph Gaedeke.

"*Finding Out What Customers Think: An Examination of Customer Response Cards,*" *Journal of Customer Service in Marketing and Management*, Vol. 3, No. 3, 1997. Coauthor: Ralph M. Gaedeke.

"*Formulating a Marketing Plan: Finding the Patients Who are Looking for You,*" *American Pharmacy*, February 1990, pp. 44-49.

"*Fortune 500 List Revisited Twelve Years Later: Still An Endangered Species For Academic Research?*" *Journal of Business Research*, Vol. 5, No. 4, August 1987, pp. 359-364. Co-author: Ralph M. Gaedeke.

"*Franchisee Failure and Turnover: An Exploratory Study,*" *Southwestern Marketing Association*, Spring 1980. Coauthors: Ronald F. Bush and JoAnne Stilley.

"*Gap Found Between Employers' and Students' Perceptions of Most Desirable Job Attributes,*" *Marketing News*, May 22, 1989, p. 42.

"*Hard Selling and Soft Selling in Advertising,*" *Werbung Publicite*, March 1973, p. 31.

"*Health Care in the 21st Century: Marketing's Role in Vertically Integrated Delivery Systems,*" *Health Marketing Quarterly*, 1995, Vol. 12, No. 4, pp. 11-24. Coauthor: Ralph M. Gaedeke.

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"*How to Build More Productive Relations with Physicians,*" *California Pharmacist*, November 1985, Vol. XXXIII, No. 5, pp. 22-24, 26-28, 30-32, 34-35. Coauthor: Wayne Blackburn.

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"*Leadership Style: The Forgotten Element in Pharmacy Management,*" California Pharmacist, May 1984, Vol. XXXI, No. 11, pp. 12-19.

"*Learning to Negotiate Enhances, Expands Pharmacy Practice,*" California Pharmacist, November 1987, Vol. XXXV, No. 5, pp. 22-26.

"*Making Performance Appraisals Work,*" California Pharmacist, July 1983, pp. 22-28.

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"*Marketing in Not-For-Profit Organizations,*" Western AIDS, Spring 1980. Coauthor: Ralph M. Gaedeke.

"*Marketing in the Public Sector: An Examination of the Profitability of Health Care Providers,*" Journal of Health Care Marketing, Fall 1984, Vol. 4, No. 4, pp. 17-21. Coauthors: Ralph M. Gaedeke and Carl Gordon.

"*Marketing Intelligence,*" Werbung Publicite, March 1972, pp. 10-11.

"*Marketing Professional Services: Representation on the Client, The Public, or the Profession?*" Journal of Professional Services Marketing, Winter 1990, pp. 17-27. Coauthored with Ralph Gaedeke.

"*Marketing's Role In A Changing Pharmacy Environment,*" California Pharmacist, November 1986, Vol. XXXIV, No. 5, pp. 30-32, 35-37.

"*Marketing to the Mature Population: Developing Marketing Strategies,*" American Pharmacy, February 1991, pp. 52-59.

"*Marketing to the Mature Population: Evaluating the Attractiveness,*" American Pharmacy, January 1991, pp. 50-56.

PUBLICATIONS (CONTINUED)

"*Northern Mammoth Equipment Company,*" a case presented at the Intercollegiate Case Clearing House (ICCH), December 1975.

"*Obtaining Needed Capital: Sources and Processes for Pharmacy Financing,*" *California Pharmacist*, March 1983, pp. 9-14.

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"*Opening and Positioning a Pharmacy for Success, Part I,*" *American Pharmacy*, January 1989, pp. 55-60.

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"*Perceptions of Young Adults as to the Future of Health Care In the 21st Century,*" *Health Marketing Quarterly*, Vol. 17, No. 2, 1999, Coauthor: Ralph M. Gaedeke.

"*Pharmacy Management--Helping Employees Understand the Process,*" *California Pharmacist*, August 1979, pp. 10-12, 14, 18.

"*Pharmacy Organization: A Key Step to Improved Personnel Relations and Profits,*" *California Pharmacists*, August 1981, pp. 35-40.

Pharmacy Owner's Survival Kit for the 90s, California Pharmacists Association, 1992.

"*Practitioners' Perceptions of Ethical Standards in Marketing,*" *Journal of Professional Services Marketing*, 1993, Vol. 8, No. 2, pp. 11-26. Coauthors: Ralph M. Gaedeke and Craig A. Kelley.

"*Professional Conferences--The Leisure of the Theory Class?*" *Collegiate News and Views*, Vol. XXXI, No. 2, Winter 1977-78, pp. 1-3.

"*Providing Consumers with Choices In Perceived Quality and Price: An Exploratory Study of Utility Trade Fruit,*" *Journals of Food Products Marketing*, Vol. 5, No. 1, 1998, Coauthor: Ralph M. Gaedeke

"*Providing Incentives to Control Health Care Costs and Remain Competitive in the Marketplace,*" *Health Marketing Quarterly*, Vol. 16. No. 2, 1998. Coauthors: Jerry Royer, MD and Robert C. Johnson.

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Purchasing and Inventory Control, California Pharmacists Association, 1983.

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Attachment 3

DENNIS H. TOOTELIAN, Ph.D.
(916) 971-4096

Partial List Of Past and Present Clients

Aerojet (GenCorp)
Agricultural Issues Forum
American Cyanamid Corporation
American Pharmaceutical Association
American Society Of Association Executives
A. Teichert & Son
Brookside Hospital
California Board of Equalization
California Board of Prison Terms
California Conservation Corps
California Department of Developmental Services
California Department of Food and Agriculture
California Department of General Services
California Department of Insurance
California Department of Parks & Recreation
California Department of Pesticide Regulation
California Department of Social Services
California Department of Transportation (CALTRANS)
California Department of Veterans Affairs
California Employment Development Department (EDD)
California Franchise Tax Board
California Landscape Contractors Association
California Lodging Industry Association
California Office of Traffic Safety
California Olive Committee
California Peace Officers Association
California Pharmacists Association
California Prison Industry Authority
California Public Employees Retirement System (CalPERS)
California Society Of Association Executives
California Society of Enrolled Agents
California Table Grape Commission
California Tree Fruit Agreement
Council for Private Postsecondary and Vocational Education
Carson Valley Inn (Hotel & Casino)
Environmental Protection Agency (Pesticide Regulation)
Eskaton Health Services

First Union Bank Corporation
Fleishman-Hillard, Inc.
G.D. Searle & Company
Genesis Broadcasting Corporation (FM 102)
Harveys Resort Hotel/Casino
Hoechst-Roussel Pharmaceuticals
Janssen Pharmaceutic (Subsidiary of Johnson & Johnson)
John Asquaga's Nugget Hotel and Casino
Larkspur Landing Hotels
O.P.T.I.O.N. Care, Inc.
McKesson Corporation
McNeil Pharmaceutical (Subsidiary of Johnson & Johnson)
Merck & Company
Merrell Dow (Subsidiary of Dow Chemical)
Miles Laboratories, Inc.
National Apartment Association
National Association of Retail Druggists
Nestle USA, Inc.
Norwest Banks
PCS Health Systems, Inc.
Peace Officers Research Association of California
Pharmaceutical Care Network, Inc.
Raleys Senior Gold Rush Classic
Riker Laboratories (Subsidiary of 3M Corporation)
Sacramento Association of Realtors
Sacramento Blood Bank
Sacramento Cable
Sacramento County Assessors Office
Sacramento Municipal Utilities District (SMUD)
Sierra Nevada Memorial Hospital
Sparks Family Hospital
State Teachers Retirement System (STRS)
Syntex Laboratories
The Gold Rush Classic (Senior Tour golf event)
The Money Store Investment Corporation
Vision Services Plan
Wal-Mart
Western Association of Convention and Visitors Bureaus

Enclosure 2

DECLARATION OF DICK KURTH

I am presently the Deputy Director of Administrative Services for the City of Newport Beach. Prior to my present position, I was the Deputy Director of Finance. I attained my present position when additional functions were added to the Finance Department. The Finance Department is responsible for treasurer functions, as we do not have an elected treasurer. In my positions, I have been the staff member with primary hands-on responsibility for the investments of the City of Newport Beach in excess of 10 years. One of the primary focuses of my position is investments.

I am familiar with the requirement for Investment Reports, and it is one of my duties to make sure that the quarterly Investment Report is prepared and submitted to the City Council. Investment reporting is a dynamic area, and it has become more so during the past few years. Concerns keep being raised as to formats, as well as the quantitative material itself.

By way of summary, the situation is simply that the report required by the State is not a project that can be accomplished, as a practical matter, by working on it once a quarter.

In order to maximize revenue for the City of Newport Beach, investments are made on a daily basis. This is done by having part of the portfolio managed by investment advisors and part of it managed directly by City staff.

The City of Newport Beach has a large portion of its portfolio positioned approximately equally with four investment advisors. Those funds are placed with them that we believe we will not need for at least several months. This is intended to be the more stable part of the City's portfolio, and transactions adding or removing funds from each investment manager account are generally limited to three or four per year. Each of the advisors has a copy of the City's investment policy. They invest funds, communicate with us concerning those funds, and provide monthly reports. Two investment advisors make presentations directly to the City Council each quarter, so that each company will have reported twice each year. Also, advice is given concerning the types of investments that are needed.

Our office invests the funds that will be needed in a shorter time frame. The City of Newport Beach uses the Local Agency Investment Fund (LAIF) with the State of California, as well as other short-term investment vehicles for this purpose.

Newport Beach experiences a generally predictable annual cash flow and investment cycle. Given the timing of major revenue sources (primarily property taxes), and, to a certain extent, expenditures, the City can expect a net inflow of funds in the winter and spring. In the summer and fall, there is a net outflow of funds. As a result, the portfolio commonly varies by $8 million to $25 million each year, with the current maximum at about $65million.

When our cash flow needs are increasing and our LAIF and short term accounts are running low, we withdraw funds from the investment advisor accounts (usually in even million dollar increments). Funds are then moved back into those accounts when the cash intake is exceeding immediate expenditures and our short-term accounts are growing inappropriately large. We communicate with our investment advisors frequently regarding predicted movements of funds; that way the maturities of investment instruments can be matched with our projected needs.

We keep track of our cash flow position daily. We examine what checks are outstanding and try to determine how much will clear the checking account each day. In order to remain fully invested, any temporarily idle funds are removed from the account and placed in one of our interest bearing accounts. Payroll and general accounts payable check runs are made on alternate Fridays. There are also special payments, varying from a few dollars to over a million dollars, issued almost every day. We monitor all payments when they are made so as to maintain a running balance of checks outstanding. The ledger balance in the City's checking account is perpetually negative, to take advantage of interest on the "float", and maximize interest income. If we err in our determination of what will clear, we have a "no bounce" feature on our account, but we must pay interest to the bank. Accordingly, we attempt to be very accurate so as to increase our earnings, and not pay interest.

We maintain a daily treasurer's summary and a transactions log, which tells us what investments or transactions have occurred. These are reconciled every month with the City's general ledger, statements from investment advisors, statements from custodians, and primary checking account statements. Additionally, for every department or every account that the city has, we receive copies of those statements each month. Every time money is moved in or out of an investment account, it is reported on a daily basis.

On a monthly basis, we submit to the City Council a report on our investments. Quarterly, we present the required quarterly investment report, as well as a presentation by two of our investment advisors who submit additional detailed information.

Preparation of the quarterly Investment Reports would be an extremely unwieldy and difficult process if the daily and monthly work were not maintained in between time. Catching up, if the daily and monthly preparation work was not accomplished ahead of time, would take much more time and effort.

Another factor is that various investments have ratings, and if the ratings change, the portfolio may be out of compliance with policy. The City's investment policy is conservative, and if the investment portfolio falls out of compliance, the policy specifies what must be done. For example, if a bond rating falls from A to B+, it might no longer be in compliance. However, we are not required to immediately hold a fire sale and dispose of the security. We are required to address the issue and determine the likelihood of the change in rating being temporary or permanent. Since bond issue ratings can change on a daily basis, this is something that needs to be closely watched. Although

bond ratings affecting Newport Beach's portfolio compliance do not occur frequently, it has occurred and this is an issue which must be watched.

Additionally, we are required to report market value and market returns. This is a relatively new requirement. Both market value information and book value information--as well as total return information--are worthwhile, but they can be confusing. Market value information can be especially misleading if it is not adequately explained, since market values and especially market based returns can fluctuate significantly. It is important information for comparison purposes, and in order to have a feel for what would happen if investments needed to be liquidated on short notice. But, the cornerstone of our investment policy is to match investment maturities with the projected time the funds will be needed. If we will need the funds in six months, we do not invest them in a security that matures in four years, even though the rate of return is usually higher. Therefore, absent an unforeseen emergency, we maintain the ability to hold a given security to maturity, if we choose to do so, no matter what the market is doing. Therefore in our case, the best predictor of how much we are going to earn and the value of the portfolio is yield to maturity at cost.

As a result, the quarterly Investment Report required by the State is a more complex undertaking than might appear at first blush. Due to the necessity of ascertaining whether the portfolio is in compliance with the investment reports and the need for cash flow projections, the quarterly Investment Report is not a point in time report; rather, it is a dynamic documents, the requirements of which are assembled on a daily basis.

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration is executed this 4th day of October, 2000 at Newport Beach, California.

Dick Kurth, Deputy Director
Administrative Services

Enclosure 3

DECLARATION OF VEE-JAY BRANN

I, Vee-Jay Brann state that I am the Treasurer of the County of Kings. I have personal knowledge of the facts stated herein, and if called upon to testify, I could do so competently.

As the Treasurer for the County of Kings, I am responsible for the investments of the County of Kings, and oversee the preparation of the Investment Report.

In order to prepare the Investment Report, it is necessary to have subsidiary ledgers. From my knowledge, subsidiary ledgers mean different things to different local governments. In some local governments, it means a link to the software accounting system; in other locales, there is a separate investment portfolio system. However, no matter what type of system is used, the investment portfolio must always be balanced back to the accounting system. In Kings County, we use a daily balance sheet, which lists the entire position of our treasury, for our cash position, deposits and withdrawals and investments, which all equals the funds we have under management.

Generally, public entities keep their deposits fully invested. When other entities deposit money with us, it is not only for their convenience, because we do the banking and accounting, but we earn interest on the funds as well. The greater percentage of funds invested, the higher returns will be. Investment earnings can constitute a significant portion of a local government's budget.

Property taxes are received in April and December of each year. These funds, together with receipts from the State, must be managed in such a way that they will provide necessary funding for the budget throughout the year. The State of California will tell us with a 3 month advance notice, of when we can expect to receive certain funds, but not the amount we will be receiving. Thus, it is important to do cash flow forecasting and be fully invested to maximize returns.

When deposits are received, if the cash is not immediately needed, it is invested. One of the known receipts, which can be used for budgeting, is interest, because with each investment, we know when there will be a return and the amount of it. In order to maximize returns, Kings County has, on average, 99.7% of its available funds invested.

This mandate requires that there be liquidity projections on a 6 month basis. To do liquidity projections, you must match disbursements with receipts. You can only use known receipts and disbursements. Because the total amount of the State's payments are unknown, it can only be done on an historical basis. For example, the State will notify us as to when we will be receiving funds for three months, such as July, August and September. As we do not know the dollar amounts, we are advised to the dates of receipts. We use this information in the cash forecasting and for investment decisions – if the state has certain funds we know are coming in on a specific date and it will cover our necessary disbursements, we will not have an investment instrument maturing at the same time.

It should be noted that not only does the County have funds on deposit, but we have school districts as well, and with our treasury, there are 14 such school districts. They can disburse funds to vendors at any time during the year. Additionally, special districts are depositors. In Kings County, there are large special districts that can, for example, make a $1,000,000 withdrawal to purchase water. The unknown expenditures is another reason why you need to maintain liquidity. On average $1.5 million is paid through the Kings County treasury daily as disbursements. We will have millions of dollars daily outstanding in checks. For these other entities, we function very much like a bank. If they have funds on deposit, they are able to withdraw them. Because we place longer term investments, we have to maintain liquidity to maintain the draws of the various depositors with the treasury.

Another reason that withdrawals can be made, is if there are large constructions projects ongoing for which contractors need to be paid. In such an event, there could be $500,000 payments to contractors for services provided.

Thus, in forecasting cash requirements and to maintain liquidity, we have known disbursements and regularly anticipate them. However, we have to examine what checks are outstanding to be able to cover them, and have adequate liquidity for the unanticipated withdrawals, which are made by depositors to the county's treasury.

Additionally, in order to make sure there is appropriate cash flow, you have to check maturities, and verify them on a daily basis. This is because, due to investments, you are typically making investments on a daily basis. Therefore, maturities are critical. You need to make sure that your investments are in compliance with state law regarding the types, credit quality, and dollar amounts of investments you can make, and that your investments are in compliance with the Investment Policy.

When an investment is made you receive a confirmation from the broker as to what was purchased and it must be reconciled against the purchase order. Typically, you purchase a security from a broker and they send the security to the custodian. The county wires the funds to the custodian. The custodian verifies the correct security was delivered before paying the broker. Then, monthly, you have to reconcile the new investment positions on the custodian's statement to the county's portfolio holdings. This is necessary for your compliance reports: You must make sure that you do have with your custodian what you purchased through your broker.

You must also reconcile the total funds that you have invested with the total funds available and total funds in the treasury. This also means that you must reconcile your cash position: in cash, in the bank, or invested. This must reconcile with the total position of the treasury daily.

There are State restrictions regarding: the different types of investments authorized, the maximum investment that you can make in each instrument type, the maximum maturity

you can buy in each instrument type, the maximum exposure to any one issuing entity, and in some cases, also purchase restrictions depending upon the type of investment.

There are restrictions on repurchase agreements, which is an instrument where you have instruments purchased for a fixed period of time, and at a set point in time in the future, you will trade and settle out. This is done more than once. Orange County had problems with reverse repurchase agreements, where you place securities with a third party, take a loan against it, and purchase additional instruments, which you then leverage. This type of hedging works in a market with falling interest rates, as you earn more on the interest rate you are being paid on the instrument than the cost of credit. However, Orange County was over-leveraged. The state now restricts these instruments to 10% of the portfolio, rather than the 300% or so which was being done with the Orange County problem.

Additionally, there is the Local Agency Investment Pool, which is operated by the State Treasurer. Depositing governments are allowed to put up to $30,000,000 with the pool for a short period of time, and different entities have differing amounts on deposit.

The Investment Report is not a point in time document. Rather, it shows the entire portfolio at this point in time and demonstrates that you are in compliance not only with your own investment policy, but also with the Government Code. If you are not in compliance on a given date, you would have to report your out of compliance condition, which is a requirement of the law. You are required to be in compliance at all times, not just on the date on which the report is due. If this were merely a point in time document, you would not have to be in compliance on all the days of the quarter, as the law now mandates. This requirement to be in compliance mandates daily monitoring.

It is possible to be out of compliance because of a change in credit ratings. If you purchase an instrument and the credit rating changes, you could be out of compliance. If you purchase too much of a particular type of instrument, you could be out of compliance. If you have an instrument with too long of a maturity, you would be out of compliance. With a reverse repurchase agreement, if one instrument matures prior to reinvestment, it could throw your portfolio out of compliance because of the remaining types of instruments and investments in the portfolio.

The mandate requires that you report not just the basis in the investment, but also the par value as well as the market value. Book value is your cost for the investment. Par value is the value upon maturity. Market value is the value which you would receive if you were to sell the investment at that time. The mandate requires us to mark the portfolio to market, even if we are not contemplating selling a given instrument prior to maturity. If the book value is over market value, you have a factor of less than one. If book value is less than market, you have a factor of more than one and a profit. Additionally, if you purchase an instrument at a value that is different from par, you must amortize the difference to the maturity/call date, and compute the yield to the maturity/call date.

This is important if you understand how the market works regarding market value and yield. In the bond market, if the interest rate goes down, the market value of an investment with a higher interest yield will go up, as it is more valuable than others with the lower present market yield. Conversely, if interest rates go up, investments which pay less interest are worth less, and thus the market value goes down. This is the market value in comparison with the par value, which is the value of the security at maturity (or call). If you sell an instrument with a lower interest rate when interest rates are rising, you have a loss. However, in such a situation if you can hold the instrument to maturity, you receive the par value. If the prices fluctuate downward, as long as you don't have to sell the instrument, you do not have to recognize the loss as you have held to maturity.

Some larger governmental entities, such as the City and County of San Francisco, actively trade their portfolio to maximize investment income. Smaller entities, such as Kings County, generally try to hold their instruments to maturity. Typically, counties with billion dollar portfolios actively trade, and it doesn't have to be a large county to have a billion dollar portfolio. Kern County, for example, has a billion dollar portfolio. Los Angeles and Orange Counties have huge portfolios. The infamous Orange County Treasurer, Mr. Citron, had $7 billion in investments in 1993.

Various factors can influence the values. When Alan Greenspan changes the federal funds rate, the change interest rates can affect the value of the portfolio.

The state now allows you to have 10% of your portfolio in reverse repurchase agreements. You take an instrument that you own and place it with a broker. You use the security as collateral to purchase another instrument. You are using your instrument to get money back to invest. Hopefully, the yield on the second instrument purchased will be greater than the cost for obtaining the funds from your broker, and thus make money on the spread, or difference in interest rates. However, if Alan Greenspan increases interest rates, the collateral value on what you have deposited with your broker decreases. If you were over leveraged, you would receive a collateral call for either more funds or for more collateral. This is what caused Mr. Citron's problem. He was multiply leveraged. Every time he bought an instrument, he would place it with a broker, obtain funds against it and purchase a new instrument. This works as long as interest rates are decreasing. However, when interest rates started to increase, you have to put up more collateral for the loan, and the spread between the interest you pay on the funds loaned to you and the interest you receive on the new instrument decreases, or can actually be negative.

Another factor which can impact your Investment Policy and whether or not you are in compliance are major court cases, like the Cigarette cases. If you are holding corporate paper for these companies, there could be an adverse court decision which could result in Moody's, Standard & Poor's, Fitch's or another rating entity to downgrade the commercial paper. This would then necessitate that you review your Investment Policy to see if you can hold the paper until maturity, or if you have to sell the instrument at a loss.

Additionally, your portfolio size can fluctuate, which can also affect whether your portfolio is in compliance. For example, say you have a portfolio with $100 million, and you are allowed to have 30% in commercial paper, that is $30 million. If you have $10 million go out in payment to vendors, then your portfolio is only $90 million. If you have $30 million remaining in commercial paper, you are now out of compliance.

In order to stay fully invested and maximize returns, we invest funds every night. Every day, we check to see the amount of checks we have outstanding, and estimate what will clear. For example, we may have $7 million in checks outstanding, yet leave only $1.5 million in our checking account because historically, not everything will clear on the same day. We anticipate what we can have invested, and leave in a money market account over night. If we can make more on what we have in our checking account, because we do earn a small amount on those funds, it makes more sense to invest it. However, if we guess wrong, we overdraw our account and pay the bank prime interest plus. Thus, we try and be accurate in our estimates as to the amount we need to keep in our account to maximize returns.

With Investment Reports, we are now required to report market value. We have to pay our custodian to provide us with the market value which is now required by Investment Reports. The report must also state not only the market value, but the source of the valuation. Some entities have had to go to a third party to obtain this information.

Some local governments contract to have their compliance reporting performed. After the Orange County problem, Kings County contracted to have a third party do the Investment Reports and provide the information to the Board of Supervisors and the Oversight Committee. Because an outside firm was doing the reporting, the outside auditor could verify, and not have to audit the county system.

Thus, when examining the entire concept of Investment Reports, it becomes clear that it is a daily activity, not just a snapshot every quarter. This is because investments are made on a daily basis. Funds flow in and out of the portfolio on a daily basis. Changes in portfolio composition, interest rates, maturities, credit ratings and other factors may cause the portfolio to come out of compliance at any time. Thus, the subsidiary ledgers and their preparation and reconciliation are an inherent portion of the Investment Report mandate.

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration is executed this 11th day of October, 2000 at Hanford, California.

Vee-Jay Brann
Kings County Treasurer

EXHIBIT G

COUNTY OF LOS ANGELES
DEPARTMENT OF AUDITOR-CONTROLLER

KENNETH HAHN HALL OF ADMINISTRATION
500 WEST TEMPLE STREET, ROOM 525
LOS ANGELES, CALIFORNIA 90012-2766
PHONE: (213) 974-8301 FAX: (213) 626-5427

J. TYLER McCAULEY
AUDITOR-CONTROLLER

February 28, 2001

Ms. Paula Higashi
Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, California 95814

Dear Ms. Higashi:

Review of State Controller's Office Comments
County of Los Angeles Incorrect Reduction Claim
Investment Reporting, Chapter 783, Statutes of 1995

We submit and enclose herein our review of the State Controller's Office [January 18, 2001] comments on the subject incorrect reduction claim.

Leonard Kaye of my staff is available at (213) 974-8564 to answer questions you may have concerning this submission.

Very truly yours,

J. Tyler McCauley by

J. Tyler McCauley
Auditor-Controller

JTM:JN:LK
Enclosures

CC: Shawn D. Silva, SCO Staff Counsel

Review of State Controller's Office Comments
County of Los Angeles Incorrect Reduction Claim
Investment Reporting, Chapter 783, Statutes of 1995

The State Controller's Office [SCO], in their January 18, 2001 comments on Los Angeles County's [County] incorrect reduction claim[1], maintains that investment transactions need not be posted daily to render investment reports, required under subdivisions (b)(1), (2) and (3) of Section 53646 [of the Government Code], and, even if daily posting is required, such activities are not reimbursable because these requirements are also found in prior law or 'good business practice'.

The County maintains otherwise.

Prior law and 'good business practice' did not mandate frequent investment data input and monitoring; and, most counties reported only a gross total dollar value of investment purchases and sales. Under prior law, such practices were lawful. Now, such practices are not lawful.

Now, Government Code Section 53646(b)(1) requires that the Treasurer prepare a quarterly report of investments that includes the type of investment, issuer, date of maturity, par and cost amounts of all securities held by the local agency.

Now, Government Code Section 53646(b)(2) requires that the investment report shall state compliance of the portfolio to the statement of investment policy or manner in which the portfolio is not in compliance.

Now, Government Code Section 53646(b)(3) requires a determination that expenditure requirements could be met for six months[2]. Without a

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[1] On August 31, 2000, the County filed an incorrect reduction claim [IRC] with the Commission on State Mandates [Commission] seeking reinstatement of investment reporting costs reduced by SCO. County's three-volume IRC detailed why SCO's reductions of $327,187, or 99% of costs claimed for 1997-98, and $301,750, or 98% of costs claimed for 1996-97, were arbitrary, capricious and contrary to law.

[2] In order to comply with this unique requirement, a comprehensive cash flow analysis must be performed. Daily investment data must be input, monitored and analyzed in order to project deposits, withdrawals and investment maturities.

comprehensive cash flow analysis, it would be impossible to determine if expenditure requirements could be met for six months.

Legislative Intent

In 1995, following investment losses in Orange County, the Legislature found local governments' investment reporting to be inadequate. Accordingly, specific investment reporting requirements were enacted on October 12, 1995 in Chapter 783, Statutes of 1995. Thereafter, the freedom of local officials to report only brief or summary investment information was gone.

Under prior law, the county board of supervisors need not have been informed of the investment policies followed by the county treasurer. However, now, in subdivision (a) of Section 53646, the treasurer is required to annually render to the legislative body of the local agency, and any oversight committee, a statement of investment policy. Also, local agencies are now responsible for reporting compliance of their investment portfolio with their statement of investment policy [subdivision (b)(2) of Section 53646].

The Legislature's intent here is clear. In a companion bill, Chapter 784/95, enacted on October 12, 1995, the same day the test claim legislation [Chapter 783/95] was enacted, Section 53600.1 [of the Government Code] declared "that the deposit and investment of public funds by local officials and local agencies is an issue of statewide concern". New local investment reporting requirements were thus set and specified in subdivisions (b)(1), (2) and (3) of Section 53646, as added and amended by Chapter 783/95, to explicitly mandate that:

> "(b)(1) The treasurer or chief fiscal officer shall render a quarterly report to the chief executive officer, the internal auditor, and the legislative body of the local agency. The quarterly report shall be so submitted within 30 days following the end of the quarter covered by the report. Except as provided in subdivisions (e) and (f), this report shall include the type of investment, issuer, date of maturity par and dollar amount invested on all securities, investments and moneys held by the local agency, and shall additionally include a description of any of the local agency's funds, investments, or programs, that are under the management of contracted parties, including lending programs. With respect to all securities held by the local agency, and under management of any

outside party that is not also a local agency or the State of California Local Agency Investment Fund, the report shall also include a current market value as of the date of the report, and shall include the source of this same valuation.

(2) The quarterly report shall state compliance of the portfolio to the statement of investment policy, or manner in which the portfolio is not in compliance.

(3) The quarterly report shall include a statement denoting the ability of the local agency to meet its pool's expenditure requirements for the next six months, or provide an explanation as to why sufficient money shall, or may, not be available."

Detailed Reporting Required

Complying with the above mandates requires detailed, daily investment data input, monitoring and analysis. As noted by Joseph H. Spillane, Los Angeles County's Assistant Treasurer and Tax Collector, in his declaration found in Tab 1 of County's IRC, "Government Code Section 53646 is very specific as to the requirements imposed by the Legislature".

In addition, Mr. Spillane notes that "Government Code Section 53646 requires reporting of securities held throughout the reporting period and that to conclude otherwise, one would have to believe that the Legislature was only concerned with investment activities four days per year".

Also, the test claim legislation, Section 53646, is the only legislation that requires a meaningful report to be developed by local treasurers, detailing daily investment and cash flow activities to ensure that concentration limits, collateral requirements and creditworthiness are met in accordance with the agency's investment policy throughout the reporting period.

Accordingly, Mr. Spillane concluded that "the State Controller's Office (SCO) reductions of $327,187, or 99% of costs claimed for 1997-98, and $301,750, or 98% of costs claimed for 1996-97, were arbitrary, capricious and contrary to law".

Other Findings

Supporting the County's position that frequent data input and analysis is necessary to comply with subdivisions (b)(1), (2) and (3) of Section 53646 are other findings --- the declarations of Dick Kurth, Deputy Director of Administrative Services for the City of Newport Beach and Vee-Jay Brann, Kings County Treasurer [which are attached to SCO's supplemental comments].

Mr. Brann's declaration supports the County's position that subsidiary ledgers or daily transaction tracking is an "inherent portion of the Investment Report mandate". [Brann declaration, page 5]

In addition, the County concurs with Mr. Brann's conclusion that "[i]n order to prepare the Investment Report, it is necessary to have subsidiary ledgers .... a link to the software accounting system [or] ... a separate investment portfolio system". [Brann declaration, page 1].

The County also agrees with Mr. Kurth's description of investment reporting activities mandated under the subject law. In particular, the County concurs with Mr. Kurth's observation that:

> "Preparation of the [mandated] quarterly Investment Reports would be an extremely unwieldy and difficult process if the daily and monthly work were not maintained in between time. Catching up, if the daily and monthly report preparation work was not accomplished ahead of time, would take much more time and effort." [Kurth declaration, page 4]

Therefore, both the Kurth declaration and the Brann declaration support the County's position that Section 53646 requires frequent, daily data input, monitoring and analysis.

Finance's Findings

The State Department of Finance supports the County's position that performing daily transaction tracking or maintaining subsidiary ledgers necessary to render specified reports is a reimbursable activity.

The State Department of Finance has opined that "the preparation and maintenance of a subsidiary portfolio ledger system" is part of the reimbursable activities ... [as long as these activities are] not a formal audit performed by an auditor". [State Department of Finance letter to Paula Higashi, Commission's Executive Director, of November 22, 2000, is attached as Exhibit 1].

In the case of Los Angeles County, none of its claimed costs were audit costs, and, therefore, under Finance's opinion, the County's claimed data input and analysis costs are reimbursable.

SCO's Claiming Instructions

SCO's own claiming instructions provide for reimbursing daily tracking of investments. SCO indicates, on page 1 of these instructions, issued in January of 1998, attached in Tab 6 of Volume 1 of County's Incorrect Reduction Claim, filed on August 30, 2000, that:

> "Government Code section 53646, subdivsion (a), (b), and (e), as added and amended by Chapter 783, Statutes of 1995, Chapter 156 and 749, Statutes of 1996, requires the treasurer or chief fiscal officer to render an annual statement of investment policy and a quarterly report of investments, containing specified information to the legislative body and oversight committee, as specified."

On page 3, SCO explicitly tells claimants to compile and accumulate all data necessary for rendering the investment reports, as follows:

> "(a) Accumulate and compile data necessary to prepare the quarterly reports of investments, as required in Government Code section 53646, subdivision (b)(1), (2), (3), and/or (e).

Further, SCO claiming instructions do not indicate that compiling and accumulating daily investment data is prohibited. To the contrary, as noted above, daily investment data input, monitoring and analysis is necessary in rendering the required investment reports.

Commission Found Necessary Daily Activities to be Reimbursable

The Commission found that daily investment data input, monitoring and analysis, including maintaining subsidiary ledgers, necessary to render the investment reports, required under subdivisions (b)(1), (2) and (3) of Section 53646, are reimbursable activities.

This point was so important that Commissioner Dave Cox pulled the Investment Reports decision off the consent calendar at Commission's November 20, 1997 hearing in order to note "his concern that the requirements should be broad enough to allow discretion in the reporting aspect". [Hearing minutes, in pertinent part, attached as Exhibit 2, on page 1.] The minutes further indicate that:

> "Gary Hori, Legal Counsel to the Commission, responded that, if a subsidiary ledger is necessary to accomplish the documents for subdivision (b)(1), (2) and (3), it would be subsumed in those subdivisions and subdivision (b)(4) would not stand on its own." [Hearing minutes, pages 1-2.]

At the November 20, 1997 hearing of the matter, Mr. Hori explained that "subdivision (b) (4) [which permits but does not require the use of subsidiary ledgers], on its face is deemed not reimbursable". [Hearing transcript, in pertinent part, attached as Exhibit 3, on page 6.] However, Mr. Hori notes, that maintaining such ledgers are reimbursable activities "if a subsidiary ledger is necessary to accomplish the documents for (b)(1), (2) and (3) ... [then] it would be subsumed in [the required and reimbursable activities found in] (b) (1), (2) and (3); and (b) (4) [permitting but not requiring the use of subsidiary ledgers and] would not stand on its own". [Hearing transcript, page 6.]

Therefore, the question here is whether a subsidiary ledger or daily transaction tracking is necessary to accomplish the documents for (b)(1), (2) and (3) in Los Angeles County's particular case. And the only evidence in the record, regarding Los Angeles County's investment program, unambiguously supports a finding that performing daily transaction tracking is necessary to render investment reports pursuant to subdivision (b)(1), (2) and (3) of Section 53646 and, as such, is reimbursable as claimed herein.

SCO's 'Business Practice' Evidence is Not Relevant

Shawn B. Silva, SCO's Staff Counsel, does not support its position that frequent investment data input, monitoring and analysis is not necessary to render investment reports set forth in subdivisions (b)(1), (2) and (3) of Section 53646 with their 5 page academic treatise on "Data Entry And Monitoring Practices For Business Operations", prepared by Dennis Tootelian, Professor of Marketing, California State University at Sacramento[3]. [Silva letter, page 1.]

Professor Tootelian's remarks are not relevant here because he does not address the issue here: the frequency of investment data input, monitoring and analysis which is necessary to render Section 53646 investment reports. Professor Tootelian plainly admits this and indicates that:

> "It is important to note that the scope of this analysis did not include any possible legal requirements that might exist for such data entry and monitoring." [Tootelian declaration, page 2, emphasis added.]

Professor Tootelian, then, simply did not consider Section 53646. Further, he did not consider subsidiary ledgers or "investment operations undertaken by particular organizations". [Tootelian declaration, page 2] Only the "essential elements" of investing for "nearly every business" were discussed. [Tootelian declaration, page 2]

Therefore, Mr. Silva's reliance on Professor Tootelian's declaration is misplaced. Certainly, Professor Tootelian did not say, as claimed by Mr. Silva, that "the investment position of the County [of Los Angeles] should be reviewed no less than once a month, preferably once a week, a frequency far greater than that imposed by Section 53646". [Silva letter, page 1]. Indeed, as noted above, Professor Tootelian did not consider Section 53646 or "any possible legal requirements".

[3] Mr. Silva also attaches declarations of Dick Kurth, Deputy Director of Administrative Services for the City of Newport Beach and Vee-Jay Brann, Kings County Treasurer. While his purpose here appears to be to support his position, just the opposite occurs as both Mr. Kurth and Mr. Brann indicate that frequent or daily data input and analysis is necessary in order to render Section 53646 reports.

Therefore, the only relevant evidence and findings supports the County's position that frequent investment data input, monitoring and analysis is necessary to render investment reports set forth in subdivisions (b)(1), (2) and (3) of Section 53646.

Conclusion

Daily investment data input, monitoring and analysis which is necessary to render investment reports pursuant to subdivision (b)(1), (2) and (3) of Section 53646 is reimbursable.

Substantial evidence and findings, that daily investment data input, monitoring and analysis is necessary to render investment reports pursuant to subdivision (b)(1); (2) and (3) of Section 53646, was provided. There is no relevant evidence or finding to the contrary.

Therefore, prompt reinstatement of the County's mandated investment reporting costs, including its daily investment input, monitoring, and analysis costs, totaling $327,187 for 1997/98 and $301,750 for 1996/97, is required.

COUNTY OF LOS ANGELES
DEPARTMENT OF AUDITOR-CONTROLLER

KENNETH HAHN HALL OF ADMINISTRATION
500 WEST TEMPLE STREET, ROOM 525
LOS ANGELES, CALIFORNIA 90012-2766
PHONE: (213) 974-8301 FAX: (213) 626-5427

J. TYLER McCAULEY
AUDITOR-CONTROLLER

Celebrating Los Angeles County 150TH 1850 2000

Review of State Controller's Office Comments
County of Los Angeles Incorrect Reduction Claim
Investment Reporting, Chapter 783, Statutes of 1995

Declaration of Leonard Kaye

Leonard Kaye makes the following declaration and statement under oath:

I, Leonard Kaye, SB90 Coordinator, in and for the County of Los Angeles, am responsible for filing test claims , reviews of State agency comments, Commission staff analyses, and for proposing parameters and guidelines (Ps&Gs) and amendments thereto, and for filing incorrect reduction claims, all for the complete and timely recovery of costs mandated by the State. Specifically, I have prepared the attached review of State Controller's Office [January 18, 2001] comments on the subject Incorrect Reduction Claim, seeking reinstatement of the $327,187 reduction of the County's 1997/98 reimbursement claim and of the $301,750 reduction of the County's 1996/97 reimbursement claim.

Specifically, I declare that I have examined the County's State mandated duties and resulting costs, in implementing the subject law, and find that such costs as set forth in the attached document, are, in my opinion, reimbursable "costs mandated by the State", as defined in Government Code section 17514:

> " ' Costs mandated by the State' means any increased costs which a local agency or school district is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution."

I am personally conversant with the foregoing facts and if so required, I could and would testify to the statements made herein.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct of my own knowledge, except as to the matters which are therein stated as information or belief, and as to those matters I believe them to be true.

2/28/01; Los Angeles, CA — L. Kaye

Date and Place — Signature

DEPARTMENT OF FINANCE
OFFICE OF THE DIRECTOR

GRAY DAVIS, GOVERNOR
STATE CAPITOL ■ ROOM 1145 ■ SACRAMENTO CA ■ 95814-4998 ■ WWW.DOF.CA.GOV

November 22, 2000

Ms. Paula Higashi
Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

Dear Ms. Higashi:

Per your letter of October 25, 2000, the Department of Finance has reviewed the proposed amendments to parameters and guidelines for costs incurred under Chapter Nos. 783, Statutes of 1995 (SB 564, P. Johnston, et al.), 749, Statutes of 1996 (SB 109, Kopp), and 156, Statutes of 1996 (SB 864, W. Craven, et al.), "Investment Reports". We concur with the proposed changes to include the preparation and maintenance of a subsidiary portfolio ledger system as part of the reimbursable activities with the following assumption.

The claimant included "audit and reconcillation of the portfolio for preparation of investment reports" as part of preparation and maintenance of a subsidiary portfolio ledger system. We understand the mandate does not require a formal audit to be performed. Therefore, our concurrence of the proposed amendments is based on the assumption that "audit" as used in this context refers to internal verification/review, not a formal audit performed by an auditor.

As required by the Commission's regulations, we are including a "Proof of Service" indicating that the parties included on the mailing list which accompanied your October 25, 2000, letter have been provided with copies of this letter via either United States Mail or, in the case of other state agencies, Interagency Mail Service.

If you have any questions regarding this letter, please contact Veronica Chung-Ng, Principal Program Budget Analyst at (916) 445-5332 or James Lombard, State Mandates Claims Coordinator for the Department of Finance, at (916) 445-8913.

Sincerely,

Carl Rogers

Carl Rogers
Program Budget Manager

Attachments

MINUTES
COMMISSION ON STATE MANDATES
Thursday, November 20, 1997
9:30 a.m.
State Capitol, Room 437
Sacramento, California

Present: Chairperson Robin Dezember
Representative of the Director of the Department of Finance
Member Bruce VanHouten
Representative of the State Treasurer
Member Richard Chivaro
Representative of the State Controller
Member Terry Rivasplata (arrived at 9:35 a.m.)
Representative of the Director of the Office of Planning and Research
Member Dave Cox
Representative of County Boards of Supervisors
Member Joann Steinmeier
Representative of School Boards

Absent: Member Albert Beltrami
Public Member

There being a quorum present, Chairperson Dezember called the meeting to order at 9:30 a.m. Paula Higashi, Executive Director to the Commission, noted for the record that Members Beltrami and Patton were attending California State Association of Counties' (CSAC's) annual conference and were therefore absent for today's meeting. Mr. Rivasplata and Mr. VanHouten were the designees for the Director of the Office of Planning and Research and the State Treasurer, respectively.

Consent Calendar: Action On Mandate Claims

Item 3 *Investment Reports* – CSM 96-358-02
County of Santa Clara
City of Newport Beach
Government Code Section 53646
Chapter 783, Statutes of 1995; Chapter 156, Statutes of 1996
Chapter 749, Statutes of 1996

Item 5 *Prisoner Parental Rights* – CSM 4427-PGA-1
County of San Bernardino, Claimant/Requester
Penal Code Section 2625
Chapter 820, Statutes of 1991

The Consent Calendar consisted of Items 3 and 5. Regarding Item 3, Member Cox noted his concern that the requirements should be broad enough to allow discretion in the reporting aspect. Gary Hori, Legal Counsel to the Commission, responded that, if a subsidiary ledger is necessary to accomplish the documents for subdivisions (b)(1), (2) and (3), it would be

subsumed in those subdivisions and subdivision (b)(4) would not stand on its own. Member Cox was satisfied with that clarification and moved for adoption of the consent calendar. Member Steinmeier seconded the motion, which passed unanimously.

Postponements

Paula Higashi announced that Item 1 was postponed to the December hearing because the parties and the members who voted on the matter would be present at that hearing. Items 4 and 6 were also postponed to the December hearing.

Proposed Parameters and Guidelines

Item 2 *Pupil Suspensions From School* - CSM-4456
San Diego Unified School District
Education Code Sections 48900, 48900.2 and 48911
Chapter 965, Statutes of 1977; Chapter 668, Statutes of 1978;
Chapter 73, Statutes of 1980; Chapter 318, Statutes of 1982;
Chapter 498, Statutes of 1983; Chapter 536, Statutes of 1984;
Chapter 318, Statutes of 1985; Chapter 856, Statutes of 1985;
Chapter 1136, Statutes of 1986; Chapter 134, Statutes of 1987;
Chapter 383, Statutes of 1987; Chapter 1306, Statutes of 1989;
Chapter 909, Statutes of 1992.
Amended to Include:
Education Code Sections 48900.3 and 48900.4
Chapter 146, Statutes of 1994; Chapter 1017, Statutes of 1994

Paula Higashi introduced the item and noted that the proposed parameters and guidelines were based on staff's review of claimant's proposals and state agency comments. The three areas of dispute remaining are in Sections 1 and 2, which include staff's language, and Section 5, which includes language objected to by the State Controller's Office. The latest draft was released in late October. No comments had been received by staff until November 17 when Girard & Vinson, representing Mandated Cost Systems, submitted a late filing. This filing was not served upon the test claim parties as required by Commission regulations. Staff faxed copies to the claimant and interested parties. [Member Rivasplata arrived.] Staff recommended the Commission approve the parameters and guidelines, as presented.

Jim Cunningham, of the San Diego Unified School District, noted his disapproval of the delays on this claim. He further submitted that many of staff's language changes were not substantive, but were instead the preferred style of the staff. He added that Commission regulations require the claimant to prepare the draft parameters and guidelines, but did not require a particular form or style.

Mr. Cunningham suggested that Section 1 was intended to provide a background explanation. He believed the claimant's draft offered a user-friendly explanation to a layman. He did not agree that claimant's should be required to use the same language that is used in the statement of decision in the parameters and guidelines. Again, in Section II, Mr. Cunningham submitted that claimant's proposed language was easier to read than staff's.

PUBLIC HEARING

COMMISSION ON STATE MANDATES

--oOo--

TIME: 9:30 AM
DATE: Thursday, November 20, 1997
PLACE: State Capitol, Room 437
Sacramento, California

--oOo--

ORIGINAL

REPORTER'S TRANSCRIPT OF PROCEEDINGS

--oOo--

Reported By: DANIEL P. FELDHAUS
CSR #6949, RDR, CRR

A P P E A R A N C E S

COMMISSIONERS PRESENT

ROBIN J. DEZEMBER, *Chairperson*
State Department of Finance

RICHARD CHIVARO
State Controller's Office

DAVE COX
County of Sacramento
Board of Supervisors

TERRY RIVASPLATA,
State Office of Planning and Research

JOANN STEINMEIER
School Board Member

BRUCE VANHOUTEN
State Treasurer's Office

STAFF PRESENT

PAULA HIGASHI, Executive Director
Commission on State Mandates

GARY D. HORI, Legal Counsel
Commission on State Mandates

SHAWN SILVA, Staff Member
Commission on State Mandates

ALSO PRESENT

JIM CUNNINGHAM
San Diego Unified School District

CINDY CHAN
State Department of Finance

I N D E X

BE IT REMEMBERED that on Thursday, November 20, 1997, commencing at the hour of 9:30 a.m., thereof, at the State Capitol, Room 437, Sacramento, California, before me, DANIEL P. FELDHAUS, CSR #6949, RDR and CRR, the proceedings were as follows:

--oOo--

MR. DEZEMBER: Good morning. I'm Robin Dezember. I'm Chief Deputy Director, State Department of Finance, sitting on this Commission under the delegation of Craig Brown, the Director of Finance. And I'd like to call to order the meeting of the Commission on State Mandates.

Ms. Higashi, would you please call the roll?

MS. HIGASHI: Yes.

Mr. Chivaro?

MR. CHIVARO: Present.

MS. HIGASHI: Mr. Cox?

MR. COX: Present.

MS. HIGASHI: Mr. Rivasplata?

Ms. Steinmeier?

MS. STEINMEIER: Here.

MS. HIGASHI: Mr. Vanhouten?

MR. VANHOUTEN: Present.

MS. HIGASHI: Mr. Dezember?

MR. DEZEMBER: Present.

MR. COX: The "presents" have it, Mr. Chairman.

MR. DEZEMBER: Thank you very much.

I will note, too, that we started exactly at 9:30.

MR. COX: Absolutely. Thank you, sir.

MS. HIGASHI: Mister --

MR. DEZEMBER: And we do have a quorum.

MS. HIGASHI: Yes. Mr. Dezember, I'd like to read into the record, Mr. Beltrami and Ms. Patton are attending CSAC's annual conference this week, which is why they're absent from the meeting. And Mr. Rivasplata, who has not yet joined us, he will be the designee for the Director of the Office of Planning and Research. And Mr. Vanhouten is designee of the State Treasurer.

MR. DEZEMBER: Thank you.

And what is our first item?

MS. HIGASHI: The first item is the Commission's proposed consent calendar. Staff is proposing that the consent calendar consist of: Item three, the proposed parameters and guidelines for "Investment Reports"; and item five, the proposed amendment of parameters and guidelines for "Prisoner Parental Rights."

To date, we've received no indications of any objection to these items moving forward.

MR. DEZEMBER: Okay.

MR. COX: Mr. Chairman?

MR. DEZEMBER: Yes.

MR. COX: With respect to item three, I just have one question; and then I'd like staff's assurance that the report that we're about to adopt is sufficient.

My only concern is that we allow the -- we allow the

documents that are necessary to complete the report and not have a language so narrow, that it creates a problem. So I think that has been addressed; but if I could just have counsel address that from the standpoint of being certain that requirements that we're asking are sufficiently broad enough to allow discretion in the reporting aspect.

MR. HORI: It was a -- what Mr. Cox is referring to was where staff addressed the outright necessity of, in particular, subsidiary ledgers with respect to Subdivision (b)(4). (b)(4), on its face, is deemed not reimbursable. However, under items (b)(1), (2) and (3), the P's and -- parameters and guidelines do indicate that reimbursable activities associated with compiling and accumulating any debt unnecessary to prepare a quarterly report.

In that situation, if a subsidiary ledger is necessary to accomplish the documents for (b)(1), (2), and (3), it would be subsumed in (b)(1), (2), and (3); and (b)(4) would not stand on its own.

MR. COX: Okay. That would be fine. I just wanted that clarification, Mr. Chairman --

MR. DEZEMBER: Certainly.

MR. COX: -- and then would move the consent calendar.

MS. STEINMEIER: Second.

MR. DEZEMBER: Okay. All those who want to move the consent calendar, signify by "aye"?

(Response by all Commission members.)

MR. DEZEMBER: The consent calendar is moved.

MS. HIGASHI: Mr. Chair, back to the regular agenda, I'd like to note for the record, that item one, the minutes of the October hearing, will be presented at the December hearing, because it is the -- it's the minutes for special education; and the parties on that matter will be back in December and also all the members who voted on that matter.

MR. DEZEMBER: Will be here in December?

MS. HIGASHI: Back in December.

Items four and six are postponed until the December hearing.

And now this brings us to item two, which is the proposed parameters and guidelines on "Pupil Suspensions."

MR. DEZEMBER: Okay.

MS. HIGASHI: The proposed parameters and guidelines before you are based on staff's review of claimant's proposals and state agency comments.

There are only three remaining areas of dispute. Sections 1 and 2 include staff's proposed language; and Section 5 includes the language which the Controller's office had found to be objectionable.

Since this draft was released in late October, no new comments were received until Monday, November 17th. This week, the Commission received a late filing from Girard & Vinson, a law firm representing Mandated Cost

REPORTER'S CERTIFICATE

I hereby certify that the foregoing proceedings were reported by me at the time and place therein named; that the proceedings were reported by me, a duly certified shorthand reporter and a disinterested person, and was thereafter transcribed into typewriting.

I further certify that I am not of counsel or attorney for any of the parties to said proceedings, nor in any way interested in the outcome of the cause named in said matter.

In witness whereof, I have hereunto set my hand this 21st day of November, 1997.

Daniel P. Feldhaus

DANIEL P. FELDHAUS
CSR #6949, RDR, CRR

EXHIBIT H

KATHLEEN CONNELL
Controller of the State of California

March 16, 2001

Ms. Shirley Opie
Assistant Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
U.S. Bank Plaza Building
Sacramento, CA 95814

Re: Incorrect Reduction Claim of the County of Los Angeles
CSM 00-9635802-I-01
Government Code section 53646
Statutes of 1995, Chapter 783
Investment Reports

Dear Ms. Opie:

This letter is a supplement to our original response to the Incorrect Reduction Claim noted above, dated December 5, 2000. After the pre-hearing conferences on the Request to Amend the Ps&Gs for the Test Claim that is the basis of this IRC, two new issues appear to be relevant, but were not previously addressed.

The first issue is that of the fiduciary duty. It is in respect to that issue that comments were solicited from Professor Tootelian. The fiduciary duty is a legal duty that exists apart from the code sections in question. It is a duty that places a certain standard of care on those in a position of trust who deal with the money of others. Since it is an objective standard, we felt that relevant comments as to appropriate business practices would be of assistance. The standard is often phrased in the context of "reasonable care" or "simple business prudence." This reference to objective standards of reasonableness makes the standard, or appropriate business practices in the field, highly relevant. It is for that purpose that we placed Professor Tootelian's comments on the record.

The second issue raised by the pre-hearing conferences is the reliance, on the part of some, on code sections that were not made a part of the initial test claim. Specifically,

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SACRAMENTO 300 Capitol Mall, Suite 1850, Sacramento, CA 95814 (916) 445-2636
LOS ANGELES 600 Corporate Pointe, Suite 8610, Culver City, CA 90230 (310) 342-5678

they are Government Code Sections 53600.5, 53601, and 53635. During discussions, the central issue became the frequency of data entry and tracking, necessary to comply with the reporting statute. It was noted that in many cases both investment policy, and the code sections cited above, placed specific ongoing limitations on types of investments and permissible balances. It was asserted that to comply with these restrictions, continuous data entry and tracking were required. However, since restrictive investment policies are voluntarily adopted by the governing bodies of the local governmental agencies, the only relevant factor is the applicable sections of the Government Code. This reliance presents two specific problems; First, the government code sections cited do not require that the local agency purchase in investment vehicles with specific percentage limits, and secondly, those sections have not been subjected to the test claim procedures. In fact, the cited sections have two levels of choice; First, they provide that fund managers "may" invest available funds, and secondly, they provide several investment vehicles that do not have specific percentage limitations, eliminating the need for daily tracking. In addition, those sections of the Government Code have not undergone the necessary scrutiny to be considered "state mandates." We believe that it is inappropriate, if not impermissible, to base a determination of necessity on code sections which have not undergone the test claim process. Therefore, we believe that daily tracking is not a state mandated, reimbursable activity.

Sincerely,

Shawn D. Silva

SHAWN D. SILVA
Staff Counsel

Cc: Leonard Kaye
Ginny Brummels, DAR

00-

EXHIBIT I

COUNTY OF LOS ANGELES
DEPARTMENT OF AUDITOR-CONTROLLER

KENNETH HAHN HALL OF ADMINISTRATION
500 WEST TEMPLE STREET, ROOM 525
LOS ANGELES, CALIFORNIA 90012-2766
PHONE: (213) 974-8301 FAX: (213) 626-5427

J. TYLER McCAULEY
AUDITOR-CONTROLLER

April 12, 2001

Ms. Paula Higashi
Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, California 95814

Dear Ms. Higashi:

Review of State Controller's Office Comments
County of Los Angeles Incorrect Reduction Claim
Investment Reporting, Chapter 783, Statutes of 1995

We submit and enclose herein our review of the State Controller's Office [March 16, 2001] comments on the subject incorrect reduction claim.

Leonard Kaye of my staff is available at (213) 974-8564 to answer questions you may have concerning this submission.

Very truly yours,

J. Tyler McCauley
Auditor-Controller

JTM:JN:LK
Enclosures

CC: Shawn D. Silva, SCO Staff Counsel

Review of State Controller's Office Supplemental Comments
County of Los Angeles Incorrect Reduction Claim
Investment Reporting, Chapter 783, Statutes of 1995

On March 16, 2001, Mr. Shawn D. Silva, Staff Counsel in the State Controller's Office [SCO] wrote Shirley Opie, Commission's Assistant Executive Director, for the third time, to request that the Commission not approve reimbursement for the County's daily investment tracking required to meet investment reporting requirements set forth in Commission's parameters and guidelines [Ps&Gs].

Mr. Silva argues, as he has in his past two commentaries, that the County must meet an investment reporting "fiduciary duty", "an objective standard" which encompasses all the requirements set forth in subdivisions (b)(1), (2) and (3) of Section 53646 of the Government Code.

However, Mr. Silva's "objective standards" are based on Dennis H. Tootelian's analysis entitled "Data Entry and Monitoring Practices For Business Operations", "which did not include any possible legal requirements that might exist for such data entry and monitoring" [Tootelian Analysis, page 2], including subdivisions (b)(1), (2) and (3) of Section 53646 [the test claim legislation].

Plainly, Tootelian's analysis is general, not specific to the test claim legislation. As such, it is irrelevant in this matter. Mr. Silva accomplishes nothing by simply repeating it. He provides no answer to the question of what duties are necessary or reimbursable in complying with the test claim legislation. Apparently, he forgot the question.

As noted by Mr. Joseph H. Spillane, Assistant Treasurer and Tax Collector for the County, in his declaration [attached], there are many unique duties imposed by the test claim legislation, and such duties are not part of the County's fiduciary duty.

For example, the County's fiduciary duty to select appropriate types and amounts of investments does not require rendering a statement of investment

policy. This statement is rendered only to comply with the test claim legislation as explicitly required in Section 53646(a)(1):

> "In the case of county government, the treasurer shall annually render to the board of supervisors a statement investment policy, which the board shall review and approve at a public meeting." [Emphasis added.]

Therefore, irrespective of the types and amounts of investments made by the County, the County's investment policy shall be rendered, reviewed and adopted [Section 53646(a)(1)] and, subsequently, the County treasurer shall state its compliance with the County's adopted policy [Section 53646(b)(2)] as follows:

> "The quarterly report shall state compliance of the portfolio to the statement of investment policy, or manner in which the portfolio is not in compliance."

Compliance Statement

As noted by Mr. Spillane, in his declaration [attached], "[d]aily review of the portfolio is required to state compliance with the investment policy irrespective of the complexity of the policy. If the investment policy is to have no investments then a review to insure that no investments have been made is still mandated. The resources and associated costs to monitor compliance will vary depending the established investment policy but the complexity of this policy is not the issue. The issue remains, that whatever the policy, as established by county government, it must be monitored."

Six Month Cash Flow Statement

As further noted by Mr. Spillane, in his declaration [attached], "[s]imilarly, county treasurers are required to state that the local agency has the ability to meet its pool's expenditure requirements for the next six months.

> Section 53646(b)(3) The quarterly report shall include a statement demonstrating the ability of the local agency to meet its pool's expenditure requirements for the next six months, or provide an

explanation as to why sufficient money shall, or may, not be available.

The issue is not how extensively the local agency performs a cash flow analysis but rather, that it be performed. The costs associated with performing the task should be recoverable."

Arbitrary Reductions

SCO's specific reductions of County's claim are still not addressed by Mr. Silva and continue to appear arbitrary. For example, SCO's 32 hour per person per year limit on labor costs for the 1996-97 year[1] is not found in Commission's Investment Reporting parameters and guidelines [Ps&Gs] or in SCO's claiming instructions. To date, SCO has not provided any basis for imposing this funding limitation or, so to speak, promulgating this 'underground regulation'.

Further, Mr. Silva does not address SCO's arbitrary reduction of essentially all claimed costs. In fact, only $361[2] was reimbursed the County for 1997/98 even though $327,512 was claimed. Even Mr. Silva admits, on page 3 of his December 5, 2000 letter, that "more" investment reporting, although not much more, is required, than under prior law. However, Mr. Silva does not quantify his conclusion. He does not state that $361 is reasonable and proper reimbursement for the County's annual $32 Billion investment reporting duties under the subject law. Clearly, $361 is not.

Data Base Costs are Reimbursable

Mr. Silva states that data base costs are reimbursable but does not recommend reinstating data base cost reductions. According to Mr. Silva, reimbursable costs may be incurred "to pull together the information already under the control of the treasurer, i.e. access the data base and pull out relevant information". [Silva, December 5, 2000 memo, page 2, emphasis added.]

---

1 For the 1997-98 fiscal year, no labor costs were paid by SCO.

2 This payment amount was also erroneously computed by SCO review staff. On form INR-1, line (05)(f) of the 1997-98 claim, included in Tab 4 of County's Incorrect Reduction Claim filed on August 31, 2000, SCO staff added $278 to $78 to incorrectly obtain $278.

Mr. Silva further indicates that reimbursable data base costs include costs incurred to access, format, analyze, and report information on the County's investments, such as: type of investment and maturity, compliance with the investment policy and detailed cash flow projections to meet future obligations. [Silva, December 5, 2000 memo, page 2.]

However, Mr. Silva does not recommend reinstatement of any of the County's data base and related costs, including $27,772.63 of software costs incurred in 1996/97 and $44,027.09 of such costs incurred in 1997/98. Further, Mr. Silva does not dispute that the amounts of such costs are reasonable and proper. Indeed, such costs are very small considering the size of the County's investment program: $32 Billion.

Therefore, reimbursement for the reasonable and proper data base costs claimed by the County is now required.

Conclusion

SCO has provided no explanation of its omissions and errors in incorrectly reducing County's claims. No basis is provided for limiting labor costs in one year and denying all such costs incurred during the following year. No allowable data base costs were approved. Without justification, SCO arbitrarily denied substantially all of County's claims.

According to SCO's expert, Professor Tootelian, SCO's analysis did not consider subdivisions (b)(1), (2) and (3) of Section 53646 of the Government Code and, as such, SCO's evidence is irrelevant.

The only relevant evidence in the record supports finding that the County incurred reasonable and proper costs in complying with the unique requirements of subdivisions (b)(1), (2) and (3) of Section 53646 of the Government Code.

Therefore, reinstatement of County's reimbursable costs as originally claimed is now required.

COUNTY OF LOS ANGELES
TREASURER AND TAX COLLECTOR

KENNETH HAHN HALL OF ADMINISTRATION
500 WEST TEMPLE STREET, ROOM 462
P. O. BOX 4917
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TELEPHONE: (213) 974-2139 FAX: (213) 626-1701

MARK J. SALADINO
TREASURER AND TAX COLLECTOR

Los Angeles County - Incorrect Reduction Claims
1997/98: $327,512 Claimed - $327,187 Reduction
1996/97: $308,252 Claimed - $301,750 Reduction
Investment Reporting (Chapter 783/95) Claims

Declaration of Joseph H. Spillane

Joseph H. Spillane makes the following and declaration and statement under oath:

I, Joseph H. Spillane, am Los Angeles County's Assistant Treasurer and Tax Collector. I am responsible for ensuring that the County of Los Angeles (County) complies with investment reporting requirements, including those imposed under the subject law.

I declare that I have examined the County's State-mandated costs in complying with the subject investing reporting law and find them to be $327,512 for 1997/98 and $308,252 for 1996/97.

It is my information or belief that the State Controller's Office (SCO) reductions of $327,187, or 99% of costs claimed for 1997-98, and $301,750, or 98% of costs claimed for 1996-97, were arbitrary, capricious and contrary to law.

It is my information or belief that Government Code Section 53646 is very specific as to the requirements imposed by the Legislature.

I declare that Government Code Section 53646(b)(1) requires that the Treasurer prepare a quarterly report of investments that includes the type of investment, issuer, date of maturity, par and cost amounts of all securities held by the local agency.

I declare that Government Code Section 53646(b)(2) requires that the investment report shall state compliance of the portfolio to the statement of investment policy or manner in which the portfolio is not in compliance.

It is my information or belief that Government Code Section 53646 requires reporting of securities held throughout the reporting period. Each report must contain a statement of compliance and exceptions to the investment policy for transactions held throughout the reporting period. To conclude otherwise, in my opinion, the State Controller's Office would have to believe that the Legislature was only concerned with investment activities four days per year.

I declare that I have reviewed the March 16, 2001 comments of Shawn D. Silva, Staff Counsel, State Controller's Office and the declaration of Dennis H. Tootelian, referred to by Mr. Silva.

I declare that, in my opinion, the County's fiduciary duty to select appropriate types and amounts of investments does not require rendering a statement of investment policy. I declare that this statement is rendered to comply with Section 53646(a)(1):

> "In the case of county government, the treasurer shall annually render to the board of supervisors and any oversight committee a statement of investment policy, which the board shall review and approve at a public meeting." [Emphasis added.]

I declare that irrespective of the types and amounts of investments made by the County, the County treasurer shall state its compliance with the County's adopted policy [Section 53646(b)(2)] as follows:

> "The quarterly report shall state compliance of the portfolio to the statement of investment policy, or manner in which the portfolio is not in compliance." [Emphasis added.]

I declare that daily review of the portfolio is required to state compliance with the investment policy irrespective of the complexity of the policy.

I declare that resources and associated costs to monitor compliance will vary depending on the established investment policy but the complexity of this policy is not the issue. The issue remains, that whatever the policy, as established by county government, it must be monitored.

I declare that county treasurers are required to state that the local agency has the ability to meet its pool's expenditure requirements for the next six months.

> "Section 53646(b)(3): The quarterly report shall include a statement demonstrating the ability of the local agency to meet its pool's expenditure requirements for the next six months, or provide an explanation as to why sufficient money shall, or may, not be available"

I declare that the issue is not how extensively the local agency performs a cash flow analysis but rather, that it be performed and that the costs associated with performing the task should be recoverable as provided for in Government Code Section 17514.

It is my information or belief that SCO's reductions of substantially all of the County's 1997-98 and 1996-97 claims are contrary to law as set forth above.

Further, I declare that I have reviewed all compliance duties and resulting costs, in implementing the subject law, and find that all claimed costs are, in my opinion, reimbursable "costs mandated by the State", as defined in Government Code section 17514:

> " 'Costs mandated by the State' means any increased costs which a local agency or school district is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution."

I am personally conversant with the foregoing facts and if so required, I could and would testify to the statements made herein.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct of my own knowledge, except as to the matters that are therein stated as information or belief, and as to those matters I believe them to be true.

4/11/01 Los Angeles County
Date and Place

Signature

COUNTY OF LOS ANGELES
DEPARTMENT OF AUDITOR-CONTROLLER

KENNETH HAHN HALL OF ADMINISTRATION
500 WEST TEMPLE STREET, ROOM 525
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J. TYLER McCAULEY
AUDITOR-CONTROLLER

Review of State Controller's Office Comments
County of Los Angeles Incorrect Reduction Claim
Investment Reporting, Chapter 783, Statutes of 1995

Declaration of Leonard Kaye

Leonard Kaye makes the following declaration and statement under oath:

I, Leonard Kaye, SB90 Coordinator, in and for the County of Los Angeles, am responsible for filing test claims , reviews of State agency comments, Commission staff analyses, and for proposing parameters and guidelines (Ps&Gs) and amendments thereto, and for filing incorrect reduction claims, all for the complete and timely recovery of costs mandated by the State. Specifically, I have prepared the attached review of State Controller's Office [March 16, 2001] comments on the subject Incorrect Reduction Claim, seeking reinstatement of the $327,187 reduction of the County's 1997/98 reimbursement claim and of the $301,750 reduction of the County's 1996/97 reimbursement claim.

Specifically, I declare that I have examined the County's State mandated duties and resulting costs, in implementing the subject law, and find that such costs as set forth in the attached document, are, in my opinion, reimbursable "costs mandated by the State", as defined in Government Code section 17514:

> " ' Costs mandated by the State' means any increased costs which a local agency or school district is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution."

I am personally conversant with the foregoing facts and if so required, I could and would testify to the statements made herein.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct of my own knowledge, except as to the matters which are therein stated as information or belief, and as to those matters I believe them to be true.

4/12/01; Los Angeles, CA — Leonard Kaye

Date and Place — Signature

KATHLEEN CONNELL
Controller of the State of California

September 21, 2001

Paula Higashi, Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

Leonard Kaye, Esq.
Office of the Auditor-Controller
Kenneth Hahn Office of Administration
500 West Temple, Room 603
Los Angeles, CA 90012

And Interested Parties (See Mailing List)

RE: **Expert Consultant Report/Prehearing Conference 2**
Incorrect Reduction Claim of the County of Los Angeles
Investment Reports
CSM 00-9635802-I-01
Statutes of 1995, Chapter 783

Dear Ms. Higashi and Mr. Kaye:

We have reviewed the expert's report, and unfortunately it does not alleviate our core concern. Our major concern from the outset has been that this claim involves financial accounting activities that are simply a part of the normal operation of a local treasurer's office. This is confirmed by reference to page four of the report, the final bullet. In that section Ms. Jamison concurs with our belief that the activities claimed are a part of the fiduciary duties of local treasurers. Since a fiduciary duty is a pre-existing legal obligation, any activities performed under such duty would not be reimbursable. Based upon that conclusion we are unable to make any changes to the adjustments made to the

County of Los Angeles' claim.

Sincerely,

SHAWN D. SILVA
Staff Counsel

cc: Mailing List

F EXHIBIT K

OCT 15 2001

COMMISSION ON STATE MANDATES

KATHLEEN CONNELL
Controller of the State of California

October 12, 2001

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

Leonard Kaye, Esq.
Office of the Auditor-Controller
Kenneth Hahn Office of Administration
500 West Temple, Room 603
Los Angeles, CA 90012

Re: Incorrect Reduction Claim of the County of Los Angeles
CSM 00-9635802-I-01
Government Code section 53646
Statutes of 1995, Chapter 783
Investment Reports

Dear Ms. Higashi:

This letter is in response to the prehearing conference of September 27, 2001. As stated at the conference the Controller believes that the obligation to enter and manage data is not derived from the test claim legislation, but comes from the fiduciary duty of a treasurer, to the public they serve. Below we set forth the arguments and law which support this proposition.

As a county officer, a treasurer owes a fiduciary duty to the public for whom he works. This requires him to diligently manage the funds under his control, including the frequent entry of data, as based upon the statements of two expert witnesses. The logical and legal support for each element of these assertions is set forth infra. A county treasurer is a county officer, as are the county controller and auditor.[1] A county officer is considered a public officer[2], as well as an agent of the state.[3] A public officer, is by definition the holder of a public office.[4] A public office is created for the benefit of the public and as such, constitutes a public trust.[5]

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[1] See Government Code Section 24000 (Exhibit 1).

[2] See *Coulter v. Pool* (1921) 187 Cal. 181, 187 (Exhibit 2).

[3] See *Miller & Lux v. Batz* (1904) 142 Cal. 447, 450 (Exhibit 3).

[4] See *Miller v. Board of Supervisors* (1864) 25 Cal. 93, 98 (Exhibit 4).

[5] See *Patton v. Board of Health* (1899) 127 Cal. 388, 393-94 (Exhibit 5).

MAILING ADDRESS P.O. Box 942850, Sacramento, CA 94250
SACRAMENTO 300 Capitol Mall, Suite 1850, Sacramento, CA 95814 (916) 445-2636
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Thus, the officers of a governmental body are trustees of the public weal, or well being.[6] As trustees, they have a fiduciary duty to the public they serve.[7] To meet this obligation a public officer must act with at least that degree of care and diligence that an ordinarily prudent person would use in connection with the particular transaction[8] in the management of his or her own affairs[9], or in the care of his or her own property under the same circumstances[10]. In addition, California recognizes the "Prudent Investor Rule",[11] codifying it in 1943 as subdivision (1) of Section 2261 of the Civil Code.[12] Both experts who have commented, Dr. Tootelian and Ms. Carson, indicate that an entity with such a large budget and with such numerous transactions as Los Angeles County, should enter data at least weekly. As experts in business and local governmental treasury operations respectively, their statements are substantial evidence that a standard of at least weekly is what is required to meet fiduciary obligations. There is no requirement found in the test claim statutes, Statement of Decision, or Parameters & Guidelines for more frequent data entry. Therefore, the requirement for frequent data entry comes from a pre-existing, as well as co-existing, fiduciary obligation, and not the state mandate, thus those costs are not reimbursable.

Although the use of the common law may be "novel" in this situation, the status of common law is well recognized. In fact, the validity of the common law is codified in the Civil Code of California.[13] Courts have found this provision to mean that when California became a state, the common law was adopted and put in force except where superseded by statute.[14] Thus, absent a statute or constitutional provision to the contrary, the above analysis would prevail, and data input and management would not be reimbursable.

In addition, we believe that the provisions of Government Code Section 17556 are inapplicable to this case as that section, by its very own terms, applies only to claims.

Sincerely,

Shawn D. Silva

SHAWN D. SILVA
Staff Counsel

Cc: Interested Parties and Affected State Agencies (See Mailing List)

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[6] See *Terry v. Bender* (1956) 143 Cal.App.2d 198, 206 (Exhibit 6).

[7] See *Nussbaum v. Weeks* (1989) 214 Cal.App.3d 1589, 1597-98 (Exhibit 7).

[8] See *In re Estate of Hamon* (1922) 60 Cal.App. 154, 157 (Exhibit 8).

[9] See *In re Estate of Whitney* (1926) 78 Cal.App. 638, 645 (Exhibit 9).

[10] See *Bermingham v. Wilcox* (1898) 120 Cal. 467, 472 (Exhibit 10).

[11] See *Estate of Talbot* (1956) 141 Cal.App.2d 309, 317 (Exhibit 11).

[12] See statute and historical note, statute was subsequently recodified to Probate Code Section 16040(b) (Exhibit 12).

[13] Section 22.2 provides that "[t]he common law of England, so far as it is not repugnant to or inconsistent with the Constitution of the United States, or the Constitution or laws of this State, is the rule of decision in all the courts of this State." (Exhibit 13.)

[14] See *In re Farley's Estate* (1944) 63 Cal.App.2d 130, 133 (Exhibit 14).

PROOF OF SERVICE VIA FIRST CLASS UNITED STATES MAIL

CSM 00-9635802-I-01

I am a citizen of the United States and a resident of the County of Sacramento. I am over the age of 18 years and not a party to the within entitled action. My place of employment and business address is 300 Capitol Mall, Suite 1850, Sacramento, California 95814.

On October 12, 2001, I served the foregoing **IRC SUPPLEMENTAL BRIEF** by causing the same to be deposited in the United States Mail to the person(s) named below at the address(es) shown:

Ginny Brummels
State Controller's Office
Division of Accounting & Reporting
3301 C Street Suite 500
Sacramento, CA 95816

Mr. Allan Burdick
DMG-Maximus
4320 Auburn Blvd., Suite 2000
Sacramento, CA 95841

Ms. Annette Chinn
Cost Recovery System
705 – 2 East Bidwell Street, #294
Folsom, CA 95630

Mr. Glen Everroad, Revenue Manager
City of Newport Beach
3300 Newport Blvd., P.O. Box 1768
Newport Beach, CA 92659

Ms. Deborah Kanner, (C-15)
State Treasurer's Office
915 Capitol Mall, Room 106

Mr. Leonard Kay, Esq.
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Mr. David Wellhouse,
David Wellhouse & Associates, Incorporated
9175 Kiefer Boulevard, Suite 1214
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Mr. William A. Doyle
San Jose Unified School District
1153 El Prado Drive
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Commission on State Mandates
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Hand Delivery!!!!!

Lawrence Hendee, Director, Financial Operations
Sweetwater Union High School District
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Mr. Wayne Martin, Director of Fiscal Ser
Stockton Unified School District
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Mr. Paul Minney
Spector, Middleton, Young & Minney, LLP
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Mr. Andy Nichols, Senior Manager
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12150 Tributary Point Drive, Suite 150
Gold River, CA 95670

Mr. Keith B. Petersen, President
Sixten & Associates
5252 Balboa Ave, Suite 807
San Diego, CA 92117

Mr. Ram Venkatsan, SB 90 Coordinator
County of Santa Clara
Controller – Treasurer Dept.
70 West Hedding Street – East Wing 2nd Floor
San Jose, CA 95110

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct. Executed on October 12, 2001, at Sacramento, California.

Shawn D. Silva

SHAWN SILVA

Exhibit 1

Part 1

OFFICERS GENERALLY

Chapter 1

COUNTY OFFICERS

Cross References

County office defined, see Elections Code § 313.
County officers as elected officers, see Elections Code § 314.

§ 24000. Enumeration of officers

The officers of a county are:

(a) A district attorney.

(b) A sheriff.

(c) A county clerk.

(d) A controller.

(e) An auditor, who shall be ex officio controller.

(f) A treasurer.

(g) A recorder.

(h) A license collector.

(i) A tax collector, who shall be ex officio license collector.

(j) An assessor.

(k) A superintendent of schools.

(l) A public administrator.

(m) A coroner.

(n) A surveyor.

(o) Members of the board of supervisors.

(p) A county veterinarian.

(q) A fish and game warden.

(r) A county librarian.

(s) A county health officer.

(t) An administrative officer.

(u) A director of finance.

(v) A road commissioner.

(w) A public guardian.

(x) Such other officers as are provided by law.

(Amended by Stats.1998, c. 1195 (S.B.405), § 6.)

Additions or changes indicated by underline; deletions by asterisks * * *

Historical and Statutory Notes

[illegible] findings and declarations for [illegible], see Historical and Statutory Notes under Government Code § 4201.

Cross References

County officers as elected officers, see Elections Code § 314.

Library References

Legal Jurisprudences

Cal Jur 3d Aff § 10; Brok § 12; Dec Est § 88; Dist Attys § 11; Fish & G § 85; Law Enf O § 13; Muni § 257; Oath § 8; Prop Tax §§ 47, 133; Pub Off § 27.

Am Jur 2d Municipal Corporations, Counties, and Other Political Subdivisions §§ 231 et seq.

Treatises and Practice Aids

Witkin, Procedure (4th ed) Courts § 393.

Witkin & Epstein, Criminal Law (2d ed) § 1789.

§ 24001. Eligibility requirements; waiver

Except as otherwise provided in Sections 27550.1 and 27641.1 * * * or in this section, or in Section 21123 or 34711 of the Water Code, or in any landowner voting district, as defined in paragraph (9) of subdivision (b) of Section 10500 of the Elections Code, a person is not eligible to a county or district office, unless he or she is a registered voter of the county or district in which the duties of the office are to be exercised at the time that nomination papers are issued to the person or at the time of the * * * appointment of the person.

The board of supervisors or any other legally constituted appointing authority in a county or district may, if it finds that the best interests of the county or district will be served, waive the requirements of this section for an appointed county or district office.

(Amended by Stats.1991, c. 52 (A.B.490), § 3; Stats.1994, c. 923 (S.B.1546), § 53.)

Historical and Statutory Notes

1994 Legislation

Subordination of legislation by Stats.1994, c. 923 (S.B. 1546), see Historical and Statutory Notes under Code of Civil Procedure § 203.

Library References

Legal Jurisprudences

Cal Jur 3d Dist Attys § 13; Law Enf O § 12; Muni § 253; Prop Tax § 47; Pub Off §§ 35, 40.

Am Jur 2d (Rev) Public Officers and Employees §§ 36, 37, 39-47, 52, 55, 56, 60-62.

Am Jur 2d Municipal Corporations, Counties, and Other Political Subdivisions §§ 246-248.

Treatises and Practice Aids

Witkin, Summary (9th ed) Const Law § 797.

Notes of Decisions

District attorneys 8

2. Persons eligible

A county board of supervisors, in appointing a person to the office of district attorney to serve the remainder of the term of the prior officeholder, may not waive the requirement that the appointed officer be a citizen of the State of California. 80 Op.Atty.Gen. 332, 11-21-97.

5. Dual employment

An individual may simultaneously serve as a San Bernardino County Sheriff's Deputy Chief and Yucaipa City Councilman. 78 Op.Atty.Gen. 362, December 29, 1995.

8. District attorneys

Under California law, district attorney acted as state, rather than county, official when he decided to proceed with criminal prosecution of accused granted new trial, given that Attorney General, rather than county, had authority to oversee district attorney's conduct with respect to investigation and prosecution of crimes; therefore, county could not be liable to accused under §§ 1983 for alleged wrongful prosecution. Weiner v. San Diego County, C.A.9 (Cal.)2000, 210 F.3d 1025.

California district attorney is a state officer when deciding whether to prosecute an individual. Weiner v. San Diego County, C.A.9 (Cal.)2000, 210 F.3d 1025.

District attorney represents state, and is not a policymaker for county, when preparing to prosecute and when

Exhibit 2

*187 Cal. 181, *; 201 P. 120, **;*
*1921 Cal. LEXIS 346, ****

PAUL COULTER, Appellant, v. C. A. POOL, as Auditor, etc., et al., Respondents

S. F. No. 9792

Supreme Court of California

187 Cal. 181; 201 P. 120; 1921 Cal. LEXIS 346

October 7, 1921

PRIOR HISTORY: [*1]**

APPEAL from a judgment of the Superior Court of Sonoma County. Emmett Seawell, Judge.

DISPOSITION: Reversed.

CORE TERMS: engineer, board of supervisors, duty, county surveyor, appointment, county officer, ordinance, appointed, uniformity, salary, county government, public office, road commissioner, electors, highway, legislative declaration, uniform system, public officer, general law, supervisor, ex-officio, elected, fixing, county treasury, entirety, tenure, supervisorial district, supervision, prescribed, appointing

SYLLABUS: The facts are stated in the opinion of the court.

COUNSEL: W. F. Cowan and R. M. F. Soto, for Appellant.

G. W. Hoyle, for Respondent.

JUDGES: In Bank. Lennon, J. Sloane, J., Wilbur, J., Angellotti, C. J., and Lawlor, J., concurred.

OPINIONBY: LENNON

OPINION: [*183] [121]** In this proceeding the plaintiff sought, and was denied, *mandamus* to compel the defendants, respectively the auditor and the treasurer of the county of Sonoma, to audit and pay the claim of plaintiff presented against said county in the sum of $ 39.24 for labor alleged to have been performed by the plaintiff upon certain of said county's highways.

The claim in controversy is founded primarily upon the admitted fact that plaintiff performed labor upon said highways under and by virtue of the direction and authority of one of the supervisors of said county elected from and representing the supervisorial district in which the labor was performed and who, by virtue of his office, was road commissioner for said district and, as such commissioner, was given supervision of the highways in his district. (Pol. **[***2]** Code, secs. 2641, 2645.) The labor which is the basis of the claim in controversy was performed on July 26, 1919, subsequent to the appointment by the board of supervisors of a county engineer, made pursuant to the provisions of an act entitled "An act providing for a county engineer for **[*184]** each county in the state, . . . his appointment, manner of removal, qualifications, compensation and duties; transferring to such engineer certain

powers, functions and duties heretofore vested in and performed by the county surveyor and members of the board of supervisors; . . . to provide for abolishing the office of county surveyor and for the fixing and levying of taxes for road purposes." (Stats. 1919, p. 1290.) Section 13 of this act provides that it shall be known and designated as "the County Engineer Act," and it will be hereinafter referred to by that title. (Stats. 1919, pp. 1290, 1295.) In keeping with the provisions of this act, the board of supervisors, when appointing the county engineer for a term of four years, fixed his salary at the sum of $ 350 per month, and the number and compensation of his assistants. Said labor was performed by plaintiff without, and never has [***3] had, the authority, inspection, and approval of said county engineer as required by the provisions of subdivision b of section 5 of [**122] said act. The claim in question was, however, approved and allowed by the board of supervisors as a legal charge against the county, apparently upon the theory that, inasmuch as an ordinance, passed subsequent to the ordinance appointing the county engineer, with apparent intent to do so, excluded the supervisorial district in which the labor involved was performed from the scope and operation of the ordinance appointing the engineer, it thereby, in effect, left the supervisor of that district as the *ex-officio* road commissioner thereof in control of the work to be done on the highway therein to the exclusion of the authority and direction of the county engineer. The writ seeking an order directing the auditing and payment of the claim thus allowed was denied by the court below upon the theory that the County Engineer Act, having been adopted by the board of supervisors of Sonoma County, applied throughout that county; that the board of supervisors had no authority to except one district of that county from the operation of the act, and [***4] that plaintiff's claim was, therefore, void on its face because the work performed by plaintiff was not performed under the provisions of the County Engineer Act. The proceeding in *mandamus* is now here upon appeal of the plaintiff.

We shall concern ourselves only with the constitutionality of the act, for if it be held, as we think it must, to be unconstitutional, [*185] then it does not invalidate the plaintiff's claim and there is no need to discuss and decide the several remaining questions involved in the appeal.

At the outset we are satisfied that the act in question contemplates the creation of a county office and does, in fact, provide for something more than a mere employment by the board of supervisors of a person to be known as the county engineer. And we are convinced that this is so despite the verbiage of the act, industriously employed, which, among other things, declares that the county engineer appointed by the board of supervisors "shall be deemed an employee and not a county officer . . . subject to the control and supervision of the board of supervisors." We are not unmindful of the cardinal rules of statutory construction which require an interpretation [***5] of a statute which will give effect to the legislative intent which, if consistent with the real object and purpose of the statute, must be adopted, and, doubtless, the express legislative declaration found in section 1 of the act purporting to designate the official character of the county engineer and specifying the category in which, when appointed, he and his duties must be considered and treated, tends in some degree to show the legislative intent to provide that the county engineer was to be a mere employee of the board of supervisors and not a county officer who was to be part and parcel of that uniform system of county government contemplated and commanded by the constitution. (Const., art. XI, sec. 4.) While ordinarily it is the rule that, when the law-making power distinctly states its design in the enactment of a particular statute, no room is left for construction, nevertheless, as the district court of appeal well said during its discussion of this phase of the case, "The label placed by the legislature upon its work cannot be permitted to give it a meaning not fairly contemplated within its terms." In other words, a legislative declaration, whether contained in the title [***6] or in the body of a statute, that the statute was intended to promote a certain purpose is not conclusive on the courts, and they may and must inquire into the real, as distinguished from the ostensible, purpose of the statute, and determine the fact whether, after all has been said and done by the legislature, the statute, in its scope and effect, departs from the declared legislative design and contravenes [*186] the fundamental and supreme law of the state. (*Matter of Jacobs*, 98

N. Y. 98, 110, [50 Am. Rep. 636]; *State* v. *Redmon*, 134 Wis. 89, 107, [126 Am. St. Rep. 1003, 15 Ann. Cas. 408, 14 L. R. A. (N. S.) 229, 114 N. W. 137]; *Mugler* v. *Kansas*, 123 U.S. 623, [31 L. Ed. 205, 8 Sup. Ct. Rep. 273, see, also, Rose's U. S. Notes].) This being so, it cannot be rightfully held that, standing alone, the legislative declaration, in the instant case, compels the conclusion without more ado that the act in question did no more than provide for the mere employment of a county engineer and did not, in truth and in fact, attempt to create a county officer to be known as the county engineer. A proper construction of the act requires that due regard be given to **[***7]** the real object of the act. (*People* v. *Dana*, 22 Cal. 11; *Genilla* v. *Hanley*, 6 Cal. App. 614, [92 Pac. 752].) This may, we think, be readily ascertained, despite the legislative declaration to the contrary, by a consideration of the requirements of the act as gathered from the context of the act in its entirety.

Looking, then, to the context of the act in its entirety for the purpose of ascertaining its real, as distinguished from its ostensible, purpose, we are first brought to a consideration of the question of what distinguishes a public office from a mere employment. The words "public office" are used in so many senses that it is hardly possible to undertake a precise definition of the meaning and purpose of the phrase which will adequately and effectively cover every situation. It is far less difficult to conceive and comprehend the requirements which characterize a public office than it is to formulate a definition thereof which will have universal application **[**123]** and be entirely free from fault. Its definition and application depend not upon what the particular office in question may be called, nor upon what a statute may call it, but upon the power **[***8]** granted and wielded, the duties and functions performed and other circumstances which manifest the true character of the position and make and mark it a public office, irrespective of its formal designation. (*Knox* v. *Los Angeles County*, 58 Cal. 59; Mechem on Public Offices, sec. 4; *Hartigan* v. *Board*, 49 W. Va. 14, [38 S. E. 698].) A public office is ordinarily and generally defined to be the right, authority, and duty, created and conferred by law, the tenure of which is not transient, **[*187]** occasional, or incidental, by which for a given period an individual is invested with power to perform a public function for the benefit of the public. (*State* v. *Jennings*, 57 Ohio St. 415, [63 Am. St. Rep. 723, 49 N. E. 404].) A public officer is a public agent and as such acts only on behalf of his principal, the public, whose sanction is generally considered as necessary to give the act performed by the officer the authority and power of a public act or law. The most general characteristic of a public officer, which distinguishes him from a mere employee, is that a public duty is delegated and entrusted to him, as agent, the performance of which is an exercise **[***9]** of a part of the governmental functions of the particular political unit for which he, as agent, is acting. There are other incidents which ordinarily distinguish a public officer, such, for instance, as a fixed tenure of position, the exaction of a public oath of office and, perhaps, an official bond, the liability to be called to account as a public offender for misfeasance or nonfeasance in office and the payment of his salary from the general county treasury. (*United States* v. *Hartwell*, 6 Wall. 385, [18 L. Ed. 830, see, also, Rose's U. S. Notes]; *United States* v. *Germaine*, 99 U.S. 508, 511, [25 L. Ed. 482]; *People* v. *Langdon*, 40 Mich. 673; *State* v. *Jennings*, *supra*; *Knox* v. *Los Angeles County*, *supra*.) As a matter of course, in keeping with these definitions, a *county* officer is a *public* officer and may be specifically defined to be one who fills a position usually provided for in the organization of counties and county governments and is selected by the political subdivision of the state called the "county" to represent that governmental unit, continuously and as part of the regular and permanent administration of public power, in **[***10]** carrying out certain acts with the performance of which it is charged in behalf of the public. (*Sheboygan Co.* v. *Parker*, 70 U.S. 93, [18 L. Ed. 33]; *State* v. *Samuelson*, 131 Wis. 499, [111 N. W. 712]; *State* v. *Higginbotham*, 84 Ark. 537, [106 S. W. 484].)

Measuring the provisions of the act hereinabove referred to by the authorities just cited, it seems evident, beyond argument, that the so-called "employee" provided for in the statute in question is, in fact, a public and a county officer. The act specifies that the tenure of the position of county engineer shall be a term of four years from the date of his **[*188]** "appointment," providing for removal only in the event of inefficiency, malfeasance, or

misconduct in office and then upon written charges filed with the board of supervisors and after a hearing of the charges by said board, and, if found guilty, the board must forthwith remove him from "office" and shall immediately appoint his "successor" in the manner provided in the act. The act also requires that "Prior to entering upon the duties of his employment the county engineer shall file with the county clerk the *oath of office as prescribed* [***11] *for the county officers* and a bond conditioned upon the faithful performance of his duties, with sufficient sureties approved by a judge of the superior court, in the sum of five thousand dollars." (Italics ours.) The salary, which is to be fixed by the board of supervisors, "shall be paid monthly out of the county treasury of the county in which he is appointed and in the same manner as county officers. . . . *provided, however*, that the compensation of the county engineer in any county shall not be less than the compensation received by the county surveyor of that county at the time said county engineer is first appointed." With respect to duties, it is provided that, among other things, "The county engineer shall be *ex-officio* road commissioner of and for each and every road district of his county and, subject to the control and supervision of the board of supervisors as herein provided, shall . . . make, or cause to be made, all surveys, maps, plans, specifications and estimates necessary or required for the construction, improvement, maintenance and repair of the county roads, highways and bridges, and shall, from and after the first Monday in September, 1919, have and [***12] exercise all the powers and duties, and perform all the functions which are now by law conferred or imposed upon county surveyors. . . ." The act further provides that the county engineer "may also hold and perform the duties of the office of county surveyor, but in all such cases no salary or other compensation shall be paid to him as county surveyor," and that he shall, at regular monthly meetings of the board, make a report to the board containing "the recommendation of acceptance or rejection of any public work completed, and all official announcements or statements which the engineer is required to make to the board" and "submit to the board of supervisors a certificate over his own signature. [*189] and official seal to the effect that such work by the contractors thereof has [**124] been completed in accordance with the specifications thereof and recommending its acceptance." The act in terms provides that, upon the appointment of the county engineer, the county office of county surveyor shall, in certain specified contingencies, be deemed abolished; nevertheless, as is evidenced by some of the provisions above set forth, the office and duties of the county surveyor [***13] are, in effect, by the act in question, merged into the office and duties of the county engineer. The county surveyor, under the general law in force throughout the state, is a county officer (Pol. Code, sec. 4013), and as such is required to do certain designated county work, not specially mentioned in the act in question, pertaining to the governmental functions of the county. (Pol. Code, sec. 4214 et seq.) The legislature, therefore, attempted to transfer the burden of the duties of the county surveyor to the so-called county engineer, in conjunction with the added and different duties imposed upon him by the act in question. That this is so is further evidenced by an amendment to the County Engineer Act, in 1921, by which a provision was added to the effect that, upon the petition of a certain percentage of qualified electors of the county, the board of supervisors in any county which shall have adopted the provisions of the act "shall discontinue such office of county engineer by ordinance declaring their intention so to do and in such ordinance the board shall provide that the person holding the office of county engineer at the time the ordinance becomes effective shall be [***14] and become the county surveyor of such county until the next ensuing general election . . ." (Stats. 1921, p. 934.)

That the position of county engineer is in fact a county office is apparent, in view of the authorities previously cited, from the provisions of the act above quoted and referred to, namely, the provision for trial and removal of the county engineer in the event of misfeasance or nonfeasance in office, the fixing of the tenure of office, the requirement of a bond and the taking of the oath prescribed for county officers, payment of salary from the general county treasury, the political and governmental nature of his duties and the relation between the position of county engineer and the office of county surveyor. "Clearly, it was a county [*190] office." (*Reed* v. *Hammond*, 18 Cal. App. 442, [123 Pac. 346].) This being

so, it may be stated, in passing, that it follows that the County Engineer Act is practically inoperative for the reason that the act itself specifies no compensation for the office, and any ordinance of a board of supervisors attempting to fix the salary of a person appointed to the position of county engineer is void to that extent for [***15] the reason that the constitution imposes upon the legislature, exclusively, the duty of regulating the compensation of all county officers, unless a county has adopted a charter in accordance with the provisions of sections 7 1/2 or 7 1/2a of article XI of the constitution, or there is some other express constitutional exception. The state legislature cannot directly delegate to the boards of supervisors of the various counties the power of fixing the compensation of a county officer. (Const., art. XI, sec. 5; *Dougherty v. Austin*, 94 Cal. 601, [16 L. R. A. 166, 28 Pac. 834, 29 Pac. 1092].)

Concluding, as we do and must, that the position of "county engineer" which the legislature attempted to provide for by the act under consideration is in truth and in fact a county office, we are then confronted with the question of whether or not the act, if permitted to become operative, is in keeping with and does not violate the mandatory provision of the constitution, which requires that "The Legislature shall establish a system of county governments which shall be uniform throughout the State . . ." (Const., art. XI, sec. 4.)

We may concede, for the purpose of discussion, that [***16] the rule prohibiting the delegation of legislative powers by a state legislature does not necessarily prohibit a conditional statute, the taking effect of which, in each locality, may be made to depend upon such subsequent event as its approval by the electors of that locality. Likewise, it may be conceded that the act in question may be said to be a general and uniform law because the general provisions thereof are applicable alike to every county in the state. The fact remains, however, that the constitution contemplates and commands that *the system of county governments shall be uniform throughout the state*, except in those special instances where the constitution itself sanctions a departure from uniformity, such, for instance, as in the case of counties or consolidated cities and counties which [*191] adopt charters in accordance with the provisions of sections 7 1/2 and 7 1/2a of the constitution. There is no section of the constitution which specially excepts the political functions dealt with by the act in question from the requirement that the general scheme of county governments provided for by the legislature must be uniform throughout the state. Therefore, [***17] if the County Engineer Act will, in its operation, necessarily tend to interfere with this uniformity, it is unconstitutional and void.

Section 1 of the act provides that "The board of supervisors of any county at their option may appoint, and upon petition therefor signed by qualified electors of the county equaling in number not less than twenty-five per cent of the total vote cast in the county for governor at the last preceding election at which a governor was elected, they must appoint a competent civil engineer . . . as county engineer." [**125] Section 11 provides that, if the provisions of the act are adopted in a county by the appointment of a county engineer, the office of the county surveyor shall be abolished either upon the date upon which the appointment is made and accepted if the person who holds the office of county surveyor is the one appointed county engineer, or, in other cases, upon the expiration of the term of the person who holds the office of county surveyor at the time the appointment of county engineer is made. By the 1921 amendment, previously mentioned, the office of county engineer may be abolished and that of county surveyor reinstated, upon the [***18] petition of a certain percentage of electors. It is evident, therefore, that the act is not mandatory in its operation. To the contrary, it is provided in the act that the question as to whether its provisions shall become operative in any particular county or whether that county shall continue under the provisions of the general law on the subject heretofore in force, is a matter to be determined, in the last analysis, solely by a percentage of the electors of that county. This being so, the act by its express terms renders possible, and probable, a situation where, in one or more of the counties of the state, the duties of surveying and fixing the boundaries of the public lands and roads, etc., would be performed by the county surveyor, an officer elected by the people

of the respective counties and subject to the rules governing elected officials, while in [*192] another or other counties there might be an arrangement whereby these same duties would be performed by an official appointed by the board of supervisors, which official would, in addition to the duties prescribed by the general law for county surveyors, also perform the various duties set forth in section 5 of [***19] the County Engineer Act. In the counties operating under the general law, each supervisor is *ex-officio* road commissioner in his supervisorial district, whereas, in counties electing to adopt the provisions of the County Engineer Act, the county engineer would be "*ex-officio* road commissioner of and for each and every road district of his county."

The word "system," as employed in the constitution, means an organized plan or scheme in keeping with which the constituent parts thereof are rendered similar and are connected and combined into one complete, harmonious whole, and it necessarily imports both a unity of purpose and entirety of operation. (*Welsh* v. *Bramlet*, 98 Cal. 219, [33 Pac. 66]; *Board* v. *State*, 26 Okl. 366, [109 Pac. 563]; *State* v. *Riordan*, 24 Wis. 484.) As previously indicated, uniformity means consistency, resemblance, sameness, a conformity to one pattern. In this resemblance, in this sameness, in this conformity of a class to one pattern, consists the uniformity of system which is essential to the creation and continuity of a uniform system. And, therefore, the constitutional mandate to establish a uniform system of county government [***20] throughout the state means one system applicable alike in all its parts and continuously operating equally in all of the counties of the state. If a particular county were expressly exempted from the operation of the act in question, there would be no doubt but that it would violate the uniformity of system contemplated and required by the constitution. And, while in the act under consideration, no particular county is expressly exempted from the operation of the law, nevertheless people of any one or more counties may, without regard to any action taken by the remaining counties, determine that they will or will not be subject to the operation of the law and thereby, of their own volition, create an exception to the general and uniform system of county government. In other words, the legislature by the act in question attempted to do by indirection that which it could not do directly. [*193] That is to say, having no power to exempt one or more counties from the operation of the act, it could not confer that power upon the people of the different counties. The legislature itself must by its own enactment establish in the first instance a system of county government uniform [***21] throughout the state, and it necessarily follows that such system, when once established, must, in so far as its uniformity is concerned, be kept intact by the legislature and must not be impaired by any subsequent legislation authorizing in counties a material difference in the manner of performing functions of government intrusted to them.

Inasmuch as the County Engineer Act provides for a county office, involving the exercise of political functions, we conclude that the said act violates the constitutional requirement that the system of county governments prescribed by the legislature shall be uniform throughout the state, by reason of the fact that it is not mandatory in its operation, but that it is optional with each county whether or not the office provided for by the act shall be established therein. (*Los Angeles County* v. *Kirk*, 148 Cal. 385, [83 Pac. 250].)

This conclusion is not in conflict with the cases relied upon by respondents. In *Scott* v. *Boyle*, 164 Cal. 321, [128 Pac. 941], the court had under consideration a statute which authorized the appointment of sealers of weights and measures but left the determination as to whether or not this authorization [***22] should be availed of to the different counties and municipalities. The statute dealt with an office which was specifically provided for by a special section of the constitution. (Const., art. XI, sec. 14), and which the court held was "distinct from the general political functions of counties and cities and [**126] the general scheme of county or municipal government." Likewise, the statute upheld in the case of *Board of Law Library Trustees* v. *Board of Supervisors*, 99 Cal. 571, [34 Pac. 244], left to the election of the different counties the matter of the establishment of law libraries, but such institutions are not part of the system of county government, at least in so far as the execution of

"political functions" is concerned, and, consequently, the point here presented was not discussed in that case. In *Tulare County v. May*, 118 Cal. 303, [50 Pac. 427], the act provided for one additional deputy sheriff and two deputy **[*194]** clerks in any county in which an additional judge of the superior court was created by the legislature. This provision was valid, for, as stated in the opinion, it operated in each county alike upon the creation of an additional **[***23]** judge in that county *by the legislature*.

The employment of plaintiff to perform the work in question was ratified by the board of supervisors by allowing his claim for compensation for the work (*Power v. May*, 123 Cal. 147, [55 Pac. 796]), and, in view of the fact that the County Engineer Act must be held unconstitutional, the record discloses no valid objection to the payment of the claim thus allowed. Disregarding the findings concerning the proceedings under the said County Engineer Act, the remaining findings of the trial court are sufficient to support a judgment in plaintiff's favor. Accordingly, the judgment is reversed, with directions to the trial court to grant the relief prayed for in plaintiff's petition.

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Exhibit 3

*142 Cal. 447, *; 76 P. 42, **;*
*1904 Cal. LEXIS 960, ****

MILLER & LUX, Appellant, v. J. B. BATZ, Treasurer of Kern County, Respondent

L. A. No. 1353

Supreme Court of California, Department One

142 Cal. 447; 76 P. 42; 1904 Cal. LEXIS 960

March 10, 1904

PRIOR HISTORY: [***1]

APPEAL from a judgment of the Superior Court of Kern County. J. W. Mahon, Judge.

DISPOSITION: For the reasons given in the foregoing opinion the judgment is reversed, with directions to overrule the demurrer.

CORE TERMS: purchaser, swamp-land, statute of limitations, reclamation, register, county treasurer, amount paid, pleaded, per acre, treasurer, treasury, demurrer, dollars, purchase money, computation, surplus, patent, duty, express trust, begin to run, expenditure, chargeable, annexation, expended, assignors, board of supervisors, liability created, taxing district, cause of action, general fund

SYLLABUS: The facts are stated in the opinion.

COUNSEL: Joseph R. Garber, for Appellant.

J. W. Ahern, and J. R. Dorsey, for Respondent.

JUDGES: Chipman, C. Gray, C., and Cooper, C., concurred. Angellotti, J., Shaw, J., Van Dyke, J.

OPINIONBY: CHIPMAN

OPINION: [*447] [**42] *Mandamus*. The principal question raised is on plea of the statute of limitations raised by the demurrer. It does not appear by the transcript when the original petition for the writ was filed, but the respondent states that it was on January 6, 1898, and we will assume that to be the date. The demurrer was sustained, and defendant had judgment, from which plaintiff appealed. The purpose of the writ was to compel [**43] defendant to pay the plaintiff certain moneys alleged to be due plaintiff out of the swamp-land fund held by defendant.

It appears that the amount paid into the treasury of Kern County by plaintiff's predecessors and assignors on account of the purchase price of the land in swamp-land district [***2] No. [*448] 457 as originally defined was $ 1,931.38, and the amount paid on account of the purchase price of land in the annexation was $ 414.37. More than two dollars per acre was expended by plaintiff and its assignors in the reclamation of the land in the original district, and the fact was duly certified by the trustees of the district, as provided by section 3476 of the Political Code, and was also so certified to the register of the state land office on

March 9, 1891, and on March 11, 1891, agreeably to section 3477 of the same code, the register forwarded to the treasurer of Kern County a statement that the amount paid by the purchaser was as above shown. Similar expenditures, to the amount of $ 414.33, were made in reclaiming the land in the annexation, and were duly certified by the trustees of the district April 4, 1893, and were certified back by the register to the treasurer of the county on April 14, 1893. There was no amount at any time chargeable against the district or its annexation by reason of moneys drawn from the swamp-land fund, nor had the district ever had any indebtedness represented by controller's warrants drawn on the state treasury.

Under section [***3] 3477 of the Political Code the right accrued to demand the sum of $ 1,931.38 out of the swamp-land fund of the county at least as early as March 11, 1891, and the sum of $ 414.37 on April 14, 1893. It is alleged, however, that from March 10, 1891, to and including December 28, 1897, the total amount of money in the swamp-land fund of said county was less than $ 1,894. On December 28, 1897, payment was demanded of the several sums due, "or as much thereof as there remained in the swamp-land fund, which demand was refused." At this time the amount in the fund was $ 1,098.09.

The alleged insufficiency of the facts to constitute a cause of action is not urged by respondent, nor is the question as to an alleged defect of parties defendant; these points will be deemed waived. Respondent rests upon the claim that the action is barred by the statute of limitations. The cause was here once before (*Miller & Lux v. Batz*, 131 Cal. 402), and the only statute then pleaded in bar was subdivision 1 of section 338 of the Code of Civil Procedure, the theory of defendant then being that the action was upon a liability created by statute other than a penalty or forfeiture. The [*449] [***4] court said: "The plaintiff's cause of action herein is not founded upon a liability created by statute, but is based upon a contract between him and the state, and is subject only to those provisions of the statute of limitations which are applicable to causes of action arising out of contractual relations." No other statute being pleaded, the cause was remanded on rehearing, with leave to plaintiff to amend so as to obviate the objection pointed out in the Department decision affirming the judgment. (61 Pac. Rep. 935.) The statute requires the county treasurer to retain all moneys arising from the sale of swamp or overflowed lands, and place the same to the credit of the "swamp-land fund" of the county. (Pol. Code, sec. 3426.) The statute also provides that when the works of reclamation are completed, or when two dollars per acre has been expended on such works, and the facts are certified to the board of supervisors, the latter must certify the facts to the register (Pol. Code, sec. 3476), and the register must thereupon credit each purchaser with payment in full for such lands who is then entitled to patent. The register must also make a statement to the county treasurer showing [***5] the amount paid by each purchaser. After making certain deductions chargeable against the swamp-land fund of the county by reason of moneys drawn therefrom, the county treasurer "must divide the balance *pro rata* among the original purchasers of the land or their assigns, and must pay to each purchaser on demand the amount found to be due from such computation, out of the moneys in his hands to the credit of the swamp-land fund of the county." In the present case there were no amounts chargeable against the fund, and the whole amount paid as above stated was due plaintiff out of this fund. Except to meet demands on the fund provided by statute (and there were none in this case), there is no authority given to use the fund for any purpose, except upon a transfer to the general county fund by way of loan (Stats. 1880, p. 399); and when necessary to repay the amount so loaned, the act authorized warrants to be drawn upon the general county fund for the amount so loaned, or any part thereof, and such claims become preferred claims against that fund, to be paid out of the first moneys received in such fund.

[*450] According to the petition, there was about $ 1,894 in the swamp-land [***6] fund from the time plaintiff could have demanded the money up to the time (December 28, 1897,) when the demand was made, and there was $ 1,098.09 when the petition was filed. The balance of the money standing to the purchaser's credit must be presumed to have been in the general fund by transfer, as there was no authority to make other disposition of it

(Code Civ. Proc., sec. 1963, subd. 15), and on demand it became the duty of the board of supervisors to retransfer the money to the swamp-land fund or issue warrants against the general fund, as provided by the act of 1880. (Stats. 1880, p. 399.)

Appellant contends that the treasurer holds the money as trustee of an express trust, [**44] and therefore the statute did not begin to run until appellant's demand was made, and until the trust is expressly repudiated the statute does not run; that the money is held in trust as is the land, and the purchaser may demand either at his pleasure. It is also claimed that if the treasurer is not the trustee of an express trust the demand was made within a reasonable time after the right accrued, and nothing more was required.

The question then is, Was the statute of limitations set in motion [***7] at the time when plaintiff or its assignors had the right to demand payment? We think the answer must be in the negative.

The original grant of swamp and overflowed land by the general government to the state was by its nature and object a trust to bring about the reclamation of the land, although title to the land passed to the state. In its disposition by the state to purchasers reclamation was contemplated, -- hence the machinery for organizing reclamation districts; the creation of a swamp-land fund, of which the money paid by the purchaser was a part; the provisions for carrying on the work of reclamation by trustees, or by the purchasers themselves out of this fund, and for the repayment to the purchasers the unexpended purchase money on completion of the reclamation or the expenditure of two dollars per acre for that purpose. The history and object of the grant and the successive state enactments will be found quite fully set forth in the *County of Kings* v. *County of Tulare*, 119 Cal. 509. It was there held that the officers of the county, so far as called upon [*451] to execute the law, were but agents of the state, and had no property right in the fund or in [***8] the land. The fund was placed in the county treasury merely to facilitate the purpose of the grant to the state, which was to cause the land to be reclaimed, and that the state had not transferred its trust. Upon proof made of complete reclamation to the register of the state land office, or to the expenditure of two dollars per acre therefor, the purchaser became entitled to a patent; and it became the duty of the register to certify to the county treasurer the amount paid by each purchaser; and the county treasurer was then required, after making computation of charges against the fund to "pay to each purchaser, or his assigns, on demand, the amount found to be due him from such computation out of the moneys in his hands to the credit of the 'swamp-land fund' of the county." (Pol. Code, sec. 3477.) Under the provisions of the law the purchaser acquires an equitable interest in the land by the deposit of his purchase money, and likewise a similar interest in the swamp-land fund, where his money is deposited, upon doing the reclamation work, and it seems to us that the land and money are both held by the state in trust for the purchaser.

This swamp-land fund is a special fund, separate [***9] from all other funds of the state or county which became vested in the state upon payment by the purchaser. The state agreed, however, on certain conditions, not only to convey the title to the land to the purchaser, but to restore to him the purchase money in the event of his reclaiming the land. It was not the purpose of the law that the state should profit pecuniarily by the transaction. The main object was to cause the land to be reclaimed, and to bring otherwise profitless land under cultivation and make it productive and habitable. The state could retain the money only upon failure of the purchaser to do what the law required of him, which, when done, entitled him not only to a patent to the land, but a return of the money paid whenever he might apply for it.

An act of Congress imposed a direct tax upon certain property, and provided that in case of sale the surplus of the proceeds "shall be paid to the owner of the property," and if not paid "shall be deposited in the treasury of the United States, to be there held for the use of the owner, or his legal [*452] representative, until he or they shall make application therefor

to the secretary of the treasury, who, upon [***10] such application, shall, by warrant on the treasury, cause the same to be paid to the applicant." Suit was brought in the Court of Claims, and the bar of the statute of limitations was pleaded. The court held that the law imposing the tax fixed no limit of time within which the application should be made, and the secretary was not authorized to fix a limit; that the government held the money as trustee, and that the statute did not begin to run against the *cestui que trust* until the trustee had unequivocally repudiated the trust. (*United States* v. *Taylor*, 104 U.S. 216.)

A gas company contracted with the municipality to furnish gas to the city, "and was to be paid ten cents on the $ 100, the tax levied for lighting purposes, whenever said taxes were collected." In a suit by the company the city pleaded the statute of limitations. It was held that the tax was levied for a specific purpose in pursuance of a lawful contract made by the city, and the gas company became the equitable owner of those taxes. The charter made it the duty of the commissioners of the taxing district to disburse taxes for the purpose for which they were levied, and a creditor could look only to [***11] the particular tax levied. The court said: "We are, therefore, of the opinion that, in view of the provisions of this charter, the commissioners are made express trustees of those taxes. The board of commissioners constitutes an agency or instrumentality of the taxing district, and the plea of the statute of limitations is unavailing as a defense to the city." (*Memphis Gas Light Co.* v. *Memphis*, 93 Tenn. 612.)

A statute of Maine provided for equalizing the burden of war debts of the towns in the state by a limited assumption on the part of the state. [**45] It was provided that where, in the process of equalizing bounties, a town had received a surplus over what it had expended, this surplus should belong to the soldiers who served on the town's quota without receiving any bounty therefrom. The court held that this legislation constituted an express trust, and the statute of limitations did not begin to run in favor of the town until disavowed by it; that mere delay on the part of the soldier in demanding payment, after his share became payable, did not bar his right of recovery. (*McGuire* v. *Linnens*, 74 Me. 344.)

[*453] The controlling principle of these [***12] cases appears applicable to the case now here, and warrants us in holding that the statute of limitations does not stand in the way of paying the plaintiff's claim.

We find nothing in what was said in the case when here before, nor in *Carpenter* v. *San Francisco Savings Union*, 128 Cal. 516, contrary to this view. In the latter case no question arose as to the statute of limitations.

It is advised that the judgment be reversed, with directions to overrule the demurrer.

For the reasons given in the foregoing opinion the judgment is reversed, with directions to overrule the demurrer.

Service: Get by LEXSEE®
Citation: 142 Cal. 447
View: Full
Date/Time: Friday, October 12, 2001 - 6:09 PM EDT

Exhibit 4

*25 Cal. 93, *; 1864 Cal. LEXIS 13, ***

J. E. MILLER v. THE BOARD OF SUPERVISORS OF SACRAMENTO COUNTY

[NO NUMBER IN ORIGINAL]

SUPREME COURT OF CALIFORNIA

25 Cal. 93; 1864 Cal. LEXIS 13

April 1864

PRIOR HISTORY: [**1] Certiorari to the Board of Supervisors of Sacramento County.

CORE TERMS: incumbent, resignation, elected, exceeded, oath of office, assigned, resigned, Practice Act, appellate jurisdiction, appointed, invested, tendered, neglect, vacant, sureties, oath, power to issue, stood, writ of certiorari, general election, adequate remedy, transmitted, prescribed, withdrawal, affirming, exhibited, modifying, annulling, complains, election

SYLLABUS: The facts are stated in the opinion of the Court.

COUNSEL: *H. H. Hartley*, for Petitioner.

Upton and *Estee*, for Respondent.

JUDGES: Currey, J. Mr. Justice Sawyer expressed no opinion.

OPINIONBY: CURREY

OPINION: [*94] The petitioner, John E. Miller, was elected at the general election of the year 1863 to the office of Public Administrator of Sacramento County, for the term to commence on the first Monday of March, 1864, and a certificate of his election was duly issued to him by the proper officer. On the first Monday of March, 1864, before Miller had taken the oath of office or executed the proper bond, with sureties, he tendered, in writing, to the Judge of the County Court of the county, his resignation of the office to which he had been elected, which was accepted by such Judge, and by him transmitted to the Board of Supervisors, and the same was placed on file with the Clerk of the Board. Afterward, on the 15th of March, the petitioner gave notice, in writing, to the Supervisors that he withdrew his resignation, and at the same time exhibited to them proof that he had duly taken the official oath required by law, [**2] and tendered to the Board his official bond, executed in the amount and form prescribed by law, which was received and filed with the Clerk of the Board. The Board met on the 5th of April, and proceeded to consider the matten in relation to the resignation of Miller; and, upon motion of one of its members, the same was in form accepted, and so entered in the minutes of their proceedings; and on the following day the Board met again and rejected the bond, for reasons specially assigned. The reasons so assigned were not because the bond was not in substance and form in compliance [*95] with the requirements of the statute in such cases made and provided, nor because the sureties were not sufficient and responsible; but, in effect, because the petitioner had resigned the office. Immediately before the petitioner gave the Board notice of his withdrawal of his resignation he applied to the County Judge and requested to be permitted to withdraw his resignation, and the Judge consented thereto and advised him that, as his resignation

had been transmitted to the Board of Supervisors, to notify the Board of his withdrawal of it.

In the petition presented to this Court, the petitioner [**3] complains that the Board of Supervisors, by their action rejecting the bond for the reasons by them assigned, acted in violation of law and exceeded their jurisdiction, to the manifest injury of the petitioner; and he therefore prays this Court to order that a writ of certiorari be issued to said Board to certify up to this Court for review their records and proceedings in the premises, that this Court may render such judgment concerning the matter as may be proper in the case.

This writ was granted without any prejudice to any defense the Board of Supervisors might have made upon the return of an order to show cause why the writ should not be granted. The Board has caused to be certified and brought before the Court all their proceedings; and upon the record thus made up it is maintained, on behalf of the Supervisors:

First -- That this Court has not jurisdiction to grant a writ of certiorari, except in aid of its appellate jurisdiction.

Second -- That if the Court has such jurisdiction, the case exhibited by the record does not show that the Board of Supervisors exceeded their jurisdiction by performing the acts of which the petitioner complains.

I. The Constitution as amended [**4] provides that the Supreme Court shall "have power to issue writs of mandamus, certiorari, prohibition and habeas corpus, and also all writs necessary or proper to the complete exercise of its appellate jurisdiction." (Art. VI, Sec. 4.) This section of the Constitution as it stood before it was amended, after enumerating the appellate powers of the Supreme Court, provided that it [*96] should have power to issue all writs and process necessary to the exercise of its appellate jurisdiction. The change effected by the amendment seems to have been designed to enlarge the powers of the Court by conferring upon it original jurisdiction in the particulars specified in the fourth section of the Sixth Article. The language of this section is too clear and explicit to leave it open to any other construction, however much the Court might be disposed to decline this new jurisdiction, in view of the inconveniences and embarrassments that may attend its exercise. (*Tyler* v. *Houghton*, 25 Cal. 26.)

II. The main point in the case is involved in the second objection, namely: that from the record certified to this Court it does not appear that the Board of Supervisors exceeded their jurisdiction [**5] in accepting the resignation of the petitioner and in the rejecting of his bond filed with the Board.

The writ of certiorari shall be granted in all cases where an inferior tribunal, Board, or officer, exercising judicial functions, has exceeded the jurisdiction of such tribunal, Board, or officer, and there is no appeal, nor in the judgment of the Court any plain, speedy, and adequate remedy. This is so provided by the four hundred and fifty-sixth section of the Practice Act; and the only question to be considered under the authority of this statute is, whether the case presented by the record before us embodies the elemental conditions authorizing the issuing of the writ in the first place; and the giving of judgment, either affirming, annulling, or modifying the proceedings of the Board, in the second place; for the power of review possessed by the Court in this case cannot be extended further than to determine whether the Board has regularly pursued its authority, (Practice Act, Section 462,) and to give judgment either affirming, annulling, or modifying the proceedings of the Board. (Practice Act, Section 463.)

By the twenty-fourth section of the Act providing for the government [**6] of the County of Sacramento, passed April 25th, 1863, (Laws 1863, p. 512,) the Board of Supervisors are required to fix the amount of the official bonds of the several county officers, and such bonds are to be approved by such [*97] Board in open session, which fact is required to be

entered in the minutes of their proceedings and indorsed on the bond by the Clerk, and it shall then be approved by the County Judge. In the matter of the approval or disapproval of the bond, the Board exercises judicial functions. (*Robinson v. Board of Supervisors of Sacramento*, 16 Cal. 208, and cases therein cited; *People v. El Dorado County*, 8 Cal. 58; *People v. The Supervisors of Marin County*, 10 Cal. 344.)

The act performed by the Board of Supervisors, alleged to have been an excess of their jurisdiction, consisted in determining, in effect, that the petitioner had resigned the office to which he was elected, and in rejecting the bond for that reason, and because of a previous attempt on his part to sell the office. Whatever may have been the truth as to such attempt, and however open to animadversion, conduct of this kind may be, that was a question with which the Board had no authority [**7] to deal, and the inquiry must be narrowed down to the point whether the petitioner had resigned the office to which he was elected by the people of the county, and whether his resignation was a subsisting fact at the time the Board acted. If this inquiry be answered in the negative, then the Board, according to the case cited from 10 Cal. 344, exceeded its jurisdiction in treating the alleged resignation as effectual, and rejecting the bond tendered and filed for the reasons by them assigned.

At the time the petitioner undertook to resign the office of Public Administrator he was not in fact invested with that office. Before he could become so he was required by law to take the constitutional oath, and execute with sureties a proper bond to be approved by the Board. Had these things been done within the ten days allowed for the purpose, he would have become the Public Administrator of Sacramento County, and fully invested with the office. Having the mere naked right to the office of Public Administrator, the taking of the constitutional oath of office and executing the bond prescribed were conditions which, fully completed, were essential to the constituting of the petitioner such [**8] officer.

[*98] The first section of the Act concerning Public Administrators is as follows: "There shall be elected at the general election in and for each of the counties of this State, by the electors thereof, a Public Administrator, who shall continue in office for the term of two years, and until his successor is elected and qualified." (Wood's Digest, 51.)

There can be but one incumbent of the office of Public Administrator at the same time, and he who held the office prior to the first Monday in March remained the incumbent on that day, notwithstanding the petitioner was then entitled to the office upon taking the oath and filing the necessary bond. The petitioner's term, or the term for which he was elected, commenced on the first Monday of March; but that fact alone could not constitute him the incumbent of the office, because an incumbent is one who is in the present possession of an office. (Webster.) An officer is one who is lawfully invested with an office; and an office is a right to exercise a public function or employment and to take the fees and emoluments belonging to it. (7 Bac. Ab. 279; title -- Offices and Officers.)

The twenty-third section of the Act concerning [**9] office is as follows: "Every office shall become vacant upon the happening of either of the following events before the expiration of the term of such office: 1. The death or resignation of the incumbent. 2. The removal of the incumbent from office. 3. The confirmed insanity of the incumbent, etc. 4. A conviction of the incumbent of a felony, etc. 5. A refusal or neglect of the person elected or appointed to take the oath of office, as prescribed in the seventeenth section of this Act; or when a bond is required by law, his refusal or neglect to give the bond within the same time in which he is required to take the oath of office. 6. The ceasing of the incumbent to be a resident, etc. 7. The ceasing of the incumbent to discharge the duties of the office for the period of three consecutive months, except, etc. 8. The decision of a competent tribunal declaring the election or appointment void, or the office vacant." (Laws of 1863, p. 389.)

By reference to these subdivisions of section thirty, it will [*99] be observed that the term "incumbent" refers to him alone who has become qualified and has entered into the

possession of the office; and that the person who has been elected [**10] or appointed to an office, who refuses or neglects to take the oath of office, or to give a bond when required, within the time prescribed by law, is not denominated an incumbent; and nothing is said as to the resignation of any other than an incumbent of the office.

In *The People* v. *Van Horne*, 18 Wend. 515, Mr. Chief Justice Savage said: "An office cannot be said to be vacant while any person is authorized to act in it, and does so act." And in reference to a statute like the first section of our Act concerning Public Administrators, he said: "In such cases there is, in fact, no vacancy, because the officers of the preceding year hold the offices until others are chosen or appointed in their places and have qualified."

If the petitioner had not become the incumbent of the office which he was elected to fill, he had no office to resign; and though he may have supposed he had, yet that did not alter the fact, and his attempted resignation and the acceptance of it by the County Judge was abortive and ineffectual.

The petitioner having taken the oath and filed the bond required by law, the Board of Supervisors ought to have approved it, if no other objection stood in the way than [**11] those assigned for rejecting it. We think the Board, by their action, which we are called upon to review, exceeded their jurisdiction. (*People* v. *Supervisors of Marin County*, 10 Cal. 344.) For the correction of this error there is no appeal, nor in our judgment, any plain, speedy, and adequate remedy other than by certiorari.

It is therefore ordered and adjudged that the proceedings of the Board of Supervisors of Sacramento County, in holding that the petitioner had resigned the office of Public Administrator, and in rejecting his bond filed, be annulled and held for naught.

Service: Get by LEXSEE®
Citation: 25 cal 93
View: Full
Date/Time: Friday, October 12, 2001 - 6:12 PM EDT

Exhibit 5

*127 Cal. 388, *; 59 P. 702, **;*
*1899 Cal. LEXIS 659, ****

A. T. PATTON, Respondent, v. BOARD OF HEALTH OF CITY AND COUNTY OF SAN FRANCISCO et al., Appellants

S. F. No. 1853

Supreme Court of California

127 Cal. 388; 59 P. 702; 1899 Cal. LEXIS 659

December 29, 1899

SUBSEQUENT HISTORY: [***1]

Rehearing denied.

PRIOR HISTORY:

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. William R. Daingerfield, Judge.

DISPOSITION: For the reasons given in the foregoing opinion the judgment is reversed, with directions to dismiss the writ.

CORE TERMS: duty, inspector, board of health, appointed, appointment, prescribed, public officer, tenure, pleasure, salary, occasional, delegated, appointee, station, emolument, harbor master, public office, duration, incumbent, permanent, conferred, governor, appoint, clerk, appointing power, power to prescribe, public service, public charge, standing laws, public trust

SYLLABUS: The facts are stated in the opinion.

COUNSEL: Garret W. McEnerney, and Sidney M. Ehrman, for Appellants.

A health inspector of the city and county of San Francisco is a public officer within the provisions of section 16 of article XX of the constitution. His salary is fixed by section 3010. The provision in section 3009, in regard to removal for cause only, being in violation of the constitutional provision as to the pleasure of the appointing power, is unconstitutional and void. (*People v. Hill*, 7 Cal. 97; *Smith v. Brown*, 59 Cal. 672; *People v. Shear* (Cal., Sept. 24, 1887), 15 Pac. Rep. 92.) A health inspector falls within the recognized definitions and authorities as to what constitutes a public office or officer. (Bacon's Abridgment, tit. Office and Officers, A; Burrill's Law Dictionary, tit. Office; *Henley v. Mayor*, 5 Bing. 91; *United States v. Hartwell*, 6 [***2] Wall. 385, 393; *United States v. Maurice*, 2 Brock. 96, 103; *Shelby v. Alcorn*, 36 Miss. 273; 72 Am. Dec. 169; *Bradford v. Justices*, 33 Ga. 332; *Bunn v. People*, 45 Ill. 397; *Attorney General v. Drohan*, 169 Mass. 534; 61 Am. St. Rep. 301; *Brown v. Russell*, 166 Mass. 14; 55 Am. St. Rep. 357; *People ex rel. Armsted v. Nostrand*, 46 N. Y. 381; *People ex rel. Kelley v. Common Council*, 77 N. Y. 503; 33 Am. Rep. 659; *Opinion of Judges*, 3 Me. 481; *Rowland v. Mayor*, 83 N. Y. 376; *Moser v. Mayor*, 21 Hun, 163; *In re Hardy*, 17 Misc. Rep. 667; 41 N. Y. Supp. 469; *Ricketts v. New York*, 67 How. Pr. 320; *Vaughn v. English*, 8 Cal. 40.)

James P. Langhorne, W. F. Fitzgerald, and A. T. Patton, *In pro. per.*, for Respondent.

The only person designated as an officer in the clause of section 3009 providing for health inspectors is the "quarantine officer." In other clauses certain "officers" are mentioned, and also "other employees." The nature of the functions of an employee determine the official or unofficial character of his employment. (*State v. Kennon*, 7 Ohio St. 557.) The health inspector is a mere agent, servant, or messenger of the board **[***3]** of health, and is not an officer. (*Smith v. Mayor*, 67 Barb. 223; *Olmstead v. Mayor*, 42 N. Y. Sup. Ct. 482; *People v. Pinckney*, 32 N. Y. 377; *Bunn v. People*, 45 Ill. 397.) Treating the "position" of health inspector as analogous to an office, still he could only be removed for "cause" after hearing. (*State ex rel. Lewis v. Board of Public Works*, 51 N. J. L. 240; *Kennedy v. Board of Education*, 82 Cal. 483; *Marion v. Board of Education*, 97 Cal. 608; *State ex rel. Denison v. St. Louis*, 90 Mo. 22; *State ex rel. Dally v. Essex County Freeholders*, 58 N. J. L. 319; *State ex rel. Reid v. Walbridge*, 119 Mo. 383; 41 Am. St. Rep. 663; *Haight v. Love*, 39 N. J. L. 22; *Dullam v. Willson*, 53 Mich. 392; 51 Am. Rep. 128; *Hallgren v. Campbell*, 82 Mich. 260; 21 Am. St. Rep. 557; *State ex rel. Hastings v. Smith*, 35 Neb. 13; *Ham v. Boston Board Police*, 142 Mass. 95; *People v. Carver*, 5 Colo. App. 159; *People ex rel. Munday v. Fire Commrs.*, 72 N. Y. 448; Mechem on Public Offices and Officers, sec. 454.) Every presumption is to be indulged in favor of the constitutionality of the express provision against removal of health inspectors, except **[***4]** for cause, contained in the section providing for their appointment. (*Bourland v. Hildreth*, 26 Cal. 161; *People v. Frisbie*, 26 Cal. 135; *University v. Bernard*, 57 Cal. 612; *People v. Hayne*, 83 Cal. 111; 17 Am. St. Rep. 217.)

JUDGES: In Bank. Chipman, C. Cooper, C., and Gray, C., concurred. Harrison, J., Garoutte, J., McFarland, J., Henshaw, J.

OPINIONBY: CHIPMAN

OPINION: **[*391]** **[**703]** Plaintiff brings this action against the board of health of the city and county of San Francisco for a writ of mandate requiring it to admit plaintiff to the position of health inspector and to approve certain of his demands on the treasury for salary accruing since his removal.

The court found as facts that the board of health appointed plaintiff on August 6, 1895, as one of the six health inspectors provided to be appointed by section 3009 of the Political Code; that the board of health, in its order appointing plaintiff, did not specify or in any manner limit the term for which plaintiff should hold or exercise the position; that plaintiff entered upon the discharge of his duties pursuant to such appointment, and discharged the duties required of him by the board until about November **[***5]** 6, 1896, at which time, and while plaintiff was proceeding to perform his duties, the board passed a resolution purporting by its terms to remove plaintiff from his said position, "but the said resolution was so passed without plaintiff's knowledge or consent, and without any notice to him that any charge whatever had been made against him, or that any charge against him would be heard by said board, ... and plaintiff had no opportunity to be heard in his own behalf before said board of health or its members before the passage of said resolution." It is further found that solely upon the authority of said resolution plaintiff has been denied his right to be and act as such health inspector, and has been deprived of the emoluments pertaining to said position; that the duties of plaintiff as such inspector, prescribed by the board, were "to inspect premises concerning which complaints have been made to said board, and to report thereon to said board, and to serve notices issued by said board to persons to abate nuisances on their premises."

As conclusions of law, the court found that plaintiff has never been legally removed from the position of health inspector, and that he is still **[***6]** one of the six health inspectors appointed by the board of health August 6, 1895, and that "It is not material whether plaintiff

was guilty of insolence, insubordination, or neglect, as he had no trial on such charge or charges"; that plaintiff is not an officer or commissioner within the meaning [*392] of section 16, article XX, of the constitution of this state, and that plaintiff is entitled to the writ, etc. At the trial plaintiff testified: "When I became a health inspector no written commission was issued to me. I took no oath of office, nor filed any bond." Plaintiff had judgment, from which and from the order denying new trial defendant appeals. Appellant relies principally upon the following proposition: The plaintiff's term of office as health inspector not having been fixed by the constitution or by law, he held at the pleasure of the appointing power; and that portion of section 3009 of the Political Code prohibiting his removal without just cause is unconstitutional and void, because in violation of section 16, article XX, of the constitution.

This provision of the constitution reads as follows: "When the term of any officer or commissioner is not provided for [***7] in this constitution, the term may be declared by law; and, if not so declared, such officer or commissioner shall hold his position as such officer or commissioner during the pleasure of the authority making the appointment; but in no case shall such term exceed four years." It is conceded that the term of the position of health inspector is not prescribed either in the constitution or by any law. Section 3009 of the Political Code contains the following, among other provisions: "The board of health must appoint . . . . six health inspectors . . . . whose duties must be fixed by the board of health. . . . The appointing power aforesaid is vested solely in said board of health, and said board shall have power to prescribe the duties of said appointees (referring to health inspectors and many other appointees), and shall not remove the same without just cause." It cannot be doubted that the legislature may authorize the employment of persons to perform certain duties in their nature public, to be prescribed by the authority making the appointment of such persons, and may provide in the law that such persons shall not be removed without just cause, if the employment is not an office [***8] within the meaning of the constitution; and it is well settled that under such a clause in the statute the appointee is entitled to notice and opportunity to be heard before he can be legally removed. (*Kennedy v. Board of Education*, 82 Cal. 483; *Marlon v. Board of Education*, 97 Cal. 608; *Fairchild v. Board of Education*, 107 Cal. 92.)

[*393] With the policy of such a law we have nothing to do; its wisdom or unwisdom is for the legislature alone to determine. We are only concerned, in the present case, with the question, Is the health inspector an officer within the meaning of the provision of the constitution above quoted?

Many of the cases and authors giving definitions of the word "office" and "officer" as used in statutes and constitutions will be found cited in chapter 1 of Mechem on Public Offices and Officers. Counsel in their briefs have called attention to some others. I do not think it possible from this mass of learning [**704] to deduce a definition universally applicable, although nearly every conceivable case has arisen and has been passed upon. It seems to be agreed by all writers that certain things are requisite to make a given employment [***9] a public office and its incumbent a public officer. Then there are numerous criteria which, while not in themselves conclusive, are yet held to indicate more or less strongly the legislative intent to create or not to create an office. One of the requisites is that the office itself must be created by the constitution of the state or it must be authorized by some statute. The section of the constitution in question embraces all classes of officers, statutory as well as constitutional. (*People v. Perry*, 79 Cal. 105.) But not all employments authorized by law are public offices in the sense of the constitution. The presidency of a private corporation may be spoken of as an office; an executor, guardian, a referee for the decision and trial of an action, are all officers who derive their existence from statutes, but they are not public officers in the constitutional sense; "their authority is restricted to specific matters, and no general powers are conferred upon them authorizing them to act in respect of all cases, or in any case or matter other than specified and named in their appointment. They owe no duty to the public, and could perform no service for the public. . . [***10] . 'Public office,' as used in the constitution, has respect to a permanent trust to be exercised in behalf of the government,

or of all citizens who may need the intervention of a public functionary or officer, and in all matters within the range of the duties pertaining to the character of the trust. It means a right to exercise generally, and in all proper cases, the functions of a public trust or employment, and to receive [*394] the fees and emoluments belonging to it, and to hold the place and perform the duty for the term and by the tenure prescribed by law." (*In re Hathaway*, 71 N. Y. 238.) Danforth, J., in *Rowland v. Mayor*, 83 N. Y. 376, said: "Whoever has a public charge or employment, or even a particular employment affecting the public, is said to hold or to be in office." Platt, J., in *Matter of Oaths*, 20 Johns. 492, speaks of "office" as "an employment on behalf of the government in any station or public trust, not merely transient, occasional, or incidental." Pearson, C. J., in *State v. Stanley*, 66 N. C. 59, 8 Am. Rep. 488, said: "A public office is an agency for the state, and the person whose duty it is to perform this agency is a public officer. [***11] . . . The essence of it is the duty of performing an agency -- that is, of doing some act or acts, or series of acts, for the state." It has hence been held by most courts, as was said in the opinion of the judges, given to the governor, reported in appendix to 3 Me. 481: "The term 'office' implies a delegation of a portion of the sovereign power to, and possession of it by, the person filling the office, and the exercise of such power, within legal limits, constitutes the correct discharge of the duties of such office." The opinion proceeds to further point out the distinction between an office and an employment under the government. "The power thus delegated and possessed may be a portion belonging to some one of the three great departments, and sometimes to another; still it is a legal power, which may be rightfully exercised, and in its effects it will bind the rights of others, and be subject to revision and correction only according to the standing laws of the state. An employment merely has none of these distinguishing features. A public agent acts only on behalf of his principal, the public, whose sanction is generally considered as necessary to give the acts performed [***12] the authority and power of a public act or law. And if the act be such as not to require such subsequent sanction, still it is only a species of service performed under the public authority and for the public good, but not in the execution of any standing laws, which are considered as the rules of action and the guardians of rights." In *United States v. Maurice*, 2 Brock. 96, Chief Justice Marshall, in determining that the "agent of fortifications" is an officer of the United States, said: "An office [*395] is defined to be 'a public charge or employment,' and he who performs the duties of the office is an officer. . . . Although an office is 'an employment,' it does not follow that every employment is an office. A man may certainly be employed under a contract, express or implied, to do an act or perform a service without becoming an officer. But if the duty be a continuing one, which is defined by rules prescribed by the government, and not by contract, which an individual is appointed by government to perform, who enters on the duties appertaining to the station without any contract defining them, if those duties continue, though the person be changed -- it seems very [***13] difficult to distinguish such a charge or employment from an office, or the person who performs the duties from an officer. If it may be converted into a contract, it must be a contract to perform the duties of the office of agent of fortifications, and such an office must exist with ascertained duties, or there is no standard by which the extent of the condition can be measured." Judge Cooley distinguished the "officer" from the "employee" in the "greater importance, dignity, and independence of his position; in being required to take an official oath, and perhaps to give an official bond; in the liability to be called to account as a public offender for misfeasance or nonfeasance in office, and usually, though not necessarily, in the tenure of the position." (*Throop v. Langdon*, 40 Mich. 673.) But it has been held that an oath of office is not a necessary criterion; nor is salary. These are but incidents and form no part of the office, though they may aid in determining the nature of the position. Duration or continuance have been said to be embraced in the term "office" and Chief Justice Marshall, in the case cited, spoke of the [**705] duty being a continuing one as an [***14] important element. But Chief Justice Pearson, in the North Carolina case cited, said "that it made no difference whether there be but one act or a series of acts to be done -- whether the office expires as soon as the one act is done, or is to be held for years or during good behavior" -- the service being performed for the state. Our court at an early day, in *Vaughn v. English*, 8 Cal. 40, held that the clerks in the offices of secretary of state and controller

and treasurer of state were officers within the meaning of the act of April 21, 1856. (Stats. 1856, p. 224.) It was there said: "The term [*396] 'officer,' in its common acceptation, is sufficiently comprehensive to include all persons in any public station or employment conferred by government." The definition given in 4 Jacob's Law Dictionary, 433, was quoted as follows: "It is said every man is a public officer who hath any duty concerning the public, and he is not the less a public officer where his authority is confined to narrow limits, because it is the duty of his office and the nature of that duty which makes him a public officer, and not the extent of his authority." The opinion continues: "The respondent [***15] was appointed by government; the duties which he is to perform concern the public, and he is paid out of the public treasury; he is, therefore, a public officer." It was held that because there was no definite term of the office could not be urged as an objection, for the clerks are appointed for the term of the officer making the appointment, subject to the power of removal.

It was held in *United States v. Germaine*, 99 U.S. 508, that civil surgeons appointed by the commissioner of pensions are not officers of the United States, because they are not appointed by a head of a department, nor are the appointments approved by such head, and this distinguished the case from *United States v. Hartwell*, 6 Wall. 385, where it was held that a clerk in the office of the assistant treasurer of the United States is an officer within the meaning of the act of Congress of June 14, 1866 (14 Stats. at Large, 65), punishing embezzlement. It was there said: "An office is a public station, or employment, conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument, and duties. The employment of defendant was in the public service of the United States. [***16] He was appointed pursuant to law, and his compensation was fixed by law. Vacating the office of his superior would not have affected the tenure of his place. His duties were continuing and permanent, not occasional or temporary."

In the case of *Bunn v. People* (1867), 45 Ill. 397, the cases were very fully examined and the conclusion reached that the commissioners appointed under an act of the legislature to superintend the construction of the statehouse were not officers within the meaning of the constitution, but were agents or employees for a single and special purpose, whose functions ceased [*397] upon the completion of the work. The question was subsequently regarded in that state of sufficient importance to call for a constitutional definition, and hence in 1870 the constitution ordained the following: "An office is a public position created by the constitution or law, continuing during the pleasure of the appointing power or for a fixed term, with a successor elected or appointed. An employment is an agency for a temporary purpose, which ceases when that purpose is accomplished." (Ill. Const. 1870, art. 5, sec. 24.)

Somewhat in line with the Illinois case last [***17] above cited is the case of *McDaniel v. Yuba County*, 14 Cal. 444, where it was held that the examining physician of the county hospital was not an officer but an employee, to be paid under the terms of his contract, though his services were rendered in a capacity in the nature of a public office or appointment. And so it was held recently in *White v. Alameda*, 124 Cal. 95, that the position of driver of a street wagon, with a salary fixed by the board of trustees, was not an office, but a mere employment held at the pleasure of the board.

In the case of *Quigg v. Evans*, 121 Cal. 546, the question was whether the harbor master of the port of Eureka was an officer within the meaning of section 8, article V, of the constitution, which reads: "When an office from any cause becomes vacant, and no mode is provided by law for filling such vacancy," the governor may appoint, etc. The act creating the position reads: "The town marshal of Eureka is the harbor master of the port of Eureka," etc. By the act he was to enforce the rules and regulations of the harbor commissioners, and his compensation was to be fixed by them. It was held that the office of harbor master was created, [***18] and that when, by the adoption of a new charter, the city of Eureka no longer had a town marshal, there existed a vacancy in the office which the governor could

fill.

Illustrations might be multiplied, but it would only emphasize what must already be apparent, that the definitions of the term "office," while not inaccurate, taken in a general sense, are quite inadequate when applied to particular cases. An examination of adjudicated cases will show that the disagreement among judges has not been so much as to definitions as in their application to the circumstances of each particular case.

[*398] Turning to the statute we find that it is made the duty of the board of health to appoint a large number of persons to various positions therein named, of greater or less importance (Pol. Code, sec. 3009); among which are six health inspectors. In every case "the duties must be fixed by the board of health," except in the single instance of the two police surgeons, who, in addition to the duties to be prescribed by the board, "shall make all autopsies required of them by the coroner." Certain "medical attendants" and "employees" are to be paid such compensation as the board shall [***19] fix, but most of the [**706] appointees named are to be paid salaries fixed by section 3010 of the Political Code, while others are to be paid such sums as may be authorized by law: "Health inspectors, twelve hundred dollars each." It seems to be reasonably well settled that where the legislature creates the position, prescribes the duties, and fixes the compensation, and these duties pertain to the public and are continuing and permanent, not occasional or temporary, such position or employment is an office and he who occupies it is an officer. In such a case, there is an unmistakable declaration by the legislature that some portion, great or small, of the sovereign functions of government are to be exercised for the benefit of the public, and the legislature has decided for itself that the employment is of sufficient dignity and importance to be deemed to be an office.

It is only where the legislature has delegated its power to create the office and to prescribe the duties and compensation, that differences of opinion have arisen in the courts. Without attempting a reconciliation of these differences, it appears that the legislature in the present case has created the office [***20] and has fixed the salary attaching to it; the employment is a continuing one and not transient, occasional, or incidental, and its incumbent would remain in office should the officers of the board of health cease to act as such, and the office of health inspectors would continue if the incumbents were removed or for any cause ceased to act. The health inspector is invested with some portion of the sovereign functions of government, to be exercised for the benefit of the public; his duties are not prescribed by contract, but are defined by the government through the board of health, and we find in the employment all the elements [*399] mentioned in the Hartwell case, *supra*, viz., tenure, duration, emoluments, duties, and a compensation fixed by law. The element of duties to be performed involved in the creation of an office under all definitions and under most of the decisions was not directly determined by the legislature; to the board was delegated the power to prescribe the duties. But many cases hold, we think properly, that an employment may be none the less an office, although the duties are to be prescribed by a superior officer.

"The board of health have general [***21] supervision of all matters appertaining to the sanitary condition of the city and county," etc. (Pol. Code, sec. 3012); their powers and duties are large and important, and the statute authorizes the board to devolve upon the health inspectors such portion of these powers and duties as the board may deem best for the good of the public service. So far as the evidence shows, the duties thus delegated to the inspectors are not extensive, but they cannot be said to be unimportant or purely ministerial, or lacking in the requirements of judgment and discretion; and the board may at any time enlarge them. It is difficult to take this case out of the rules which governed the case of *Quigg v. Eureka, supra*, or the case of *United States v. Hartwell, supra*, or *United States v. Maurice, supra*, or the principles laid down in the opinion of the judges reported in 3 Maine, *supra*, or to distinguish it from *Vaughn v. English, supra*.

In the case of *Kennedy v. Board of Education, supra,* it was conceded by both parties and assumed by the court in the majority opinion that the position of teacher in the public schools of the city and county of San Francisco is not an office, **[***22]** and hence that case cannot aid us in reaching a decision here.

Our conclusion is that the intention of the legislature was to make the health inspectors officers within the meaning of the constitution, and, having failed to declare the term of the office, they hold during the pleasure of the board of health. (*People v. Perry, supra; People v. Hill,* 7 Cal. 97; *Smith v. Brown,* 59 Cal. 672.)

It is advised that the judgment be reversed, with directions to dismiss the writ.

[*400] For the reasons given in the foregoing opinion the judgment is reversed, with directions to dismiss the writ.

Service: Get by LEXSEE®
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Date/Time: Friday, October 12, 2001 - 6:52 PM EDT

Exhibit 6

*143 Cal. App. 2d 198, *; 300 P.2d 119, **;*
*1956 Cal. App. LEXIS 1591, ****

JAMES TERRY, Appellant v. JOHN F. BENDER, Respondent

Civ. No. 21485

Court of Appeal of California, Second Appellate District, Division Two

143 Cal. App. 2d 198; 300 P.2d 119; 1956 Cal. App. LEXIS 1591

July 17, 1956

PRIOR HISTORY: [*1]**

APPEAL from a judgment of the Superior Court of Los Angeles County. Bayard Rhone, Judge.

Action for injunctive relief.

DISPOSITION: Reversed. Judgment of dismissal after sustaining demurrers to third amended complaint, reversed.

CASE SUMMARY

PROCEDURAL POSTURE: Appellant taxpayer challenged a decision of the Superior Court of Los Angeles County (California) that dismissed his complaint against respondent special city attorney in which he sought an injunction pursuant to Cal. Civ. Proc. Code § 526a to enjoin the payment of a warrant to respondent on grounds that it was illegal and against public policy.

OVERVIEW: Appellant taxpayer's action under Cal. Civ. Proc. Code § 526a to enjoin a city's payment of a warrant to respondent special city attorney on grounds that respondent had bribed the city mayor was dismissed after the trial court sustained respondent's demurrers. The court reversed the judgment below, holding that because appellant was a citizen and taxpayer and his complaint alleged an unlawful disbursement of municipal funds, he had express statutory authorization to maintain the action. The court also concluded that the complaint alleged facts that stated the essentials of a cause of action and a demurrer should not have been sustained without granting leave to amend. Facts alleged were sufficient if proven to establish that public officials had been bribed and had violated the public trust, and payments were not made pursuant to contracts that so violated public policy. In addition, the complaint prima facie established respondent's fraud in the performance of his contract with the city because it alleged that he deceptively represented the state of the law, and such fraud defeated his right to compensation.

OUTCOME: The court reversed the judgment below, which dismissed appellant taxpayer's complaint against respondent special city attorney because appellant's complaint stated the essentials of a cause of action for bribery and fraud involving public contracts that would prevent the payment of the warrant.

CORE TERMS: city council, duty, charter, cause of action, specifications, tax-deeded, demurrer, void, public officer, enjoin, special demurrer, city attorney, purchasing, secret, governmental body, personal interest, public policy, misrepresentation, treasurer, quitclaim

deed, city charter, first cause, voted, dummy, rents, fiduciary relationship, secret profits, misconduct, merchantable title, special assessment

CORE CONCEPTS - + Hide Concepts

Civil Procedure : Pleading & Practice : Pleadings : Amended Pleadings

The general rule is that an amended pleading supersedes the original complaint, which thereafter serves no function as a pleading. An exception is recognized where there are allegations in the prior complaint destructive of the cause of action which are omitted in the subsequent pleading without a valid explanation.

Governments : Local Governments : Powers & Duties

A public office is a public trust created in the interest and for the benefit of the people. Public officers are obligated, virtute officii, to discharge their responsibilities with integrity and fidelity. Since the officers of a governmental body are trustees of the public weal, they may not exploit or prostitute their official position for their private benefits. When public officials are influenced in the performance of their public duties by base and improper considerations of personal advantage, they violate their oath of office and vitiate the trust reposed in them, and the public is injured by being deprived of their loyal and honest services.

Governments : Local Governments : Powers & Duties

A transaction in which the prohibited interest of a public officer appears is held void both as repugnant to the public policy expressed in the statutes and because the interest of the officer interferes with the unfettered discharge of his duty to the public. The public officer's interest need not be a direct one, since the purpose of the statutes is also to remove all indirect influence of an interested officer as well as to discourage deliberate dishonesty. Statutes prohibiting such conflict of interest by a public officer are strictly enforced.

Civil Procedure : Justiciability : Standing

Governments : Local Governments : Claims By & Against

A taxpayer has express statutory authorization to maintain an action to prevent the alleged illegal expenditure of municipal funds. Cal. Civ. Proc. Code §526a. A municipality whose funds are to be expended pursuant to a corrupt agreement to inject the personal influence of a public officer in the procurement of action by a governmental body suffers incalculable harm to the vitality and efficiency of its public service, and a taxpayer may sue to enjoin such an imposition on the public.

Business & Corporate Entities : Agency : Causes of Action & Remedies

An officer and agent of a city is not entitled to represent secretly a party claiming adversely to the city and to accept a fee for such service. A public officer may not make an unauthorized profit out of the particular public business which has been entrusted to his care. An agent stands in a fiduciary relationship to his principal, and if he makes a secret profit from the subject matter of his agency, the principal may recover such profit.

Civil Procedure : Pleading & Practice : Defenses, Objections & Demurrers

A general demurrer admits the material allegations of the pleading to which it is directed.

Business & Corporate Entities : Agency : Causes of Action & Remedies : Breach of Fiduciary Responsibility

A faithless trustee must disgorge to his principal the secret profits and unauthorized

benefits and advantages he acquires as an outgrowth of the agency.

Civil Procedure : Justiciability : Standing
A taxpayer may sue in a representative capacity in cases involving the failure of a governmental body to perform a duty specifically enjoined.

Legal Ethics : Client Relations : Conflicts of Interest
Legal Ethics : Client Relations : Effective Representation
Where parties occupy a confidential or fiduciary relationship, deception as to the state of the law constitutes a fraudulent representation.

Business & Corporate Entities : Agency : Causes of Action & Remedies : Breach of Fiduciary Responsibility
Dependent on the character of the misconduct involved and the severability of the services rendered, an agent's fraud against his principal or some other serious breach of fealty on his part defeats the agent's right to compensation either in whole or to an extent equivalent to the injury caused the principal by his offensive conduct.

Governments : Local Governments : Powers & Duties
Public policy requires that the duties imposed by statute be discharged; therefore the requirements of a law or ordinance enacted for a public reason may not be waived by an official or a governmental body.

COUNSEL: Albert Vieri for Appellant.

Robert E. Rosskopf for Respondent.

JUDGES: Fox, J. Moore, P. J., and Ashburn, J., concurred.

OPINIONBY: FOX

OPINION: **[*201]** **[**121]** Plaintiff brought an action as a taxpayer for an injunction under section 526a, Code of Civil Procedure, to enjoin the payment of **[**122]** a warrant in the sum of $ 15,095.74. Such payment had been authorized by the City Council of Compton, California. The payee of the warrant was John F. Bender, employed as a special attorney by the city of Compton. The defendants named, in addition to Bender, are Frank G. Bussing, mayor of Compton, and Gerald L. Chapman, city treasurer.

The appeal is from a judgment of dismissal entered after the court sustained demurrers to the third amended complaint. Leave to amend the first count was granted, but plaintiff declined to do so. Demurrers to the remaining three counts were sustained without leave to amend.

The clerk's transcript contains both the original **[***2]** complaint and the third amended complaint for an injunction. The original complaint has been made a part of the record because Bender, the respondent herein, makes reference thereto in certain specifications of his special demurrer and contends that in determining the sufficiency of the third amended complaint we should examine the allegations in the original pleading. The third amended complaint will be subsequently designated as the complaint and the initial pleading will be referred to as the original complaint.

It should be emphasized at the outset that this court is confronted with questions of law only and must accept the allegations of the complaint as true for the purposes of this appeal.

[*202] Count One

The first cause of action is predicated on a financial transaction between Bender and Bussing which is denominated a bribe and charges that Bussing was induced to use his influence in procuring approval of the warrant in favor of Bender at a secret meeting of the city council because of Bussing's unlawful interest in the warrant. The following facts are alleged:

(a) Plaintiff is a citizen, resident and taxpayer of the city of Compton, California, which is a chartered [***3] municipal corporation, and brings the suit in his representative capacity as a taxpayer. Bussing is mayor of Compton and a member of its city council, having been elected for a four-year term of office in July, 1953, and Chapman is city treasurer.

(b) Defendant John F. Bender has been and is employed as special attorney for the city pursuant to a written contract executed on January 11, 1944, a copy of which is attached. This agreement recites that Bender's employment by the city was for the purpose of restoring to the tax rolls all tax-deeded parcels in the city and liquidating all special assessment delinquencies on all properties within the city. To accomplish these purposes, the agreement enumerates Bender's duties, in part, as follows:

(1) Obtaining tax analysis reports on all parcels of tax-deeded or special assessment delinquent property, and furnishing reports to the council in respect thereto.

(2) To appear before any court, board or tribunal in respect to the acquisition by the city of said tax deeds, the clearing of the titles to any of the tax-deeded properties acquired by the city, or the disposal of any such properties.

(3) To perform all legal services required [***4] to endeavor to vest merchantable title in such tax-deeded properties in the city.

(4) To handle all escrows or other matters in respect to the resale of said properties.

Bender's compensation was fixed at 25 per cent of the gross amount received on settlements of special assessments and 25 per cent of the gross sales of tax-deeded property sold by the city. The contract was terminable on 90 days' written notice.

(c) On or about October 13, 1953, the city attorney offered to render to the city as a part of the general services of the city attorney, the services which Bender was performing under his contract.

(d) Sometime between October 13, 1953, and November 17, [*203] 1953, in order to prevent the city from cancelling or terminating the contract and to obtain the payment of fees thereunder, Bender gave Bussing $ 500 in cash, as well as the sum of $ 6,550 for the [**123] purchase of real property. These payments were made with the intent to influence Bussing's vote as mayor and councilman, the parties orally agreeing: (1) that Bussing would have the free use of the property and collect rents therefrom for his own benefit as long as he was able to prevent termination [***5] of the contract; and (2) that Bender would finance further improvements on the property and assist Bussing in the real estate business if Bender was successful in retaining his contract with the city and in keeping certain properties which he purchased from the city in the names of Alzola and Webster.

(e) Bussing solicited and received the payments last described from Bender at a time when he was in financial distress, and with the corrupt intent of allowing his vote to be influenced to obtain approval of the warrant of $ 15,095.74 for Bender. Thereafter, Bussing purchased the real property with Bender's funds and obtained and kept $ 800 in rents from said property without paying Bender for the use of the property or making any other payments to him. In addition, Bender paid the 1954 taxes due on the property.

(f) In exchange for the money received and in consideration of the promises made, Bussing voted on November 17, 1953, to reject the offer of the city attorney to take over Bender's work and to instruct the city attorney to refrain from filing any civil action against Bender on behalf of the city by reason of certain wrongdoing of Bender. On March 9, 1954, the city council [***6] held a hearing on charges made by the city attorney against Bender, whereupon Bussing, pursuant to the corrupt understanding voted to instruct the city attorney that the city council did not wish to take any action against Bender.

(g) In December, 1954, and January, 1955, the city council held secret meetings at which Bussing induced the members to approve a warrant in the sum of $ 15,095.74 to Bender for services under his contract rendered during the period January 11, 1944, to June 21, 1954. On January 4, 1955, the stage having been set by Bussing's influence on the city council at its secret meetings pursuant to his corrupt agreement with Bender, the city council held its regular meeting at which time Bussing stated he favored approval of the warrant. The city council thereupon voted to approve the warrant. Because [*204] of the bribery of Bussing and his acquisition of an unlawful interest in the payment of the warrant to Bender, the resolution approving the warrant is void and the city treasurer has no authority to disburse funds pursuant thereto.

(h) The city charter of Compton contains certain provisions prohibiting officials and employees of the city from having [***7] an interest in certain contracts and transactions involving the city, which are set forth *in haec verba*. *

----------Footnotes----------

* From 1925 until March 11, 1948, section 6, article 26, of the city charter provided: "No member of the Council, or of any Board, and no officer or employee of the City shall be or become directly or indirectly interested in any contract, work or business, or in the sale of any article, the expense price or consideration of which is payable from the City Treasury, nor shall either or any of them receive any gratuity or advantage from any contractor or person furnishing labor or material for the same, and any contract with the City, in which any such officer or employee is or becomes interested, shall be declared void by the Council." (Stats. 1925, ch. 20, pp. 1212, 1245.)

Since March 11, 1948, section 1202, article 12, of the charter provides: "No member of the City Council, officer or employee of the City, shall be financially interested, directly or indirectly, in any contract, sale or transaction to which the City is a party . . . Any such contract or transaction in which there shall be such an interest shall become void at the election of the City, when so declared by resolution of the City Council . . . If any member of the City Council, officer or employee of the City . . . shall so vote or participate or be financially interested as aforesaid, upon conviction thereof, he shall forfeit his office." (Stats. 1948, ch. 11, pp. 236, 259.)

Section 601, article 6, of the 1948 charter reads: "It shall be the duty of the City Council to enforce the provisions of the Charter." (Stats. 1948, ch. 11, pp. 236, 242.)

----------End Footnotes---------- [***8]

(I) By reason of his corrupt agreement with and his receipt of money from Bender, Bussing has acquired a personal interest in the retention of Bender's contract with the city and in the payment of the warrant which is in conflict with the faithful discharge of his duty as mayor. The greater [**124] the payments to Bender and the longer Bender retains his contract, the greater will be Bender's ability to carry out his promise of economic reward to Bussing pursuant to their agreement. The payment of bribes to Bussing is an illegal payment under section 526a of the Code of Civil Procedure and contrary to public policy.

(j) Unless Chapman is restrained from signing and paying the warrant and Bussing is restrained from participating in deliberations, discussions and votes of the city council relating to Bender, the city will suffer irreparable damage.

As has been previously stated, Bender's general demurrer to the first cause of action was overruled, and his special demurrer sustained with leave to amend. Following plaintiff's [*205] election to stand upon his pleading, the court dismissed the complaint. A review of the propriety of this action requires a statement of the [***9] several grounds of special demurrer.

There are eight specifications in the special demurrer based on the grounds of ambiguity, uncertainty and unintelligibility of the first cause of action. In the first two specifications, reference is made to the original complaint in which it is asserted the entire transaction between Bussing and Bender was alleged to be in writing, whereas the amended complaint alleges an oral agreement. In this connection, Bender's brief makes much of the fact that the original complaint alleges Bussing executed a note secured by a trust deed on the property he acquired through Bender and gave an assignment of rents as further security. The trust deed, in which one Danciu, Bender's nominee and agent, is named as beneficiary, was attached as an exhibit. The amended complaints omit these matters, and contain a slightly different version of the transaction by which property passed to Bussing. Bender purports to regard this as fatally inconsistent and ambiguous. His argument is founded on an entirely untenable premise. The general rule is that an amended pleading supersedes the original complaint, which thereafter serves no function as a pleading. (*Meyer* [***10] v. *State Board of Equalization*, 42 Cal.2d 376, 384 [276 P.2d 257]; *Schaefer* v. *Berinstein*, 140 Cal.App.2d 278, 284 [295 P.2d 113].) An exception is recognized where there are allegations in the prior complaint destructive of the cause of action which are omitted in the subsequent pleading without a valid explanation. (*Owens* v. *Traverso*, 125 Cal.App.2d 803, 808 [271 P.2d 164].) This is not such a case. All that was omitted were certain evidentiary facts relating to the technique of consummating the Bender-Bussing transaction, which were not essential to the allegation of a cause of action; and all that was varied were unsubstantial details which in no way changed the fundamental character of that transaction. Under such circumstances, Bender's challenge to the sufficiency of the amended complaint must be determined without reference to the superseded pleading.

Specifications 3 through 5, and other elements of specifications 1 and 2, all of which purport to attack the pleading on the ground of ambiguity, uncertainty and unintelligibility, seem to be concerned less with these features than with the sufficiency of the facts to state a cause of action. But [***11] viewed from either aspect, they are not well taken. In essence, it is claimed that the facts alleged do not constitute any defense [*206] to the payment of the warrant nor do they show any prohibited interest by Bussing in Bender's contract; that it not appearing that Bender did not earn his compensation, Bussing's vote to approve the warrant is immaterial; and that it does not appear that Bussing's participation or vote affected or influenced the approval of the warrant or that the transaction between Bender and Bussing is of any materiality so far as Bender's [**125] right to payment of the warrant is concerned. Since these specifications pertain to matters fundamental both to this count as well as others which may be subsequently discussed, it may be profitable to explore the controlling principles at this point.

These principles have been instructively set forth in the ably-considered opinion of Mr. Justice Vallee in *Schaefer* v. *Berinstein*, 140 Cal.App.2d 278 [295 P.2d 113] (hear. den.), which may well be viewed as a companion case. There, as here, Bender is the chief protagonist, and his questioned activities during his tenure as special city attorney are [***12] the focal point of the litigation. We epitomize and distill what is there stated, so far as it is here germane and without immediate reference to the numerous authorities cited therein (pp. 288-291): A public office is a public trust created in the interest and for the benefit of the people.

Public officers are obligated, *virtute officii*, to discharge their responsibilities with integrity and fidelity. Since the officers of a governmental body are trustees of the public weal, they may not exploit or prostitute their official position for their private benefits. When public officials are influenced in the performance of their public duties by base and improper considerations of personal advantage, they violate their oath of office and vitiate the trust reposed in them, and the public is injured by being deprived of their loyal and honest services. It is therefore the general policy of this state that public officers shall not have a personal interest in any contract made in their official capacity. The charter provisions of the city of Compton are in harmony with the established policy of the state in this regard by prohibiting a city officer from being financially interested **[***13]** in any contract or transaction to which the city is a party. A transaction in which the prohibited interest of a public officer appears is held void both as repugnant to the public policy expressed in the statutes and because the interest of the officer interferes with the unfettered discharge of his duty to the public. The public officer's interest need not be a direct one, since the **[*207]** purpose of the statutes is also to remove all indirect influence of an interested officer as well as to discourage deliberate dishonesty. Statutes prohibiting such "conflict of interest" by a public officer are strictly enforced. These propositions are supported by a plethora of authority, most notably, Government Code, sections 1090- 1092; *Moody* v. *Shuffleton*, 203 Cal. 100, 105 [262 P. 1095]; *Miller* v. *City of Martinez*, 28 Cal.App.2d 364, 370 [82 P.2d 519]; *Stockton Plumbing & Supply Co.* v. *Wheeler*, 68 Cal.App. 592, 601-602 [229 P. 1020].

This court has had occasion to give expression and definition to similar pronouncements in two recent cases involving the unlawful interests of members of the Los Angeles Board of Education. In *People* v. *Darby*, **[***14]** 114 Cal.App.2d 412, 426 [250 P.2d 743], we pointed out that the conduct denounced by the law was "the defendant's creation of a situation whereby he becomes interested in a public contract while he is a member of the board. The interest comes under the ban of section 1090 [of the Government Code] whether the member brings about the situation or continues to be interested after knowledge of its existence. For a school trustee to have an 'interest' he is not required to share directly in the profits to be realized. He has an interest the moment he places himself in a situation 'where his personal interest will conflict with the faithful performance of his duty as trustee.' [Citations.]" In *People* v. *Elliott*, 115 Cal.App.2d 410, 418 [252 P.2d 661], it was observed that "the unlawful interest of a public officer in a public contract which is prohibited, is a 'personal interest which might interfere with the unbiased discharge of his duty to the public or prevent the exercise of absolute loyalty and undivided allegiance to the best interests of the governmental unit which he represents.' [Citations.]"

Tested by these prevailing concepts of public morality, and accepting **[***15]** as true the allegations of the complaint, it is beyond question that at the time Bussing **[**126]** voted for approval of the warrant to Bender he had acquired such an interest in the latter's contract as restricted the free exercise of the discretion vested in him for the public good. He had placed himself in a position of economic servitude to Bender, his continued free use of the property passing to him from Bender and his appropriation of the rents therefrom being dependent on Bender's retention of his contract with the city. Bussing agreed to use his official position and influence in Bender's behalf in exchange for the monetary benefits flowing from Bender's largesse towards him. The fact that Bussing's **[*208]** interest might be small or indirect is immaterial so long as it is such as deprives the city of his overriding fidelity to it and places him in the compromising situation where, in the exercise of his official judgment or discretion, he may be influenced by personal considerations rather than the public good. (*Schaefer* v. *Berinstein*, 140 Cal.App.2d 278, 289-290 [295 P.2d 113].) The interest revealed by the pleading was plainly a disqualifying one, for **[***16]** it was clearly to Bussing's pecuniary advantage to insure the perpetuation of Bender's contract. (*People* v. *Elliott, supra*, p. 419.) As long as it continued, he was assured of the gratuitous use of, and income from property he had acquired through Bender. Such an interest by Bussing tainted Bender's contract with illegality and rendered payment for services performed thereunder, at least during the existence of such prohibited interest, contrary to public policy. (*Miller* v. *City*

of Martinez, supra; County of Shasta v. Moody, 90 Cal.App. 519, 523 [265 P. 1032]; Hobbs, Wall & Co. v. Moran, 109 Cal.App. 316, 319-320 [293 P. 145].)

In disavowing the proposition that Bussing had a prohibited interest in the contract under consideration, Bender relies on Commonwealth v. Strickler, 259 Pa. 60 [102 A. 282]. A similar argument based on the Strickler decision was repelled in People v. Darby, supra, page 432, this court pointing out that the Pennsylvania decision is out of harmony with the California law.

Specifications 6 through 8 of the special demurrer attack the adequacy of plaintiff's allegations of irreparable damage as a basis [***17] for enjoining payment of the warrant. Plaintiff is suing as a resident citizen and taxpayer of Compton and his complaint alleges facts which indicate that payment of the warrant as drawn will result in the unlawful disbursement of municipal funds. As such taxpayer, he has express statutory authorization to maintain an action to prevent the alleged illegal expenditure. (Code Civ. Proc., § 526a; Simpson v. City of Los Angeles, 40 Cal.2d 271, 276 [253 P.2d 464]; Wirin v. Horrall, 85 Cal.App.2d 497, 504 [193 P.2d 470].) It may not be amiss to observe that the integrity of its officials is of vital concern to the public. A municipality whose funds are to be expended pursuant to a corrupt agreement to inject the personal influence of a public officer in the procurement of action by a governmental body would suffer incalculable harm to the vitality and efficiency of its public [*209] service, and a taxpayer may sue to enjoin such an imposition on the public.

As far as concerns the claimed uncertainties in the first cause of action, they relate to matters which lie within the knowledge of defendant. Demurrer does not lie to such matters. (Schaefer v. [***18] Berinstein, supra, p. 298.)

The Second Count

Count II generally alleges that during the period for which compensation for services was authorized under the warrant, Bender violated the city charter by purchasing property from the city through "dummies"; and that he had an interest adverse to the city in certain transactions wherein he represented private purchasers of land from the city and received fees upon such sales. It is particularly alleged:

1. Bender, as special attorney for the city of Compton in matters relating to [**127] the sale of its tax-deeded real property, was required by the city council to advise them on its sales and give his opinion (a) whether sales should be made by quitclaim deed only or by merchantable title, and whether such merchantable title should be obtained in quiet title proceedings or by purchasing outstanding clouds, and (b) whether the price for which properties sold by quitclaim deed was fair in view of the condition of its particular title. As to sales of property to be hereafter described, Bender advised the city council that it was to the city's best interest to sell by quitclaim deed only and that the price offered was fair and [***19] reasonable because of the condition of the title. In approving those sales, the city believed Bender's representations and relied on his judgment.

2. In 1945, unknown to the city, Bender purchased numerous lots from the city in the names of John M. Alzola and Grayce W. Webster for a total of $ 3,830 by representing that the price was fair because of the condition of the title. The fair and reasonable value of those properties was not less than four times the price paid. Bender knew when he made his representation to the city that the purchase price was not fair, and intended to purchase them for his own account, clear title, and realize a secret profit at the city's expense. The city relied on Bender's representations without knowing he was buying for his own account in making the sale and paid him $ 951 as attorney's fees and $ 169 as reimbursement of costs under his contract. The city's damage on these transactions was $ 11,320.

[*210] 3. In 1947 and 1948, a corporation known as Elbert, Ltd., bought various parcels of

property from the city for a total consideration of $ 17,340. Elbert claimed an interest as lienholder in those properties adverse to the city. In connection [***20] with those sales, Bender falsely represented to the city that he had knowledge that Elbert held valid liens on the properties which it could enforce against any purchaser from the city and that the sales price to them was a fair one. He therefore advised the city to sell to Elbert by quitclaim deed without attempting to clear its title to the properties. Relying on Bender's false representations, the city sold to Elbert at a price which was one-fifth of the true value of the property, suffering damage in the sum of $ 69,000. Bender was paid over $ 4,000 as attorney's fees under his contract with the city. Unknown to the city and without its consent, Bender also acted as attorney for Elbert in these transactions and received compensation for his services in an amount unknown to plaintiff.

4. Because of Bender's fraudulent concealment, Bender's dual representation of both the city and Elbert, Ltd. and his purchase of city property through dummies was not known to the city, which was unaware of any facts that might put it on notice of wrongdoing on the part of Bender. In March and April, 1953, the city acquired knowledge of these facts through statements made by a private citizen [***21] at a hearing held by the city council, and subsequently through statements to the city council by the city attorney of Compton.

5. On January 4, 1955, the city council approved payment of a warrant to Bender for services rendered under his contract between January 11, 1944, and June 21, 1954, despite knowledge of the violations by Bender of the city charter. By reason of Bender's violation of the charter and his breach of a fiduciary duty, Bender was not entitled to receive any compensation from the city and payment of the warrant is illegal.

As has been stated, the court below sustained a demurrer to this count without leave to amend. This was error.

The crucial allegations of the complaint are (1) that Bender made secret profits at the city's expense by purchasing, through dummies, city property at grossly undervalued prices because of his misrepresentations to the city council, and (2) that while special city attorney, he represented and received fees from a private client with an interest adverse to [*211] the city, [**128] and by his misrepresentations to the city enabled that client to purchase city property at a fraction of its value. That Bender's action in purchasing [***22] property from the city in 1945 was a violation of section 6, article 26 of the city charter of Compton, as it then existed is established by the case of *Schaefer v. Berinstein, supra.* In rejecting Bender's argument that the charter provision covered only sales *to* the city and not a sale *by* the city, the court stated (p. 291): "The charter provision cannot be given such a narrow construction. The distinction is unsound since the evil is involved in both transactions." Continuing its discussion, the court pointed out that Bender's conduct was also prohibited by section 1090 of the Government Code and characterized his clandestine purchases as follows: "Bender was employed by the city of Compton as a special city attorney for the purpose of rehabilitating tax deeded and special assessment frozen properties situated within the city. He was an officer and agent of the city and as such was in a position to advise the city council as to what action should be taken relative to the property involved. He could not buy the property in his own name and he could not do so through a dummy. The contracts to purchase from the city and the ultimate sales were contrary to public [***23] policy and are void [citations]." According to the pleading, this violation of the statutes relating to "conflicts of interest" damaged the city in an amount over $ 11,000.00. Equally improper was Bender's activity in representing as an attorney a private purchaser from the city, with interests antagonistic to the city, at a time when it was his official duty to give legal counsel to the city with respect to those transactions. As an officer and agent of the city, he was not entitled to represent secretly a party claiming adversely to the city and to accept a fee for such service. A public officer may not make an unauthorized profit out of the particular public business which has been entrusted to his care. An agent stands in a fiduciary relationship to his principal, and if he makes a secret profit from the subject matter of his agency, the

principal may recover such profit. (*Adams* v. *Herman*, 106 Cal.App.2d 92, 98-99 [234 P.2d 695]; *Steiner* v. *Rowley*, 35 Cal.2d 713, 717 [221 P.2d 9].)

A general demurrer admits the material allegations of the pleading to which it is directed (*Steiner* v. *Rowley, supra.*) Count II alleges that Bender bought property [***24] from the city at one-fourth its value and that he received attorney's fees from both the city and Elbert, Ltd., while the undisclosed [*212] agent of both parties. A faithless trustee must disgorge to his principal the secret profits and unauthorized benefits and advantages he has acquired as an outgrowth of the agency. (*Savage* v. *Mayer*, 33 Cal.2d 548, 551 [203 P.2d 9].) Having in his possession money and property rightfully belonging to the city which he received as secret profits from void transactions and from an undisclosed dual representation, Bender is required to account to the city for the benefits and profits so received. (*Schwarting* v. *Artel*, 40 Cal.App.2d 433, 441 [105 P.2d 380]; *Eaton* v. *Thieme*, 15 Cal.App.2d 458, 473 [59 P.2d 638].) Until such accounting is rendered and it is ascertained what balance, if any, is due him, Bender is not entitled to payment under his contract and clearly not to the full amount of the warrant. Section 601 of the 1948 Compton charter enjoins on the city council the duty of enforcing the charter. A taxpayer may sue in a representative capacity in cases involving the failure of a governmental body to perform [***25] a duty specifically enjoined. (*Pratt* v. *Security Trust & Sav. Bank*, 15 Cal.App.2d 630, 636 [59 P.2d 862]; *Schaefer* v. *Berinstein, supra*, p. 289.) The facts show not only a failure on the part of the city council to perform a specifically enjoined duty in its refusal to declare void Bender's transactions, but a willingness to compensate him after being informed of his violation of the charter and his derelictions of duty. [**129] Under such circumstances, plaintiff as a taxpayer has the capacity to maintain this action to enjoin the illegal expenditure and waste of city funds. (Code Civ. Proc., § 526a.)

Count III

As distinguished from Count II, which concerns itself with Bender's violation of the conflict of interest provisions and his breach of a fiduciary relationship, the third cause of action, after realleging the facts of the first and second counts, adds additional allegations which dwell on Bender's fraudulent misrepresentation of the law to the city council for the benefit of his private clients and to conceal his own acts of misfeasance. While there is an abundance of surplusage incorporated into this count, the following facts are alleged which [***26] state the essentials of a cause of action and demonstrate the impropriety of sustaining Bender's demurrer without leave to amend:

1. In 1953, Elbert, Ltd., a private client of Bender, received payments from the city treasurer as alleged holder of liens on property created by a 1911 bond issue. Bender [*213] knowingly and intentionally failed to inform the city council of legislation and judicial decisions, of which he was aware, that Elbert's bond liens were presumably extinguished at the time of these payments. Bender falsely advised the city council with reference to payments to Elbert as lienholder for the purpose of promoting the interests of Elbert, which was then his client in connection with that matter.

2. In 1953, Bender falsely represented and exaggerated the rights to payments of certain holders of improvement bonds. Bender was at that time representing these bondholders, and misrepresented their rights for the purpose of furthering the interests of these private clients at the expense of the city, which he likewise represented.

3. Other instances are mentioned in which Bender is alleged to have misrepresented the state of the law relating to the rights of lienholders [***27] on tax-deeded property and to have concealed his representation of private clients having interests adverse to the city in their transactions with the city.

Accepting these facts as true, as we must, the third count *prima facie* establishes fraud on

the part of Bender in the course of performance of his contract. ⊤Where parties occupy a confidential or fiduciary relationship, deception as to the state of the law constitutes a fraudulent representation. (*Bank of America* v. *Sanchez*, 3 Cal.App.2d 238, 242 [38 P.2d 787]; *Mathewson* v. *Naylor*, 18 Cal.App.2d 741, 744 [64 P.2d 979].) Condensed to its ultimate factors, the count alleges that because of Bender's knowing misrepresentation of law the city was intentionally led into a misapprehension of the rights of bondholders whom Bender represented and relied on such representations to its detriment. These are the essential elements of fraud. (*Schaefer* v. *Berinstein, supra*, p. 294.) ⊤Dependent on the character of the misconduct involved and the severability of the services rendered, an agent's fraud against his principal or some other serious breach of fealty on his part will defeat the agent's right to compensation **[***28]** either in whole or to an extent equivalent to the injury caused the principal by his offensive conduct. (3 C.J.S., Agency, § 182.) More significantly, it must not be overlooked that by virtue of his contract, Bender's relations to the city were governed by the code of ethics binding upon attorneys in their relation to a client. "Misrepresentation of facts, practiced by an attorney as against his client, is conduct reprehensible in itself, and particularly so where it is used to perpetrate a fraud upon the client, or **[*214]** to cover up antecedent misconduct." (6 Cal.Jur.2d, § 91, p. 245.) In *Clark* v. *Millsap*, 197 Cal. 765, 785 [242 P. 918], it is declared that "a court may refuse to allow an attorney any sum as an attorney's fee if his relations with his client are tainted with fraud. 'Fraud or unfairness on the part of the attorney will prevent him from recovering for services rendered, **[**130]** as will acts in violation or excess of authority, and acts of impropriety inconsistent with the character of the profession, and incompatible with the faithful discharge of his duties' [citation]." We need not pass on whether the misconduct ascribed to Bender under **[***29]** the pleadings would disentitle him to any compensation; suffice it to say that because of the alleged fraud he would not be entitled to the full compensation embodied in the warrant.

Laches and Waiver

An additional ground of demurrer was the laches of plaintiff. This is without merit. The instant action is for the limited purpose of enjoining payment of a warrant. The warrant was approved on or about January 4, 1955. This suit was filed the following day to enjoin its payment. It would be difficult to conceive of greater alacrity. Regardless of other forms of relief that might have been pursued, as a taxpayer availing himself of section 526a of the Code of Civil Procedure to enjoin an illegal payment, plaintiff's cause of action commenced upon the city council's approval of the warrant, when such payment became a threatened possibility.

Another ground of demurrer was that the complaint discloses that the city council has waived any claim against Bender for his alleged wrongdoing. As has been noted, Bender's alleged conduct in purchasing property secretly from the city was a violation of the charter provisions. Laws of this nature are for the protection of the public by promoting **[***30]** honesty in governmental affairs. ⊤Public policy requires that the duties imposed by statute be discharged; therefore the requirements of a law or ordinance enacted for a public reason may not be waived by an official or a governmental body. (Civ. Code, § 3513; *Western Surgical Supply Co.* v. *Affleck*, 110 Cal.App.2d 388, 392-393 [242 P.2d 929]. See *Panzer-Hamilton Co.* v. *Bray*, 96 Cal.App. 460, 464 [274 P. 769].)

Plaintiff's fourth cause of action realleges the facts of the first and second causes of action. It is a mere restatement and duplication of those previous causes of action and relies **[*215]** on the same ultimate facts without adding other allegations of fact. Upon argument plaintiff has conceded that this count may be dismissed if the others are upheld as stating causes of action. This count is obviously surplusage. It may properly be dismissed by the trial court.

The judgment is reversed.

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Exhibit 7

*214 Cal. App. 3d 1589, *; 1989 Cal. App. LEXIS 1096, **;*
*263 Cal. Rptr. 360, ****

VERNON BRADLEY NUSSBAUM et al., as Trustees, etc., Plaintiffs and Respondents, v. LOWELL WEEKS et al., Defendants and Appellants

No. E004893

Court of Appeal of California, Fourth Appellate District, Division Two

214 Cal. App. 3d 1589; 1989 Cal. App. LEXIS 1096; 263 Cal. Rptr. 360

October 30, 1989

SUBSEQUENT HISTORY: [1]**

A petition for a rehearing was denied November 17, 1989, and respondents' petition for review by the Supreme Court was denied February 1, 1990. Broussard, J., was of the opinion that the petition should be granted.

PRIOR HISTORY:

Superior Court of Riverside County, No. I-42821, Frank R. Moore, Judge.

DISPOSITION: The judgment is reversed.

CASE SUMMARY

PROCEDURAL POSTURE: Defendant buyer sought review of a judgment from the Superior Court of Riverside County (California), which awarded plaintiff seller monetary damages after a jury found that defendant had a duty to disclose material facts concerning a change in water policy, that he as the general manager of the water district would know about, to plaintiff, but intentionally withheld those facts.

OVERVIEW: Defendant buyer challenged a judgment that awarded plaintiff seller monetary damages. Plaintiff alleged that defendant breached a fiduciary duty as a public official by failing to disclose to plaintiff that canal water would soon be available to the subject 80-acre parcel. The trial court did not err in instructing the jury that defendant was a public official. If a public official violated the trust placed in him by privately profiting from information known to him in his public capacity, he breached the duty he owed to his constituency and was guilty of misconduct that could lead to his removal from office. However, his duty was to all his constituents generally, not to each constituent specifically, so there was no fiduciary or confidential relationship between plaintiff and defendant, and the trial court should have applied the appropriate jury instruction to find that there was no duty to disclose known facts. Instead, the trial court gave two erroneous instructions proposed by plaintiff. A buyer had a duty to disclose material facts only under certain limited circumstances not present in the case. There was no evidentiary basis for liability. The judgment was reversed.

OUTCOME: The judgment was reversed because, although defendant buyer was a public official, there was no fiduciary or confidential relationship between plaintiff seller and defendant, so defendant was not liable for any nondisclosure of facts.

CORE TERMS: water, duty, seller, buyer, public official, duty to disclose, general manager, public office, confidential relationship, material fact, disclose, board of directors, fiduciary, water district, disclosure, public officer, fiduciary relationship, distribution system, known facts, duty of disclosure, fiduciary duty, canal, public officers, state of mind, irrigation, pipeline, subject property, new policy, et seq, accessible

CORE CONCEPTS - + Hide Concepts

Civil Procedure : Appeals : Standards of Review : Substantial Evidence Rule

If the instructions are proper, the verdict is proper if there is substantial evidence to support it. In determining whether evidence is substantial, the court resolves all conflicts in plaintiff's favor and draws all permissible inferences necessary to support the judgment.

Torts : Business & Employment Torts : Fraud & Deceit

Deceit may be affirmative or negative. Affirmatively, it is a false statement. Negatively, it includes the suppression of a fact by a person who is obligated to disclose it. Cal. Civ. Code § 1710. The relevant test is that, where material facts are known to one party and not to the other, failure to disclose them is not actionable fraud unless there is some relationship between the parties which gives rise to a duty to disclose such known facts. A duty to disclose known facts arises when the party having knowledge of the facts is in a fiduciary or a confidential relationship.

Contracts Law : Contract Interpretation : Fiduciary Responsibilities

A fiduciary or a confidential relationship exists whenever under the circumstances trust and confidence reasonably may be and is reposed by one person in the integrity and fidelity of another.

COUNSEL: Gresham, Varner, Savage, Nolan & Tilden and Allen B. Gresham for Defendants and Appellants.

Kirshman & Harris, Norman H. Kirshman and Michael S. Harris for Plaintiffs and Respondents.

JUDGES: Opinion by Hollenhorst, J., with Campbell, P. J., and Dabney, J., concurring.

OPINIONBY: HOLLENHORST

OPINION: **[*1592]** **[***361]** Action for nondisclosure in the purchase of an 80-acre parcel of real property. The seller sued, alleging that the buyer, the general manager of a water district, had a fiduciary duty to disclose his intention to cause a change in water policy affecting the subject real property. The jury found in favor of the seller and the general manager appeals.

Historical Background

The Coachella Valley Water District (District) provides Colorado River water to the Coachella Valley through the Coachella Canal. The District maintains a water distribution system which provides irrigation water to certain **[**2]** properties in the valley. Properties originally classified as soil types 1 through 5 receive water through the distribution system. The subject property, located south of Indio, has class 6 soil. Class 6 soil was originally thought to be less suitable for agricultural purposes and was therefore excluded from the distribution system. Nevertheless, in the late '40's, class 6 lands were able to receive water in some circumstances by applying to the District.

In 1954, the board of directors of the District decided to cease approving applications [***362] for water to class 6 lands. This decision was due to the commencement of proceedings in the U.S. Supreme Court to adjudicate water rights on the Colorado River. (*Arizona* v. *California* (1954) 344 U.S. 806 [97 L.Ed. 628, 73 S.Ct. 6]; 347 U.S. 985-986 [98 L.Ed. 1121, 74 S.Ct. 848].) The case was perceived as a threat to water supplies and, accordingly, the District wanted to limit expansion of its service until the threat was removed. As a result, owners of class 6 lands had to rely on well water.

In 1969, the board of directors of the District modified [**3] its policy to allow surplus water to be used for irrigation of class 6 lands under certain conditions. n1 These conditions included the following: (1) since the service was supplementary, the property served had to have adequate well water available; (2) the applicant would pay for delivery facilities; (3) the quantity would be limited and the price would be higher than standard irrigation water; (4) the service would be delivered through a District pipeline only if there was sufficient capacity in the pipeline; and (5) the service was interruptible. The subject property qualified to receive supplementary water under these conditions for 44 of its 80 acres, but water was not actually received prior to 1984 because of the lack of a distribution system.

----------Footnotes----------

n1 The policy change was triggered by a request by Nussbaum for emergency service to other class 6 property owned by him.

----------End Footnotes----------

[*1593] On March 20, 1983, the U.S. Supreme Court issued a decision in *Arizona* v. *California* (1983) 460 U.S. 605 [75 L.Ed.2d 318, 103 S.Ct. 1382]. [**4] Under this decision, the court declined to reopen its 1964 decision (376 U.S. 340 [11 L.Ed.2d 757, 84 S.Ct. 755]) to allow Indian tribes to assert claims for allegedly omitted lands. As a result, the threat that available water would be limited to serve Indian lands was greatly lessened. Shortly after that decision, the District's counsel advised the District that the legal reasons for limiting water service to class 6 lands no longer existed. The events in this lawsuit occurred in the next year and a half.

Following a study by the District staff in June 1984, the board of directors of the District adopted a new policy for water service to class 6 lands. Under the new policy, a landowner could elect to remain under the 1969 policy but no new applications would be granted under the 1969 policy. If the landowner did not elect to remain under the old policy, he would be able to obtain canal water for drip irrigation without a quantity limit. However, since capacity in the existing distribution system was limited, he would generally have to bear the cost of a pipeline from the canal to his property, either alone or as part of an assessment [**5] district. The evidence here was that the cost of building a pipeline to the subject property is $ 300,000.

The Subject Litigation

Plaintiff Nussbaum (Nussbaum), the seller, alleged that defendant Lowell Weeks (Weeks), the buyer and general manager of the District, learned in March 1983, that the reasons for denying canal water to class 6 properties had ceased to exist, that Weeks then formed a plan to buy class 6 properties before the policy changed, that Weeks did purchase Nussbaum's class 6 property, and that Weeks then caused the policy to be changed by recommending the change to the board. He contended that Weeks profited from the resulting increase in the value of class 6 land, since property with water is generally more valuable than property without water. (*United States* v. *Coachella Valley Water Dist.* (S.D.Cal. 1953) 111 F.Supp. 172, 173.) Specifically, the complaint alleges that Weeks breached an alleged fiduciary duty

as a public official by failing to disclose to Nussbaum that canal water would be made available to the subject 80-acre parcel in the near future.

Although Nussbaum also alleged that Ray Rummonds, a realtor and chairman of the board [**6] of directors, conspired with Weeks and Weeks's son to carry out this plan, the trial court entered a nonsuit as to [***363] Mr. Rummonds, and the jury found that no conspiracy existed.

[*1594] The jury did find that Weeks had a duty to disclose material facts to Nussbaum, that he intentionally failed to do so, and that Nussbaum was damaged in the sum of $ 75,360. n2 This appeal followed.

----------Footnotes----------

n2 The jury also found that defendant K & W Farms, Inc. was the alter ego of Lowell Weeks and judgment was entered against it for punitive damages in the sum of $ 3,467.

----------End Footnotes----------

Standard of Review

Like all juries, the jury here determined the facts and applied them to the legal standards given to the jury in the instructions. In reviewing the jury's decision, we are primarily concerned with the issue of whether the jury was properly instructed on the legal standards involved. ↑If the instructions are proper, the verdict is proper if there is substantial evidence to support it. Obviously, we cannot disturb the verdict of a properly instructed jury [**7] if there is substantial evidence to support it. (See, generally, 9 Witkin, Cal. Procedure (9th ed. 1985) Appeal, §§ 241-242, 278-282, pp. 246-249, 289-294.) In determining whether evidence is substantial, we resolve all conflicts in Nussbaum's favor and draw all permissible inferences necessary to support the judgment. (*Hobart v. Hobart Estate Co.* (1945) 26 Cal.2d 412, 422 [159 P.2d 958].)

A reminder of the distinction is necessary here because Weeks emphasizes the legal standards given to the jury, while Nussbaum emphasizes the factual determinations made by the jury.

Issues Presented

↑Deceit may be affirmative or negative. Affirmatively, it is a false statement. Negatively, it includes the suppression of a fact by a person who is obligated to disclose it. (Civ. Code, § 1710.) BAJI No. 12.36 (7th ed. 1986) sets forth the relevant test: ". . . where material facts are known to one party and not to the other, failure to disclose them is not actionable fraud unless there is some relationship between the parties which gives rise to a duty to disclose such known facts. [para.] A duty to disclose known facts arises when the party having knowledge [**8] of the facts is in a fiduciary or a confidential relationship." n3

----------Footnotes----------

n3 The last paragraph of BAJI No. 12.36 (7th ed. 1986) was not given but is discussed below. It reads: "[A duty to disclose known facts arises [in the absence of a fiduciary or a confidential relationship] where one party knows of material facts and also knows that such facts are neither known nor readily accessible to the other party.]"

----------End Footnotes----------

Nussbaum argued below, and argues here, that this test applies because Weeks was a public

official who therefore was in a fiduciary relationship with all members of the public, including Nussbaum.

[*1595] On appeal, Weeks contends that he was not a public official and that, even if he was, he had no fiduciary relationship with members of the public while conducting his own private business. Weeks also contends that the duty of disclosure is limited to sellers of real property and does not apply to buyers. Next, Weeks argues that, even if he had a duty of disclosure, there were no facts known to him which he failed [**9] to disclose.

We consider each of these issues in turn.

Is the General Manager of a Water District a Public Official?

The Coachella District Merger Law (Wat. Code, § 33100 et seq.) provides that the Coachella Valley County Water District is a public agency of the State of California. (Wat. Code, §§ 33117, 33118.) Its directors and officers are elected or appointed in the same manner as the directors and officers of other county water districts. (Wat. Code, § 33135.) The general manager of a county water district is appointed by the board of directors of the District. (Wat. Code, § 30540.)

Water Code sections 30580 and 30581 give the general manager the power to (1) have full charge and control of the maintenance, operation, and construction of the water works of the District; (2) employ and discharge employees of the District; (3) fix [***364] the duties and compensation of District employees; and (4) perform other duties assigned by the board.

Weeks contends that he was only an employee of the District, serving at the pleasure of the board of directors. He contends that he took no oath of office, had no vote on policy matters and never had an employment contract.

We think Weeks is too [**10] modest. Weeks held the title of general manager and chief engineer of the district, and had held that position for almost 30 years. He was chief operating officer with over 400 employees reporting to him. Mr. Rummonds, president of the board of directors of the District, testified that Weeks conducted the day-to-day operations of the District. Under the circumstances, Weeks was an officer holding a public office, not a mere employee. (67 Ops.Cal.Atty.Gen. 409, 413 (1984): the general manager of a county water district holds a public office; 24 Ops.Cal.Atty.Gen. 188, 189 (1954): the general manager of a public utility district is a public officer.) "The officers of [an irrigation] district are public officers, and their duties are public official duties." (63 Cal.Jur.3d, Water, § 939, p. 341.)

Nussbaum supports this conclusion by referring us to the discussion in the early case of *Patton v. Board of Health Etc.* (1899) 127 Cal. 388 [59 P. [*1596] 702], in which a health inspector was held to be a public officer. The court said: "It seems to be reasonably well settled that where the legislature creates [**11] the position, prescribes the duties, and fixes the compensation, and these duties pertain to the public and are continuing and permanent, not occasional or temporary, such position or employment is an office and he who occupies it is an officer." (*Id.*, at p. 398.)

Similarly, in *Coulter v. Pool* (1921) 187 Cal. 181 [201 P. 120], a county engineer was held to be a county officer. The court said: "A public office is ordinarily and generally defined to be the right, authority, and duty, created and conferred by law, the tenure of which is not transient, occasional, or incidental, by which for a given period an individual is invested with power to perform a public function for the benefit of the public. [Citations.] [para.] . . . The most general characteristic of a public officer, which distinguishes him from a mere employee, is that a public duty is delegated and entrusted to him, as agent, the performance

of which is an exercise of a part of the governmental functions of the particular political unit for which he, as agent, is acting." (*Id.*, at pp. 186-187; see, also, *People* v. *Olsen* (1986) 186 Cal.App.3d 257, 265-266 **[**12]** (law enforcement officers are public officers); *People* ex rel. *Chapman* v. *Rapsey* (1940) 16 Cal.2d 636, 639-640 [107 P.2d 388] (city attorney is a public officer); *Perry* v. *Otay Irrigation District* (1900) 127 Cal. 565, 567 [60 P. 40] (treasurer of an irrigation district is a public officer).) "[A]n office, as a general rule, is based on some law that defines the duties appertaining to it and fixes the tenure, and it exists independently of the presence of the person in it." (52 Cal.Jur.3d, Public Officers and Employees, § 12, p. 177; see, also, 3 McQuillin, Municipal Corporations (3d ed. 1982) §§ 12.29-12.31, pp. 148-160.)

The duties of the general manager of the water district are provided by statute and it is clear that the general manager has considerable responsibility for the day-to-day operations of the water district: ". . . the general manager of a county water district holds a public office . . . . His statutory duties make him the chief executive officer of the district. He has full authority to hire and fire personnel, prescribe the duties of all employees, and controls the operations of the **[**13]** district's property. As such, he exercises the sovereign functions of the district in his executive capacity sufficient to be classified as a public officer." (67 Ops.Cal.Atty.Gen. 409, 413 (1984).)

We therefore agree with Nussbaum that the trial court did not err in instructing the jury that Weeks was a public official.

[*1597] Does a Public Official Owe a Fiduciary Duty to the General Public?

Nussbaum relies on the truism that a public office is a public trust. (*People* v. **[***365]** *Harby* (1942) 51 Cal.App.2d 759, 773 [125 P.2d 874].) He quotes the following passage from *Hobbs, Wall & Co.* v. *Moran* (1930) 109 Cal.App. 316, 319 [293 P. 145]: "The theory of the law is that a councilman or other officer of a city sustains the same fiduciary relationship toward the citizens of his community that a trustee bears to his *cestui que trust*, and should therefore act with the utmost good faith." (See, also, *Terry* v. *Bender* (1956) 143 Cal.App.2d 198, 206 [300 P.2d 119]; 52 Cal.Jur.3d, Public Officers and Employees, § 17, p. 179; Rest.2d Trusts § 170; Rest., Restitution, **[**14]** § 190; Rest.2d Torts, § 551, com. e.)

Using this theory, Nussbaum contends that, as a member of the general public, he was owed a duty by the officeholder. Accordingly, he contends that this duty is sufficient to create the "fiduciary or confidential relationship" referred to in BAJI No. 12.36 and a duty to disclose known facts therefore arose. Under this theory, it is immaterial that Weeks purchased Nussbaum's property as a private citizen because Weeks was allegedly using, and profiting from, information which he learned in his official capacity. In effect, Nussbaum charges Weeks with a type of insider trading in using information obtained in his public capacity to profit in his private transactions. n4

----------Footnotes----------

n4 Nussbaum does not rely on specific conflict of interest statutes. For example, section 87100 of the Political Reform Act provides: "No public official at any level of state or local government shall make, participate in making or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest." (Gov. Code, § 87100; see, also, Gov. Code, §§ 87101, 1090-1091, 3060, 3600 et seq.) Instead Nussbaum relies on the more general principles stated above. For a discussion of the interrelation between the conflict of interest statutes and the common law in the water district context, see 67 Ops.Cal.Atty.Gen. 369 (1984).

----------End Footnotes---------- **[**15]**

Weeks relies on *Mazzola v. City and County of San Francisco* (1980) 112 Cal.App.3d 141 [169 Cal.Rptr. 127]. In *Mazzola*, the business agent of a plumber's union was also an airport commissioner at the time his union went on strike against the airport. The board of supervisors removed him from office for alleged official misconduct. The court discussed the meaning of official misconduct and concluded that the business agent was not guilty of official misconduct. The court found the concept of fiduciary duty inapplicable because the business agent never gained any monetary profit or advantage for his union by using his public office to do so. Accordingly, he did not violate the trust placed in him as a public official.

Here, however, it was alleged, and the jury found, that Weeks did violate the trust placed in him as a public official. Although *Mazzola* is therefore **[*1598]** inapplicable, Nussbaum has cited no authority for the proposition that a general fiduciary duty of a public official creates the specific fiduciary relationship contemplated by Civil Code section 1710, subdivision 3 and described in BAJI No. 12.36 (7th ed. 1986). **[**16]**

In our view, the duties are not the same. If a public official violates the trust placed in him by privately profiting from information known to him in his public capacity, he has breached the duty he owes to his constituency, and he is therefore guilty of misconduct that can lead to his removal from office. (52 Cal.Jur.3d, Public Officers and Employees, §§ 124-125, pp. 280-282.) In such a case, his duty is to all his constituents generally, not to each constituent specifically.

The duty described in BAJI No. 12.36, on the other hand, arises because of a specific relationship between the buyer and the seller. The relationship usually springs from specific personal or business dealings. (5 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 698, p. 800.) Because of such a relationship, a reasonable buyer would expect disclosure and the breach of that duty gives rise to the cause of action. As the instruction states, "A fiduciary or a confidential relationship exists whenever under the circumstances trust and confidence reasonably may be and is reposed by one person in the integrity and fidelity of another."

[*366]** Since there was no fiduciary or confidential relationship here, the **[**17]** court should have applied BAJI No. 12.36 to find that there was no duty to disclose known facts. Instead, the trial court gave two additional instructions proposed by Nussbaum. The first instruction informed the jury that a fiduciary relationship did exist simply because Weeks held a public office. The second instruction told the jury that certain dealings between a public official and private citizens are against public policy. n5

----------Footnotes----------

n5 The two instructions read as follows: (1) "And you are instructed that Lowell Weeks is an official holding public office. And a public office is like a public trust that is created in the interest and for the benefit of members of the public. The individual who occupies a public office is a public agent and as such acts on behalf of his principal, the public. As such, a fiduciary relationship existed between Lowell Weeks on the one hand and the plaintiffs Nussbaums and Drakes as members of the public on the other hand"; (2) "Public officials are obligated to discharge their responsibilities with integrity and fidelity. And may not exploit their official positions for their private benefit. Dealings between a public officer and himself as a private citizen which brings [*sic*] him into conflict or collusion with other citizens are against public policy. This is so because public officials may not place themselves in a position in which their personal interest may come in conflict with the duty they owe to the public."

----------End Footnotes---------- **[**18]**

The giving of the two additional instructions was error because the general duty they state is

not the specific duty referred to in BAJI No. 12.36. The fact that Weeks was a public official with a general fiduciary responsibility [*1599] to members of his constituency does not mean that he had a specific fiduciary duty to Nussbaum as an individual member of the public.

Having held that there was no fiduciary or confidential relationship within the meaning of BAJI No. 12.36 simply because Weeks held public office, we next consider Nussbaum's alternative argument that a duty of disclosure existed in the absence of a fiduciary or confidential relationship.

The Purchaser's Disclosure Obligation

The fourth paragraph of BAJI No. 12.36 states: "[A duty to disclose known facts arises [in the absence of a fiduciary or a confidential relationship] where one party knows of material facts and also knows that such facts are neither known nor readily accessible to the other party.]" Although both parties requested that BAJI No. 12.36 be given, the trial court did not give this paragraph.

Nevertheless, Nussbaum argues that the paragraph is a correct statement of the law, and that it therefore [**19] provides an independent basis for finding that Weeks had a duty to disclose known facts to Nussbaum.

The Use Note states: "The decisions enunciating the rule stated in the last paragraph are in cases involving nondisclosure by the seller. Whether the same rule would apply to a nondisclosure by the buyer is uncertain." The Comment refers to 4 Witkin, Summary of California Law (8th ed. 1974) Torts, sections 459-462, pages 2724-2727. The comparable paragraphs of the ninth edition are sections 697-701. Section 697 states the general rule: "Although material facts are known to one party and not the other, failure to disclose them is ordinarily not actionable fraud unless there is some fiduciary relationship giving rise to a duty to disclose." (5 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 697, pp. 799-800.) According to Mr. Witkin, an exception to this general rule exists "where the defendant alone has knowledge of material facts which are not accessible to the plaintiff." (*Id.*, at § 700, pp. 801-802.)

The cases cited in support of the exception are cases which require disclosure by the seller of real property. (E.g., *Lingsch v. Savage* (1963) 213 Cal.App.2d 729 [29 Cal.Rptr. 201, 8 A.L.R.3d 537]; [**20] *Barnhouse v. City of Pinole* (1982) 133 Cal.App.3d 171 [183 Cal.Rptr. 881].) Since the seller is likely to know of material facts affecting the value of the property which should be disclosed, the disclosure obligation normally falls on the seller. (1 Miller & Starr, Current Law of Cal. Real Estate, § 1:80, pp. 116-118.) Accordingly, it is well established that the seller is under an affirmative duty to disclose material facts concerning the property. [***367] (Cal. Real [*1600] Property Sales Transactions (Cont.Ed.Bar 1981) § 1.69, pp. 49-50.) More recent statutes describe the seller's disclosure obligation more specifically. (Civ. Code, § 1102 et seq.)

Does the buyer have an equal affirmative obligation to disclose a material fact affecting the value of the property? "The buyer has the same duty to disclose material facts affecting the property to the seller, but it is rare that the buyer has knowledge of such facts which would impose a disclosure duty. While the duty has been expressed in the context of a fact that would affect the 'value or desirability' of the property, the extent that a party must disclose matters which do not affect the [**21] physical integrity of the property, but which affect the property's value, has not been fully developed. If the buyer's duty were extended as broadly as the seller's duty, the rule would result in the ridiculous conclusion that a buyer must disclose to the seller factors that have or will indicate that the seller is selling the property below its true value. Absent affirmative representation, such a rule would eliminate the freedom to negotiate in the marketplace." (1 Miller & Starr, Cal. Real Estate 2d (1989) §

1.121, p. 414.)

Because the seller's duty of disclosure is now codified in statutes applicable only to seller (Civ. Code, § 1102 et seq.), we agree that the seller's duty of disclosure is greater than that of the buyer. Thus, under Civil Code section 1102 and prior case law, the seller has a general duty to disclose material facts that are not accessible to buyer. (5 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 700, pp. 801-802.) This principle is contained in the fourth paragraph of BAJI No. 12.36.

The buyer, on the other hand, has a duty to disclose material facts only under certain limited circumstances not present here. n6 These circumstances are described **[**22]** in Restatement Second of Torts section 551. They include situations in which a fiduciary or confidential relationship exists, situations in which a partial or misleading disclosure is made, and situations in which the buyer knows that the seller would reasonably expect a disclosure to be made. In other circumstances, disclosure by the buyer is not **[*1601]** required but may be prudent to avoid liability based on fraud, misrepresentation or half-truths. (Cal. Real Property Sales Transactions (Cont.Ed.Bar 1981) § 1.82, p. 57.) It is therefore apparent that the fourth paragraph of BAJI No. 12.36 does not accurately state the buyer's duty of disclosure and a specific instruction should be given. There was no error here, however, because the trial court did not give the fourth paragraph to the jury.

----------Footnotes----------

n6 Some courts hold that no such duty exists. For example, in *Zaschak v. Traverse Corp.* (1983) 123 Mich.App. 126 [333 N.W.2d 191], the court held: "Michigan courts have not yet recognized a duty on the part of a vendee to disclose facts relevant to the value of the real estate in question even when specifically asked." (*Id.*, at p. 193.) Cases from other jurisdictions support the proposition that a buyer is not under a duty to disclose material facts known to him in the absence of a confidential relationship. (See, e.g., *Consolidated Oil & Gas, Inc. v. Ryan* (W.D.Ark. 1966) 250 F.Supp. 600, affirmed (8th Cir. 1966) 368 F.2d 177; *Finley v. Dalton* (1968) 251 S.C. 586 [164 S.E.2d 763, 35 A.L.R.3d 1364]; *Moser v. Spizzirro* (1968) 31 App.Div.2d 537 [295 N.Y.S.2d 188], affirmed (1969) 25 N.Y.2d 941 [305 N.Y.S.2d 153, 252 N.E.2d 632] (seller's silence not actionable fraud); 91 C.J.S. Vendor & Purchaser, § 57, pp. 914-916.)

----------End Footnotes---------- **[**23]**

Since there was no basis for a finding that Weeks had a duty to disclose here, and since Civil Code section 1710, subdivision 3, requires that a duty exist before deceit can be found, there was no basis for liability here. n7

----------Footnotes----------

n7 Civil Code section 1710, subdivision 3, defines deceit to include: "The suppression of a fact, by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact . . . ."

----------End Footnotes----------

Although we have found that Weeks did not have a specific fiduciary relationship or a general obligation to disclose material facts, we will briefly consider whether, if there was such a duty, there was sufficient evidence for the jury to find that he did suppress a material fact.

[*368]** Was There Substantial Evidence to Support the Jury's Finding That Weeks Suppressed a Material Fact?

The jury found that Weeks intentionally concealed or suppressed a material fact with the intent to defraud Nussbaum. What was the material fact that was suppressed?

Nussbaum's [**24] argument is significant: "It is Mr. Weeks' state of mind, coupled with his power to implement that state of mind, that constitutes the material fact." n8.

----------Footnotes----------

n8 In the complaint, Nussbaum alleged that Weeks failed to disclose that canal water would be made available by the District to the subject property within the forseeable future. Under this allegation, Weeks would clearly be required to predict a future action by the board of directors of the District. As Weeks points out, if he had made this representation, he could have been sued on the same theories if the change did not take place.

----------End Footnotes----------

As evidence of this alleged material fact, Nussbaum cites evidence that (1) legal counsel informed Weeks in early 1983 that the legal reasons to deny canal water to class 6 lands had ended with the 1983 decision in *Arizona* v. *California*; (2) Weeks then purchased class 6 lands; (3) his children and a friend purchased class 6 lands; and (4) "Mr. Weeks had the practical ability to control the Board and did so at a time that suited [**25] him" by subsequently changing the policy applicable to class 6 lands.

Nussbaum then states: "The foregoing facts justify the jury's drawing of the inference that Mr. Weeks formed an intent to change the District's [*1602] water policy, that he knew he had the power to implement that intent and that he purchased plaintiffs' property without disclosing that intent."

In this case we have no secret material facts that Weeks used against the seller. We have only Weeks's alleged state of mind: an intention to change the District's water policy affecting the subject parcel. While a specific present intention can be a material fact (Rest.2d Torts, § 525, com. d; cf. *Pilcher v. New York Life Ins. Co.* (1972) 25 Cal.App.3d 717, 724 [102 Cal.Rptr. 82]), the question is whether the facts cited by Nussbaum were sufficient to allow the jury to draw the inference that the intention existed. Even if the intention existed, the intention would not be material unless, as Nussbaum urges, Weeks had the actual power to change water policy.

After examining the entire record, we find that the evidence does not support Nussbaum's contentions. One example will suffice. [**26]

The most important "fact" alleged was that Weeks had the practical ability to control the board of directors of the District, and did so here. However, there was no evidence to support this allegation except testimony that the board generally followed staff recommendations.

Mr. Rummonds testified that the policy was reconsidered in 1984 because three landowners had written to request reconsideration and that he appointed a study committee at a board meeting on March 27, 1984, as a result of these requests. Mr. Rummonds also testified that he did not consult Weeks before appointing the committee.

Several witnesses testified that, except for attending one meeting, Weeks did not participate in the formulation of the recommendations of the committee. Several directors testified that Weeks did not try to influence their vote on adoption of the new policy. Director Powell testified that he did not discuss the progress of the study with Weeks, that there were arguments on both sides of the policy change, and that he did not know if the proposal would be approved before the vote. Director Powell also testified that he did not discuss his vote with Weeks. Director Nichols testified through [**27] a deposition that he did not discuss

the study with Weeks before the vote. Director Rummonds also testified that he did not discuss his vote with anyone before the August board meeting, and that he did not know how the vote would come out before the vote was taken.

[*1603]

There was no evidence from which the jury could conclude that Weeks manipulated the political process to obtain a new [***369] policy favorable to him. n9 We therefore find that Nussbaum's theory that the undisclosed material fact was Weeks's state of mind, coupled with a power to change District policy, is simply unsupported by substantial evidence. n10

----------Footnotes----------

n9 As Weeks points out, if Weeks knew that the policy was changing, he could have drilled an additional water well on the former Nussbaum property, or he could have installed a larger pump to qualify the entire parcel for supplemental water under the old policy. He did not do so but only qualified for supplemental water on half of the parcel. Weeks also testified that he made no effort to influence the study committee report or the board vote, even though he knew that the policy change would adversely affect him. [**28]

n10 Weeks's state of mind was also immaterial because of Nussbaum's testimony that the property lacked a water distribution system. Under both the 1969 and 1984 policies, the landowner had to pay for water distribution facilities. Although Nussbaum had sufficient well capacity to qualify half of the parcel for supplemental water under the 1969 policy, he had no way to obtain that water without paying for a pipeline. Weeks was able to provide water to the property through a previously existing reservoir on his land. The limiting factor in obtaining water for the property under either policy was the lack of a distribution system, not the right to obtain water.

----------End Footnotes----------

Thus, even if Weeks had a disclosure obligation, which we find he did not, there was insubstantial evidence to allow the jury to conclude that Weeks failed to disclose a material fact.

The judgment is reversed.

Exhibit 8

*60 Cal. App. 154, *; 212 P. 399, **;*
*1922 Cal. App. LEXIS 35, ****

In the Matter of the Estate of MARY A. HAMON, Deceased

Civ. No. 3881

COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION TWO

60 Cal. App. 154; 212 P. 399; 1922 Cal. App. LEXIS 35

December 15, 1922, Decided

SUBSEQUENT HISTORY: [***1] A Petition to have the Cause Heard in the Supreme Court, after Judgment in the District Court of Appeal, was Denied by the Supreme Court on February 13, 1923.

PRIOR HISTORY: APPEAL from a judgment of the Superior Court of Los Angeles County. John M. York, Judge.

DISPOSITION: Affirmed.

CORE TERMS: testator, birthday, legacy, marriage, mortgage, thirtieth, dies, legatee, bequest, per acre, residue, birth, estate devised, devised, goes, absolute estate, market value, diligence, nephew, devise, water, dying, die, clear and distinct, foreclosure sale, real estate, thereupon, irreconcilable, unqualified, beneficiary

SYLLABUS: The facts are stated in the opinion of the court.

COUNSEL: Tanner, Odell & Taft for Appellant.

D. H. Laubersheimer for Respondent.

JUDGES: CRAIG, J. Finlayson, P. J., and Works, J., concurred.

OPINIONBY: CRAIG

OPINION: [*155] [**400] CRAIG, J. The appellant, Ada Miriam Parker, was appointed executrix of the will of Mary A. Hamon, and also a trustee to receive certain property devised thereunder and to manage it as directed by the will. The will was probated and in due time the court made its final decree of distribution by which one-half of the property was distributed to Ada Miriam Parker individually, and the other half, consisting of $ 3,695.14 in cash and small items of personal property, to her as trustee for Percival James Langdon. She loaned the money held in trust upon real estate security. A more detailed statement will be made of this transaction later. However, this mortgage was subsequently foreclosed and the appellant, at [***2] the foreclosure sale, as trustee, bought the property for $ 5,079.57, being the full amount of the principal, interest, judgment, and costs. The trustee reported to the court under section 1699 of the Code of Civil Procedure, and prayed for her discharge. Thereupon Langdon appeared and filed objections to the report on the ground that the real estate security was valueless and also of alleged negligence on the part of the trustee in making the loan. Upon the hearing the trial court sustained the objections to the report and ordered the mortgage representing the loan to be reassigned to Ada Miriam Parker, and