

MINUTES

COMMISSION ON STATE MANDATES

State Capitol, Room 126
Sacramento, California
July 28, 2006

Present: Member Anne Sheehan, Chairperson
Representative of the Director of the Department of Finance
Member Amy Hair, Vice Chairperson
Representative of the State Controller
Member Francisco Lujano
Representative of the State Treasurer
Member Sean Walsh
Director of the Office of Planning and Research
Member J. Steven Worthley
County Supervisor
Member Paul Glaab
City Council Member
Member Sarah Olsen
Public Member

CALL TO ORDER AND ROLL CALL

Chairperson Sheehan called the meeting to order at 9:30 a.m. She welcomed Amy Hair, the new representative for the State Controller. Paula Higashi, Executive Director, introduced new Commission Counsel, Kelly Loyer.

CLOSED EXECUTIVE SESSION PURSUANT TO GOVERNMENT CODE SECTIONS 11126 and 17526.

PERSONNEL

Report from Personnel Subcommittee and to confer on personnel matters pursuant to Government Code sections 11126, subdivision (a) and 17526.

PENDING LITIGATION

To confer with and receive advice from legal counsel, for consideration and action, as necessary and appropriate, upon the following matters pursuant to Government Code section 11126, subdivision (e)(1):

1. *State of California, Department of Finance v. Commission on State Mandates, et al.*, Sacramento Superior Court Case No. 03CS01069, CSM Case No. 03-L-01, consolidated with *County of Los Angeles v. Commission on State Mandates, et al.*, Los Angeles Superior Court Case No. BS087959, transferred to Sacramento Superior Court, Case No. 05CS00865, CSM Case No. 03-L-11 [*Animal Adoption*]
2. *State of California, Department of Finance v. Commission on State Mandates, et al.*, Sacramento Superior Court Case No. 03CS01432, CSM Case No. 03-L-02 [*Behavioral Intervention Plans*]

3. *CSAC Excess Insurance Authority v. Commission on State Mandates, et al.*, Second District Court of Appeal, Case Number B188169, on appeal from Los Angeles Superior Court Case No. BS092146, CSM Case No. 04-L-01 [*Cancer Presumption for Law Enforcement and Firefighters and Lower Back Injury Presumption for Law Enforcement*], consolidated with *City of Newport Beach v. Commission on State Mandates, et al.*, Los Angeles Superior Court Case No. BS095456, CSM Case No. 04-L-02 [*Skin Cancer Presumption for Lifeguards*]
4. *County of Los Angeles, et al. v. Commission on State Mandates, et al.*, Second District Court of Appeal [Los Angeles] Case Number B183981, CSM Case No. 04-L-03, (Los Angeles Superior Court Nos. BS089769, BS089785) [*Transit Trash Receptacles, et al./Waste Discharge Requirements*]
5. *County of San Bernardino v. Commission on State Mandates, et al.*, San Bernardino County Superior Court, Case No. SCVSS 138622 [*Standardized Emergency Management Systems (SEMs)*]

To confer with and receive advice from legal counsel, for consideration and action, as necessary and appropriate, upon the following matter pursuant to Government Code section 11126, subdivision (e)(2):

- Based on existing facts and circumstances, there is a specific matter which presents a significant exposure to litigation against the Commission on State Mandates, its members and/or staff (Gov. Code, § 11126, subd. (e)(2)(B)(i).)

Chairperson Sheehan adjourned into closed executive session pursuant to Government Code section 11126, subdivision (e), to confer with and receive advice from legal counsel for consideration and action, as necessary and appropriate, upon the pending litigation listed on the published notice and agenda; and Government Code sections 11126, subdivision (a), and 17526, to confer on personnel matters listed on the published notice and agenda.

REPORT FROM CLOSED EXECUTIVE SESSION

Chairperson Sheehan reconvened the public meeting and reported that the Commission met in closed executive session pursuant to Government Code section 11126, subdivision (e), to confer with and receive advice from legal counsel for consideration and action, as necessary and appropriate, upon the pending litigation listed on the published notice and agenda; and Government Code sections 11126, subdivision (a), and 17526, to confer on personnel matters listed on the published notice and agenda.

SPECIAL ORDER OF BUSINESS: HEARING AND DECISION PURSUANT TO REMAND OF THE COURT (Gov. Code, § 17559, subd. (b)) (action)

Paula Higashi, Executive Director, swore in the parties and witnesses participating in the hearing of items 18 and 19.

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| Item 19 | State Controller's Reevaluation of Reimbursement Claims
<i>Graduation Requirements</i> on Remand from the Sacramento County Superior Court, <i>San Diego Unified School District, et al. v. Commission on State Mandates, et al.</i> , Case Nos. 03CS01401 (Consolidated with Nos. 03CS01568, 03CS01569, 03CS01570, 03CS 01702, 04CS00028) |
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Camille Shelton, Chief Legal Counsel, presented this item. She stated that this item was a

remand from the Sacramento County Superior Court on incorrect reduction claims filed by six school districts for the cost of teacher salaries on the *Graduation Requirements* program. For purposes of this hearing, she clarified that the Commission was required to determine whether the State Controller's Office properly reevaluated the claims of the school districts pursuant to the court's ruling, in which the sole issue is whether the school districts experienced any savings pursuant to Education Code section 44955 to offset teacher salary costs as a direct result of the mandated science course.

Ms. Shelton explained that Education Code section 44955 authorizes school districts to terminate the services of permanent employees of non-mandated classes when the amendment of state law requires the modification of curriculum. The court found that a school district's use of Education Code section 44955 is solely within the discretion of the school district and cannot be used by the Controller's Office to deny or reduce a claim for teacher salary costs on the ground that a school district has not shown a reduction or an offset of costs for non-science classes or teachers.

Pursuant to the court's ruling, and based on the Controller's finding that the Grossmont Union High School District properly filed its reimbursement claim for teacher salaries, staff recommended that the Commission issue a new decision consistent with the staff analysis on the claim filed by the Grossmont Union High School District and remand the claim to the Controller's Office for payment. Staff further recommended, based on the ground that the Controller's reduction of its claims does not comply with the court's ruling, that the Commission return the evaluation of the claims filed by the remaining five school districts to the Controller for correction and resubmission to the Commission within 30 days.

Parties were represented as follows: Keith Petersen, representing five of the six districts; Art Palkowitz, on behalf of the San Diego Unified School District; Geoffrey Graybill, Deputy Attorney General for the State Controller; Jim Spano, with the State Controller's Office; and Sloan Simmons, with Lozano Smith.

Mr. Petersen stated that he was going to stand on his written submission, noting that he disagreed with many of the jurisdictional issues.

Mr. Palkowitz provided background information about the history and issues with the incorrect reduction claims for the *Graduation Requirements* program. He noted the tremendous impact on the districts of prolonging this matter further. He stated that if the Commission was going to provide another 30-day reevaluation, he wanted to hear what the Controller's Office anticipates to take place in that period of time, and requested that the item be placed on the September agenda.

Mr. Graybill noted that he was not available to the Controller's Office when all the documentation submitted to the Commission was prepared. He had additional comments that he wanted to present in writing, but stated that his request for a postponement was denied by the executive director. He indicated that if there was continuing objection to his citing of additional authority, he would renew his request for a postponement to the Commission.

Ms. Shelton responded that under Bagley-Keene, any case can be cited and brought in public testimony. However, she stated that she would not be able to respond as she had not read the cases. Ms. Shelton stated her position that the Commission was bound by the court's ruling. Regarding the continuance, she noted that everything issued by the Commission staff was issued directly to the Controller's Office and to the Attorney General's Office. She indicated that the draft staff analysis was issued in March, and the Controller's Office requested a continuance in April so that the Attorney General's Office could review the draft staff analysis. An extension

was granted until June 19, but the notice stated that no additional extensions would be granted.

Mr. Palkowitz commented that on June 19, the Department of Justice filed a four-page document analyzing the Commission's analysis, which was signed by Catherine Van Aken, Supervising Attorney General. He added that none of the cases just cited by Mr. Graybill were mentioned in that document. Mr. Palkowitz agreed with staff regarding the denial of the postponement request.

Mr. Graybill noted that he did not take part in the preparation of the June 19 response.

Chairperson Sheehan understood that there may have been personnel issues; however, she stated that the Commission had an obligation to move forward with this matter.

Mr. Graybill argued that staff incorrectly framed the issue and unduly restricted it, inconsistent with the court's decision. He disagreed with staff that Education Code section 44955 is the only factor to be considered. He stated his opinion that the failure of the districts to provide the information requested by the State Controller makes it likely that the court would uphold a Commission decision affirming the Controller's reevaluation. He contended that the Controller did the type of analysis that the court authorized when ruling on the issue of classroom remodeling costs and used data from the California Basic Educational Data System. In support of his arguments, Mr. Graybill referenced *Taye v. Coye* and *Coastal Community Hospital v. Belshé*. He added that the type of information that the districts submitted to the Controller initially was not reliable in terms of an audit.

[Member Walsh entered the room at 10:10 a.m.]

Mr. Graybill asked Mr. Spano if he prepared all the documentation submitted by the Controller's Office in this matter, and whether the information in the documents were true based on his personal knowledge, information, of belief. Mr. Spano affirmed.

Mr. Simmons stated that the court's ruling was that the Controller's Office complete a reevaluation, which was done and the process followed. He asserted that, at this time, the matter needed to move forward because the Controller's Office had numerous opportunities to get it right.

Ms. Shelton explained that according to the writ, the Commission's jurisdiction is to determine whether the Controller properly reevaluated the case with regard to the offset issue, and if the Commission finds that it did not, the Commission must send it back and the Controller has 30 days to resubmit another evaluation. She maintained that the court focused its review on the Commission's incorrect reduction claim decision and this was the only issue on remand back to the Commission.

With regard to documentation, Ms. Shelton stated that the Controller could not compare the documentation requirement for the teacher salaries issue with the claiming of the remodeling costs. The parameters and guidelines and claiming instructions for remodeling costs require specific documentation to be filed with the reimbursement claims. There is no documentation requirement in the parameters and guidelines or claiming instructions with regard to teacher salary costs. Although the court found the documentation requirement could be reasonably read into the claiming instructions pursuant to Government Code section 17561, the validity of the Controller's request for documentation turns on whether the offsetting savings requirement is substantively valid and consistent with the test claim decision, the parameters and guidelines, and the intent of Education Code sections 51225.3 and 44955. The court held that the Controller

is prevented from denying the school districts' claims for reimbursement of science teachers' salaries on the ground that the claimants have not shown a reduction in non-science classes and teachers, corresponding to the addition of the science class. The Commission, Ms. Shelton explained, already found in the test claim that they are entitled to reimbursement for teacher salary costs, and that such costs are mandated by the state. Thus, the test claim finding cannot be disturbed.

Mr. Graybill argued that there would be no purpose in requiring documentation if staff's interpretation were to prevail, which was not the court's intent.

Ms. Shelton responded that the court had no idea what documentation the school districts had. She acknowledged that the court said the Controller may properly request documentation, but quoting the court's ruling, "the Court's conclusion regarding the invalidity of the Controller's offsetting savings requirement does prevent the Controller from denying the school district's claims for reimbursement on the ground that the claimants have not shown a reduction."

Member Lujano made a motion to adopt the staff recommendation, which was seconded by Member Walsh. The motion carried 6-1, with Member Hair voting "No."

- Item 18 Proposed Orders to Set Aside Statements of Decision on Incorrect Reduction Claims on *Graduation Requirements*, CSM 4435-I-02, 14-21, 25, 27, 28, 30, 32-34, Education Code Section 51225.3, Statutes 1983, Chapter 498 (SB 813) Pursuant to Order of the Sacramento County Superior Court dated May 24, 2006, Case No. 05CS01253 (Consolidated with Case Nos. 05CS01262, 05CS01237, 05CS01256, 05CS01401):
Claimants: Yuba City, Vallejo City, West Contra Costa, John Swett, Stockton, Novato, Center, Lake Tahoe, Ojai, Lincoln, San Juan and Linden Unified School Districts, and Placer Union, East Side Union, Anderson Union, and Woodland Joint Union High School Districts.

Camille Shelton, Chief Legal Counsel, presented this item. She stated that this item was the second consolidated litigation on the *Graduation Requirements* program filed by 16 school districts. She noted that in this case, the school districts, the Controller's Office, and the Commission signed a stipulation to dismiss the case and have the Controller reevaluate the claims in light of the *San Diego* decision. She indicated that there was a signed order from Judge Connolly, which was based on the stipulation.

Parties were represented as follows: Rogelio Ruiz, for the East Side Union High School District; Geoffrey Graybill, Deputy Attorney General for the State Controller; and Sloan Simmons, with Lozano Smith.

Mr. Simmons, Mr. Graybill, and Mr. Ruiz concurred.

Member Worthley made a motion to adopt the proposed order. With a second by Member Glaab, the motion carried unanimously.

APPROVAL OF MINUTES

Item 1 May 25, 2006

Upon motion by Member Olsen and second by Member Worthley, the minutes were unanimously adopted.

PROPOSED CONSENT CALENDAR

INFORMATIONAL HEARING PURSUANT TO CALIFORNIA CODE OF REGULATIONS, TITLE 2, CHAPTER 2.5, ARTICLE 8 (action)

ADOPTION OF PROPOSED PARAMETERS AND GUIDELINES AND PROPOSED PARAMETERS AND GUIDELINES AMENDMENTS

- Item 20 *Agency Fee Arrangements*, 00-TC-17/01-TC-14
Statutes 1980, Chapter 816 (SB 2030); Statutes 2000, Chapter 893 (SB 1960); Statutes 2001, Chapter 805 (SB 614)
Clovis Unified School District, Claimant

- Item 24 *Mandate Reimbursement Process*, 05-RL-4204-02 (CSM 4204 & 4485)
Statutes 1975, Chapter 486 (AB 1375)
Statutes 1984, Chapter 1459 (SB 2337)

PROPOSED AMENDMENTS TO CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5 (action)

- Item 25 Adoption of Proposed Regulatory Action: Article I Cleanup Amendments to California Code of Regulations, Title 2, Chapter 2.5, Article 1. General, Section 1181.4

Member Olsen moved for adoption of items 20 and 25 on the consent calendar. With a second by Member Glaab, the items were unanimously adopted.

Member Walsh moved for adoption of item 24 on the consent calendar, which was seconded by Member Glaab. The motion carried 6-1, with Member Lujano voting "No."

APPEAL OF EXECUTIVE DIRECTOR DECISIONS PURSUANT TO CALIFORNIA CODE OF REGULATIONS, TITLE 2, SECTION 1181, SUBDIVISION (c)

- Item 3 Staff Report (if necessary)

No appeals were filed.

HEARINGS AND DECISIONS ON TEST CLAIMS, PURSUANT TO CALIFORNIA CODE OF REGULATIONS, TITLE 2, CHAPTER 2.5, ARTICLE 7 (Gov. Code, § 17551) (action)

Ms. Higashi swore in the parties and witnesses participating in the hearing of the remaining items.

- Item 4 *Post Conviction: DNA Court Proceedings*, 00-TC21/01-TC-08
Penal Code Sections 1405 and 1417.9
Statutes 2000, Chapter 821 (SB 1342), Statutes 2001, Chapter 943 (SB 83)
County of Los Angeles, Claimant

Camille Shelton, Chief Legal Counsel, presented this item. She noted that the test claim legislation requires civil court proceedings as a post-conviction remedy for convicted felons to obtain DNA testing of biological evidence in cases where identity is the issue. It also requires counties to retain biological material for felony cases for the period of time the convicted person remains incarcerated.

Staff found that the test claim legislation imposes a partial reimbursable state-mandated program on local agencies within the meaning of article XIII B, section 6 of the California Constitution for specific activities.

Parties were represented as follows: Leonard Kaye, on behalf of the County of Los Angeles; and Susan Geanacou, with the Department of Finance.

Ms. Shelton clarified that staff recommended denial of the court hearing because of the statutory language giving discretion to the court on whether to conduct a hearing, and the activity of notifying the convicted felon that the evidence was being disposed.

Mr. Kaye raised two issues for clarification. First, he requested clarification that at this point, the Commission staff had made no finding regarding DNA testing required of the sheriff's department and transporting prisoners to and from state institutions, and that the activities would be discussed at the parameters and guidelines phase. Mr. Kaye noted that they were in partnership with the Department of Justice.

Ms. Shelton responded that all activities not specified in statute would still be discussed at the parameters and guidelines phase. She clarified that there is a finding in the proposed Statement of Decision that would not reimburse the county for the cost of the DNA test.

Mr. Kaye explained that many times, the court will require the sheriff to provide the DNA testing service. In the event that the court has insufficient funds to pay for the cost of the test, he asserted that the local agency should be reimbursed for the cost.

Ms. Shelton stated that there is no direct mandate for the county to pay for the cost of the DNA test at all, and it is within the court's discretion to decide who to charge. She maintained that according to the plain language of the statute, the cost of the test ordered shall be borne by the state or the applicant as determined by the court.

Ms. Geanacou supported the staff analysis. She emphasized that the appointment of counsel in this matter is at the court's discretion and not required by the state. Therefore, it was not a reimbursable mandate. She noted that the Department of Finance remains open to commenting on the reimbursable activities during the parameters and guidelines phase.

Ms. Shelton clarified staff's finding that the appointment of defense counsel was mandated under the earlier 2000 statute. The statute was amended in 2001, and applies only to the population of inmates that filed a motion for DNA testing during the first year of the program. If one of those inmates already filed a motion and the court already appointed defense counsel for that inmate, the court has discretion to allow the defense counsel to file another motion. Ms. Geanacou and Mr. Kaye agreed.

Member Walsh made a motion to adopt the staff recommendation. With a second by Member Glaab, the motion carried unanimously.

Item 5 Proposed Statement of Decision
Post Conviction: DNA Court Proceedings, 00-TC-21/01-TC-08
See Above

Camille Shelton, Chief Legal Counsel, presented this item. Staff recommended that the Commission adopt the proposed Statement of Decision, which accurately reflected the staff recommendation. Ms. Shelton indicated that minor changes, including hearing testimony and vote count, would be reflected in the final Statement of Decision.

Member Olsen made a motion to adopt the proposed Statement of Decision. With a second by Member Worthley, the motion carried unanimously.

HEARINGS AND DECISIONS ON TEST CLAIMS, PURSUANT TO CALIFORNIA CODE OF REGULATIONS, TITLE 2, CHAPTER 2.5, ARTICLE 7 (Gov. Code, § 17551) (action)

- Item 6 *Charter School Collective Bargaining, 99-TC-05*
Education Code Sections 47605, Subdivision (b)(5)(O) and 47611.5,
Government Code Section 3540, et seq., Statutes 1999, Chapter 828
(AB 631)
Western Placer Unified School District, Claimant

Camille Shelton, Chief Legal Counsel, presented this item. She stated that the test claim was filed by a school district and the test claim legislation requires a charter school to insert in the charter a declaration as to whether the charter school will be deemed a public school employer for purposes of collective bargaining under the Educational Employment Relations Act. If the charter school does not decide to be a public school employer, the school district where the charter is located is deemed the public school employer by operation of law for purposes of collective bargaining.

Staff recommended that the Commission adopt the staff analysis to deny the test claim.

Parties were represented as follows: David Scribner, on behalf of the claimant; and Susan Geanacou, with the Department of Finance.

Mr. Scribner stated that members of the Legislature that his clients spoke with thought that the Commission would be able to resolve the charter school issue. Thus, he had no legislative directive and nothing new to bring forward. He concurred with the staff recommendation.

Ms. Geanacou supported the staff analysis, adding that the test claim should be denied because charter schools are not eligible claimants under state mandates law, and furthermore, there is no charter school claimant on the claim. She commented that new charter school employees in a school district where the charter school is not the public-school employer would likely join existing bargaining units, and thus, there would be no new activities. She maintained that more charter school employees would not increase bargaining unit activities.

Chairperson Sheehan stated that the members were sympathetic but constrained by statute.

Member Worthley made a motion to adopt the staff analysis. With a second by Member Glaab, the motion carried unanimously.

- Item 7 Proposed Statement of Decision
Charter School Collective Bargaining, 99-TC-05
See Above

Camille Shelton, Chief Legal Counsel, presented this item. She indicated that minor changes, including hearing testimony and vote count, would be reflected in the final Statement of Decision.

Member Worthley made a motion to adopt the proposed Statement of Decision. With a second by Member Olsen, the motion carried unanimously.

Item 8 *Mentally Disordered Offenders: Treatment as a Condition of Parole,*
00-TC-28/05-TC-06
Statutes 1985, Chapter 1419 (SB 1296); Statutes 1986, Chapter 858
(SB 1845); Statutes 1987, Chapter 687 (SB 425); Statutes 1988,
Chapter 658 (SB 538); Statutes 1989, Chapter 228 (SB 1625);
Statutes 1994, Chapter 706 (SB 1918)
County of San Bernardino, Claimant

Deborah Borzelleri, Commission Counsel, presented this item. She noted that the test claim legislation established continued mental health treatment and civil commitment procedures for people with severe mental disorders at the time their parole or sentence is terminating. The legislation sets forth procedures for civil court hearings that are initiated by the prisoner or parolee. The court is required to conduct the hearing, the District Attorney is required to represent the people, and the public defender is required to represent the person, if the person is indigent.

Staff found that the test claim legislation imposes a reimbursable state mandate for the civil hearings, the activities of the District Attorney representing the people, and the public defender representing indigent persons. Staff recommended that the Commission adopt the staff analysis to approve the test claim for these activities.

Parties were represented as follows: Bonnie Ter Keurst, representing the claimant; and Susan Geanacou, with the Department of Finance.

Ms. Ter Keurst had no comments.

Ms. Geanacou supported the final staff analysis and reserved the right to comment on the reimbursable activities during the parameters and guidelines phase.

Member Olsen made a motion to adopt the staff recommendation. With a second by Member Glaab, the motion carried unanimously.

Item 9 Proposed Statement of Decision
Mentally Disordered Offenders: Treatment as a Condition of Parole,
00-TC-28/05-TC-06
See Above

Deborah Borzelleri, Commission Counsel, presented this item. She stated that the issue before the Commission is whether the proposed Statement of Decision accurately reflected the Commission's decision. She indicated that minor changes, including hearing testimony and vote count, would be reflected in the final Statement of Decision.

Member Hair made a motion to adopt the proposed Statement of Decision. With a second by Member Worthley, the motion carried unanimously.

[A short break was taken at this time.]

Item 10 *Binding Arbitration*, 01-TC-07
Code of Civil Procedure, Sections 1281.1, 1299, 1299.2, 1299.3
1299.4, 1299.5, 1299.6, 1299.7, 1299.8, and 1299.9
Statutes 2000, Chapter 906 (SB 402)
City of Palos Verdes Estates, Claimant

Deborah Borzelleri, Commission Counsel, presented this item. She noted that the test claim legislation establishes a mandatory binding arbitration process for local governments and law enforcement officers and firefighters. The legislation requires that when an impasse in employer-employee relations is declared, the parties would be subject to binding arbitration if the employee organization so requested.

Ms. Borzelleri explained that the test claim statute became effective on January 1, 2001, but was declared unconstitutional by the California Supreme Court on April 23, 2003, in the *County of Riverside* case, as violating the home rule provisions of the California Constitution. She indicated that the Supreme Court did not address whether or not its ruling was retroactive to the original effective date of the test claim statute, and thus, staff's analysis addresses whether the statute, while it was believed to be constitutional between January 1, 2001 through April 21, 2003, created a reimbursable state-mandated program.

Staff found that applying the court's ruling of unconstitutionality retroactively to the original date of the effective legislation could have the effect of forcing programs and costs on local governments without the state paying for them, which is contrary to the stated purpose of article XIII B, section 6. Moreover, staff found that the test claim legislation did not constitute a new program or higher level of service. Ms. Borzelleri explained that cases have consistently held that additional costs for increased employee benefits and compensation in the absence of some increase in the actual level or quality of governmental services provided to the public do not constitute an enhanced service to the public, and therefore, do not impose a new program or higher level of service on local governments within the meaning of article XIII B, section 6 of the Constitution.

Ms. Borzelleri noted that because strikes by law enforcement officers and fire services personnel are prohibited by law, no successful argument can be made that the legislation affects law enforcement or firefighting services to the public. Staff recommended that the Commission adopt the staff analysis to deny the test claim.

Parties were represented as follows: John Liebert, Pamela Stone, and Daniel Dreiling, representing the City of Palos Verdes Estates; Allan Burdick, on behalf of the California State Association of Counties; and Susan Geanacou, with the Department of Finance.

Mr. Liebert disagreed with the staff conclusion that the test claim legislation did not constitute a new program or higher level of service, but agreed that case law has consistently held that legislation, where there is a cost traceable to an increase in employee benefits, would not qualify for reimbursement under the Constitution. He asserted that the test claim was not just seeking reimbursement for the costs of increased employee benefits. Mr. Liebert withdrew two activities from the original 23 seeking increased employee benefits that the claimant alleged to be reimbursable, leaving 21 other activities that he contended to be reimbursable.

Mr. Liebert also disagreed with staff's conclusion that no service to the public was involved. He referred to several cases in support of his arguments, including the *County of Los Angeles* case, the *Carmel Valley* case, and the *San Diego Unified School District* case. He argued that in reality, strikes are likely and have occurred notwithstanding that they are against the law. He contended that the claim met all the requirements of a reimbursable state-mandated program.

Given the oath she took, Chairperson Sheehan expressed the difficulty she was experiencing with the idea of ignoring the appellate court decision and statute outlawing strikes by firefighters and law enforcement.

Ms. Stone presented the Commission members with additional exhibits, which were prior Commission decisions pertaining to labor matters wherein the labor process was found to be reimbursable. She addressed a couple of the decisions, asserting that the same issue was present in this case. She conceded the issues of increase in salaries and litigation costs, clarifying that they sought reimbursement for the labor process costs that would be incurred.

In response to Mr. Liebert's reference to the *County of Los Angeles* case, Ms. Borzelleri agreed that binding arbitration is in fact a program; however, she disagreed that it was a new program or higher level of service. With regard to his reference to other cases, she maintained that those cases identified an actual public service, unlike this case. As to the argument that the Commission ruled on similar cases in the past, she stated that those decisions are not binding; rather, the Commission must rely on case law.

Ms. Shelton added that the Supreme Court repeatedly said that the whole purpose of article XIII B, section 6 is to prevent the state from shifting costs to local agencies to provide a service to the public.

Ms. Geanacou agreed with the staff analysis that there is no higher level of service to the public from binding arbitration following impasse and bargaining. She noted that recent cases confirmed at an appellate level that an alleged increased cost of providing services to the public does not equal an increased level of services to the public. She also noted that many of the activities claimed in the test claim are not required by the legislation.

Mr. Liebert contended that the definition of a program refers to services to the public, as well as a unique requirement imposed upon local government by the state. He submitted that binding arbitration was a perfect example of a law that implements state policy and imposes unique requirements on local governments that do not apply to other entities.

Ms. Stone commented that notwithstanding case law precluding strikes by peace officers illegal, there have been severe cases of "blue flu," in which various safety officers call in sick. She argued that this legislation was very clear in its intent to provide a service to the public by ensuring that there were no employer-employee disagreements that could affect the provision of both fire and police. She noted that these were found in *Carmel Valley* and other cases to be two of the most primary governmental services that local government provides to its citizens.

Ms. Shelton explained that there are several elements to finding a reimbursable state-mandated program that must be satisfied: 1) a mandated activity is imposed on the agency, 2) the activities constitute a program, 3) the program has to be a new program or higher level of service, and 4) there are increased costs mandated by the state for the activities required by statute. The fact that the program is unique to local government satisfies the test that it is in fact a program subject to article XIII B.

Mr. Liebert continued to disagree, maintaining that when a higher level of service is provided for an existing program, a new program is created, which results in services to the public. Ms. Shelton responded that the courts have defined a new program or higher level of service as providing a service to the public.

Ms. Higashi requested clarification as to which activities the claimant was officially withdrawing. Ms. Stone clarified that they were withdrawing the costs of implementing the award to the employees as a result of the test claim statute, the costs of litigation, and additional intangible costs.

Member Worthley acknowledged that increased costs do not necessarily reflect increased quality, but struggled with the concept that there is no correlation between increased costs and quality.

Ms. Shelton stated that the Supreme Court in the *San Diego* case said that the same arguments were raised in the prior cases that were reviewed, and even though there could be a higher quality of service provided to the public, the court still found that there is no higher level of service because it was just a benefit to the employee.

Member Olsen said that the issue was the directness of the correlation between increased costs and quality. She noted that everything government does ultimately affects a public outcome in some way. From her perspective, binding arbitration is provided as a way of dealing with a conflict between employees and employers. While increased benefits may result, she submitted that they were not a direct outcome of requiring binding arbitration.

Mr. Burdick commented that this was a unique program placed on local government and that the cost issue is being litigated. He maintained that local government disagreed that increased costs should not be reimbursed.

Ms. Higashi clarified that the *Collective Bargaining* decision was made before any of the cited case law appeared. Also, because there was no evidence in the record, she asked if there was any report as to how many jurisdictions actually participated in binding arbitration, and whether or not the claimant entered into binding arbitration as a result of the test claim statute.

Ms. Stone responded that she was personally aware of one county being forced into binding arbitration, which resulted in an award higher than the last best final offer. She added that other entities did the pre-stages but did not enter into the stage of binding interest arbitration, or get as far as an arbitration decision.

Ms. Higashi requested clarification as to whether Ms. Stone was suggesting there may only be one claimant. Ms. Stone clarified that there would be some claimants with regard to the initial start-up costs, but that there was only one agency that went through the entire process.

Mr. Liebert clarified that the claimant's concern related to the costs of the process.

Mr. Burdick commented that several agencies could qualify for increased costs so he cautioned against saying that there is a single agency. However, he did not believe that there will be substantial claims in this particular process.

Ms. Higashi noted that the analysis did not go into detail as to whether the claimant's allegations are mandated by statute, and if the Commission were to approve the test claim, whether the activities would still be reasonably necessary to implement the mandate.

Member Walsh made a motion to adopt the staff recommendation, which was seconded by Member Glaab. The motion carried 6-1, with Member Worthley voting "No."

- Item 11 Proposed Statement of Decision
Binding Arbitration, 01-TC-07
See Above

Deborah Borzelleri, Commission Counsel, presented this item. She stated that the issue before the Commission is whether the proposed Statement of Decision accurately reflected the Commission's decision.

Ms. Shelton added that the final Statement of Decision would reflect the hearing testimony and indicate that the claimant waived its request for certain benefits and litigation costs.

Member Olsen made a motion to adopt the proposed Statement of Decision, which was seconded by Member Walsh. The motion carried 6-1, with Member Worthley voting "No."

- Item 12 *Worker's Compensation Disability Benefits for Government Employees, 00-TC-20/02-TC-02*
Labor Code Section 4850; Statutes 2000, Chapter 920 (AB 1883) & 929 (SB 2081); Statutes 1999, Chapters 270 (AB 224) & 970 (AB 1387); Statutes 1989, Chapter 1464 (SB 1172); Statutes 1977, Chapter 981 (SB 989)
County of Los Angeles, Claimant
San Diego Unified School District, Co-Claimant

- Item 13 Proposed Statement of Decision
Worker's Compensation Disability Benefits for Government Employees, 00-TC-20/02-TC-02
See Above

Items 12 and 13 were postponed.

- Item 14 *Modified Primary Election, 01-TC-13*
Statutes 2000, Chapter 898 (SB 28)
County of Orange, Claimant

Katherine Tokarski, Commission Counsel, presented this item. She noted that the test claim dealt with changes to the partisan primary system in California. In 1996, the voters adopted Proposition 198 of the Open Primary Act; however, Statutes 2000, chapter 898, largely repealed and reenacted the Elections Code sections that were amended by Proposition 198 following the U.S. Supreme Court decision finding that the process was unconstitutional.

Ms. Tokarski explained that by amending a few of the Elections Code sections, the test claim legislation altered the prior closed primary system to one in which voters who declined to state a political party affiliation may choose any political party's partisan primary ballot, if allowed by the political party. This created a form of open primary.

Staff concluded that the test claim legislation imposes a reimbursable state-mandated program on counties for allowing voters who decline to state a party affiliation to vote a party ballot at the primary, and for adding related information to voter registration cards. Ms. Tokarski indicated that no comments were received on the draft staff analysis. Staff recommended that the Commission adopt the staff analysis to partially approve the test claim.

Parties were represented as follows: Pamela Stone and Suzanne Slupsky, representing the County of Orange; and Susan Geanacou, with the Department of Finance.

Ms. Stone concurred with the staff analysis. She noted that there were necessary activities to reasonably accomplish the mandate that they would raise at the parameters and guidelines phase.

Ms. Geanacou agreed with the staff analysis and reserved the right to comment on the reimbursable activities during the parameters and guidelines phase.

Ms. Stone noted that the claimant and the Department of Finance disagreed on the potential reimbursable activities.

Member Worthley made a motion to adopt the staff recommendation. With a second by Member Olsen, the motion carried unanimously.

Item 15 Proposed Statement of Decision
Modified Primary Election, 01-TC-13
See Above

Katherine Tokarski, Commission Counsel, presented this item. Staff recommended that the Commission adopt the proposed Statement of Decision, which accurately reflected the staff analysis and recommendation. Ms. Tokarski indicated that minor changes, including hearing testimony and vote count, would be reflected in the final Statement of Decision.

Member Olsen made a motion to adopt the proposed Statement of Decision. With a second by Member Worthley, the motion carried unanimously.

Item 16 *Permanent Absent Voter II, 03-TC-11*
Elections Code Sections 3100, 3101, 3103, 3104, 3106, 3108, 3110, 3200, 3201, 3202, 3203, 3204, 3205, and 3206; Statutes 1994, Chapter 920 (SB 1547); Statutes 1996, Chapter 724 (AB 1700); Statutes 2001, Chapters 918 (AB 719) and 922 (AB 1520); Statutes 2002, Chapter 664 (AB 3034); and Statutes 2003, Chapter 347 (SB 445)
County of Sacramento, Claimant

Katherine Tokarski, Commission Counsel, presented this item. She noted that this test claim was filed to reflect changes in the election law pertaining to the original *Permanent Absent Voters* test claim, which was decided in 1989. At the time, the Commission determined that Elections Code sections 1450 through 1456 imposed a reimbursable state-mandated program. Ms. Tokarski explained that in 2001, the Elections Code was substantively amended to allow all registered voters to apply for permanent absent voter status rather than limiting eligibility.

Staff concluded that the test claim legislation imposes a reimbursable state-mandated program, replacing the related activity from *Permanent Absent Voter I*. Ms. Tokarski stated that county election officials are newly required to include explanations of the absentee voting procedure and of Elections Code section 3206 in all absentee ballot mailings. She noted that no comments were received on the draft staff analysis. Staff recommended that the Commission adopt the staff analysis to partially approve the test claim.

Parties were represented as follows: Pamela Stone and Alice Jarboe, representing the County of Sacramento; and Susan Geanacou, with the Department of Finance.

Ms. Stone concurred with the staff analysis. She indicated that the claimant will propose one set of parameters and guidelines covering the activities for both the *Permanent Absent Voter I* and

Permanent Absent Voter II programs.

Ms. Geanacou supported the staff analysis. She had a technical question about a reference to a code section in the staff analysis. Ms. Tokarski clarified the mistake.

Ms. Geanacou reserved the right to comment during the parameters and guidelines phase.

Member Worthley made a motion to adopt the staff recommendation. With a second by Member Olsen, the motion carried unanimously.

- Item 17 Proposed Statement of Decision
Permanent Absent Voter II, 03-TC-11
See Above

Katherine Tokarski, Commission Counsel, presented this item. Staff recommended that the Commission adopt the proposed Statement of Decision, which accurately reflected the staff analysis and recommendation. Ms. Tokarski indicated that minor changes, including hearing testimony and vote count, would be reflected in the final Statement of Decision.

Member Walsh made a motion to adopt the proposed Statement of Decision. With a second by Member Glaab, the motion carried unanimously.

INFORMATIONAL HEARING PURSUANT TO CALIFORNIA CODE OF REGULATIONS, TITLE 2, CHAPTER 2.5, ARTICLE 8 (action)

ADOPTION OF PROPOSED PARAMETERS AND GUIDELINES AND PROPOSED PARAMETERS AND GUIDELINES AMENDMENTS

- Item 21 *Missing Children Reports*, 01-TC-09
Education Code Sections 38139 and 49068.6
Statutes 1986, Chapter 249 (AB 606); Statutes 1996, Chapter 277 (SB 1562); Statutes 1999; Chapter 832 (AB 646)
San Jose Unified School District, Claimant
And
Request to Amend All Parameters and Guidelines to Include Time Study Language, 04-PGA-04
State Controller's Office, Requestor

Item 21 was postponed.

- Item 22 *Pupil Expulsions from School: Additional Hearing Costs for Mandated Recommendations of Expulsion for Specified Offenses*
(*San Diego Unified School District v. Commission on State Mandates* (2004) 33 Cal.4th 859, 867), 05-PGA-04 (CSM-4455)
Education Code Section 48915, Statutes 1993, Chapters 1255 (AB 342) and 1256 (SB 1198); Education Code Section 48918, Statutes 1975, Chapter 1253 (AB 1770); Statutes 1977, Chapter 965 (AB 530); Statutes 1978, Chapter 668 (AB 2191); Statutes 1983, Chapters 498 (SB 813) and 1302 (AB 70) Statutes 1985, Chapter 856 (AB 1758); Statutes 1987, Chapter 134 (AB 439); Statutes 1990, Chapter 1231 (SB 2356); Statutes 1994, Chapter 146 (AB 3601)
San Diego Unified School District, Claimant

Nancy Patton, Assistant Executive Director, presented this item. She stated that in October 1999,

the San Diego Unified School District challenged the *Pupil Expulsions from School* decision. In 2004, the Supreme Court issued its ruling, requiring the state to reimburse school districts for all resulting hearing costs, including those attributable to procedures required by federal law or mandated recommendations of expulsion for certain offenses, back to the initial reimbursement period beginning in fiscal year 1993-1994.

Ms. Patton indicated that in May 2005, the Commission amended its original Statement of Decision to conform to the Supreme Court decision. Here, a new set of parameters and guidelines are proposed so school districts can claim additional hearing costs dating back to fiscal year 1993-1994. Ms. Patton explained that the San Diego Unified School District proposed a uniform cost allowance of \$587.15 for the direct and indirect costs of expulsion hearings for each mandated recommendation of expulsion for fiscal year 2005-2006. For prior years, the amount would be adjusted back to fiscal year 1993-1994, using the implicit price deflator for the costs of goods and services to governmental agencies, as determined by the Department of Finance.

Based on a review of comparable costs and activities for state agency due process hearings, staff found that the claimant's proposal is reasonable and should be adopted. Staff recommended that the Commission adopt the proposed parameters and guidelines and authorize staff to make any necessary technical corrections.

Parties were represented as follows: Art Palkowitz, representing the San Diego Unified School District; and Ryan Storm, with the Department of Finance.

Mr. Palkowitz concurred with the staff analysis.

Mr. Storm disagreed with the staff analysis because the uniform cost allowance should be based on actual costs audited by the State Controller's Office. He argued that some of the most expensive areas are Los Angeles and San Diego, and thus, some of the more remote areas and other regions in the state may have lower costs. The Department of Finance proposed, as an alternative, that the Controller's Office select a sample of different districts, based on size and location, and create a reimbursement rate that is based on actual costs. He stated that with staff's recommendation, the state would actually be reimbursing more than the true cost of the mandate.

Chairperson Sheehan asked what the different costs might be due to geography. Mr. Palkowitz responded that the classification of individuals that perform the work include a Deputy Attorney General, a paralegal, and an administrative law judge. He noted that the uniform cost allowance was based on uniform state rates for these classifications.

Mr. Storm contended that there may be different compensation levels for these classifications in San Diego as opposed to an area like Modoc County.

Ms. Higashi commented that the uniform state rates were used as representative costs because school districts are authorized to contract with the Office of Administrative Hearings to conduct hearings. She stated that she welcomed unit cost proposals based on audited data, however there were no such proposals before her. She noted that state law authorizes the Department of Finance or the Controller's Office to develop a proposal at a time in the future.

Chairperson Sheehan emphasized the need for data and acknowledged that matters could not just be tolled continually.

Ms. Shelton stated that the Department of Finance has the authority to come back and request that the parameters and guidelines be amended prospectively.

Chairperson Sheehan recognized the need for additional data, but stated her reluctance to continually toll the item until any data is submitted. She also reiterated the open invitation for additional data.

Member Glaab made a motion to adopt the staff recommendation. With a second by Member Walsh, the motion carried unanimously.

- Item 23 Amendment of *Pupil Suspensions, Expulsions, and Expulsion Appeals*
05-PGA-04 (CSM-4455, 4456, and 4463)
San Diego Unified School District, Requestor And
Pupil Suspensions from School - CSM-4456
Education Code Section 48911, subdivisions (b) and (e)
Statutes 1977, Chapter 965 (AB 530); Statutes 1978, Chapter 668 (AB 2191); Statutes 1980, Chapter 73 (SB 1247); Statutes 1983, Chapter 498 (SB 813); Statutes 1985, Chapter 856 (AB 1758); Statutes 1987, Chapter 134 (AB 439) And
Pupil Expulsions from School - CSM-4455
Education Code Sections 48915, subdivisions (a) and (b), 48915.1, 48915.2, 48916 and 48918
Statutes 1975, Chapter 1253 (AB 1770); Statutes 1977, Chapter 965 (AB 530); Statutes 1978, Chapter 668 (AB 2191); Statutes 1982, Chapter 318 (SB 1385); Statutes 1983, Chapter 498 (SB 813); Statutes 1984, Chapter 622 (SB 1685); Statutes 1987, Chapter 942 (AB 2590); Statutes 1990, Chapter 1231 (AB 3794); Statutes 1992, Chapter 152 (AB 3362); Statutes 1993, Chapters 1255 (AB 342), 1256 (SB 1198); 1257 (SB 1130); and, Statutes 1994, Chapter 146 (AB 3601) And
Pupil Expulsion Appeals - CSM-4463
Education Code Sections 48919, 48921-48924
Statutes 1975, Chapter 1253 (AB 1770); Statutes 1977, Chapter 965 (AB 530); Statutes 1978, Chapter 668 (AB 2191); and Statutes 1983, Chapter 498 (SB 813)

Nancy Patton, Assistant Executive Director, presented this item. She noted that the Commission adopted three related Statements of Decision on the pupil disciplinary process: *Pupil Suspensions from School*, *Pupil Expulsions from School*, and *Pupil Expulsions Appeals*. She stated that the parameters and guidelines for each program were consolidated so there would be one set of claiming instructions, but the consolidated parameters and guidelines must be amended to implement the Supreme Court decision in the *San Diego Unified School District* case.

Ms. Patton noted that the same uniform cost allowance for reimbursement of additional hearing costs from the previous item is incorporated here. Staff recommended that the Commission adopt the proposed amendments to the consolidated parameters and guidelines, effective July 1, 2006. Staff also recommended that the Commission authorize staff to make technical, non-substantive changes as necessary.

Parties were represented as follows: Art Palkowitz, representing the San Diego Unified School District; and Ryan Storm, with the Department of Finance.

Mr. Palkowitz concurred with the staff analysis and recommendation.

Mr. Storm disagreed based on his testimony from the previous item.

Member Walsh made a motion to adopt the staff recommendation. With a second by Member Glaab, the motion carried unanimously.

MEETING AND HEARING CALENDAR

Item 26 Adoption of 2007 Meeting and Hearing Calendar

Nancy Patton, Assistant Executive Director, presented this item. She stated that the Commission is required to meet at least once every two months. In addition to the six required meetings, she noted that two tentative hearing dates were proposed to accommodate additional agenda items, if necessary. Staff recommended that the Commission adopt the proposed 2007 hearing calendar.

Member Worthley made a motion to adopt the proposed hearing calendar. With a second by Member Walsh, the motion carried unanimously.

STAFF REPORTS

Item 27 Chief Legal Counsel's Report (info) Recent Decisions, Litigation Calendar

Ms. Shelton had no additional items to report.

Item 28 Executive Director's Report (info/action) Workload, Budget, Legislation, and Next Hearing

Ms. Higashi reported the following:

- *Budget.* There is a new requirement for the Commission to report its workload to the Department of Finance annually. The budget detail for mandate reimbursement appropriations includes supplemental language regarding how these monies can be used for reimbursement. A new Government Code provision was added to clarify when a Commission decision triggers article XIII B, section 6, in terms of funding or suspending local agency mandates.
- *Legislation.* Assembly Bill 2652, the Commission's sponsored legislation, is on the Senate floor.
- *Next Hearing.* Because of conflicts for the scheduled September hearing, a new date will be confirmed and announced.

PUBLIC COMMENT

There was no public comment.

CLOSED EXECUTIVE SESSION PURSUANT TO GOVERNMENT CODE SECTIONS 11126 and 17526.

PERSONNEL

Report from Personnel Subcommittee and to confer on personnel matters pursuant to Government Code sections 11126, subdivision (a) and 17526.

PENDING LITIGATION

To confer with and receive advice from legal counsel, for consideration and action, as necessary and appropriate, upon the following matters pursuant to Government Code section 11126, subdivision (e)(1):

1. *State of California, Department of Finance v. Commission on State Mandates, et al.*, Sacramento Superior Court Case No. 03CS01069, CSM Case No. 03-L-01, consolidated with *County of Los Angeles v. Commission on State Mandates, et al.*, Los Angeles Superior Court Case No. BS087959, transferred to Sacramento Superior Court, Case No. 05CS00865, CSM Case No. 03-L-11 [*Animal Adoption*]
2. *State of California, Department of Finance v. Commission on State Mandates, et al.*, Sacramento Superior Court Case No. 03CS01432, CSM Case No. 03-L-02 [*Behavioral Intervention Plans*]
3. *CSAC Excess Insurance Authority v. Commission on State Mandates, et al.*, Second District Court of Appeal, Case Number B188169, on appeal from Los Angeles Superior Court Case No. BS092146, CSM Case No. 04-L-01 [*Cancer Presumption for Law Enforcement and Firefighters and Lower Back Injury Presumption for Law Enforcement*], consolidated with *City of Newport Beach v. Commission on State Mandates, et al.*, Los Angeles Superior Court Case No. BS095456, CSM Case No. 04-L-02 [*Skin Cancer Presumption for Lifeguards*]
4. *County of Los Angeles, et al. v. Commission on State Mandates, et al.*, Second District Court of Appeal [Los Angeles] Case Number B183981, CSM Case No. 04-L-03, (Los Angeles Superior Court Nos. BS089769, BS089785) [*Transit Trash Receptacles, et al./Waste Discharge Requirements*]
5. *County of San Bernardino v. Commission on State Mandates, et al.*, San Bernardino County Superior Court, Case No. SCVSS 138622 [*Standardized Emergency Management Systems (SEMs)*]

To confer with and receive advice from legal counsel, for consideration and action, as necessary and appropriate, upon the following matter pursuant to Government Code section 11126, subdivision (e)(2):

- Based on existing facts and circumstances, there is a specific matter which presents a significant exposure to litigation against the Commission on State Mandates, its members and/or staff (Gov. Code, § 11126, subd. (e)(2)(B)(i).)

Hearing no further comments, Chairperson Sheehan adjourned into closed executive session pursuant to Government Code section 11126, subdivision (e), to confer with and receive advice from legal counsel for consideration and action, as necessary and appropriate, upon the pending litigation listed on the published notice and agenda; and Government Code sections 11126, subdivision (a), and 17526, to confer on personnel matters listed on the published notice and agenda.

REPORT FROM CLOSED EXECUTIVE SESSION

Chairperson Sheehan reported that the Commission met in closed executive session pursuant to Government Code section 11126, subdivision (e), to confer with and receive advice from legal counsel for consideration and action, as necessary and appropriate, upon the pending litigation listed on the published notice and agenda; and Government Code sections 11126, subdivision (a), and 17526, to confer on personnel matters listed on the published notice and agenda.

ADJOURNMENT

Hearing no further business, Member Sheehan adjourned the meeting at 12:50 p.m.


PAULA HIGASHI
Executive Director