Hearing Date: December 1, 2011
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TEST CLAIM
DRAFT STAFF ANALYSIS

Government Code Sections 3304, 3306.5, 3309, and 3312

Statutes 1976, Chapter 465; Statutes 1994, Chapter 1259; Statutes 1997, Chapter 148; Statutes 1998, Chapter 786; Statutes 1998, Chapter 263; Chapter 1998, Chapter 112; Chapter 1999, Chapter 338; Statutes 2000, Chapter 209; Statutes 2002, Chapter 1156; and Statutes 2002, Chapter 170

Peace Officers Procedural Bill of Rights II
03-TC-18

City of Newport Beach, Claimant

EXECUTIVE SUMMARY

Overview

This test claim addresses activities associated with the Peace Officers Procedural Bill of Rights Act (POBOR) (Gov. Code, § 3300 et seq.). POBOR provides a series of rights and procedural safeguards to peace officers employed by local agencies, school districts, and special districts that are subject to investigation or discipline.

In 1999, the Commission approved the first POBOR test claim (CSM 4499), which authorizes reimbursement, beginning July 1, 1994, to the law enforcement agencies of counties, cities, and those special police protection districts named in Government Code section 53060.7[1] for the following activities:

1. Providing the opportunity for an administrative appeal for specified disciplinary actions.
2. Conducting an interrogation of a peace officer while the officer is on duty, or compensating the peace officer for off-duty time in accordance with regular department procedures.
3. Providing prior notice to the peace officer regarding the nature of the interrogation and identification of the investigating officers.
4. Tape recording the interrogation when the peace officer records the interrogation.
5. Providing the peace officer access to the tape recording prior to any further interrogation at a subsequent time.

The first POBOR test claim has a long and complicated history, which includes a decision on reconsideration that was directed by the Legislature and litigation. The history is fully summarized in the analysis.

[1] Hereafter, cities, counties, and the special police protection districts named in Government Code section 53060.7 are referred to as "employers," unless otherwise stated.

This test claim analyzes Government Code sections 3304, 3306.5, 3309, and 3312, which address the time frame required to investigate an officer for allegations of misconduct, notices required to be provided to an officer in order to take disciplinary action, access to officer personnel files, and the procedural requirements to search an officer's locker.

The claimant pled Government Code section 3304, as amended by Statutes 1998, chapter 786. However, section 3304(a), (b), and part of (c), as amended in 1998, were already included in the POBOR decision on reconsideration. The Commission's decisions on the first POBOR claim (CSM 4499) are final binding decisions, and will not be re-addressed here.[2]

Procedural History

The *Peace Officers Procedural Bill of Rights II* (03-TC-18) test claim was filed on September 26, 2003, during the 2003-2004 fiscal year. As a result, the reimbursement period for this test claim begins on July 1, 2002.

On November 14, 2003, the Department of Finance filed comments in response to the test claim arguing that not all of the activities alleged by the claimants are reimbursable state-mandated new programs or higher levels of service. On January 30, 2004, the claimants filed a response to the Department of Finance's comments on the test claim.

Positions of the Parties

Claimant's Position

The claimant contends that Government Code sections 3304, 3306.5, 3309, and 3312 constitute reimbursable state-mandated programs within the meaning of article XIII B, section 6 of the California Constitution and necessitate the drafting, review, and establishment of policies, procedures, forms, and protocols and training to implement them for officers, supervisors, investigators, employers, counsel, and staff. The state-mandated activities alleged by the claimants include:

1. Drafting written notices prior to removing a chief of police for any reason (Gov. Code, § 3304(b)).
2. Completing an investigation of an officer within one year of discovering an act, omission, or other allegation of misconduct by the officer (Gov. Code, § 3304(d)).
3. Reopening an investigation, under specified circumstances, after the one-year statute of limitations (Gov. Code, § 3304(g)).
4. Maintaining officer personnel records (Gov. Code, § 3306.5).
5. Permitting an officer to inspect his or her personnel file (Gov. Code, § 3306.5).
6. Paying the officers during times in which the officer is inspecting his or her personnel file (Gov. Code, § 3306.5).
7. Responding in writing to requests for corrections or deletions by the officer in regard to the content of his or her personnel file (Gov. Code, § 3306.5).

[2] *California School Boards Assoc. v. State of California* (2009) 171 Cal.App.4th 1183, 1201-1202.

8. Filing a denial of a request to correct or delete portions of an officer's personnel file in the officer's personnel file (Gov. Code, § 3306.5).
9. Providing "notice or legal process" before an officer's locker can be searched (Gov. Code, § 3306.5).
10. Providing written notice and an opportunity to appeal any discipline in order to discipline an officer for wearing a pin or displaying any other item containing the American flag (Gov. Code, § 3312).

Department of Finance (Finance)

In comments dated November 14, 2003, Finance raised the following concerns regarding the activities alleged to be reimbursable by the claimant:

1. In regard to the statute of limitations provided in Government Code section 3304 and the claimant's allegation that it requires the establishment of policies, procedures, forms, protocols, file tracking systems, and training to implement the practices, Finance argues that "[t]he establishment of a timeframe, by itself, does not create the need to have procedures for conducting an investigation. In addition, since there is no level of punitive actions prescribed by current law, the one-year timeframe does not, by itself, require more work on the part of the police officers. We also note that a long list of police officer organizations supported the legislation that enacted this change."[3]
2. In regard to reopening investigations against officers pursuant to Government Code section 3304, Finance argues that "[t]he 1997 amendment to the law allows, but does not require, an investigation to be reopened against a public safety officer beyond the one-year time period under certain conditions; therefore, the discretionary authority does not constitute a reimbursable state mandate."
3. In regard to the claimant's assertion that Government Code section 3309, which addresses searching an officer's locker or storage space, requires employers to draft, review, and establish policies, procedures, forms, protocols, and training, Finance notes that "since [employers'] existing practices have gone unchallenged since 1976 when this statute was enacted, no new procedures are expected or necessary."
4. In regard to Government Code section 3312, Finance argues that "[t]his is an example of a specific reason for disciplinary action. In the unlikely event this authority for disciplinary action was exercised, existing procedures and relief are addressed pursuant to the original POBOR test claim."

Commission Responsibilities

Under article XIII B, section 6 of the California Constitution, local agencies and school districts are entitled to reimbursement for the costs of state-mandated new programs or higher levels of service. In order for local government to be eligible for reimbursement, one or more similarly situated local agencies or school districts must file a test claim with the Commission. "Test claim" means the first claim filed with the Commission alleging that a particular statute or

[3] There is no evidence in the record to support a finding of "no costs mandated by the state" under Government Code section 17556(a) that the City of Newport Beach requested legislative authority to implement the program specified in Government Code section 3304.

executive order imposes costs mandated by the state. Test claims function similarly to class actions and all members of the class have the opportunity to participate in the test claim process and all are bound by the final decision of the Commission for purposes of that test claim.

The Commission is the quasi-judicial body vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6. In making its decisions, the Commission cannot apply article XIII B, section 6 as an equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities.

Claims

The following chart provides a brief summary of the claims and issues raised by the claimants, and staff's recommendation.

Claim	**Description**	**Issues**	**Staff Recommendation**
Government Code sections 3304 and 3312	These sections address the time frame to conduct an investigation of officer misconduct, and the provision of notice to an officer in order to take disciplinary action against the officer.	Claimant alleges that these sections require: (1) the closing and reopening of an investigation of officer misconduct; and (2) the drafting, review and establishment of policies, procedures, forms and protocols.	*Partially Approved*: The code sections mandate the new program or higher level of service to provide notices to officers facing disciplinary action. Conducting an investigation is not reimbursable.
Government Code section 3306.5	This section addresses the ability of officers to review and contest the contents of their personnel file.	Claimant alleges that this section requires claimant to: (1) maintain an officer's personnel files; (2) pay officers while they inspect their personnel file; and (3) respond in writing to requests for corrections or deletions in the personnel file.	*Partially Approved*: The code section mandates employers to provide officers access to their personnel files, the right to contest the content of the file, and to respond.
Government Code section 3309	This section addresses an officer's rights and the procedural requirements imposed on an employer in regard to the search of an officer's locker.	Claimant alleges that this section mandates notice or legal process before an officer's locker can be searched.	*Partially Approved*: The code section mandates employers to notify officers that their locker or storage space will be searched.

Staff Analysis

Staff makes the following findings:

Protection of procedural rights (Gov. Code, §§ 3304 and 3312)

As relevant to this test claim, section 3304 provides for a dismissal notice to a chief of police being dismissed, a statute of limitations for an employer to complete an investigation into alleged misconduct by an officer, and requires that the officer be provided notification that he or she may be disciplined and a subsequent written notification of the employer's decision to impose discipline. Government Code section 3312 prohibits an employer from taking punitive action against an officer for wearing a pin or displaying any other item containing the American flag, unless the employer gives the officer a written notice that includes specified information.

As applicable to this test claim, sections 3304 and 3312 only require employers to provide notices to officers regarding the disciplinary action that the officer faces.

The notices provided to a peace officer under sections 3304 and 3312 are required by statute. However, the notice requirements are not triggered until the employing agency decides to investigate allegations of an officer's misconduct and to take punitive action against the officer. These initial decisions are governed by local policy, ordinance, city charter, or a memorandum of understanding.

Nevertheless, based on findings made by the California Supreme Court regarding the POBOR legislation and in *San Diego Unified School Dist*., staff finds that sections 3304 and 3312 constitute a state-mandated program within the meaning of article XIII B, section 6 of the California Constitution. This finding is consistent with the Commission's decision on reconsideration of the first POBOR test claim.

In addition, although the due process clause of the United States and California Constitutions already required employers to provide these notices to specific types of officers facing specific types of discipline, staff finds that some of the state-mandated notices exceed existing federal and state due process requirements. These notices constitute reimbursable new programs and higher levels of service.

Inspection of personnel files of officer (Gov. Code, § 3306.5)

Section 3306.5 requires employers to permit an officer to inspect his or her personnel file and request any corrections or deletions that he or she believes are incorrectly included in the file. Section 3306.5 requires employers to notify the officer whether the request has been approved or denied.

Some of the activities required by section 3306.5 as applicable to officers employed by counties were required immediately prior to the enactment of section 3306.5. As a result, some of the activities do not constitute new programs or higher levels of service for county employers. In regard to cities and special police protection districts named in Government Code section 53060.7, the requirements imposed by section 3306.5 constitute reimbursable state-mandated new programs or higher levels of service.

Search of locker (Gov. Code, § 3309)

Section 3309 provides a general prohibition against the search of an officer's locker or storage space assigned by an employer. This prohibition is subject to the following exceptions:

(1) having the officer present during the search; (2) obtaining the officer's consent; (3) obtaining a validly issued search warrant; or (4) notifying the officer that a search will be conducted.

Although the plain language of section 3309 does not impose any activities on employers, read in light of the role that peace officers play in society, and the effects of section 3309 on employer-employee rights regarding the search of officers' lockers or storage spaces assigned by an employer, staff finds that, at a minimum, the employer must notify an officer that a search of his or her locker will be conducted.

Like sections 3304 and 3312, the procedural rights provided by section 3309 are not triggered until the employing agency decides to investigate allegations of an officer's misconduct and to search the officer's locker or storage space. These initial decisions are governed by local policy, ordinance, city charter, or a memorandum of understanding.

Nevertheless, based on findings made by the California Supreme Court regarding the POBOR legislation and in *San Diego Unified School Dist*., staff finds that section 3309 constitutes a state-mandated new program within the meaning of article XIII B, section 6 of the California Constitution.

Conclusion

Staff concludes that Government Code sections 3304, 3306.5, 3309, and 3312 impose reimbursable state-mandated programs on cities, counties, cities and counties, and special police protection districts named in Government Code section 53060.7,[4] within the meaning of article XIII B, section 6 of the California Constitution, and Government Code section 17514 for the activities listed on pages 38 through 40, under section III of the analysis titled "Conclusion"

Any other test claim statutes and allegations not specifically approved above, do not impose a reimbursable state mandated program subject to article XIII B, section 6 of the California Constitution.

Staff Recommendation

Staff recommends that the Commission adopt this analysis to partially approve this test claim.

[4] Government Code section 53060.7 identifies Bear Valley Community Services District, the Broadmoor Police Protection District, the Kensington Police Protection and Community Services District, the Lake Shastina Community Services District, and the Stallion Springs Community Services District.

STAFF ANALYSIS

Claimant

City of Newport Beach

Chronology

09/26/03	Claimant files test claim 03-TC-18
11/14/03	State Personnel Board indicates that it will not participate in this test claim
11/14/03	Department of Finance files comments on 03-TC-18 test claim
01/30/04	Claimant files response to the Department of Finance's comments

I. Background

This test claim addresses activities associated with the Peace Officers Procedural Bill of Rights Act (POBOR) (Gov. Code, § 3300 et seq.). POBOR provides a series of rights and procedural safeguards to peace officers employed by local agencies and school districts that are subject to investigation or discipline.[5] This test claim analyzes Government Code sections 3304, 3306.5, 3309, and 3312.[6] These sections address the time frame required to investigate an officer, the provision of notice to an officer in order to take disciplinary action, access to officer personnel files, and the procedural requirements to search an officer's locker.

Prior to this test claim, the City of Sacramento filed the *Peace Officer Procedural Bill of Rights* (CSM 4499) test claim alleging reimbursable costs resulting from portions of POBOR, including Government Code section 3304. As summarized below, the Commission partially approved the test claim for costs incurred beginning July 1, 1994, including activities associated with Government Code section 3304.

[5] POBOR applies to all employees classified as "peace officers" under Penal Code sections 830.1, 830.2, 830.3, 830.31, 830.32, 830.33, except subdivision (e), 830.34, 830.35, except subdivision (c), 830.36, 830.37, 830.38, 830.4, and 830.5. This includes peace officers employed by counties, cities, and special districts.

[6] Exhibit A, test claim filing, dated September 26, 2003, p. 7. The claimant has pled 10 chaptered bills amending and adding various sections of POBOR. Some of these bills are not associated with Government Code sections 3304, 3306.5, 3309, or 3312. However, the claimant clearly states, "As related above, the mandated activities are contained in Government Code §§ 3304, 3306.5, 3309, 3312. These sections directly relate to the reimbursable provisions of this test claim." From this statement and the claimant's narrative, it is clear that the claimant is only alleging reimbursement for activities resulting from Government Code section 3304, 3306.5, 3309, 3312. As a result, staff makes no findings on the following chaptered bills which do not add or amend these code sections: Statutes 1994, chapter 1259; Statutes 1998, chapter 263; Statutes 1998, chapter 112; Statutes 1999, chapter 338; and Statutes 2002; chapter 1156.

Because the Commission made a mandates determination on a portion of Government Code section 3304 as pled in this test claim, this analysis will *only* address the portion of Government Code section 3304 that has not been previously analyzed by the Commission.[7]

Past Commission Decisions on POBOR

In 1999, the Commission partially approved the first test claim on POBOR (CSM 4449). The Commission found that certain procedural requirements under POBOR were rights already provided to public employees under the due process clause of the United States and California Constitutions. Thus, the Commission denied the procedural requirements of POBOR that were already required by law on the ground that they did not impose a new program or higher level of service, or impose costs mandated by the state pursuant to Government Code section 17556(c) (the federal mandate exception to reimbursement). The Commission approved the activities required by POBOR that exceeded the requirements of existing state and federal law.[8]

The 1999 Commission decision found that Government Code section 3304, as added in 1976,[9] imposed the following reimbursable state-mandated activity:

- Providing the opportunity for an administrative appeal for the following disciplinary actions (Gov. Code, § 3304(b) (Stats. 1976, ch. 465)):
    - Dismissal, demotion, suspension, salary reduction, or written reprimand received by probationary and at-will employees whose liberty interest *are not* affected (i.e. the charges supporting a dismissal do not harm the employee's reputation or ability to find future employment);
    - Transfer of permanent, probationary and at-will employees for purposes of punishment;
    - Denial of promotion for permanent, probationary and at-will employees for reasons other than merit; and
    - Other actions against permanent, probationary and at-will employees that result in disadvantage, harm, loss, or hardship and impact the career opportunities of the employee.

[7] *California School Boards Assoc. v. State of California* (2009) 171 Cal.App.4th 1183, 1201-1202.

[8] The activities found to be reimbursable by the Commission include: (1) providing an opportunity for an administrative appeal for specific disciplinary actions against officers; (2) conducting an interrogation of a peace officer while the officer is on duty, or compensating the peace officer for off-duty time in accordance with regular department procedures; (3) providing prior notice to the peace officer regarding the nature of the interrogation and identification of the investigating officers; (4) tape recording the interrogation when the peace officer records the interrogation; and (5) providing the peace officer access to the tape recording prior to any further interrogation at a subsequent time.

[9] Statutes 1976, chapter 465.

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

In 2005, the Legislature added section 3313 to the Government Code to direct the Commission to "review" the statement of decision, adopted in 1999, on the *POBOR* (CSM 4499) test claim to clarify whether the subject legislation imposed a mandate consistent with California Supreme Court Decision in *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859 and other applicable court decisions.[10]

On April 26, 2006, the Commission reconsidered the Commission's 1999 statement of decision in light of the *San Diego Unified School Dist*. and other applicable court decisions.[11] The Commission found that although the rights of POBOR are triggered by local decisions to interrogate an officer, take punitive action against an officer, or place an adverse comment in an officer's personnel file, the activities required by POBOR are state-mandated programs based on the California Supreme Court's decision in *San Diego Unified School Dist*. and the plain language of the POBOR legislation.[12]

The Commission found that the original statement of decision was supported by the applicable case law for all of the activities approved by the Commission for counties, cities, school districts, and special districts identified in Government Code section 3301. Specifically:

1. Providing the opportunity for, and the conduct of an administrative appeal hearing for the following disciplinary actions (Gov. Code, § 3304(b) (Stats. 1998, ch. 786)):
    a. Transfer of permanent-employees for purposes of punishment;
    b. Denial of promotion for permanent-employees for reasons other than merit; and
    c. Other actions against permanent employees that result in disadvantage, harm, loss, or hardship and impact the career opportunities of the employee.
2. Providing the opportunity for, and the conduct of an administrative hearing for removal of the chief of police under circumstances that do not create a liberty interest (i.e., the charges do not constitute moral turpitude, which harms the employee's reputation and ability to find future employment). (Gov. Code, § 3304(c) (Stats. 1998, ch. 786).)

Except, the Commission excluded the following activity from the finding that Government Code section 3304 imposes a reimbursable state-mandated activity:

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

[10] Statutes 2005, chapter 72, section 6 (AB 138).

[11] Exhibit E, 2006 reconsideration of *Peace Officer Bill of Rights* (CSM 4499) statement of decision (Case No. 05-RL-4499-01), adopted April 26, 2006.

[12] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 887-888.

probationary period that may be required" by the employing agency and to situations where the chief of police is removed. (Stats. 1998, ch. 786, § 1.)

In January 2007, the Department of Finance filed a petition for writ of mandate challenging only the findings made by the Commission with respect to the eligible claimants.[13] The Department of Finance asserted that POBOR does not constitute a state-mandated program for school districts and most special districts since those entities are not required by law to employ peace officers. Finance therefore argued that school districts and special districts are not eligible to claim reimbursement under the POBOR program (Sacramento County Superior Court, Case No. 07CS00079). The Department of Finance agreed, however, that the test claim statutes are state-mandated with respect counties, cities, and to the police protection districts named in Government Code section 53060.7 that wholly supplant the law enforcement functions of the county within their jurisdiction.

On February 6, 2009, the Third District Court of Appeal, in *Department of Finance v. Commission on State Mandates* (2009) 170 Cal.App.4th 1355, 1357, determined that POBOR does not impose a reimbursable state-mandated program as to school districts and special districts that are permitted by statute, but not required, to employ peace officers who supplement the general law enforcement units of cities and counties. On July 31, 2009, in compliance with the judgment and writ issued by the superior court on remand,[14] the Commission amended the 2006 statement of decision to deny reimbursement to school districts, community college districts, and special districts that are permitted by statute, but not required to employ peace officers who supplement the general law enforcement units of cities and counties. The Commission's decision notes that special police protection districts named in Government Code section 53060.7 that wholly supplant the law enforcement functions within their jurisdiction are eligible to claim reimbursement for state-mandated costs imposed by POBOR.[15]

Hereafter, cities, counties, and the special police protection districts named in Government Code section 53060.7 are referred to as "employers," unless otherwise stated.

II. Positions of the Parties

A. Claimant's Position

The claimant contends that Government Code sections 3304, 3306.5, 3309, and 3312 constitute reimbursable state-mandated programs within the meaning of article XIII B, section 6 of the California Constitution and necessitate the drafting, review and establishment of policies, procedures, forms and protocols, and training to implement them for officers, supervisors,

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[13] POBOR expressly applies to all peace officers specified in Penal Code sections 830.1, 830.2, 830.3, 830.31, 830.32, 830.33 (except subdivision (e)), 830.34, 830.35 (except subdivision (c)), 830.36, 830.37, 830.38, 830.4, and 830.5. (Gov. Code, § 3301.)

[14] *Department of Finance v. Commission on State Mandates* (Super. Ct. Sacramento County, May 8, 2009, No. 07CS00079).

[15] Government Code section 53060.7 identifies Bear Valley Community Services District, the Broadmoor Police Protection District, the Kensington Police Protection and Community Services District, the Lake Shastina Community Services District, and the Stallion Springs Community Services District.

investigators, employers, counsel, and staff. The state-mandated programs alleged by the claimants include:

1. Drafting written notices prior to removing a chief of police for any reason (Gov. Code, § 3304(b)).
2. Completing an investigation of an officer within one year of discovering an act, omission, or other allegation of misconduct by the officer (Gov. Code, § 3304(d)).
3. Reopening an investigation, under specified circumstances, after the one-year statute of limitations (Gov. Code, § 3304(g)).
4. Maintaining officer personnel records (Gov. Code, § 3306.5).
5. Permitting an officer to inspect his or her personnel file (Gov. Code, § 3306.5).
6. Paying the officers during times in which the officer is inspecting his or her personnel file (Gov. Code, § 3306.5).
7. Responding in writing to requests for corrections or deletions by the officer in regard to the content of his or her personnel file (Gov. Code, § 3306.5).
8. Filing a denial of a request to correct or delete portions of an officer's personnel file in the officer's personnel file (Gov. Code, § 3306.5).
9. Providing "notice or legal process" before an officer's locker can be searched (Gov. Code, § 3306.5).
10. Providing written notice and an opportunity to appeal any discipline in order to discipline an officer for wearing a pin or displaying any other item containing the American flag (Gov. Code, § 3312).

On January 30, 2004, the claimant filed a response to the Department of Finance's comments on the test claim.

B. Department of Finance's Position (Finance)

In comments dated November 14, 2003, Finance raised the following concerns regarding the activities alleged to be reimbursable by the claimant:

1. In regard to the statute of limitations provided in Government Code section 3304 and the claimant's allegation that it requires the establishment of policies, procedures, forms, protocols, file tracking systems and training to implement the practices, Finance argues that "[t]he establishment of a timeframe, by itself, does not create the need to have procedures for conducting an investigation. In addition, since there is no level of punitive actions prescribed by current law, the one-year timeframe does not, by itself, require more work on the part of the police officers. We also note that a long list of police officer organizations supported the legislation that enacted this change."[16]
2. In regard to reopening investigations against officers pursuant to Government Code section 3304, Finance argues that "[t]he 1997 amendment to the law allows, but does not

[16] There is no evidence in the record to support a finding of "no costs mandated by the state" under Government Code section 17556(a) that the City of Newport Beach requested legislative authority to implement the program specified in Government Code section 3304.

require, an investigation to be reopened against a public safety officer beyond the one-year time period under certain conditions; therefore, the discretionary authority does not constitute a reimbursable state mandate."

3. In regard to the claimant's assertion that Government Code section 3309, which addresses searching an officer's locker or storage space, requires employers to draft, review, and establish policies, procedures, forms, protocols, and training, Finance notes that "since [employers'] existing practices have gone unchallenged since 1976 when this statute was enacted, no new procedures are expected or necessary."
4. In regard to Government Code section 3312, Finance argues that "[t]his is an example of a specific reason for disciplinary action. In the unlikely event this authority for disciplinary action was exercised, existing procedures and relief are addressed pursuant to the original POBOR test claim."

C. State Personnel Board

In a letter dated November 14, 2003, the State Personnel Board indicated that it will not be participating in this test claim.

III. Discussion

Article XIII B, section 6 of the California Constitution provides in relevant part the following:

> Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such programs or increased level of service.

The purpose of article XIII B, section 6 is to "preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[17] Thus, the subvention requirement of section 6 is "directed to state-mandated increases in the services provided by [local government] …"[18]

Reimbursement under article XIII B, section 6 is required when the following elements are met:

1. A state statute or executive order requires or "mandates" local agencies or school districts to perform an activity.[19]
2. The mandated activity either:
    a. Carries out the governmental function of providing a service to the public; or
    b. Imposes unique requirements on local agencies or school districts and does not apply generally to all residents and entities in the state.[20]

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[17] *County of San Diego, supra,* 15 Cal.4th 68, 81.

[18] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56.

[19] *San Diego Unified School Dist. v. Commission on State Mandates, supra*, 33 Cal.4th at p. 874.

[20] *San Diego Unified School Dist., supra*, 33 Cal.4th at pgs. 874-875 (reaffirming the test set out in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56.

3. The mandated activity is new when compared with the legal requirements in effect immediately before the enactment of the test claim statute or executive order and it increases the level of service provided to the public.[21]

4. The mandated activity results in the local agency or school district incurring increased costs. Increased costs, however, are not reimbursable if an exception identified in Government Code section 17556 applies to the activity. [22]

The Commission is vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6.[23] The determination whether a statute or executive order imposes a reimbursable state-mandated program is a question of law.[24] In making its decisions, the Commission must strictly construe article XIII B, section 6, and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[25]

Government Code section 3304 addresses the protection of procedural rights for peace officers subject to punitive action and section 3312 addresses a specific instance in which an officer may be subject to punitive action. Because of the direct relation between sections 3304 and 3312, the following discussion regarding whether the code sections pled impose reimbursable state-mandated new programs or higher levels of service will address sections 3304 and 3312 together, and sections 3306.5 and 3309 individually.

Issue 1: Parts of Government Code sections 3304, 3306.5, 3309, and 3312 impose state-mandated new programs or higher levels of service subject to article XIII B, section 6, of the California Constitution.

A. Protection of procedural rights (Gov. Code, §§ 3304 and 3312)

i. Activities required by Government Code sections 3304 and 3312.

Government Code section 3304

Government Code section 3304 provides officers that have passed probation and are facing punitive action, and chiefs of police facing removal from office, an opportunity for an administrative appeal. In addition, Government Code section 3304 provides all officers the right to notices regarding any punitive action that they may or will face. "Punitive action" is defined by Government Code section 3303 as "any action that may lead to dismissal, demotion,

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[21] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 874-875, 878; *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 835.

[22] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1265, 1284; Government Code sections 17514 and 17556.

[23] *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331-334; Government Code sections 17551 and 17552.

[24] *County of San Diego, supra,* 15 Cal.4th 68, 109.

[25] *County of Sonoma, supra,* 84 Cal.App.4th 1265, 1280, citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817.

suspension, reduction in salary, written reprimand, or transfer for purposes of punishment."[26] Additionally, at least one appellate court has found that other actions taken by an employer that result in "disadvantage, harm, loss or hardship" and impact the peace officer's career constitutes punitive action.[27]

The Commission has already made a mandate determination on the 1998 version of Government Code section 3304(a) and (b), and a portion of subdivision (c). Thus, this analysis will only address the remaining portion of section 3304(c) and subdivisions (d)-(g).[28]

As amended in 1998, section 3304(c) provides that no chief of police may be removed without being provided with "written notice and the reason or reasons therefor."[29]

Government Code section 3304(d) prohibits an employer from taking punitive action against, or denying promotion on grounds other than merit, to a peace officer on the grounds of any act, omission, or other allegation of misconduct unless the investigation into the allegation is completed within one year of the employer's discovery of the misconduct.

The one-year statute of limitations provided by section 3304(d) does not apply, or is tolled, in specified circumstances including but not limited to: (1) during the time in which a criminal investigation or prosecution is pending and the criminal investigation or prosecution involves the misconduct that is the subject of the administrative investigation; (2) during the time specified in a written waiver of the one-year period written by the peace officer being investigated; (3) the investigation is a multijurisdictional investigation that requires a reasonable extension for coordination of the involved agencies; (4) if the investigation involves an employee who is incapacitated or otherwise unavailable; (5) during the time in which a civil action is pending and the administrative investigation involves a matter in the civil litigation and the officer is named as a party defendant; and (7) if the investigation involves an allegation of workers' compensation fraud on the part of the peace officer.

Section 3304(d) also provides that after the completion of the investigation an employer is required to provide notice that discipline may be taken against the officer subject to the investigation.

Section 3304(e) provides that the time for any pre-disciplinary response or grievance procedure that is required or utilized is not governed by POBOR.

After the investigation and any predisciplinary response or procedure required by an employer, section 3304(f) requires the employer to notify an officer in writing of its decision to impose discipline, including the date that the discipline will be imposed, within 30 days of its decision.

Section 3304(g) provides that an employer may reopen an investigation after the one-year period specified in subdivision (d), if both of the following circumstances exist: (1) significant new

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[26] Government Code section 3303, as amended by Statutes 1994, chapter 1259.

[27] *Hopson v. City of Los Angeles* (1983) 139 Cal.App.3d 347, 354.

[28] *California School Boards Assoc. v. State of California* (2009) 171 Cal.App.4th 1183, 1201-1202. Government Code section 3304(h) is applicable only to peace officers employed by the state, and thus, is not relevant to this test claim.

[29] Statues 1998, chapter 786.

evidence has been discovered that is likely to affect the outcome of the investigation; and (2) the evidence could not reasonably have been discovered in the normal course of investigation without resorting to extraordinary measures by the agency, *or* the evidence resulted from the peace officer's predisciplinary response or procedure.

The claimant argues that section 3304 imposes a state-mandated new program or higher level of service on employers to complete investigations of officers as set forth in Government Code section 3303 within one year where previously there was no statute of limitations (Gov. Code, § 3304(d)).[30] In addition, the claimant argues that section 3304 imposes a state-mandated new program or higher level of service to reopen investigations, under specified circumstances, after the one year period (Gov. Code, § 3304(g)).[31] At its base, the claimant's arguments seek reimbursement for the cost of conducting an investigation of an officer.

The activity of conducting an investigation of an officer was previously denied in the reconsideration of the *Peace Officer Procedural Bill of Rights* test claim (Case No. 05-RL-4499-01).[32] In the reconsideration, the claimants alleged this activity in association with Government Code section 3303, which prescribes protections that apply when peace officers are interrogated in the course of an administrative investigation that might subject the officer to punitive actions. As found by the Commission, "[I]nvestigation services go beyond the scope of the test claim legislation and are ***not*** reimbursable. As explained by the courts, POBOR deals with labor relations. It does not interfere with the employer's right to manage and control its own police department."[33] As a result, the Commission found that Government Code section 3303 does not direct employers to investigate peace officers.

Here, the plain language of section 3304 does not require employers to engage in the activity of investigating allegations of officer misconduct or reopening an investigation. Instead it places a limitation, subject to certain exceptions, on an employer's pre-existing authority to conduct investigations and take punitive action on a peace officer. Consistent with the Commission's prior decision, staff finds that the activity of investigating officer misconduct is not mandated by POBOR.

Additionally, the establishment of a statute of limitations to conduct an investigation does not require employers to perform a new activity. The plain language of the statute *prohibits* an employer from taking punitive action against, or denying promotion on grounds other than merit, to a peace officer on the grounds of any act, omission, or other allegation of misconduct unless the investigation into the allegation is completed within one year of the employer's discovery of the misconduct. Although there is now a specified time frame to complete an activity, the statute does not require local law enforcement agencies to perform any new activities.

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[30] Exhibit A, test claim filing by the City of Newport Beach, dated September 26, 2003, p. 4. In context of the claimant's narrative as a whole, staff interprets the claimant's statement, "[T]he process set forth in the *previous section* regarding investigations of officers . . . ," as a reference to Government Code section 3303. (Italics added.)

[31] *Ibid*.

[32] *Peace Officer Procedural Bill of Rights* (Case No. 05-RL-4499-01), adopted April 26, 2006, p. 38-39.

[33] *Ibid*. (Emphasis in original.)

Thus, Government Code section 3304 requires employers to provide the following notices before disciplinary action is taken:

1. Provide a chief of police that is dismissed with a written notice and the reason or reasons for the dismissal. (Gov. Code, § 3304(c) (Stats. 1998, ch. 786).)
2. Within one year of discovery of any misconduct, notify a peace officer being investigated that he or she may face disciplinary action after the investigation is completed. (Gov. Code, § 3304(d) (Stats. 1998, ch. 786).)
3. After the investigation and any predisciplinary response or procedure utilized by the employer, notify the peace officer in writing that the employer has decided to impose discipline on the officer. (Gov. Code, § 3304(f) (Stats. 1998, ch. 786).)

   The written notification must be provided within 30 days of the decision and include the date that the discipline will be imposed.

Government Code section 3312

Government Code section 3312 requires employers to provide a written notice in order to take punitive action against an officer for wearing a pin or displaying another item containing the American flag. This notice must include the following information: (1) a statement that the officer's pin or other item violates an existing rule, regulation, policy, or local agency agreement or contract regarding the wearing of a pin or displaying of any other item, containing the American flag; (2) a citation to the specific rule, regulation, policy, or local agency agreement or contract that the pin or other item violates; and (3) a statement that the officer may file an appeal against the employer challenging the alleged violation pursuant to the applicable grievance or appeal procedures adopted by the department or public agency that otherwise comply with existing law.

The claimant contends that section 3312 requires local law enforcement agencies to provide notice, establish new rules and regulations regarding the wearing of a pin, and provide an opportunity to appeal any discipline that results. The claimant is misreading the plain language of the statute.

Section 3312 *only* requires the provision of a written notice in order to take punitive action against an officer for wearing a pin or displaying any other item containing the American flag. Although the written notice needs to identify the *existing* local policy, procedure, etc., that an officer is violating, the plain language of section 3312 *does not* require employers to establish any new policies, procedures, forms, or protocols. Nor does the language require the provision of an additional appeals process. Instead, the language requires an employer to give a written notice to an officer of the punitive action indicating that the officer may file an appeal through the appeals process already adopted by the employer that otherwise complies with existing law.

Existing law only requires the employer to provide an appeals process for permanent officers and the chief of police if the chief is being dismissed.[34] Section 3312 does not create a new right to appeal for all peace officers. Instead it requires a *notice* be provided to officers that they may appeal under a local appeal process already adopted by the employer. Staff notes that the

[34] Government Code section 3304(b) and (c).

appeals processes pursuant to Government Code section 3304(b) and (c) are already claimed under existing parameters and guidelines.[35]

Thus, the following is the only activity required by Government Code section 3312:

> When an officer violates an existing rule, regulation, policy, or local agency agreement or contract regarding the wearing of a pin or other item containing the American flag, give the officer written notice that includes the following information: (1) a statement that the officer's pin or other item violates an existing rule, regulation, policy, or local agency agreement or contract regarding the wearing of a pin, or the displaying of any other item, containing the American flag; (2) a citation to the specific rule, regulation, policy, or local agency agreement or contract that the pin or other item violates; and (3) a statement that the officer may file an appeal against the employer challenging the alleged violation pursuant to the applicable grievance or appeal procedures adopted by the department or public agency that otherwise comply with existing law. (Gov. Code, § 3312 (Stats. 2002, ch. 170).)

ii. <u>The activities required by Government Code sections 3304 and 3312 constitute state-mandated activities even though a local decision is first made to take punitive action against the officer</u>.

The procedural rights and protections afforded a peace officer under sections 3304 and 3312 are required by statute. However, the rights are not triggered until the employing agency decides to investigate and take punitive action against the officer. These initial decisions are governed by local policy, ordinance, city charter, or a memorandum of understanding.

Nevertheless, based on findings made by the California Supreme Court regarding the POBOR legislation and in *San Diego Unified School Dist*., staff finds that sections 3304 and 3312 constitute a state-mandated program within the meaning of article XIII B, section 6 of the California Constitution.

The California Supreme Court's decision in *San Diego Unified School Dist*. was preceded by two prior decisions dealing with the "state mandate" issue. In 2003, the California Supreme Court considered the meaning of the term "state mandate" as it appears in article XIII B, section 6 of the California Constitution in its decision in *Department of Finance v. Commission on State Mandates* (*Kern High School Dist*.).[36] In *Kern High School Dist.*, school districts requested reimbursement for notice and agenda costs for meetings of their school site councils and advisory bodies. These bodies were established as a condition of various education-related programs that were funded by the state and federal government.

When analyzing the term "state mandate," the court reviewed the ballot materials for article XIII B, which provided that "a state mandate comprises something that a local government entity is required or forced to do."[37] The ballot summary by the Legislative Analyst further defined

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[35] Parameters and guidelines, *Reconsideration of Peace Officers' Procedural Bill of Rights* (Case No. 05-RL-4499-01), amended July 31, 2009.

[36] *Kern High School Dist.* (2003) 30 Cal.4th 727.

[37] *Id.* at page 737.

"state mandates" as "requirements imposed on local governments by legislation or executive orders."[38]

The court also reviewed and affirmed the holding of *City of Merced v. State of California* (1984) 153 Cal.App.3d 777, determining that, when analyzing state-mandate claims, the Commission must look at the underlying program to determine if the claimant's participation in the underlying program is voluntary or legally compelled.[39] The court stated the following:

> In *City of Merced*, the city was under no legal compulsion to resort to eminent domain – but when it elected to employ that means of acquiring property, its obligation to compensate for lost business goodwill was not a reimbursable state mandate, because the city was not required to employ eminent domain in the first place. Here as well, if a school district elects to participate in or continue participation in any underlying *voluntary* education-related funded program, the district's obligation to comply with the notice and agenda requirements related to that program does not constitute a reimbursable state mandate. (Emphasis in original.)[40]

Thus, the Supreme Court held as follows:

> [W]e reject claimants' assertion that they have been legally compelled to incur notice and agenda costs, and hence are entitled to reimbursement from the state, based merely upon the circumstance that notice and agenda provisions are mandatory elements of education-related programs in which claimants have participated, *without regard to whether claimant's participation in the underlying program is voluntary or compelled.* [Emphasis added.][41]

Based on the plain language of the statutes creating the underlying education programs in *Kern High School Dist.*, the court determined that school districts were not legally compelled to participate in eight of the nine underlying programs.[42]

The school districts in *Kern High School Dist*., however, urged the court to define "state mandate" broadly to include situations where participation in the program is coerced as a result of severe penalties that would be imposed for noncompliance. The court previously applied such a broad construction to the definition of a federal mandate in the case of *City of Sacramento v. State* (1990) 50 Cal.3d 51, 74, where the state's failure to comply with federal legislation that extended mandatory coverage under the state's unemployment insurance law would result in California businesses facing "a new and serious penalty – full, double unemployment taxation by both state and federal governments."[43] Although the court in *Kern High School Dist*. declined to apply the reasoning in *City of Sacramento* that a state mandate may be found in the absence of

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[38] *Ibid*.

[39] *Id.* at page 743.

[40] *Ibid.*

[41] *Id.* at page 731.

[42] *Id*. at pages 744-745.

[43] *City of Sacramento, supra*, 50 Cal.3d 51, 74.

strict legal compulsion on the facts before it in *Kern*, after reflecting on the purpose of article XIII B, section 6 – to preclude the state from shifting financial responsibilities onto local agencies that have limited tax revenue – the court stated:

> In light of that purpose, we do not foreclose the possibility that a reimbursable state mandate under article XIII B, section 6, properly might be found in some circumstances in which a local entity is not legally compelled to participate in a program that requires it to expend additional funds.[44]

Thus, the court in *Kern* recognized that there could be a case, based on its facts, where reimbursement would be required under article XIII B, section 6 in circumstances where the local entity was not legally compelled to participate in a program.

One year after *Kern High School Dist*., the Supreme Court revisited the "mandate" issue in *San Diego Unified School Dist*., a case that addressed a challenge to a Commission decision involving a school district's expulsion of a student. The school district acknowledged that under specified circumstances, the statutory scheme at issue in the case gave school districts discretion to expel a student. The district nevertheless argued that it was mandated to incur the costs associated with the due process hearing required by the test claim legislation when a student is expelled. The district argued that "although any particular expulsion recommendation may be discretionary, as a practical matter it is inevitable that some school expulsions will occur in the administration of any public school program" and, thus, the ruling in *City of Merced* should not apply.[45]

In *San Diego Unified School Dist*., the Supreme Court did not overrule the *Kern* or *City of Merced* cases, but stated that "[u]pon reflection, we agree with the District and amici curiae that there is reason to question an extension of the holding of *City of Merced* so as to preclude reimbursement under article XIII B, section 6 of the state Constitution and Government Code section 17514, whenever an entity makes an initial discretionary decision that in turn triggers mandated costs."[46] The court explained as follows:

> Indeed, it would appear that under a strict application of the language of *City of Merced*, public entities would be denied reimbursement for state-mandated costs in apparent contravention of the intent underlying article XIII B, section 6 of the state Constitution and Government Code section 17514 and contrary to past decisions in which it has been established that reimbursement was in fact proper. For example, in *Carmel Valley* [citation omitted] an executive order requiring that county firefighters be provided with protective clothing and safety equipment was found to create a reimbursable state mandate for the added costs of such clothing and equipment. [Citation omitted.] The court in *Carmel Valley* apparently did not contemplate that reimbursement would be foreclosed in that setting merely because a local agency possessed discretion concerning how many firefighters it would employ – and hence, in that sense, could control or perhaps even avoid the extra costs to which it would be subjected. Yet, under a strict application of the

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[44] *Kern High School Dist., supra*, 30 Cal.4th 727, 752.

[45] *San Diego Unified School Dist., supra*, 33 Cal.4th 859, 887.

[46] *Id*. at page 887.

> rule gleaned from *City of Merced* [citation omitted], such costs would not be reimbursable for the simple reason that the local agency's decision to employ firefighters involves an exercise of discretion concerning, for example, how many firefighters are needed to be employed, etc. We find it doubtful that the voters who enacted article XIII B, section 6, or the Legislature that adopted Government Code section 17514, intended that result, and hence we are reluctant to endorse, in this case, an application of the rule of *City of Merced* that might lead to such result.[47]

Ultimately, however, the court did not resolve the issue regarding the application of the *City of Merced* case to the discretionary expulsions, and resolved the case on alternative grounds.[48]

In the present case, the purpose of POBOR, as stated in Government Code section 3301, is to assure that stable employment relations are continued throughout the state and to further assure that effective law enforcement services are provided to all people of the state. The Legislature declared POBOR a matter of statewide concern.

In 1982, the California Supreme Court addressed the POBOR legislation in *Baggett v. Gates*.[49] In *Baggett*, the City of Los Angeles received information that certain peace officer employees were engaging in misconduct during work hours. The city interrogated the officers and reassigned them to lower-paying positions (a punitive action under POBOR). The employees requested an administrative appeal pursuant to the POBOR legislation and the city denied the request, arguing that charter cities cannot be constitutionally bound by POBOR. The court acknowledged that the home rule provision of the Constitution gives charter cities the power to make and enforce all ordinances and regulations, subject only to the restrictions and limitations provided in the city charter. Nevertheless, the court found that the City of Los Angeles was required by the POBOR legislation to provide the opportunity for an administrative appeal to the officers.[50] In reaching its conclusion, the court relied, in part, on the express language of legislative intent in Government Code section 3301 that the POBOR legislation is a "matter of statewide concern."[51]

The court in *Baggett* also concluded that the consequences of a breakdown in employment relations between peace officers and their employers would create a clear and present threat to the health, safety, and welfare of the citizens of the city, which would extend far beyond local boundaries.

> Finally, it can hardly be disputed that the maintenance of stable employment relations between police officers and their employers is a matter of statewide concern. The consequences of a breakdown in such relations are not confined to a city's borders. These employees provide an essential service. Its absence would create a clear and present threat not only to the health, safety, and welfare of the

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[47] *Id.* at pages 887-888.

[48] *Id*. at page 888.

[49] *Baggett v. Gates* (1982) 32 Cal.3d 128.

[50] *Id.* at page 141.

[51] *Id*. at page 136.

> citizens of the city, but also to the hundreds, if not thousands, of nonresidents who daily visit there. Its effect would also be felt by the many nonresident owners of property and businesses located within the city's borders. Our society is no longer a collection of insular local communities. Communities today are highly interdependent. The inevitable result is that labor unrest and strikes produce consequences which extend far beyond local boundaries.[52]

Thus, the court found that "the total effect of the POBOR legislation is not to deprive local governments of the right to manage and control their police departments but to secure basic rights and protections to a segment of public employees who were thought unable to secure them for themselves."[53]

In 1990, the Supreme Court revisited the POBOR legislation in *Pasadena Police Officers Assn. v. City of Pasadena (Pasadena)*.[54] The *Pasadena* case addressed the POBOR requirement in Government Code section 3303 to require the employer to provide an officer subject to an interrogation with any reports or complaints made by investigators. In the language quoted below, the court described the POBOR legislation and recognized that the public has a high expectation that peace officers are to be held above suspicion of violation of the laws they are sworn to enforce. Thus, in order to maintain the public's confidence, "a law enforcement agency *must* promptly, thoroughly, and fairly investigate allegations of officer misconduct … [and] institute disciplinary proceedings." (Emphasis added.)

> Courts have long recognized that, while the off-duty conduct of employees is generally of no legal consequence to their employers, the public expects peace officers to be "above suspicion of violation of the very laws they are sworn … to enforce." [Citations omitted.] Historically, peace officers have been held to a higher standard than other public employees, in part because they alone are the "guardians of peace and security of the community, and the efficiency of our whole system, designed for the purpose of maintaining law and order, depends upon the extent to which such officers perform their duties and are faithful to the trust reposed in them." [Citation omitted.] To maintain the public's confidence in its police force, a law enforcement agency must promptly, thoroughly, and fairly investigate allegations of officer misconduct; if warranted, it must institute disciplinary proceedings.[55]

Under a strict application of the *City of Merced* case, the requirements of the POBOR legislation would not constitute a state-mandated program within the meaning of article XIII B, section 6 "for the simple reason" that the local entity's ability to decide who to discipline and when means that it "could control or perhaps even avoid the extra costs" of the POBOR legislation.[56] But a local entity does not decide who to investigate or discipline based on the costs incurred to the entity. The decision is made, as indicated by the Supreme Court, to maintain the public's

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[52] *Id*. at page 139-140.

[53] *Id*. at page 140.

[54] *Pasadena Police Officers Assn. v. City of Pasadena* (1990) 51 Cal.3d 564.

[55] *Id.* at page 571-572.

[56] *San Diego Unified School Dist., supra*, 33 Cal.4th 859, 887-888.

confidence in the police force and to protect health, safety, and welfare. Thus, as indicated by the Supreme Court in *San Diego Unified School Dist.*, a finding that the POBOR legislation does not constitute a mandated program would conflict with past decisions like *Carmel Valley*, where the court found a mandated program for providing protective clothing and safety equipment to firefighters and made it clear that "[p]olice and fire protection are two of the most essential and basic functions of local government."[57]

Moreover, the POBOR legislation implements a state policy to maintain stable employment relations between police officers and their employers to "assure that effective services are provided to all people of the state." POBOR, therefore, carries out the governmental function of providing a service to the public, and imposes unique requirements on local agencies to implement the state policy.[58] Thus, a finding that sections 3304 and 3312 do not impose a state-mandated program contravenes the purpose of article XIII B, section 6 "to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill-equipped' to assume increased financial responsibilities" due to the tax and spend provisions of articles XIII A and XIII B.[59]

Accordingly, the activities required by Government Code sections 3304 and 3312 constitute state-mandated programs within the meaning of article XIII B, section 6 of the California Constitution, except as provided below.[60] If these activities are already required by state and federal law, they do not mandate a new program or higher level of service and are not eligible for reimbursement.

iii. Some of the activities required by Government Code sections 3304(d) and (f), and 3312 are mandated by existing state and federal due process law and, thus, do not mandate a new program or higher level of service within the meaning of article XIII B, section 6.

When analyzing federal law in the context of a test claim under article XIII B, section 6, the court in *Hayes v. Commission on State Mandates* held that "[w]hen the federal government imposes costs on local agencies those costs are not mandated by the state and thus would not require a state subvention. Instead, such costs are exempt from local agencies' taxing and spending limitations" under article XIII B.[61]

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[57] *San Diego Unified School Dist., supra*, 33 Cal.4th 859, 887-888; *Carmel Valley Fire Protection Dist. v. State* (1987) 190 Cal.App.3d 521, 537.

[58] *San Diego Unified School, supra*, 33 Cal.4th at page 874.

[59] *Id.* at page 888, fn. 23.

[60] This conclusion is consistent with the Commission's analysis and decision in the 2006 reconsideration of *Peace Officer Bill of Rights* (CSM 4499) statement of decision (Case No. 05-RL-4499-01), adopted April 26, 2006, p. 15-20.

[61] *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564, 1593 citing *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 76; see also, Government Code section 17513 and Article XIII B, section 9(b), of the California Constitution, which excludes from either the state or local spending limit any "[a]ppropriations required to complying with mandates of the courts or the federal government which, without discretion, require an

The due process clause of the United States and California Constitutions provide that the state shall not "deprive any person of life, liberty, or property without due process of law."[62] In the public employment arena, an employee's property and liberty interests are commonly at stake and due process procedures are often required. Thus, to the extent certain procedural requirements under POBOR are rights already provided to public employees under the due process clause of the United States and California Constitutions, they do not mandate a new program or higher level of service.

Property Interest in Employment

Property interests protected by the due process clause extend beyond actual ownership of real or personal property. The U.S. Supreme Court determined that a property interest deserving protection of the due process clause exists when an employee has a "legitimate claim" to continued employment.

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. . . .
>
> Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law-rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.[63]

Applying the above principles, both the U.S. Supreme Court and California courts hold that "permanent" employees, who can only be dismissed or subjected to other disciplinary measures for "cause," have a legitimate claim of entitlement to their job and thus, possess a property interest in continued employment.[64]

Moreover, California courts require employers to comply with due process when a permanent employee is dismissed,[65] demoted,[66] suspended,[67] receives a reduction in salary,[68] or receives a

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expenditure for additional services or which unavoidably make the providing of existing services more costly."

[62] U.S. Constitution, 14th Amendment; California Constitution, Article 1, §§ 7 and 15.

[63] *Board of Regents* v. *Roth* (1972) 408 U.S. 564, 577.

[64] *Gilbert* v. *Homar* (1997) 520 U.S. 924, where the U.S. Supreme Court found that a police officer, employed as a permanent employee by a state university, had a property interest in continued employment and was afforded due process protections resulting from a suspension without pay; *Skelly* v. *State Personnel Board* (1975) 15 Cal.3d 194, where the California Supreme Court held a permanent civil service employee of the state has a property interest in continued employment and cannot be dismissed without due process of law.

[65] *Skelly, supra,* 15 Cal.3d 194.

[66] *Ng.* v. *State Personnel Board* (1977) 68 Cal.App.3d 600.

[67] *Civil Service Assn.* v. *City and County of San Francisco* (1978) 22 Cal.3d 552, 558-560.

[68] *Ng, supra,* 68 Cal.App.3d 600, 605.

written reprimand.[69] However, employers are not required to provide due process protection in the case of a transfer or denial of promotion for reasons other than merit.[70]

When a property interest is affected and due process applies, the procedural safeguards required by the due process clause generally require notice to the employee and an opportunity to respond, with some variation as to the nature and timing of the procedural safeguards. In cases of dismissal, demotion, long-term suspension and reduction of pay, the California Supreme Court in *Skelly v. State Personnel Board* (*Skelly*) prescribed the following due process requirements *before* the discipline becomes effective:

- Notice of the proposed action;
- The reasons for the action;
- A copy of the charges and materials upon which the action is based; and
- The right to respond, either orally or in writing, to the authority initially imposing discipline.[71]

In cases of short-term suspensions (ten days or less), the employee's property interest is protected as long as the employee receives notice, reasons for the action, a copy of the charges, and the right to respond *either during the suspension, or within a reasonable time thereafter*.[72] The same is true in cases of a written reprimand where the employee is not deprived of pay or benefits.[73] As noted by the court in *Stanton*:

> Even without the protections afforded by *Skelly*, *plaintiff's procedural due process rights*, following a written reprimand, are protected by the appeals process mandated by Government Code section 3304, subdivision (b).[74] (Italics added.)

Courts have held that at a minimum, individuals entitled to procedural due process should be accorded:

> [W]ritten notice of the grounds for the disciplinary measures; disclosure of the evidence supporting the disciplinary grounds; the right to present witnesses and to

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[69] *Stanton* v. *City of West Sacramento* (*Stanton*) (1991) 226 Cal.App.3d 1438.

[70] *Howell v. County of San Bernardino* (1983) 149 Cal.App.3d 200, 205, in which the court found that "[a]lthough a permanent employee's right to continued employment is generally regarded as fundamental and vested, an employee enjoys no such right to continuation in a particular job assignment." *Nunez v. City of Los Angeles* (9th Cir. 1998) 147 F.3d 867, 871-874. The court held that officers do not have a property or liberty interest in promotions.

[71] *Skelly, supra*, 15 Cal.3d 194, 215.

[72] *Civil Service Assn., supra*, 22 Cal.3d 552, 564.

[73] *Stanton*, *supra*, 226 Cal.App.3d 1438, 1442, in which the court states, "Even without the protection afforded by *Skelly*, plaintiff's procedural due process rights, following a written reprimand, are protected by the appeals process mandated by Government Code section 3304, subdivision (b)."

[74] *Ibid*.

> confront adverse witnesses; the right to be represented by counsel; a fair and impartial decisionmaker; and a written statement from the fact finder listing the evidence relied upon and the reasons for the determination made.[75]

Accordingly, the due process clause of the United States and California Constitutions mandates the following:

> In order to dismiss, demote, suspend, reduce the salary of, or give a written reprimand to a permanent officer, provide the officer: (1) notice of the proposed action; (2) the reasons for the action; (3) a copy of the charges and materials upon which the action is based; and (4) the right to respond, either orally or in writing, to the authority initially imposing discipline.

Liberty Interest

Although probationary and at-will employees, who can be dismissed without cause, do not have a property interest in their employment, the employee may have a liberty interest affected by a dismissal when the charges supporting the dismissal damage the employee's reputation and impair the employee's ability to find other employment. The courts have defined the liberty interest as follows:

> "[A]n employee's liberty is impaired if the government, in connection with an employee's dismissal or failure to be rehired, makes a 'charge against him that might seriously damage his standing and associations in the community,' such as a charge of dishonesty or immorality, or would 'impose on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities.' [Citations omitted.] A person's protected liberty interests are not infringed merely by defamatory statements, for an interest in reputation alone is not a constitutionally protected liberty interest. [Citations omitted.] Rather, the liberty interest is infringed only when the defamation is made in connection with the loss of a government benefit, such as, . . . employment. [Citations omitted.]"[76]

For example, in *Murden* v. *County of Sacramento*, the court found a protected liberty interest when a *temporary* deputy sheriff was dismissed from employment based on charges that he was engaging two female employees in embarrassing and inappropriate conversation regarding sexual activities. The court noted that the charge impugned the employee's character and morality, and if circulated, would damage his reputation and impair his ability to find other employment.

The court in *Murden* clarified that a dismissal based on charges that the employee was unable to learn the basic duties of the job does *not* constitute a protected interest.[77]

When the employer infringes on a person's liberty interest, due process simply requires the employer to provide:

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[75] *Burrell v. City of Los Angeles* (1989) 209 Cal.App.3d 568, 577.

[76] *Murden* v. *County of Sacramento* (1984) 160 Cal.App.3d 302, 308.

[77] *Murden, supra*. 160 Cal.App.3d 302, 308.

1. Notice to the employee; and
2. An opportunity to refute the charges and clear his or her name.[78]

Accordingly, the due process clauses of the United States and California Constitutions apply when the charges supporting the dismissal of a probationary or at-will employee damage the employee's reputation and impair the employee's ability to find other employment.

Government Code section 3304

Government Code section 3304(c), (d) and (f) require employers to engage in the following activities:

1. Provide a chief of police that is dismissed with a written notice and the reason or reasons for the dismissal. (Gov. Code, § 3304(c) (Stats. 1998, ch. 786).)
2. Within one year of discovery of any misconduct, notify a peace officer being investigated that he or she may face disciplinary action after the investigation is completed. (Gov. Code, § 3304(d) (Stats. 1998, ch. 786).)
3. After the investigation and any predisciplinary response or procedure utilized by the employer, notify the peace officer in writing that the employer has decided to impose discipline on the officer. (Gov. Code, § 3304(f) (Stats. 1998, ch. 786).)

   The written notification must be provided within 30 days of the decision and include the date that the discipline will be imposed.

The notice required by section 3304(c) to the chief of police who is subject to a dismissal is already mandated by state and federal law when the dismissal infringes on the officer's liberty interest in the following instance:

> Provide a chief of police notice of dismissal and the reason or reasons for the dismissal when the charges supporting the dismissal damage the chief of police's ability to find other employment.

Absent the requirement of section 3304(c), local law enforcement agencies would still be required to comply with the notice requirement in this situation under the constitutional guarantees of federal due process law.[79]

The second notice required by section 3304(f) contemplates that a decision to impose a specific form of discipline has been made. In the following specific instances, existing state and federal law due process law mandate the same activity:

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[78] *Murden, supra,* 160 Cal.App.3d 302, 310.

[79] *County of Los Angeles v. Commission on State Mandates* (1995) 32 Cal.App.4th 805, 815. The test claim statute in *County of Los Angeles* required counties to provide indigent criminal defendants with defense funds for ancillary investigation services for capital murder cases. The court determined that even in the absence of the test claim statute, indigent defendants in capital cases were entitled to such funds under the Sixth Amendment of the federal Constitution. See also, *San Diego Unified School Dist., supra,* 33 Cal.4th at page 888-889.

Provide an officer notice of any of the following disciplinary actions to be taken as follows:

- A permanent employee is dismissed, demoted, suspended, receives a reduction in pay or a written reprimand; or
- A probationary or at-will employee is dismissed and the employee's reputation and ability to obtain future employment is harmed by the charges supporting the dismissal.

Absent the requirement in Government Code section 3304(f), local law enforcement agencies would still be required to comply with the notice requirement in these situations under the constitutional guarantees of federal due process law.[80]

As a result, staff finds the activities required by Government Code section 3304(c) and (f) are mandated by existing state and federal due process law under the circumstances described above and, thus, do not impose state-mandated new programs or higher levels of service.

The remaining activities required by Government Code sections 3304(c), (d) and (f) exceed those requirements of state and federal due process law and are new.[81] Therefore, staff finds that the following activities mandate a new program or higher level of service:[82]

1. Provide a chief of police that is dismissed with a written notice and the reason or reasons for the dismissal when the charges supporting the dismissal *do not* damage the chief of police's ability to find other employment and trigger existing notice requirements under the due process clause of the United States and California Constitutions. (Gov. Code, § 3304(c) (Stats. 1998, ch. 786).)
2. Within one year of discovery of any misconduct, provide notice to the peace officer being investigated that he or she may face disciplinary action after the investigation is completed. (Gov. Code, § 3304(d) (Stats. 1998, ch. 786).)
3. After the investigation and any predisciplinary response or procedure utilized by the employer, notify the peace officer in writing that the employer has decided to impose discipline on the officer. (Gov. Code, § 3304(f) (Stats. 1998, ch. 786)):
    a. Dismissal, demotion, suspension, salary reduction or written reprimand received by probationary and at-will employees whose liberty interest *are not* affected (i.e., the charges supporting a dismissal do not harm the employee's reputation or ability to find future employment);

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[80] *Ibid*.

[81] Government Code section 17556(e) further provides that there are no costs mandated by the state when a statute or executive order imposes requirements that are mandated by federal law and results in costs mandated by the federal government, "unless the statute or executive order mandates costs that exceed the mandate in that federal law or regulation."

[82] The claimant pled Government Code section 3304 as amended by Statutes 1997, chapter 148; and Statutes 1998, chapter 786. Immediately prior to the 1997 and 1998 amendments to section 3304, employers were not required to engage in the requirements that exceed state and federal due process law.

b. Transfer of permanent, probationary and at-will employees for purposes of punishment;

c. Denial of promotion for permanent, probationary, and at-will employees for reasons other than merit; and

d. Other actions against permanent, probationary, and at-will employees that result in disadvantage, harm, loss or hardship and impact the career opportunities of the employee.

Government Code section 3312

Government section 3312 requires employers to engage in the following activity:

> When an officer violates an existing rule, regulation, policy, or local agency agreement or contract regarding the wearing of a pin or displaying any other item containing the American flag, give the officer written notice that includes the following information: (1) a statement that the officer's pin or other item violates an existing rule, regulation, policy, or local agency agreement or contract regarding the wearing of a pin, or the displaying of any other item, containing the American flag; (2) a citation to the specific rule, regulation, policy, or local agency agreement or contract that the pin or other item violates; and (3) a statement that the officer may file an appeal against the employer challenging the alleged violation pursuant to the applicable grievance or appeal procedures adopted by the department or public agency that otherwise comply with existing law. (Gov. Code, § 3312 (Stats. 2002, ch. 170).)

As discussed above, the United States and California Constitutions mandate employers to engage in the following due process activities:

1. In order to dismiss, demote, suspend, reduce the salary of, or give a written reprimand to a permanent officer, provide the officer: (1) notice of the proposed action; (2) the reasons for the action; (3) a copy of the charges and materials upon which the action is based; and (4) the right to respond, either orally or in writing, to the authority initially imposing discipline.

2. In order to dismiss a probationary or at-will officer, provide notice to the probationary or at-will officer when the charges supporting the dismissal damage the officer's ability to find other employment.

3. In order to dismiss a probationary or at-will officer, provide an opportunity to refute the charges and clear his or her name when the charges supporting the dismissal damage the officer's ability to find other employment.

Thus, in regard to permanent officers, the notice requirements of Government Code section 3312 are mandated by state and federal due process law in cases in which the officer faces dismissal, demotion, suspension, reduction of salary, or a written reprimand. However, existing state and federal law does not require the notice imposed by section 3312 when the permanent officer faces transfer for purposes of punishment, denial of promotion, or other actions that result in disadvantage, harm, loss or hardship and impact the career opportunities of the employee.

In regard to probationary or at-will officers, the notice requirements of section 3312 are mandated by state and federal due process law in situations in which the officer's liberty interest

is affected (i.e, where the probationary or at-will officer is dismissed and the charges supporting the dismissal damage the officer's ability to find other employment). In all other instances Government Code section 3312 imposes the following activity that exceeds the existing requirements of state and federal due process law:

> Provide notice in order to take any of the following disciplinary actions for wearing a pin or displaying any other item containing the American flag (Gov. Code, § 3312 (Stats. 2002, ch. 170)):
>
> a. Dismissal of a probationary or at-will officer when the charges supporting the dismissal *do not* damage the officer's ability to find other employment;
>
> b. Demotion, suspension, salary reduction or written reprimand of a probationary or at-will officer;
>
> c. Transfer for purposes of punishment of a permanent, probationary, or at-will officer;
>
> d. Denial of promotion to a permanent, probationary, or at-will officer; and
>
> e. Other actions against permanent, probationary, or at-will officer that result in disadvantage, harm, loss or hardship and impact the career opportunities of the officer.
>
> The notice must include: (1) a statement that the officer's pin or other item violates an existing rule, regulation, policy, or local agency agreement or contract regarding the wearing of a pin, or the displaying of any other item, containing the American flag; (2) a citation to the specific rule, regulation, policy, or local agency agreement or contract that the pin or other item violates; and (3) a statement that the officer may file an appeal against the employer challenging the alleged violation pursuant to the applicable grievance or appeal procedures adopted by the department or public agency that otherwise comply with existing law.

The claimant pled Government Code section 3312 as added in 2002.[83] Immediately before the enactment of section 3312, employers were not required to engage in the above activity that exceeds the requirements of state and federal due process. Thus, staff finds that this activity imposes a state-mandated new program or higher level of service.

B. Inspection of personnel files of officer (Gov. Code, § 3306.5)

Government Code section 3306.5 provides a peace officer the right to inspect his or her personnel files at reasonable times, at reasonable intervals, and during usual business hours, with no loss of compensation. In addition, an officer is given the ability to request corrections or deletions of a portion of the file. The officer's employer is required to grant or deny the request. If the request is denied, the employer must explain the denial in writing.

[83] Statutes 2002, chapter 170.

i. Government Code section 3306.5 mandates employers to engage in activities.

The claimant argues that section 3306.5 requires employers to pay an officer when an officer is inspecting his or her personnel file. Finance argues that section 3306.5 "only provides that there be no loss of compensation to the officer."[84] In response the claimant argues:

> Yet, for inspections that occur during on-duty hours, the concept of "must pay" and "no loss of compensation" are one in the same. The Department is correct, however, if on the off chance that an officer opts to inspect his records off-duty, he will not be compensated.[85]

The claimant's argument misidentifies the activity that is required by section 3306.5. Section 3306.5(a) provides:

> Every employer shall, at reasonable times and at reasonable intervals, upon the request of a public safety officer, during usual business hours, with no loss of compensation to the officer, permit that officer to inspect personnel files that are used or have been used to determine that officer's qualifications for employment, promotion, additional compensation, or termination or other disciplinary action.

Although, as argued by the claimant, an employer may have to pay officers that inspect personnel records while on duty, this section does not require that an officer inspect his or her file while on duty. The activity imposed by section 3306.5(a) is for an employer to permit an officer to inspect the officer's personnel files. The provision that the officer shall be permitted to do so "with no loss of compensation" does not impose an activity on employers.

In light of the above discussion, staff finds that the plain language of section 3306.5 mandates employers to engage in the following activities:

1. Permit a peace officer to inspect personnel files at reasonable times and intervals, and during usual business hours, upon request by the officer. The personnel files that an officer may inspect are limited to those that are used or have been used to determine that officer's qualifications for employment, promotion, additional compensation, or termination or other disciplinary action. (Gov. Code, § 3306.5(a) (Stats. 2000, ch. 209).)
2. Keep each peace officer's personnel file or a true and correct copy thereof, and make the file or copy thereof available within a reasonable period of time after a request by the officer. (Gov. Code, § 3306.5(b) (Stats. 2000, ch. 209).)
3. Make an officer's written request to correct or delete a portion of the officer's personnel file, which the officer believes to be mistakenly or unlawfully placed in the file, part of the officer's personnel file. (Gov. Code, § 3306.5(c) (Stats. 2000, ch. 209).)
4. Within 30 days of receiving an officer's request to correct or delete a portion of his or her personnel file pursuant to Government Code section 3306.5(c), grant the request and make the requested changes or notify the officer of the decision to refuse the request. (Gov. Code, § 3306.5(d) (Stats. 2000, ch. 209).)

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[84] Exhibit B, comments filed by the Department of Finance, dated November 14, 2003, p. 2.

[85] Exhibit D, comments filed by the claimant in response to the Department of Finance, dated January 30, 2004, p. 3.

5. If the employer refuses to grant the request, in whole or in part, state in writing the reasons for refusing the request, and make the written statement part of the requesting officer's personnel file. (Gov. Code, § 3306.5(d) (Stats. 2000, ch. 209).)

ii. Some of the activities imposed by Government Code section 3306.5 constitute new programs or higher levels of service.

With respect to some law enforcement agency employers, however, some of these activities are not newly required and do not impose a new program or higher level of service.

Government Code section 3306.5 was enacted in 2000.[86] Finance argues:

> Government Code Section 31011, enacted in 1974, and Labor Code Section 1198.5, enacted in 1975, provide personnel review and response procedures for county, city and special district employees, thus the new requirement set forth in section 3306.5 does not constitute a new state program, with the exception of the explanation an employer must provide if a requested change is denied.[87]

Although Government Code section 31011 and Labor Code section 1198.5 provided for personnel review and response procedures, it is necessary to compare Government Code section 3306.5 with the legal requirements in effect *immediately* before its enactment.[88]

From 1974 until the 2000 enactment of section 3306.5, Government Code section 31011 gave *county* employees, including peace officers, the right to inspect personnel files kept and maintained by the employer relating to the employee's performance as an employee or relating to a grievance concerning the employee. Inspection was required to be allowed at reasonable intervals during the regular business hours of the employer.[89] Excluded from the right to inspect are letters of reference and records relating to the investigation of a possible criminal offense. In addition, the Legislature provided county employees the opportunity to respond in writing, or orally in a personal interview, to any information about which he or she disagrees. This response would then become part of the employee's personnel record.[90] Thus, permitting an officer to inspect his or her personnel files, excluding letters of reference and records relating to the investigation of a possible criminal offense does not constitute new programs or higher levels of service as applied to county employers.

In contrast, all of the activities mandated by Government Code section 3306.5 are newly required for cities and the special police protection districts named in Government Code section 53060.7. Labor Code section 1198.5, which provided rights similar to those provided by Government Code section 3306.5 to *all* employees, was amended in 1993 to be inapplicable to "every city, county, city and county, district, and every public and quasi-public agency."[91] As a result, from

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[86] Statutes 2000, chapter 209.

[87] Exhibit B, comments filed by the Department of Finance, dated November 14, 2003, p. 2.

[88] *Lucia Mar, supra*, 44 Cal.3d 830, 835.

[89] Government Code section 31011 (Stats. 1974, ch. 315).

[90] *Ibid*.

[91] Labor Code section 1198.5 (Stats. 1993, ch. 59). In 1983, Labor Code section 1198.5 had been determined to impose reimbursable state-mandated activities by the Commission's

1993 until the 2000 enactment of section 3306.5, officers employed by cities, and special police protection districts named in Government Code section 53060.7, were not given the right to inspect and respond to the content of their personnel files. Thus, *immediately* before the enactment of Government Code section 3306.5 the activities mandated by Government Code section 3306.5 constitute new programs or higher levels of service as applied to cities and special police protection districts named in Government Code section 53060.7.

In addition, prior to the enactment of Government Code section 3306.5 in 2000, employers of peace officers were required to keep the personnel files of peace officers. This is evidenced by the pre-existing requirements regarding the manner in which records of citizens' personnel complaints against peace officers are to be maintained. Since 1978, Penal Code section 832.5 has required employers to establish procedures to investigate complaints by members of the public against peace officers.[92]

Penal Code section 832.5 also requires the complaints and any reports or findings relating thereto to be retained for a period of at least five years. "Personnel records" as used in Penal Code section 832.7, which addresses the confidentiality of personnel records and records maintained pursuant to section 832.5, is defined to include any file maintained under the individual's name by his or her employing agency that contains records relating to, among other things, complaints or investigations of complaints.[93] Thus, since at least 1978, employers were required to keep personnel files. As a result, staff finds that keeping each peace officer's personnel file or a true and correct copy thereof, as required by Government Code section 3306.5(b), does not constitute a new program or higher level of service.

As a result, staff finds that the following state-mandated activities imposed by Government Code section 3306.5 constitute new programs or higher levels of service:

Counties

1. Permit a peace officer to inspect letters of reference and records relating to the investigation of a possible criminal offense if they are used or have been used to determine that officer's qualifications for employment, promotion, additional compensation, or termination or other disciplinary action. (Gov. Code, § 3306.5(a) (Stats. 2000, ch. 209).)
2. Make the personnel file or copy thereof available within a reasonable period of time after a request by the officer. (Gov. Code, § 3306.5(b) (Stats. 2000, ch. 209).)
3. Make an officer's written request to correct or delete a portion of the officer's personnel file, which the officer believes to be mistakenly or unlawfully placed in the file, part of the officer's personnel file. (Gov. Code, § 3306.5(c) (Stats. 2000, ch. 209).)

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predecessor (the Board of Control). The 1993 amendment to section 1198.5 was preceded by the Legislature's suspension of the section 1198.5 mandates pursuant to Government Code section 17581 for the 1989-1990, 1990-1991, and 1991-1992 fiscal years. As a result of the suspension, local agencies were not required to implement the mandated activities imposed by Government Code section 1198.5.

[92] California Penal Code section 832.5 (Statutes 1978, ch. 630).

[93] California Penal Code section 832.8 (Statutes 1978, ch. 630).

4. Within 30 days of receiving an officer's request to correct or delete a portion of his or her personnel file pursuant to Government Code section 3306.5(c), grant the request and make the requested changes or notify the officer of the decision to refuse the request. (Gov. Code, § 3306.5(d) (Stats. 2000, ch. 209).)

5. If the employer refuses to grant the request, in whole or in part, state in writing the reasons for refusing the request, and make the written statement part of the requesting officer's personnel file. (Gov. Code, § 3306.5(d) (Stats. 2000, ch. 209).)

Cities and special police protection districts named in Government Code section 53060.7

1. Permit a peace officer to inspect personnel files at reasonable times and intervals, and during usual business hours, upon request by the officer. The personnel files that an officer may inspect are limited to those that are used or have been used to determine that officer's qualifications for employment, promotion, additional compensation, or termination or other disciplinary action. (Gov. Code, § 3306.5(a) (Stats. 2000, ch. 209).)

2. Make the file or copy thereof available within a reasonable period of time after a request by the officer. (Gov. Code, § 3306.5(b) (Stats. 2000, ch. 209).)

3. Make an officer's written request to correct or delete a portion of the officer's personnel file, which the officer believes to be mistakenly or unlawfully placed in the file, part of the officer's personnel file. (Gov. Code, § 3306.5(c) (Stats. 2000, ch. 209).)

4. Within 30 days of receiving an officer's request to correct or delete a portion of his or her personnel file pursuant to Government Code section 3306.5(c), grant the request or notify the officer of the decision to refuse the request. (Gov. Code, § 3306.5(d) (Stats. 2000, ch. 209).)

5. If the employer refuses to grant the request, in whole or in part, state in writing the reasons for refusing the request, and make the written statement part of the requesting officer's personnel file. (Gov. Code, § 3306.5(d) (Stats. 2000, ch. 209).)

C. Search of locker (Gov. Code, § 3309)

i. Government Code section 3309 imposes a state-mandated activity on employers.

Government Code section 3309 provides:

> No public safety officer shall have his locker, or other space for storage that may be assigned to him searched except in his presence, or with his consent, or unless a valid search warrant has been obtained or where he has been notified that a search will be conducted. This section shall apply only to lockers or other space for storage that are owned or leased by the employing agency.

On its face, section 3309 does not impose any requirements on employers. Instead, the plain language of section 3309 sets forth a general prohibition against the search of an officer's locker or storage space assigned to the officer. This general prohibition is subject to the following four exceptions or conditions, satisfaction of any one of which would allow the search of the locker or storage space: (1) having the officer present during the search; (2) obtaining the officer's consent; (3) obtaining a valid search warrant; and (4) notifying the officer of the search.

However, in order to fully analyze whether section 3309 imposes requirements on employers, it is necessary to read section 3309 in light of the role that peace officers play in society, and the

effects of section 3309 on employer-employee rights regarding the search of officers' lockers or storage spaces assigned by an employer.

As discussed above, the role of peace officers in society as the "guardians of peace and security" and the need to maintain the public's confidence in its police force creates the need to investigate officer misconduct.[94] By extension an employer may need to search an officer's locker or storage space assigned by the employer if necessary for an investigation of officer misconduct. As a result, section 3309 requires an employer to meet one of the exceptions to the general prohibition on searching an officer's locker or storage space in order to carry out the pre-existing duty to search an officer's locker or storage space.[95] To be clear, section 3309 *does not* impose the requirement to search an officer's locker. Instead, in the event that it is necessary to search an officer's locker, this section requires an employer to perform one of the procedural activities outlined in the statute before the agency can search the officer's locker. Under the statute, the employer can choose to obtain a search warrant, get the consent of the officer, have the officer present during the search, or simply provide notice to the officer that the locker will be searched.

If Government Code section 3309 did not exist, employer-employee rights regarding the search of an officer's assigned locker or storage space would be governed by the state and federal constitutional right against unreasonable searches and seizures by governmental officials. Absent POBOR, an officer's rights and the procedural requirements imposed on an employer in regard to the search of an officer's locker or storage space assigned by the employer depend on whether the officer has a reasonable expectation of privacy in the locker or storage space.[96] If an officer has a reasonable expectation of privacy in an assigned locker or storage space, the officer's rights and the procedural requirements imposed on an employer are governed by the Fourth Amendment to the United States Constitution and article I, section 13 of the California Constitution, which protect people against unreasonable searches and seizures by governmental officials.[97]

Whether an individual has a reasonable expectation of privacy in a place being searched is determined in light of all the circumstances. In the context of a public employee's locker, courts

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[94] *Pasadena Police Officers Assn. v. City of Pasadena*, *supra*, 51 Cal.3d at pgs. 571-572.

[95] See *Pasadena Police Officers Assn. v. City of Pasadena*, *supra*, 51 Cal.3d 564, 572, in which the notes that the authorization of administrative searches under section 3309, "in itself manifests an acknowledgment by the Legislature that such searches are integral to law enforcement employment."

[96] *O'Connor v. Ortega* (1987) 480 U.S. 709, 715.

[97] The Fourth Amendment to the United States Constitution provides:

> The right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

This prohibition is applicable to the states through the Fourteenth Amendment. Article I, section 13 of the California Constitution includes a similar prohibition against unreasonable searches and seizures.

have focused on the presence of employer-adopted regulations or employer-established practices regarding an employee's use of the locker and the employer's access to the locker. In *United States v. Speights* a federal court of appeals found that a New Jersey police officer had a reasonable expectation of privacy in his locker where his employer did not adopt any regulations or establish any policy regarding the use or search of employer-assigned lockers.[98]

In contrast, the federal district court in *Chicago Fire Fighters Union, Local 2 v. City of Chicago* found that a firefighter did not have a reasonable expectation of privacy in his locker where the fire department strictly regulated and controlled working conditions at the fire houses and the fire department's regulations provided for warrantless searches of firefighter lockers.[99] Similarly, the 9th circuit court of appeals in *United States v. Bunkers* found that a postal worker in California did not have a reasonable expectation of privacy where warrantless searches were provided for by postal regulation and by employee union agreement.[100]

If an officer has a reasonable expectation of privacy and a search is conducted as part of a criminal investigation, it is well settled that a search conducted without a valid warrant issued upon probable cause is per se unreasonable, subject to specifically established exceptions, such as consent.[101] If the search is being conducted for non-investigatory, work-related purposes, or for investigations of work-related misconduct, an employer's search of an officer's locker or storage space assigned by the employer must meet a "reasonableness standard" to be constitutionally valid.[102]

The enactment of section 3309 effectively eliminates an officer's reasonable expectation of privacy in his or her locker or storage space. With section 3309, an employer does not need to determine whether an officer has a reasonable expectation to privacy, or obtain a valid search warrant or the consent of an officer, or to conduct a search meeting a "reasonableness standard." Instead, an employer can search an officer's assigned locker or storage space under any circumstance if the employer has the officer present during the search or notifies the officer that a search will occur.

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[98] *United States v. Speights* (3rd Cir. 1977) 557 F.2d 362.

[99] *Chicago Fire Fighters Union, Local 2 v. City of Chicago* (N.D. Ill. 1989) 717 F. Supp.1314, 1318.

[100] *United States v. Bunkers* (9th Cir. 1975) 521 F.2d 1217.

[101] *Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 219.

[102] *O'Connor v. Ortega* (1987) 480 U.S. 709. See page 725-726, where a plurality of the court developed a "reasonableness standard" in which the search must be justified at its inception and the search conducted must be reasonably related in scope to the circumstances justifying the search in the first place. Also see page 731-732, where Justice Scalia, in a concurring opinion, developed a "reasonableness standard" in which the public employer's search must be reasonable and normal in the private-employer context." Since the Court's decision, little clarity has been provided regarding which approach is the proper analytical framework. Instead, courts have analyzed the factual situations surrounding each case under both the plurality test and Justice Scalia's test. See *City of Ontario, California v. Quon* (2010) __ U.S. __ [130 S.Ct. 2619]; and *Richards v. County of Los Angeles* (C.D.Cal. 2011) 775 F.Supp.2d 1176.

This interpretation of the effect of Government Code section 3309 on the Fourth Amendment rights of officers and the procedural requirements imposed on employers in the context of searching an officer's locker is consistent with a federal district court's interpretation set forth in *Los Angeles Police Protective League v. Gates*.[103] As stated by the court in response to an officer's allegation that his locker was illegally searched during an investigation into allegations of misconduct:

> Even if [the officer] had not consented to the search, the Fourth Amendment offers him no protection because he had no reasonable expectation to privacy in the locker. [Citation] Under California Government Code § 3309, a police officer's locker may be searched "in his presence, or with his consent, or . . . where he has been notified that a search will be conducted." Just as in [*United States v. Bunkers* (1975) 521 F.2d 1217], the regulation here eliminated Gibson's reasonable expectation of privacy in his locker if he observed, or was notified of, the search.[104]

Although the Commission is not bound by a lower federal court's interpretation of the affect that section 3309 had on the Fourth Amendment rights of officers and procedural duties of employers, it is persuasive and entitled to great weight.[105] Because the enactment of section 3309 removes an officer's reasonable expectation of privacy in a locker or storage space assigned to the officer, the rights afforded by the Fourth Amendment to the United States Constitution and article I, section 13 of the California Constitution are never triggered. Thus, under no circumstance would an employer be required by constitutional law to obtain a valid search warrant or an officer's consent prior to searching the officer's assigned locker or storage space if the officer was present or notified.

Although section 3309 requires action by the employer before searching a locker, it provides the employer with options. As indicated above, the law does not mandate the employer to obtain a valid search warrant or the consent of the officer before searching the locker. Nor is the employer required to have the officer present. However, at a minimum, the employer must notify an officer that a search of his or her locker will be conducted. As a result, staff finds that Government Code section 3309 requires employers to:

> Notify an officer, either orally or in writing, that a search of the officer's employer assigned locker or storage space will be conducted, if during the course of an investigation into officer misconduct an employer determines it is necessary to conduct a search of the officer's employer assigned locker or storage space. (Gov. Code, § 3309 (Stats. 1976, ch. 465).)

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[103] *Los Angeles Police Protective League v. Gates* (1984) 579 F.Supp. 36.

[104] *Id.* at 44.

[105] *People v. Bradley* (1969) 1 Cal.3d 80, 86, in which the California Supreme Court notes that it is not bound by the decisions of the lower federal courts even on federal questions, but the decisions are persuasive and entitled to great weight. Here, a lower federal court has interpreted the affect of Government Code section 3309 on the Fourth Amendment rights of an officer and the procedural requirements imposed on an employer in regard to searching an officer's locker or storage space.

Like Government Code sections 3304 and 3312, the procedural rights and protections afforded a peace officer under section 3309 are required by statute. However, the rights are not triggered until the employing agency decides to investigate and search an officer's assigned locker or storage space. These initial decisions are governed by local policy, ordinance, city charter, or a memorandum of understanding.

However, for the same reasons discussed above for sections 3304 and 3312, the activity required by Government Code section 3309 constitutes a state-mandated program.

ii. The activity imposed on employers by Government Code section 3309 constitutes a new program or higher level of service.

Prior to the enactment of section 3309, employers were not required to notify the officer that a search of a locker will be conducted. As a result, staff finds that the state-mandated activity imposed by section 3309 constitutes a new program or higher level of service.

Issue 2: The test claim statutes impose costs mandated by the state within the meaning of Government Code sections 17514 and 17556.

The final issue is whether the test claim statutes and regulations impose costs mandated by the state,[106] and whether any statutory exceptions listed in Government Code section 17556 apply to the claim. Government Code section 17514 defines "cost mandated by the state" as follows:

> [A]ny 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.

"Any increased costs" for which claimants may seek reimbursement include both direct and indirect costs.[107] Government Code section 17556 sets forth a number of exceptions under which the Commission is prohibited from finding costs mandated by the state as defined by section 17514.

Government Code section 17564 states that no test claim or reimbursement claim shall be made, nor shall any payment be made, unless claims exceed $1,000. The claimant estimates that the costs to carry out the program exceed $1,000 per year.[108] Thus, the claimants have met the minimum burden of showing costs necessary to file a test claim pursuant to Government Code section 17564.

In addition, none of the statutory exceptions listed in Government Code section 17556 apply to the state-mandated new programs or higher levels of service found in the analysis above. As a result, staff finds that the state-mandated new programs or higher levels of service impose costs mandated by the state on employers within the meaning of article XIII B, section 6, and Government Code sections 17514 and 17556.

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[106] *Lucia Mar, supra*, 44 Cal.3d 830, 835; Government Code section 17514.

[107] Government Code section 17564.

[108] Exhibit A, test claim filing, dated September 26, 2003.

IV. Conclusion

Staff concludes that Government Code sections 3304, 3306.5, 3309, and 3312 impose reimbursable state-mandated programs on cities, counties, cities and counties, and special police protection districts named in Government Code section 53060.7,[109] within the meaning of article XIII B, section 6 of the California Constitution, and Government Code section 17514 for the following activities:

1. Provide a chief of police that is dismissed with a written notice and the reason or reasons for the dismissal when the charges supporting the dismissal *do not* damage the chief of police's ability to find other employment and trigger existing notice requirements under the due process clause of the United States and California Constitutions. (Gov. Code, § 3304(c) (Stats. 1998, ch. 786).)
2. Within one year of discovery of any misconduct, provide notice to the peace officer being investigated that he or she may face disciplinary action after the investigation is completed. (Gov. Code, § 3304(d) (Stats. 1998, ch. 786).)
3. After the investigation and any predisciplinary response or procedure utilized by the employer, notify the peace officer in writing that the employer has decided to impose discipline on the officer. (Gov. Code, § 3304(f) (Stats. 1998, ch. 786)):
    a. Dismissal, demotion, suspension, salary reduction or written reprimand received by probationary and at-will employees whose liberty interest *are not* affected (i.e., the charges supporting a dismissal do not harm the employee's reputation or ability to find future employment);
    b. Transfer of permanent, probationary and at-will employees for purposes of punishment;
    c. Denial of promotion for permanent, probationary, and at-will employees for reasons other than merit; and
    d. Other actions against permanent, probationary, and at-will employees that result in disadvantage, harm, loss or hardship and impact the career opportunities of the employee.

    Conducting investigations is not reimbursable.
4. Provide notice in order to take any of the following disciplinary actions for wearing a pin or displaying any other item containing the American flag (Gov. Code, § 3312 (Stats. 2002, ch. 170)):
    a. Dismissal of a probationary or at-will officer when the charges supporting the dismissal *do not* damage the officer's ability to find other employment;
    b. Demotion, suspension, salary reduction, or written reprimand of a probationary or at-will officer;

[109] Government Code section 53060.7 identifies Bear Valley Community Services District, the Broadmoor Police Protection District, the Kensington Police Protection and Community Services District, the Lake Shastina Community Services District, and the Stallion Springs Community Services District.

c. Transfer for purposes of punishment of a permanent, probationary, or at-will officer;

d. Denial of promotion to a permanent, probationary, or at-will officer; and

e. Other actions against permanent, probationary, or at-will officer that result in disadvantage, harm, loss, or hardship and impact the career opportunities of the officer.

The notice must include: (1) a statement that the officer's pin or other item violates an existing rule, regulation, policy, or local agency agreement or contract regarding the wearing of a pin, or the displaying of any other item, containing the American flag; (2) a citation to the specific rule, regulation, policy, or local agency agreement or contract that the pin or other item violates; and (3) a statement that the officer may file an appeal against the employer challenging the alleged violation pursuant to the applicable grievance or appeal procedures adopted by the department or public agency that otherwise comply with existing law.

5. Perform the following activities upon receipt of a request by an officer to inspect his or her personnel files (Gov. Code, § 3306.5):

<u>Counties</u>

a. Permit a peace officer to inspect letters of reference and records relating to the investigation of a possible criminal offense if they are used or have been used to determine that officer's qualifications for employment, promotion, additional compensation, or termination or other disciplinary action. (Gov. Code, § 3306.5(a) (Stats. 2000, ch. 209).)

b. Make the personnel file or copy thereof available within a reasonable period of time after a request therefor by the officer. (Gov. Code, § 3306.5(b) (Stats. 2000, ch. 209).)

c. Make an officer's written request to correct or delete a portion of the officer's personnel file, which the officer believes to be mistakenly or unlawfully placed in the file, part of the officer's personnel file. (Gov. Code, § 3306.5(c) (Stats. 2000, ch. 209).)

d. Within 30 days of receiving an officer's request to correct or delete a portion of his or her personnel file pursuant to Government Code section 3306.5(c), grant the request and make the requested changes or notify the officer of the decision to refuse the request. (Gov. Code, § 3306.5(d) (Stats. 2000, ch. 209).)

e. If the employer refuses to grant the request, in whole or in part, state in writing the reasons for refusing the request, and make the written statement part of the requesting officer's personnel file. (Gov. Code, § 3306.5(d) (Stats. 2000, ch. 209).)

<u>Cities and Special Police Protection Districts Named in Government Code Section 53060.7</u>

a. Permit a peace officer to inspect personnel files at reasonable times and intervals, and during usual business hours, upon request by the officer. The personnel files

that an officer may inspect are limited to those that are used or have been used to determine that officer's qualifications for employment, promotion, additional compensation, or termination or other disciplinary action. (Gov. Code, § 3306.5(a) (Stats. 2000, ch. 209).)

b. Make the file or copy thereof available within a reasonable period of time after a request therefor by the officer. (Gov. Code, § 3306.5(b) (Stats. 2000, ch. 209).)

c. Make an officer's written request to correct or delete a portion of the officer's personnel file, which the officer believes to be mistakenly or unlawfully placed in the file, part of the officer's personnel file. (Gov. Code, § 3306.5(c) (Stats. 2000, ch. 209).)

d. Within 30 days of receiving an officer's request to correct or delete a portion of his or her personnel file pursuant to Government Code section 3306.5(c), grant the request and make the requested changes or notify the officer of the decision to refuse the request. (Gov. Code, § 3306.5(d) (Stats. 2000, ch. 209).)

e. If the employer refuses to grant the request, in whole or in part, state in writing the reasons for refusing the request, and make the written statement part of the requesting officer's personnel file. (Gov. Code, § 3306.5(d) (Stats. 2000, ch. 209).)

6. Notify an officer, either orally or in writing, that a search of the officer's employer assigned locker or storage space will be conducted, if during the course of an investigation into officer misconduct an employer determines it is necessary to conduct a search of the officer's employer assigned locker or storage space. (Gov. Code, § 3309 (Stats. 1976, ch. 465).)

Any other test claim statutes and allegations not specifically approved above, do not impose a reimbursable state mandated program subject to article XIII B, section 6 of the California Constitution.

V. Staff Recommendation

Staff recommends that the Commission adopt this analysis to partially approve this test claim.