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California State Controller

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Commission on
State Mandates

February 27, 2015

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Re: Controller's Comments on Proposed Decision
Collective Bargaining and Collective Bargaining Agreement Disclosure
09-4425-I-17 and 10-4425-I-18
Government Code Section 3540-3549.9
Statutes 1975, Chapter 961; Statutes 1991, Chapter 1213
Fiscal Years 2003-03 through 2005-06
Sierra Joint Community College District, Claimant

Dear Ms. Halsey and Mr. Petersen:

This letter constitutes the Controller's response to the Proposed Decision (PD) in the above-entitled matter. The Controller disagrees with the determination that the audit is initiated when the entrance conference occurs, and also disagrees with analysis with respect to the appropriate course of action where the mandated costs exceed the costs claimed.

The question of when an audit is initiated is a core issue when analyzing whether an audit was commenced in a timely fashion, as well as if it was completed in a timely manner. In this case the audit was clearly commenced before the deadline so the question does not receive as detailed of an analysis as is found in the Draft Proposed Decision (DPD) in the Los Rios Health Fee Elimination IRC (05-4206-I-06), which is also scheduled for hearing on March 27, 2015. We believe the analysis in this PD blurs the lines between determining a question of law, and a question of fact. As noted in the PD (page 15, ¶ 3) "[t]he Commission must review questions of law … de novo, without consideration of legal conclusions made by the Controller in the context of an audit." This case clearly present a question of law as its final determination requires that we define what is meant by the phrase "initiation of an audit" as found in Government Code section 17558.5(a).

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Questions of law are resolved through statutory interpretation; the analysis of the relevant statutory provision in context, in an effort to determine the intent of the Legislature. However, in this case the only statutory interpretation engaged in was two dictionary citations. We believe that such an important question deserves a more thorough statutory interpretation analysis.

As noted in the Los Rios DPD (Page 21, 3rd ¶) "a phone call, a confirming letter, or an entrance conference, are all events that could reasonably be viewed as the initiation date under the statute". That conclusion applies with equal force in this case. Given this ambiguity, and the importance of the conclusion, a detailed in depth statutory interpretation of Section 17558.5 was appropriate. However, the PD only cites to Black's Law Dictionary for the definition of "audit" as "[a] formal examination of an individual's or organization's accounting records …", and to Webster's Dictionary for the proposition that initiate is synonymous with commence. The PD does not explain what a formal examination entails, but appears to conclude that it requires an onsite visit. Not only does this analysis ignore numerous rules of statutory construction, but it is inconsistent with the prior rationale of the Commission with respect to what constitutes an audit. In the Grossmont Increased Graduation Requirements IRC, the Commission addressed the assertion that a desk review (sometimes called an informal audit) did not satisfy the audit requirement of Section 17561. In that case the Commission noted that "[t]here is nothing in this section [17561] that defines the scope of the SCO's audit, or the manner in which the audit may be conducted." Relying on the constitutional and statutory audit authority granted to the Controller, the Commission concluded that the "SCO exercised its audit authority in accordance with state law", when a claim was reduced based on a desk review of the claim and its supporting documentation. We do not believe it is appropriate to limit the concept of an audit in this case to an onsite formal examination of the records of the claimant.

In addition, the analysis of this question is not consistent with how the Division of Audits actually conducts audits. The Division begins reviewing claims and their supporting documentation before they even call the auditee to arrange the entrance conference. They do this to determine the time left to audit the different claimants, and how to allocate available manpower. The document request in the formal audit letter is made because the auditors want to look at all relevant documents not just those submitted with the claim, and to ensure that the most recent versions are available. For a full description of the process involved in determining whom and when to audit, see the attached declaration of Jim Spano.

The primary purpose of statutory construction is "to determine the Legislature's intent so as to effectuate the law's purpose." *In re C.H.* (2011) 53 Cal.4th 94, 100. "We give the words of the statute their ordinary and usual meaning and view them in their statutory context." *Ibid.* We should "examine[] the disputed phrases in the context of the statute

as a whole." *Grafton Partners v. Superior Court* (2005) 36 Cal.4th 944, 959. In this case the PD focuses on only two words from the statute, not the statute as a whole. In addition, the analysis does not look at how Section 17558.5 fits within the statutory scheme governing mandates. The courts have held that statutes must be harmonized "both internally and with each other, to the extent possible." *Scottsdale Ins. Co. v. State Farm Mut. Auto Ins. Co.* (2005) 130 Cal.App.4th 890, 898. We believe that the analysis in the PD is too narrow to satisfy the rules and purposes of statutory interpretation.

When looking at Section 17558.5, subdivision (a) we can clearly see that it is a statute of limitations provision. To aid us in interpretation we should look at the purpose of a statute of limitation, as well as compare it to other statutes of limitations. Statutes of limitations are "designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Romano v. Rockwell International, Inc.* (1996) 14 Cal.4th 479, 488. The courts have also stated that the "legislative goal underlying limitations statutes is to require diligent prosecution of known claims so that legal affairs can have their necessary finality and predictability and so that claims can be resolved while evidence remains reasonably available and fresh." *Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 756. In this case, as in other audits conducted by the Controller, the claimant's sense of finality is not disturbed as they have received notice before the expiration of the statute of limitations. If we are looking for predictability, relying on the entrance conference is misplaced. It can be delayed or continued by scheduling issues as well as staff availability or natural disasters, and is only certain once it occurs. For finality and predictability we should identify a more certain and definite event.

Use of the entrance conference is even more questionable when we compare the application of the statutes of limitations in other areas of the law. In civil and criminal law (misdemeanor), the event that ends the running of the statute is the filing of a complaint. For administrative law, the accusation or statement of issues is the operative document. The Continuing Education of the Bar, California Administrative Hearing Guide states that "[i]n practice, the accusation or statement of issues is considered filed on the date when it was signed and dated by the executive officer or other employee of an agency." (§3.26, page 3-19.) Each of these processes relies at its core on a written document, not a face to face meeting between the parties. Another characteristic in common is that the filing is accomplished by a unilateral act of the plaintiff/complainant, no contact or coordination with the opposing party is required. The conclusion of the PD would create a statute of limitations procedure that is unlike any other, essentially requiring the consent of the auditee and a face to face meeting, before an audit could be initiated. There is nothing in Section 17558.5(a) that suggests such a departure from other statute of limitation procedures. In light of the purposes of statutes of limitations, as well as the common characteristics of other statutes of limitation schemes, we believe

that the formal audit letter should constitute the initiating act, and the date thereon, the date of initiation of the audit. In this case the audit letter was dated April 3, 2007, which should be the date the audit is considered initiated. Since the statute didn't run at its earliest until January 10, 2008, the audit of the fiscal years in question should be considered timely.

The PD also blurs the line between a question of law, and a question of fact in respect to the allowable costs question. The question of whether the Controller can increase the amount paid to a claimant over the claimed amount is a question of law, not fact. It depends primarily on the interpretation of Subdivision (d)(2)(B), which states that the "Controller may ***reduce*** any ***claim*** that the Controller determines is excessive or unreasonable." (Emphasis added.) However, the PD spends the majority of the time citing to the factual record. The problem is, there is no real dispute as to the facts. This approach confuses the issue and detracts from the necessary task of statutory interpretation. This conflation flows all the way to conclusion where the PD states that the Controller's decision not to reimburse above the amount claimed was "incorrect as a matter of law, and represents an arbitrary and capricious reduction …". (PD page 26, ¶2). The inclusion of the phrase "arbitrary and capricious" is inapposite, as that determination is only applicable in the resolution of a question of fact.

Section 17561, subdivision (d)(2)(B), unequivocally gives the Controller's Office only the power to reduce claims, not increase or adjust them. "When interpreting statutory language, we may neither insert language which has been omitted nor ignore language which has been inserted. *People v. National Automobile & Casualty Ins. Co.* (2002) 98 Cal. App.4th 277, 282. In this case it appears the PD has inserted "adjust" and "insufficient", and is ignoring the word "reduce". "If the language is clear and unambiguous there is no need for construction, nor is it necessary to resort to indicia of the intent of the Legislature." *People v. Zambia* (2011) 51 Cal.4th 965, 972. Subdivision (d)(2)(B) clearly and unambiguously grants the Controller only the power to reduce a claim, not to adjust it. Even if we engage in statutory construction we will find that such construction will support the plain language. In this analysis it's also important to note that the Legislature chose to use the word claim, rather than "costs mandated by the state" or other similar provision, when referring to the item that is subject to reduction.

Even though subdivision (a) of Section 17561may state that the "state shall reimburse each local agency and school district for all 'costs mandated by the state'…", that does not permit the Commission to rewrite subdivision (d)(2)(B). The importance of the focus of the term "claim", as opposed to "costs mandated by the state" is evidenced by Section 17560, which sets the deadline for filing a claim for reimbursement, and Section 17568 which states that "[i]n no case shall a reimbursement claim be paid that is submitted more than one year after the deadline specified in Section 17560." The mere fact that a local agency or school district has incurred a cost mandated by the state, is not sufficient itself

to entitle them to reimbursement. It is the filing of claim, within the allotted time frames, detailing the costs actually incurred, that entitles the claimant to reimbursement.

The mandates statutes emphasis on reduction, rather than failure to increase is also found in other statutes and regulations governing mandates. The statute that provides claimants the authority to file an incorrect reduction claim (IRC), Section 17588.7, requires that "the Controller ***reduce***[] a claim" as a condition precedent to the filing of an IRC. (Emphasis added.) Nowhere in this statute does it provide that a claimant may file an IRC because the Controller has failed to increase the amount of the claim. This is mirrored by Commission regulations; Section 1185.1 of Title 2, provides that a claimant may file an IRC to determine if "the Office of State Controller incorrectly ***reduced*** a reimbursement claim." (Emphasis added.) This is further reinforced by Section 1185.9 that provides that if the Commission determines "that a reimbursement claim was incorrectly ***reduced***, the Commission shall send the decision to the Office of State Controller and request that the Office of State Controller reinstate the costs that were incorrectly ***reduced***." (Emphasis added.) Nowhere in these provisions does it provide or permit that a claim can be increased, in fact without a reduction, the Commission is without jurisdiction to hear the matter. The PD then goes on to assert that a failure to provide an increase, is itself a reduction. This rather Orwellian contortion of the English language aside, the PD fails to provide any adequate support for this conclusion, or any justification for ignoring the plain language of Subdivision (d)(2)(B), which only provides that the Controller may reduce a claim.

Another consequence of the approach put forth in the PD is to add uncertainty to budgetary questions, where there had been certainty before. Pursuant to Section 17568 the dollar amount of mandate claims for a given fiscal year is fixed, 19½ months after the end of the fiscal year. Any state entity that may rely on that information, such as the Legislature or Finance, will know the maximum exposure of the state for mandated claims for that fiscal year. However, with this new approach, which has never been articulated before, that certainty would be removed, in some cases over a decade after the costs were incurred. Such an approach would substantially limit the effectiveness of the deadlines articulated by Section 17568.

Requiring the Controller to pay more than the amount claimed, contrary to the plain language limiting our power to that of reduction, would also put the Controller's Office in jeopardy of violating Article XVI, Section 7, of the California Constitution. That section provides that "[m]oney may be drawn from the Treasury only through an appropriation made by law and upon a Controller's duly drawn warrant." The Attorney General has opined that "[a] duly drawn warrant is one that is drawn for a lawful amount;" it "signifies correctness propriety, validity and that which is legally required." 71 Ops.Cal.Atty.Gen. 275, 278-9. Since the Controller only has the power to reduce, pursuant to Subdivision (d)(2)(B), an increase in the payment to the claimant, beyond the

amount claimed, cannot be said to be legally required. Therefore, making such additional payment would be a violation of the Controller's constitutional obligations. Such a payment would also run afoul of Article XVI, Section 6, of the California Constitution, which prohibits the making of a gift of public funds.

In light of the clear statutory restriction on the Controller, limiting his action to the reduction of a claim, the Commission should find that the reimbursement to the Claimant is limited to the amount claimed.

Sincerely,

Shawn D. Silva

SHAWN D. SILVA
Senior Staff Counsel

Attachment

SDS/ss

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BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

INCORRECT REDUCTION CLAIM (IRC) ON: *Collective Bargaining and Collective Bargaining Agreement Disclosure Program* Government Code Sections 3540-3549.9 Statutes 1975, Chapter 961; Statutes 1991, Chapter 1213 Sierra Joint Community College District, Claimant	No.: IRC 09-4425-I-17 and 10-4425-I-18 AFFIDAVIT OF BUREAU CHIEF

I, Jim L. Spano, make the following declarations:

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

2) I am currently employed as a Bureau Chief, and have been so since April 21, 2000. Before that, I was employed as an Audit Manager for two years and three months.

3) I am a California Certified Public Accountant.

4) I reviewed the work performed by the SCO auditors.

5) The SCO Division of Audits develops an annual workplan using a risk-based approach that identifies claims subject to audit. We audited the district's Collective Bargaining and Collective Bargaining Agreement Disclosure Program claims for fiscal year (FY) 2002-03 through FY 2005-06. The claims were selected from the annual work plan and assigned by the Audit Manager. The Auditor-in-Charge pulled the claim packages from the SCO's Division of Accounting and Reporting claim files and reviewed and analyzed the filed claim forms and attached supporting documentation.

6) For this audit, the documentation included schedules detailing the district's calculations of its indirect cost rates and various other documentation supporting claimed costs. The Auditor-in-Charge noted the official filing dates for the various claims and determined that they were still subject to audit in accordance with the language of Government Code section 17558.5 at that time.

7) Prior to making telephone contact with the district, the Auditor-in-Charge reviewed all of these claimant-prepared records to ascertain whether to officially initiate an audit of the district's claims. The Auditor-in-Charge then requested payment information from the Division of Accounting and Reporting's database to confirm that the claims were still subject to audit based on claim payment information. The Audit Manager then discussed the audit with the Bureau Chief prior to proceeding.

8) The Auditor-in-Charge contacted the district, stating that the SCO will be initiating an audit of the district's mandated cost claims for the Collective Bargaining and Collective Bargaining Agreement Disclosure Program and requesting to schedule an entrance conference. The Auditor-in-Charge and district agreed to an April 17, 2007, start date for the fieldwork portion of the audit.

9) The Auditor-in-Charge processed a formal start letter, dated April 3, 2007, that was addressed to the district's Director of Finance and signed by the Audit Manager. The start letter identified the Auditor-in-Charge, program being audited, the entrance conference date and time, and a basic records request. Some of the basic records requested in the audit start letter included claimant-prepared records already made available, such as copies of claims, support for the district's indirect cost rates, and relevant accounting data. The document request was made because the auditors want to review all relevant documents, not just those submitted with the claim, and ensure that the most recent versions are available.

10) The initial final report was issued on April 17, 2009, and reissued on August 25, 2010, reducing the audit adjustments by $5,855.

11) The protocol related to the audit process described above is consistent with the protocol for all audits of mandated cost claims.

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

Date: February 26, 2015

OFFICE OF THE STATE CONTROLLER

By: _____

Jim L. Spano, Chief
Mandated Cost Audits Bureau
Division of Audits
State Controller's Office

DECLARATION OF SERVICE BY EMAIL

I, the undersigned, declare as follows:

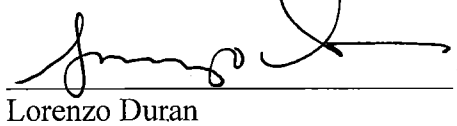
I am a resident of the County of Sacramento and I am over the age of 18 years, and not a party to the within action. My place of employment is 980 Ninth Street, Suite 300, Sacramento, California 95814.

On March 2, 2015, I served the:

SCO Comments
Collective Bargaining and Collective Bargaining Agreement Disclosure
09-4425-I-17 and 10-4425-I-18
Government Code Sections 3540-3549.9
Statutes 1975, Chapter 961; Statutes 1991, Chapter 1213
Fiscal Years 2002-2003 through 2005-2006
Sierra Joint Community College District, Claimant

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

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on March 2, 2015 at Sacramento, California.



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COMMISSION ON STATE MANDATES

Mailing List

Last Updated: 2/3/15

Claim Number: 09-4425-I-17 and 10-4425-I-18

Matter: Collective Bargaining and Collective Bargaining Agreement Disclosure

Claimant: Sierra Joint Community College District

TO ALL PARTIES, INTERESTED PARTIES, AND INTERESTED PERSONS:

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