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8 *Department of Finance, Michael Genest, and*
Controller Chiang

10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 COUNTY OF SACRAMENTO

14 CALIFORNIA ASSOCIATION OF
15 PROFESSIONAL SCIENTISTS,

16 Petitioner,

17 v.

18 STATE OF CALIFORNIA,
19 DEPARTMENT OF PERSONNEL
ADMINISTRATION; DAVID GILB,
20 DIRECTOR OF DEPARTMENT OF
PERSONNEL ADMINISTRATION;
21 STATE OF CALIFORNIA DEPARTMENT
OF FINANCE; MICHAEL GENEST,
22 DIRECTOR OF FINANCE; STATE
CONTROLLER JOHN CHIANG; and
23 DOES 1 THROUGH 10, INCLUSIVE,

24 Respondents.

34-2008-00014476-CU-WM-GDS

**FINANCE'S REPLY TO CAPS'
SUPPLEMENTAL OPENING BRIEF**

Date: April 24, 2009
Time: 10:30 a.m.
Dept: 33
Judge: The Honorable Lloyd G.
Connelly
Trial Date: None
Action Filed: June 27, 2008

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INTRODUCTION

Despite having the burden to do so, CAPS cannot provide evidence to establish that there is any ministerial duty on Finance to (1) make any determination under Government Code section 19826 that there are funds in existing appropriations to pay for salary increases or (2) recommend that the Legislature make appropriations for the salary increases in upcoming budget negotiations.

Also, CAPS has not presented any evidence that contradicts the sworn testimony of Mr. Lynn regarding the role of the Budget Act Log in determining the amount of the appropriation in Budget Item 9800. CAPS also has not presented any evidence that contradicts the testimony of Mr. Lynn that all of the money appropriated in Budget Item 9800 is obligated for a specific purpose as reflected in the DPA Budget Act Log for the applicable fiscal year.

In sum, despite being given every opportunity to develop facts to support its theory that Finance has a ministerial duty to help the scientist supervisors get a pay raise, CAPS has failed to do so, and therefore, the petition must be denied.

LEGAL ARGUMENT

15 **I. CAPS MISCHARACTERIZES FINANCE'S POSITION REGARDING THE AVAILABILITY**
16 **OF FUNDS IN BUDGET ITEM 9800 FOR THE RECOMMENDED SALARY INCREASES.**

17 CAPS claims that Finance has taken a position that because the totals reflected in the
18 "Budget Log and the 9800 Item match – unless the salary increases are specifically listed on the
19 Budget Log, they cannot be paid." (CAPS Supplemental Brief in Support of Petition (CAPS
20 Supp. Brief), at p. 5:25-26.) This is an incorrect simplification of Finance's position.

21 The reason that Finance has repeatedly informed CAPS that there is no money available to
22 fund the salary increases through the current Budget Item 9800 is because the money in that item
23 is obligated for other purposes. Specifically, the money appropriated in Budget Item 9800 is
24 required to be used for the purposes described in the Budget Act Log because those amounts
25 reflect legislatively approved memoranda of understanding between the state and represented
26 employees as well as pay letters issued by the Director of DPA. To date, the DPA Budget Act log
27 does not contain a compensation increase for the scientist supervisors. As a result, there is no
28 money available in the Budget Item 9800 for such an increase.

1 Finance has explained that the money appropriated in Budget Item 9800 “match[es]” the
2 corresponding Budget Act Log in order to explain how the Legislature determines how much
3 money to appropriate in 9800 and to establish that there is no “extra” money in Budget Item 9800
4 available to fund the salary increases they desire for the scientist supervisors. If an order is issued
5 requiring that money be taken out of Budget Item 9800 for the scientist supervisors, the Court
6 will inevitably cause the state to be “short” in paying the compensation increases for other
7 represented employees or excluded employees who have either (1) obtained a legislatively
8 approved and ratified MOU or (2) obtained a pay letter from DPA’s Director that permits the
9 payment. The scientist supervisors are attempting to make an end-run around the legislative
10 process by filing this petition instead of taking steps to have money for their raises added to the
11 Budget Act log. It would be unfair to punish the employee groups¹ who have obtained a
12 legislative appropriation through Budget Item 9800 for their compensation increases by taking
13 away their money and giving it to the scientist supervisors.

14 **II. FINANCE DOES NOT REQUIRE A “SPECIFIC APPROPRIATION” BE MADE BEFORE**
15 **THE RECOMMENDED SALARY INCREASES CAN BE PAID.**

16 CAPS contends that Finance requires a “specific appropriation” be made before the
17 recommended salary increases can be paid. (CAPS Supp. Brief, at p. 6:10-11.) CAPS’
18 contention is incorrect and misstates Finance’s position.

19 At no time – either in its legal briefs or during discovery – has Finance ever stated that it
20 requires a “specific appropriation” be made before the recommended salary increases can be paid
21 to the scientist supervisors. Budget Item 9800 represents a summary appropriation – meaning, it
22 is a budget item that simply shows a total without the various items of expenditure broken out.
23 During his deposition, Tim Lynn, the Assistant Program Budget Manager at Finance, explained
24 that while Budget Item 9800 doesn’t specifically detail the contents of the DPA Budget Act Log,
25 the log is relied upon in determining the amount of the appropriation:

26 ¹ Additionally, the employee groups who have obligated funds for compensation increases
27 pursuant to Budget Item 9800 and the DPA Budget Act Log are not parties to this proceeding,
28 and would have an interest to protect if the court were to decide that the funds in the Budget Item
9800 that are obligated to them could be used for other purposes.

1 There are no such things as line items in the Budget Act anymore. What
2 we have is a summary document [referring to the Budget Act] and a
3 summary appropriation [referring to Budget Item 9800] for which this
4 document [referring to the Budget Act Log] is the supporting information.

(Lynn Depo., attached as Exhibit 2 to Graham Dec), at p. 54:16-25.)

5 However, before a salary increase for a particular employee group can be paid, the increase
6 must be accounted for on the DPA Budget Act Log. Since there is no money for the scientist
7 supervisors on the current DPA Budget Act Log, there is no funding for such an increase
8 available through the appropriation in Budget Item 9800.

9 **III. CAPS' ATTORNEY IS NOT COMPETENT TO ANALYZE WHETHER THERE IS**
10 **SUFFICIENT FUNDING AVAILABLE FOR THE SALARY INCREASES, AND THEREFORE**
11 **HIS DECLARATION MUST BE STRICKEN.**

12 In support of CAPS' supplemental opening brief, Attorney Gerald James submitted a
13 declaration that consisted of nothing more than improper speculation about the existence of funds
14 to pay for the recommended salary increases for the scientist supervisors.

15 Specifically, Attorney James states that after "review[ing]" the DPA Budget Act Log for
16 Fiscal Year 2008-2009, he is "aware that not all of the salary increases contemplated by the [log]
17 supervisory engineers and managerial engineers have been paid in full even though the Budget
18 Act Log lists July 1, 2008 as the effective date." (Declaration of Gerald James (James Dec.),
19 at ¶ 2.) Based on this analysis, he concludes that "[Budget Item] 9800 ... contains both special
20 and general fund unspent funds which may be used to pay the increased supervisory scientist
21 salaries." (*Ibid.*) However, because Attorney James cannot establish that he possesses the
22 expertise to provide such an analysis, and because there is no foundation for the factual
23 assertions, Finance requests that this Court strike paragraph 2 of the declaration and its contents
24 from the record.

25 A party may move to strike inadmissible evidence so long as it is "timely made and so
26 stated as to make clear the specific ground." (Evid. Code, § 353, subd. (a).) In other words, the
27 motion must point to the specific ground of the objection, and the particular portion of the
28 evidence deemed objectionable. (See *Lucy v. Davis* (1912) 163 Cal. 611, 615 ["A motion to be

1 available must be directed with precision to the testimony which the moving party desires the
2 court to eliminate.”].) Often, a motion to strike is the only remedy available to a party where
3 testimony is given before a proper objection can be made or ruled upon, such as in this case,
4 where counsel has submitted a declaration in support of his supplemental opening brief.

5 Finance objects to Attorney James’ declaration for the following reasons. First, the
6 statement that there is money that can be seized from the obligated funds belonging to the
7 engineering classifications in order to fund the recommended salary increases for the scientist
8 supervisors is an inadmissible legal conclusion. (*Adams v. City of Fremont* (1998)
9 68 Cal.App.4th 243, 266 [“Opinion testimony is inadmissible and irrelevant to adjudging
10 questions of law.”].) Second, absent from Attorney James’ declaration is any evidence that he
11 has personal knowledge that the funds for the salary increases obligated to the engineering
12 classifications have not been exhausted. (Evid. Code, § 702 [“[T]he testimony of a witness
13 concerning a particular matter is inadmissible unless he has personal knowledge of the matter.”].)
14 Third, the budgetary and fiscal process is complicated and far exceeds the subjects appropriate for
15 lay testimony. (Evid. Code, § 802 [witness must state “his special knowledge, skill, experience,
16 training and education” upon which his opinion is based]; § 803 [court may exclude opinion
17 testimony based on matter that is not a proper basis for such an opinion].) There is no evidence
18 that Attorney James has the specialized knowledge of the budget process or current fiscal
19 condition of the state’s treasury that would potentially qualify him to offer an opinion that the
20 state has extra money available to give raises to CAPS .

21 For these reasons, paragraph 2 of Attorney James’ declaration should be stricken from the
22 record and not considered as evidence in this case.

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1 **CONCLUSION**

2 CAPS simply cannot meet its burden to establish that Finance has a ministerial duty to pay
3 the recommended salary increases for the scientist supervisors. Further, CAPS cannot
4 demonstrate that there are sufficient funds in Budget Item 9800 to provide the requested raises, or
5 that Finance must perform a particular duty to ensure that such increases are paid. As a result,
6 CAPS petition for writ of mandate should be denied in its entirety.

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8 Dated: April 9, 2009

Respectfully Submitted,

9 EDMUND G. BROWN JR.
10 Attorney General of California
11 JONATHAN K. RENNER
12 Supervising Deputy Attorney General

13 

14 KIMBERLY J. GRAHAM
15 Deputy Attorney General
16 *Attorneys for Respondents*

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DECLARATION OF SERVICE BY OVERNIGHT COURIER

Case Name: **California Association of Professional Scientists v. State of California, et al. (DOF)**

No.: **34-2008-00014476-CU-WM-GDS**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is: 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550.

On April 9, 2009, I served the attached **Finance's Reply to CAPS' Supplemental Opening Brief** by placing a true copy thereof enclosed in a sealed envelope with the **Golden State Overnight** Courier Service, addressed as follows:

Gerald James
Labor Relations Counsel
Law Office of Gerald James
660 J Street, Suite 480
Sacramento, CA 95814

Jennifer M. Garten
Department of Personnel Administration -
Sacramento
Legal Division
1515 "S" Street, North Building, Suite 400
Sacramento, CA 95814-7743

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on April 9, 2009, at Sacramento, California.

Scott De Medeiros

Declarant

Scott De Medeiros

Signature