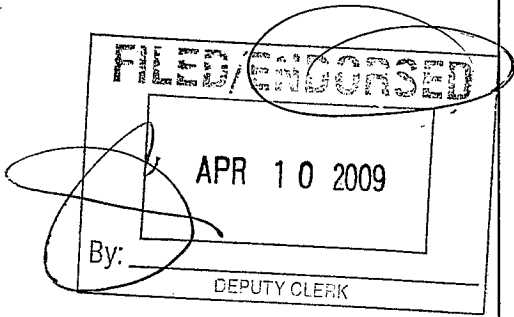


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8 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 IN AND FOR THE COUNTY OF SACRAMENTO
10

11 CALIFORNIA ASSOCIATION OF
12 PROFESSIONAL SCIENTISTS

13 Petitioner,

14 v.
15

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

21 Respondents.
22
23

CASE NO.
34-2008-00014476-CU-WM-GDS

**PETITIONER CAPS' REPLY TO
SUPPLEMENTAL BRIEFS OF DPA
AND DEPARTMENT OF FINANCE IN
OPPOSITION TO PETITION FOR
WRIT OF MANDATE**

Date: April 24, 2009
Time: 10:30 a.m.
Dept: 33

Honorable Lloyd G. Connolly

24 **INTRODUCTION**
25

26 In opposition, neither the Department of Finance (Finance) nor the Department of
27 Personnel Administration (DPA) contest the California Association of Professional Scientists
28 (CAPS) position that state supervisory scientists are legally entitled to the salaries set forth in the

1 DPA Director's Decision of April 28, 2008. As such, the declaratory relief requested by CAPS,
2 confirmation that the increased salaries for fourteen classes of state supervisory scientists at the
3 rate established by the DPA Director's April 28, 2008 Decision are a legal obligation of the state,
4 is appropriate.

5 Finance and DPA each contend there is not an appropriation to pay the increased
6 supervisory scientists' salaries and that Finance and DPA cannot be compelled to include the
7 salary increases in the proposed budget. They note that the setting of salaries by DPA is not itself
8 an appropriation, the increased salaries cannot be paid without a legislative appropriation for that
9 purpose, and that the courts cannot compel the Legislature to appropriate funds. None of these
10 points address CAPS' writ petition.

11 CAPS has consistently acknowledged that there must be an appropriation to pay the
12 increased salaries and that the courts cannot compel the Legislature to make such an
13 appropriation. However, in this case, the money to pay the salary increases has been
14 appropriated. Here, CAPS seeks payment of the increased salaries out of the 9800 Item of the
15 State Budget Act. Contrary to the assertion of Finance, CAPS' petition does not ask this court to
16 "change the state's budget". (Finance's Supplemental Brief in Opposition, p. 1, ln. 18 - 20.) The
17 9800 Item contains funds that have been appropriated for increasing the salaries of state
18 employees. Finance acknowledges that "not all of the money that is obligated in Budget Item
19 9800 is used in any given fiscal year." (Finance's Supplemental Brief in Opposition, p. 6, ln. 2 -
20 7 citing the Lynn Declaration at Paragraph 12, and the Lynn Depo. at p. 35:7-22.) It is this
21 money in the 9800 Item that CAPS seeks to have applied to state supervisory scientists consistent
22 with DPA's decision.

23 Finance takes the position that all of the 9800 Item has been "obligated" for employee
24 compensation increases. This apparently was a unilateral decision by Finance to "obligate" funds
25 in their minds. Nothing prevents using these funds to pay salary increases. Indeed, that is what
26 the appropriation in the 9800 Item is for. The question presented to this Court is whether
27 Finance's position regarding "obligated" money is a valid bar from utilizing unspent money in
28 the 9800 Item to pay state supervisory scientists the salaries determined by the DPA. CAPS

1 contends that because the Legislature did not restrict the expenditures in the manner urged by
2 Finance, that the unspent money is available to pay the increases. The current budget act for
3 2008 - 2009 and appropriation language would not need to be amended at all to authorize these
4 expenditures from the 9800 Item. This Court's order to pay the increased salaries out of the
5 appropriation for salary increases will therefore not run afoul of any separation of powers issues.

6 If the Court declines to find an appropriation is available to pay the increased salaries,
7 DPA and Finance have a duty under the law to present the increased salaries to the Legislature
8 for the Legislature's consideration. Finance argues that it cannot be compelled to include the
9 items in a budget proposal as that would infringe upon Finance's exercise of discretion. This
10 argument is wholly inconsistent with the position taken by Finance in this litigation that it has no
11 role in determining compensation of state employees. Under the state's budget process, state
12 agencies, including the DPA are to submit all proposed expenditures for the year, including all
13 sums necessary for employee compensation. Since the DPA Director made the salary
14 determinations for these supervisory scientists, DPA and Finance have a statutory obligation to
15 include the increases for the Legislature's consideration.

16 17 II. ARGUMENT

18 A. DPA HAS AGAIN CONFIRMED THAT IT HAS ADJUSTED THE 19 SALARIES, MAKING DECLARATORY RELIEF AND A WRIT OF 20 MANDATE APPROPRIATE

21 Finance correctly notes that it does not have the power to set employee compensation,
22 rather setting compensation is a legislative function which has been delegated to DPA.
23 (Finance's Supplemental Brief in Opposition, p. 12, footnote 7.) DPA acknowledges that the
24 DPA Decision adjusts the salaries for the fourteen supervisory classifications, arguing only that
25 the decision does not create an appropriation for those increases. (DPA's Supplemental Brief in
26 Opposition, p. 5, ln. 11 - 13.)

27 CAPS is entitled to a declaration that the salaries as determined in the April 28, 2008
28 DPA Decision are the salaries that the employees are legally entitled to, subject to an

1 appropriation. CAPS is further entitled to a writ of mandate directing compliance with the law to
2 pay the salaries called for in the April 28, 2008 decision whenever compliance can be achieved
3 without violating the salary setting statute's restriction against adjustments in excess of existing
4 appropriations. (Gov. Code §19826; *State Trial Attorneys' Assn. v. State of California* (1976) 63
5 Cal.App.3d 298, 305.)

6 In opposition DPA again questions the retroactivity of its salary setting decision. CAPS
7 sought retroactivity to the 2005 - 2006 fiscal year before the DPA and in its request for a hearing.
8 DPA contends that there is no mandate to provide retroactivity to that year for the salary setting
9 decision. The record is clear that CAPS demanded the salary increases sought here continuously,
10 including 2005 - 2006. (See "Salary Relationship Issues", November 29, 2005 Supervisors
11 Proposal, Exhibit E the Declaration of Christopher J. Voight, filed June 27, 2008.) Within the
12 delegation of salary setting authority, from 2005 forward, DPA lacked the discretion to set
13 salaries in a manner inconsistent with the mandate of paying like pay for like work, therefore the
14 retroactive application of the salary setting decision is mandatory, including the 2005 - 2006
15 fiscal year and each subsequent fiscal year. (Gov. Code §19826; *State Trial Attorneys' Assn. v.*
16 *State of California* (1976) 63 Cal.App.3d 298.)

17
18 **B. THE INCREASED SALARIES MAY BE PAID OUT OF THE 9800 ITEM -**
19 **FINANCE'S POSITION THAT THE FUNDS ARE "OBLIGATED" IS NOT**
20 **SUPPORTED BY THE LANGUAGE OF THE STATE BUDGET ACT**

21 In opposition, Finance and DPA say that if a salary increase is not in the "Budget Act
22 Log", it cannot be paid. In support of this argument Finance says that "[T]he 'Budget Act Log' is
23 shared with the Legislature to use as a foundation for determining how much money is needed in
24 the budget for employee compensation increases." (Finance's Supplemental Brief in Opposition,
25 p. 3, ln. 17 - 26.) Finance further says that "[T]he amounts contained on the DPA Budget Act
26 Logs are considered 'obligated' money by Finance." (Finance's Supplemental Brief in
27 Opposition, p. 3, ln. 23 - 26.)

28 Here, the Legislature did not approve the "Budget Act Log" rather the Legislature

1 approved a block of money for employee compensation increases. The issue here is whether the
2 "Budget Act Log" which was presented to the Legislature by Finance as the building blocks of
3 the 9800 Item can be considered "obligations" which would bar there use for employee
4 compensation increases from the 9800 Item for increases not contained in the Budget Act Log.
5 To resolve this issue, we need look no further than the express language of the 2008 - 2009 State
6 Budget Act.

7 In approving the 2008 - 2009 State Budget Act (Assembly Bill 1751, Statutes of 2008),
8 the Legislature appropriated funds for salary increases for employees excluded from collective
9 bargaining "in accordance with the salary and benefit schedules established by the Department of
10 Personnel Administration." (See Petitioner's Exhibit 6 to the Deposition of Timothy Lynn,
11 Attachment A to the Declaration of Gerald James.) The Legislature therefore approved a block
12 of money for employee compensation increases. In opposition, Finance did not point to any
13 provision in the Budget Act or law to support its position that the Budget Act Log is a restriction
14 on the use of funds in the 9800 Item. It should be noted that the increased salaries of the fourteen
15 classifications of state scientist supervisors as covered by the April 28, 2008 Director's Decision
16 clearly would fall within the definition of excluded employees whose salary and benefit
17 schedules were established by the DPA.

18 Practically, CAPS acknowledges that the 9800 Item is finite and does have a tie to the
19 approved labor contracts and pay plan for excluded employees. As argued by Finance and DPA,
20 and as supported by the statutorily defined budget process, the 9800 Item is made up of DPA's
21 expected salary increases. However, if those funds are not to be used for the salary increases that
22 made up the "building blocks" of the 9800 Item, we turn to the language of the State Budget Act
23 to determine whether they can be used to fund a different salary increase for excluded employees
24 "established by the Department of Personnel Administration". The answer must be "yes" as the
25 appropriation language in the State Budget Act would not need to be changed one word to
26 authorize the increased salaries at issue here.

27 As listed in the Declaration of Gerald James filed with CAPS' supplemental brief, CAPS
28 has identified specific portions of the 9800 Item which have not been spent. Further, Finance

1 acknowledges that “not all of the money that is obligated in Budget Item 9800 is used in any
2 given fiscal year.” (Finance’s Supplemental Brief in Opposition, p. 6, ln. 2 - 7 citing the Lynn
3 Declaration at Paragraph 12, and the Lynn Depo. at p. 35:7-22.) It is therefore not in dispute that
4 there are currently funds available which have been approved for salary increases. CAPS urges
5 that those unspent funds must be used to pay the increased supervisory scientist salaries in
6 accordance with the DPA salary setting decision as “compliance can be achieved without
7 violating the statute’s restriction against adjustments in excess of existing appropriations.” (*State*
8 *Trial Attorneys’ Assn. v. State of California* (1976) 63 Cal.App.3d 298, 305.) Once the
9 Legislature has authorized the use of these funds for salary increase purposes, “a court
10 transgresses no constitutional principle when it orders the State Controller or other similar
11 official to make appropriate expenditures from such funds.” (*Mandel v. Myers* (1981) 29 Cal.3d
12 531.)

13
14 **C. DPA and FINANCE CAN BE COMPELLED TO PLACE THE APPROPRIATION
15 BEFORE THE LEGISLATURE**

16 The DPA argues in opposition that it retains considerable discretion in establishing
17 salaries. (DPA’s Supplemental Brief in Opposition, p. 5, ln. 21 - p. 6, ln. 6.) While this
18 statement is generally true, the DPA Director’s Decision continues unless and until DPA makes a
19 different finding regarding the relationship of supervisory engineering and supervisory scientists.
20 The DPA salary setting decision is a “quasi-legislative” decision setting the salaries of the
21 supervisory scientists involved and which involves the formulation of rules to apply in future
22 cases. (*Lowe v. California Resources Agency* (1991) Cal.App.4th 1140, 1149.)

23 In preparing the 2009 - 2010 Budget Act Log, despite the salary determinations in the
24 April 28, 2008 decision, DPA declined to include the required increases for supervisory
25 scientists. As DPA notes in its opposition, DPA’s exercise of the quasi-legislative salary setting
26 is subject to the ultimate authority of the Legislature to reject or alter such exercise of authority
27 through appropriate legislation. (DPA’s Supplemental Brief in Opposition, p. 4, ln. 15 - 18 citing
28 *Tirapelle v. Davis* (1993) 20 Cal.App.4th 1317, 1323, fn. 8.)

1 The Legislature may approve or may decline to approve the salary increase, but following
2 the state's budget process, they must be presented with the proposed salary increases as they were
3 "increases for excluded employees ... ordered by the director of DPA." (Finance's Supplemental
4 Brief in Opposition, p. 3, ln. 9 - 13 citing the Lynn Depo. at pp. 10:1-11:8., 11:24-12:13.)

5 When the Legislature granted the DPA the salary setting function by passing Government
6 Code section 19826, it put DPA in a position to determine the salaries and thus the legal
7 obligations of the state. Utilizing the process described by Timothy Lynn of Finance, each year
8 the DPA provides to Finance the funding amounts it needs to pay for new employee
9 compensation items. (See Petitioner's Exhibit 5, to the December 5, 2008 Deposition of
10 Timothy Lynn; Attachment A to the Declaration of Gerald James.) This is consistent with
11 Government Code section 19835.5 which requires each agency to call attention to the sums
12 necessary for employee compensation and with Government Code section 13320 which requires
13 every state agency to submit to Finance a complete and detailed budget setting forth all proposed
14 expenditures for the year. Once DPA has determined the salaries for employees excluded from
15 collective bargaining, under Government Code section 13322, Finance has a ministerial duty to
16 include these items in the proposed state budget.

17 This statutory scheme and method must be followed to ensure the Legislature can either
18 approve the payments for the salary obligations identified by DPA through an appropriation or to
19 reject those increased salaries. Under Government Code sections 19826 and 13322, the Court
20 may compel DPA and Finance to include the proposed funding in the 9800 Item of the Budget
21 Act or separately for the Legislature's consideration. This in no way would infringe on the
22 Legislature's ability to approve or reject an appropriation, would not infringe on DPA's salary
23 setting ability, or infringe on Finance as Finance admits it has "no role" in determining the
24 amount of employee compensation.

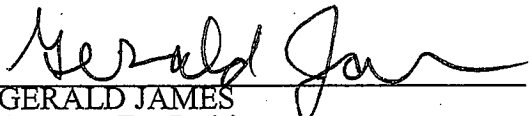
25 In *State Trial Attorneys' Assn. v. State of California*, the court granted a writ of mandate
26 directing compliance with the Section 18550 (now 19826) whenever compliance could be
27 achieved without violating the statute's restriction against adjustments in excess of existing
28 appropriations. (*State Trial Attorneys' Assn. v. State of California* (1976) 63 Cal.App.3d 298,

1 305.) The court stated that the State Personnel Board could lawfully adjust salaries at issue in the
2 expectation of adequate appropriations for the fiscal year 1977 - 1978. CAPS is entitled to a
3 similar writ and order. DPA may be ordered to adjust the salaries in the expectation of adequate
4 appropriations for the 2009 - 2010 fiscal year. Under Government Code sections 19826 and
5 13322, the Court may compel DPA and Finance to include the proposed funding in the budget
6 for the Legislature's consideration.

7
8 **III. CONCLUSION**
9

10 As the DPA has set the increased salaries and an unexhausted appropriation is available
11 to pay the increased salaries, CAPS respectfully claims it is entitled to both declaratory relief and
12 the issuance of a writ of mandate commanding Respondents to comply with their obligations
13 under the law to pay the salaries for the fourteen classifications of supervisory scientists as
14 determined by the DPA in the April 28, 2008 Decision.

15
16
17 Dated: April 10, 2009


18 GERALD JAMES
19 Attorney For Petitioner
20 California Association of Professional Scientists
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1
2 **PROOF OF SERVICE BY PERSONAL DELIVERY**
3

4 I declare that I am employed in the County of Sacramento, California. I am over the age
5 of 18 years and not a party to the within entitled cause. The address of my business is 660 J
6 Street, Suite 480, Sacramento, California, 95814.

7 On April 10, 2009, I served the following documents:

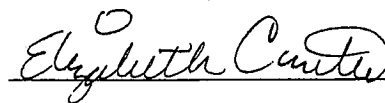
8 **PETITIONER CAPS' REPLY TO SUPPLEMENTAL BRIEFS OF DPA AND**
9 **DEPARTMENT OF FINANCE IN OPPOSITION TO PETITION FOR WRIT OF**
10 **MANDATE**

11 on the parties listed below by delivering a true copy thereof to the following persons:

12 Jennifer Garten
13 State of California
14 Department of Personnel Administration
15 1515 S Street, North Bldg., Ste. 400
16 Sacramento, CA 95811-7246
17 *Attorney for Department of Personnel Administration and Director David Gilb*

18 Kimberly J. Graham
19 State of California
20 Department of Justice
21 1300 I Street, Suite 125
22 Sacramento, CA 95814
23 *Attorney for Department of Finance, Director Michael Genest, and State*
24 *Controller John Chiang*

25 I declare under penalty of perjury under the laws of the State of California that the
26 foregoing is true and correct. Executed on April 10, 2009 at Sacramento, California.
27

28


Elizabeth Cantu