

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

CALIFORNIA ASSOCIATION OF
PROFESSIONAL SCIENTISTS,

Plaintiff and Respondent,

v.

DEPARTMENT OF FINANCE; ET AL.,

Defendants and Appellants.

Case No. C063118

Sacramento County Superior Court
Case No. 34-2008-00014476-CU-WM-GDS
The Honorable Lloyd G. Connelly, Judge

APPELLANT'S OPENING BRIEF

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INTRODUCTION

The trial court erred by ordering the Department of Finance (Finance) to inform the Legislature that an appropriation is needed to fund pay raises for members of the California Association of Professional Scientists (CAPS) because Finance has no ministerial duty to do so. The trial court based its ruling on its interpretation of Government Code sections 19826 and 18500. But neither of those sections require Finance to do what the court ordered. The trial court also erred because its judgment necessarily requires that Finance exercise its discretion in a particular manner, which cannot be compelled via a petition for writ of mandate. Therefore, the judgment and peremptory writ of mandate must be reversed.

STATEMENT OF APPEALABILITY

This appeal is from a final judgment entered on July 28, 2009, granting a peremptory writ of mandate for Plaintiff and Respondent. That judgment is made appealable by Code of Civil Procedure section 904.1. (*Professional Engineers in California Government v. Kempton* (2007) 40 Cal.4th 1016, 1029.)

FACTUAL BACKGROUND

I. CAPS' CHALLENGE TO THE SALARIES OF SCIENTIST SUPERVISORS.

CAPS is a supervisory employee organization under Government Code section 3527, subdivision (c), and represents members who are employed in supervisory scientific classifications. (CT 4.)

In November 2006, CAPS challenged the salary ranges for fourteen supervisory scientist classifications under Government Code section 19826 claiming that the Department of Personnel Administration (DPA) violated the "legislative mandate" of "pay[ing] like salaries for comparable work." (CT 9-10.) In response to CAPS' challenge, the Director of DPA, David

Gilb, established an investigative hearing panel to review the salary structure for scientist supervisor classifications. After holding various hearings throughout 2007, the panel submitted a final report to Director Gilb in February 2008. (CT 10.)

II. DPA'S REPORT ON CAPS' CHALLENGE AND ITS CORRESPONDENCE TO FINANCE RECOGNIZING THAT THE PAY RAISE RECOMMENDATION WAS CONTINGENT ON THE EXISTENCE OF APPROPRIATIONS TO FUND IT.

On April 28, 2008, DPA Director Gilb sent Finance a copy of the department's report regarding the salary hearing conducted by the investigative hearing panel under Government Code section 19826. (CT 43.) In the report, DPA concluded that the factual evidence showed that the duties and responsibilities of supervising scientist classifications were similar but not identical to those of supervising engineering classifications. (CT 40.) Based on that finding, DPA recommended that adjustments be made to the salaries of scientist supervisor classifications. (CT 40.) In doing so, DPA acknowledged that, consistent with Government Code section 19826, a determination needed to be made as to "whether the recommended pay adjustment is within existing salary appropriations." (CT 42.)

DPA stated that it would forward a copy of the report to Finance "for its consideration." In its memorandum to Finance enclosing the report, DPA again referenced the need under section 19826 for a determination as to whether the recommended salary adjustments were within existing salary appropriations. (CT 427, 470.)

III. FINANCE DETERMINED THAT FUNDS FOR THE RECOMMENDED SALARY ADJUSTMENTS HAD NOT BEEN APPROPRIATED.

In response to Director Gilb's memorandum, Tim Lynn, the Assistant Program Budget Manager at Finance, reviewed the 2007-2008 budget to

determine whether there was any legislative intent to provide the compensation increase sought by CAPS in the state budget. (CT 430.) In making this determination, Lynn reviewed the 2007-2008 DPA Budget Act Log,¹ which did not include any reference to a compensation increase for scientist supervisors. (CT 430-432.) Lynn also considered the language in the 2007-2008 budget act expressly stating the Legislature's "intent to reject any proposed augmentations" that are not included in Budget Item 9800 (which uses the estimates in the DPA Budget Act Log to determine the amount of the appropriation). (CT 514-516, 530-536, 566.)

Thus, having reviewed the 2007-2008 DPA Budget Act Log and not finding any appropriation for the recommended salary increase, Lynn drafted a letter on behalf of Director Genest in response to Director Gilb's memorandum. (CT 210.) The letter informed DPA that Government Code section 19826 prohibited DPA from making adjustments to salaries that required expenditures in excess of existing appropriations. (CT 210.) And, most importantly, the letter stated that there were no funds appropriated in either the department budgets or in the state budget for the recommended salary increases. (CT 210.)

DPA thereafter informed CAPS in a letter dated June 27, 2008, that there was no money "identified" by Finance for the recommended pay adjustments; and reminded CAPS that "when funds are unavailable for

¹ The "Budget Act Log" consists of DPA's estimated totals for employee compensation increases that were agreed to by DPA and employee unions during the collective bargaining process and which were later approved by the Legislature. (CT 564.) DPA presents the "Budget Act Log" to Finance, who reviews it for accuracy and amends it to include provisions over which DPA does not have responsibility, such as allocations for judicial salaries. (CT 412-415.) The "Budget Act Log" is then presented to the Legislature to use as a foundation for determining how much money is needed in the budget—specifically, Budget Item 9800—for employee compensation increases. (CT 412.)

salary adjustments, expenditures must be approved by the Legislature.”
(CT 198-206.)

PROCEDURAL HISTORY

On June 27, 2008, CAPS filed a verified petition for writ of mandate in Sacramento County Superior Court requesting that Finance be compelled to perform a “ministerial duty to determine whether the increases in salaries called for in the DPA Director’s Decision ... can be paid out of existing appropriations.” (CT 17.) The petition also alleged that Finance had “a duty to include in the proposed budget for 2008-2009 for the Legislature’s consideration” the amount needed for an appropriation to pay for the recommended salary increases. (CT 18.) Finance answered the verified petition on August 25, 2008. (CT 1-19, 174-185.)

After extensive briefing by the parties (CT 160-173, 186-211, 228-277, 278-288), the trial court held a hearing on September 19, 2008, during which it declined to issue a ruling on the merits of the writ. (RT 1, 19-24; CT 289.) Instead, the trial court granted CAPS leave to conduct discovery. (RT 1, 19-24; CT 289.)

After conducting the discovery, the parties filed additional briefing with the trial court. (CT 290-298, 370-379, 492-513, 639-645, 646-650, 653-661.) A second hearing was held on April 24, 2009, during which the trial court orally concluded that there was an

implied finding by the legislature as part of the 19826 that when a determination has been made that salary adjustments are needed to comport with the State Constitution of like salaries for comparable duties that *the Department of Personnel Administration has an obligation to present that finding with an appropriate request to the legislature for funding.*

(RT 71-72; CT 662) (emphasis added). In its oral ruling, however, the trial court did not discuss any implied obligation on Finance to request funding for the recommended salary increases from the Legislature. The trial court

then directed CAPS to prepare a judgment that was consistent with the oral ruling. (RT 72; CT 662.)

The parties attempted to prepare a proposed judgment and writ, but were ultimately unable to agree on a final version. (CT 663-681.) Thus, the trial court issued a judgment on July 28, 2009, concluding that Finance and DPA were obligated to present information to the Legislature indicating that funds needed to be appropriated for the recommended salary increases. The trial court reasoned that “withholding that information from the Legislature and allowing the recommended salary adjustments to founder would degrade the statutory like-pay-for-like-work principle section 198[26] and defeat the related legislative purpose in section 18500.” (CT 684.)

In issuing the peremptory writ of mandate, the trial court commanded Finance to “include accurate information furnished by [DPA] about the amount of funds needed for the salary adjustments in a Budget Act Log or other document presented to the Legislature for its consideration in appropriating funds for state employees’ salary increases.” (CT 687.) The trial court also commanded Finance to “continue to present this information to the Legislature in a suitable document until the Legislature appropriates funds needed to implement the recommended adjustments pursuant to the like-pay-for-like-work principle in subdivision (a) of Government Code section 19826. . . .” (CT 687.)

STANDARD OF REVIEW

The interpretation of various state statutes and appropriations are reviewed de novo. (*Greenwood Addition Homeowners Assn v. City of San Marino* (1993) 14 Cal.App.4th 1360, 1367 [de novo standard applies where issues concern the meaning and effect of statutes, and whether they impose the duties the trial court directed to be discharged].) Factual findings, to the extent they are challenged, are reviewed for substantial evidence. (*Travis v.*

Board of Trustees of California State University (2008) 161 Cal.App.4th 335, 340.)

LEGAL ARGUMENT

I. STANDARD FOR MANDAMUS RELIEF

Mandamus lies to compel the performance of a clear, present, and ministerial duty where the petitioner has a beneficial right to performance of that duty. (*Carrancho v. California Air Resources Bd.* (2003) 111 Cal.App.4th 1255, 1264-65.) To warrant relief by writ of mandate, a petitioner must demonstrate that the public entity had a ministerial duty to perform, that is, a duty that the entity is required to perform in a prescribed manner without any exercise of judgment or opinion concerning the propriety of the act. (*California Ass'n for Health Services at Home v. Department of Health Services* (2007) 148 Cal.App.4th 696, 704).

An action in ordinary mandamus is proper where the claim is that an agency has failed to act as required by law, and it will issue only to compel the performance of an act specially enjoined by law. (*Conlan v. Bonta* (2002) 102 Cal.App.4th 745, 752.) Courts have held that if a statute clearly defines the specific duties or course of conduct that a governing body must take, it creates a ministerial duty and eliminates any element of discretion. (*Rodriguez v. Solis* (1991) 1 Cal.App.4th 495, 504-05.) “In short, where a statute requires an officer to do a prescribed act on a prescribed contingency, his functions are ministerial.” (*People ex rel. Fund American Companies v. California Ins. Co.* (1974) 43 Cal.App.3d 423, 431-432.)

II. GOVERNMENT CODE SECTION 19826 DOES NOT REQUIRE FINANCE TO PERFORM ANY MINISTERIAL DUTY.

In the peremptory writ of mandate, the trial court commanded Finance to take a specific action in accordance with Government Code section

19826; namely, to inform the Legislature that an appropriation was needed to pay for the recommended salary increases.

But Government Code section 19826 does not require Finance to perform any duty whatsoever. Rather, the section only refers to obligations that DPA is required to perform:

[DPA] shall establish and adjust salary ranges for each class of position in the state civil service subject to any merit limits contained in Article VII of the California Constitution. The salary range shall be based on the principle that like salaries shall be paid for comparable duties and responsibilities. In establishing or changing these ranges, consideration shall be given to the prevailing rates for comparable service in other public employment and in private business. [DPA] shall make no adjustments that require expenditures in excess of existing appropriations that may be used for salary increase purposes.

[DPA] may make a change in salary range retroactive to the date of application of this change.

(Gov. Code, § 19826, subd. (a).) In fact, the section appears in the part of the code addressing the duties of DPA, not Finance. The provisions that address Finance's duties appear in sections 13000 through 13881.

Had the Legislature intended to require Finance (or any other state department) to seek an appropriation for excluded employee salary adjustments made under Government Code section 19826, it could have included language similar to that of Government Code sections 3517.6 and 19829.5. These statutes require DPA to present negotiated salary increases for rank and file employees to the Legislature for approval. But the Legislature did not choose to impose this duty in section 19826, and the trial court erred in concluding that one was implied.

The trial court's conclusion that "[withholding that information . . . would degrade the statutory like-pay-for-like-work principle in section 198[26]. . ." (CT 684) is clearly wrong. Properly construed, the principle the Legislature set forth in section 19826 is that like-pay-for-like-work

should be achieved so long as appropriations exist to fund any pay raise necessary to achieve this goal. And, contrary to the trial court's conclusion, section 19826 operated in the manner the Legislature intended because the section prohibits DPA from making any salary adjustments "that require expenditures in excess of existing appropriations that may be used for salary increase purposes." (Gov. Code, § 19826, subd. (a).) DPA conducted a factual inquiry as to whether a salary adjustment was warranted, but a determination was made that there was no existing appropriation available to fund the salary adjustment. Thus, the obligations and limitations imposed by section 19826 were fully complied with and no further action under the statute is authorized.

In sum, there is nothing in section 19826 that "clearly defines the specific duties or course of conduct that [Finance] must take." (*Rodriguez, supra*, 1 Cal.App.4th at pp. 504-05.) Thus, the trial court erred when it issued a writ of mandate commanding Finance to provide information to the Legislature about the need for an appropriation for the recommended salary increases because it had no ministerial duty to do so. (See *Connolly v. County of Orange* (1992) 1 Cal. 4th 1105, 1115 [agreeing that the county could not be compelled to take a certain action under the Revenue and Taxation Code because the statute required the assessor to perform the duty instead].)

III. GOVERNMENT CODE SECTION 18500 ALSO DOES NOT REQUIRE FINANCE TO PERFORM ANY MINISTERIAL DUTY.

The trial court also based its order that Finance inform the Legislature of the need to appropriate funds for the recommended salary increases on Government Code section 18500:

Again, however, Government Code section 18500 makes no mention of any duty that Finance is required to perform. Rather, section 18500 expresses a legislative goal that the state personnel system ensure that

“[p]ositions involving comparable duties and responsibilities are similarly classified and compensated.” (Gov. Code, § 18500, subd. (c)(1).) In fact, the title of the section is “Enumeration of *objectives*”—it is not an enumeration of ministerial duties. Thus, section 18500 does not create a mandatory duty upon any state department to inform the Legislature of the need to fund any salary increase on the basis of a like-pay-for-like-work issue.² (See *Wilson v. County of San Diego* (2001) 91 Cal.App.4th 974, 980 [noting that statute does not create mandatory duty if it recites legislative goals and policies that must be implemented through a public entity’s exercise of discretion]; see also *County of Los Angeles v. Superior Court* (2002) 102 Cal.App.4th 627, 646 [finding that a statute that expresses a legislative goal does not create a mandatory duty].)

The trial court’s conclusion that “[w]ithholding that information ... would ... defeat the related legislative purpose in section 18500” (CT 684) is wrong because section 18500 provides that the like-pay-for-like-work principle must be tempered by the considerations of what is best for the state. It states “[t]he rights and interests of the state civil service employee are given consideration *insofar as consistent with the best interests of the state.*” (Gov. Code, § 18500, subd. (c)(4); see also *Valenzuela v. State of California* (1987) 194 Cal.App.3d 916, 920 [“Government Code section 18500 enumerates the objectives and purposes of the Civil Service Act. It was enacted to facilitate the constitutional mandate, to promote economy

² The trial court’s reference in the judgment to *State Trial Attorneys’ Association v. State of California* (1976) 63 Cal.App.3d 298 does not support a finding of a ministerial duty on Finance to inform the Legislature of the need for funding the recommended salary increases. Rather, the cited portion of the case only briefly discusses the legislative objective that positions involving comparable duties and responsibilities are similarly classified and compensated. (*Id.* at p. 304.)

and efficiency, and to provide a comprehensive personnel system which balances the rights of the employees ‘with the best interests of the state.’”].)

In the context of making personnel decisions, the courts have recognized that the “best interests of the State” include consideration of whether there are available funds. In *Pacific Legal Foundation v. Brown* (1981) 29 Cal.3d 168, 181-183, the California Supreme Court discussed a constitutional amendment adopted by the voters in 1934—the same year that section 18500 was added to the Government Code—that restructured the civil service system. The Court noted that the ballot argument stated that the civil service system created by the constitutional amendment gave the Legislature “a free hand in setting up laws relating to personnel administration for the best interests of the State, including the setting up of causes for dismissal such as inefficiency, misconduct or *lack of funds*.” (*Ibid.*) (emphasis added).

Thus, section 18500 expressly recognizes that discretion must be exercised in determining whether a recommended salary increase is in the best interests of the state. In this case, in addition to the absence of an existing appropriation, Finance provided evidence to the trial court that it could not recommend the funding of the desired salary increases given the severe fiscal situation that the state was (and still is) facing. Specifically, Finance attached the December 19, 2008 proclamation issued by Governor Arnold Schwarzenegger declaring a “Fiscal Emergency” and which noted, in part, that “within months the State will not be able to meet all of its expenses. . . .”³ (CT 514-516, 554-555.)

³ In fact, when making its oral ruling on the merits, the trial court recognized the state’s fiscal crisis: “Additionally, this argument which is difficult for petitioner in this type of lawsuit any time is difficult now because the financial condition of the state is such, it is difficult, if not impossible, for the Court to make a determination contrary to the assertions
(continued...)

Accordingly, section 18500 cannot create a ministerial duty upon Finance to inform the Legislature of the need to fund recommended salary increases for the scientist supervisor classifications.

IV. THE WRIT IMPROPERLY COMMANDS FINANCE TO EXERCISE ITS DISCRETION IN A PARTICULAR MANNER.

The peremptory writ of mandate commands Finance to inform the Legislature of the need to appropriate money for the recommended salary increases. However, this action may not be compelled by writ of mandate because it requires Finance to exercise its discretion in a particular manner; namely, to recommend funding for a salary increase that would likely be fiscally irresponsible given the state's current financial crisis.

While mandamus will lie to compel a public official to perform an official act required by law (Code of Civ. Proc., § 1085), it may not be used to control an exercise of discretion, i.e., to compel an official to exercise discretion in a particular manner. (*People v. Karriker* (2007) 149 Cal.App.4th 763, 774.) Although a court may issue a writ of mandate requiring legislative or executive action to conform to the law, it may not substitute its discretion for that of legislative or executive bodies in matters committed to the discretion of those branches. For example, in *Serrano v. Priest* (1976) 18 Cal.3d 728, 751, the California Supreme Court noted that "the courts may not order the Legislature or its members to enact or not to enact, or the Governor to sign or not to sign, specific legislation" Similarly, although a court may order a legislative body to perform a nondiscretionary ministerial act, it may not control an official's discretion.

(...continued)

of the Governor through the Department of Finance that these funds are not available in any context because of the final [sic] crisis that the State faces uncertainty with regard to State funding in the short-term and long-term." (RT 69.)

(*Glendale City Employees' Assn., Inc. v. City of Glendale* (1975) 15 Cal.3d 328.)

Here, the peremptory writ of mandate compels Finance to inform the Legislature of the need to appropriate money to fund the recommended salary increases. This essentially requires Finance to exercise its discretion in a particular manner, which, as described above, is contrary to law.

Moreover, Finance acts as the advisor to the Governor on fiscal matters. (Gov. Code, § 13000; see also 58 Cal.Jur.3d. (2008) State of California, § 48.) It is the Governor who ultimately makes the decision as to the budget proposal that is made to the Legislature, not Finance. (Cal. Const., art. IV, § 12, subd. (e); see also *Tirapelle v. Davis* (1993) 20 Cal.App.4th 1317, 1320-21 [discussing Finance's role in state government].) Thus, compelling Finance to make a recommendation that it believes could jeopardize the fragile fiscal state of our current and future budgets would necessarily require Finance to abandon its governmental role.⁴

Based on the foregoing, the trial court improperly compelled Finance to exercise its discretion in a particular manner when it ordered Finance to inform the Legislature of the need to appropriate the amount of money needed to fund the recommended salary increases. And thus the judgment and peremptory writ of mandate must be reversed.

CONCLUSION

The judgment and peremptory writ of mandate issued by the trial court are improper because neither Government Code section 19826 nor 18500 impose a ministerial duty upon Finance to inform the Legislature of

⁴ Also, a recommendation by Finance will not automatically provide the relief that the trial court (and CAPS) intends to compel by issuing the peremptory writ of mandate—namely, a salary increase for scientist supervisors. Even if Finance made the recommendation, there is no guarantee that the Legislature would follow it.

the need to appropriate money to fund pay raises for CAPS supervisory members.

Moreover, in light of current budget crisis—perhaps the worst in California’s history—ordering Finance to make such a recommendation would necessarily require that the department exercise its discretion in a particular manner. This order would require Finance to abdicate its role as the Governor’s advisor on state fiscal and budget matters.

For these reasons, the judgment and peremptory writ of mandate must be reversed.

Dated: May 21, 2010

Respectfully submitted,

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