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Department of Personnel Administration and Director Gilb

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

12 CALIFORNIA ASSOCIATION OF)
13 PROFESSIONAL SCIENTISTS,)

14 Petitioner,)

15 v.)

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.)

Case No. 34-2008-00014476-CU-WM-GDS

**RESPONDENTS DPA AND DIRECTOR
GILB'S OPPOSITION TO VERIFIED
PETITION FOR WRIT OF MANDATE
AND COMPLAINT FOR DECLARATORY
RELIEF**

Date: September 19, 2008
Time: 1:30 p.m.
Dept: 33
Judge: Hon. Lloyd G. Connelly

**Exempt from fees
(Gov. Code, § 6103)**

22
23 **INTRODUCTION**

24 Respondents Department of Personnel Administration (DPA), and DPA's director, David
25 Gilb (collectively DPA Respondents) have fulfilled all of their statutory obligations under
26 Government Code section 19826. At Petitioner California Association of Professional Scientists'
27 (CAPS) request, DPA held a quasi-legislative hearing on whether certain supervisory scientist
28 classifications were performing work comparable to certain supervisory engineering classifications.

1 DPA published its results in its April 28, 2008 Director's Decision, recommending salary
2 adjustments for fourteen supervisory scientist classifications. However, since DPA cannot adjust
3 salaries in excess of existing appropriations and cannot itself appropriate monies, DPA requested
4 from Respondent Department of Finance (DOF), whether there were existing appropriations. DOF
5 determined there were none.

6 However, CAPS now seeks an order to compel DPA Respondents to pay the salaries
7 determined by DPA's Director Decision. CAPS further seeks retroactive application to the fiscal
8 year 2005-2006, and speculative prospective application for the fiscal year 2008-2009. CAPS fails
9 to prove DPA has any ministerial duty to grant retroactive or prospective salary increases. CAPS
10 also fails to prove DPA acted arbitrarily and capriciously with respect to retroactive or prospective
11 salary increases. Accordingly, CAPS Petition for Writ of Mandate and Complaint for Declaratory
12 Relief (Petition) must be dismissed.

13 BACKGROUND FACTS

14 On or about November 3, 2006, CAPS filed a claim with DPA requesting a hearing and
15 salary adjustments for fourteen supervising scientist classifications, pursuant to DPA's authority
16 under Government Code section 19826, subdivision (a). (Request for Judicial Notice (RJN),
17 Declaration of Jennifer M. Garten (Decl. Garten), at Exhibit A. CAPS alleged the 2006-2007 pay
18 plan for the fourteen supervising scientist classifications must be made comparable with certain
19 supervising engineering classifications, as required by Government Code section 19826. (*Id.*)

20 On or about December 1, 2006, DPA granted CAPS a quasi-legislative hearing, and
21 established an investigative hearing panel. (RJN, Decl. Garten, at Exhibit B.) The panel held
22 hearing on April 11, 12, November 26, 27, 30, and December 3, 2007. (*Id.*) Based on the panel's
23 findings, on April 28, 2008, DPA determined the duties and responsibilities of the subject
24 supervising scientist classifications are similar but not identical to those of the subject supervising
25 classifications. (*Id.*) The decision recommended salary adjustments to the fourteen supervising
26 scientist classifications. (*Id.*)

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1 On or about April 28, 2008, DPA forwarded its Director's Decision to the DOF and
2 requested DOF make a determination as to whether there were existing salary appropriations for the
3 recommended salary adjustments in the DPA Director's Decision. (RJN, Decl. Garten, at Exhibit
4 C.)

5 DOF responded to DPA on or about May 7, 2008. DOF determined that funds for the
6 recommended salary increases have not been appropriated in either the departmental budgets or
7 Budget Act Item 9800. (RJN, Decl. Garten, at Exhibit D.)

8 On or about February 21, 2008, CAPS sponsored Assembly Bill 2519 (Stats. 2008) which
9 would implement the DPA salary recommendations by appropriating the necessary funds. (RJN,
10 Decl. Garten, at Exhibit E.) The last action on Assembly Bill 2519 was on May 22, 2008, when the
11 appropriations committee took the bill under submission. (*Id.*)

12 On or about June 27, 2008, CAPS filed the instant Petition.

13 ARGUMENT

14 I.

15 DPA HAS NO AUTHORITY TO MAKE SALARY 16 ADJUSTMENTS IN EXCESS OF EXISTING APPROPRIATIONS

17 The mandatory language of Government Code section 19826, subdivision (a) precludes DPA
18 from adjusting the salaries of the supervisory scientist classifications if there are no existing
19 appropriations to cover the salary increases. Government Code section 19826, subdivision (a)
20 provides:

21 The department shall establish and adjust salary ranges for each class
22 of position in the state civil service subject to any merit limits
23 contained in Article VII of the California Constitution. The salary
24 range shall be based on the principle that like salaries shall be paid for
25 comparable duties and responsibilities. In establishing or changing
26 these ranges, consideration shall be given to the prevailing rates for
comparable service in other public employment and in private
business. *The department shall make no adjustments that require
expenditures in excess of existing appropriations that may be used
for salary increase purposes.* The department may make a change in
salary range retroactive to the date of application of this change.

27 (Emphasis added; Gov. Code, § 19826, subd. (a).)

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1 The rules governing statutory construction are well settled. The fundamental premise of
2 statutory interpretation is to ascertain and effectuate legislative intent. To determine statutory intent,
3 the court must first refer to the words of the statute. A maxim of statutory construction is that where
4 no ambiguity exists, the intent of the Legislature is to be gleaned from the words of the statute itself,
5 according to the usual and ordinary import of the language employed. (*Nolan v. City of Anaheim*
6 (2004) 33 Cal.4th 335, 340; *Buckley v. Cal. Coastal Com.* (1998) 68 Cal. App.4th 178, 188.) When
7 the language of the statute is clear and unambiguous, the court need go no further. It is only when
8 the language is susceptible of more than one reasonable interpretation that extrinsic aids may be
9 used. (*Nolan, supra*, 33 Cal.4th at p. 340.)

10 The definitin of “may” and “shall” is codified in Government Code section 14, which states
11 “[s]hall’ is mandatory and ‘may’ is permissive.” The word “‘shall’...is inconsistent with the
12 concept of discretion.” (*Common Cause of California et al. v. Board of Supervisors of Los Angeles*
13 *County, et al.* (1989) 49 Cal.3d 432, 443.) While, the word “may” connotes a permissive act, the
14 word “shall” connotes a mandatory duty. (*Woodbury v. Brown-Dempsey* (2003) 108 Cal.App.4th
15 421, 433; *In re J.N.* (2006) 138 Cal.App.4th 450, fn 4.)

16 Accordingly, the Legislature mandated that DPA must not make a salary adjustment in
17 excess of existing appropriations when it plainly and unambiguously stated DPA “shall make no
18 adjustments which require expenditures in excess of existing appropriations which may be used for
19 salary increase purposes.” (Gov. Code, § 19826, subd. (a).) CAPS concedes this point, noting that
20 existing appropriations are a limit on the DPA’s quasi-legislative salary authority. (CAPS’ Brief at
21 7:25-26.)

22 II.

23 DPA CANNOT ADJUST SALARIES BECAUSE 24 THERE ARE NO EXISTING APPROPRIATIONS

25 DPA is precluded from adjusting salaries for the supervisory scientists because the DOF has
26 determined there are no existing appropriations in either departmental budgets or Budget Item 9800.
27 (See RJN, Decl. Garten, at Exhibit D.)

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1 DPA generally has “jurisdiction over the state’s financial relationship with its employees,
2 including matters of salary, layoffs and non-disciplinary demotions.” (*Tirapelle v. Davis* (1993) 20
3 Cal.App.4th 1317, 1322 citing to Gov. Code, §§ 19816, 19816.2, 19825, 19826.) However, DPA
4 “can act only to the extent and in a manner consistent with the legislative delegation of authority.
5 And the DPA’s exercise of this authority is quasi-legislative [citations omitted], and is thus subject
6 to the ultimate authority of the Legislature to reject or alter such exercise of authority through
7 appropriate legislation.” (*Id.*, at 1323, fn 8.) “The power of appropriation resides exclusively in the
8 Legislature.” (*Id.*, at p. 1321, citing to *California State Employees’ Assn. v. State of California*
9 (1973) 32 Cal.App.3d 103, 107-08.) The Legislature provides appropriations for the support of state
10 agencies in the budget act. (*Id.*)

11 “The payment of a salary to a state employee depends upon the availability of an
12 appropriation to pay the salary.” (*White v. Davis* (2003) Cal.4th 528, 567.) The “fixing or
13 authorizing the fixing of the salary of a State officer or employee by statute is not intended to and
14 does not constitute an appropriation of money for the payment of the salary.” (Gov. Code, § 9610.)
15 Thus, DPA’s decision to adjust the salaries for certain supervisory scientists classifications does not
16 create an appropriation for those increases.

17 DOF “has general powers of supervision over all matters concerning the financial and
18 business policies of the state.” (*Tirapelle v. Davis, supra*, 20 Cal.App.4th, at p. 1320; see also Gov.
19 Code, § 13070.) Appointing agencies submit their budget requirements to DOF. Appointing
20 agencies must estimate and emphasize the sums necessary for employee compensation. (*Id.*; Gov.
21 Code, § 19835.5.) Until enactment of the budget act, DOF can revise, alter and amend the budget of
22 any state agency. (*Tirapelle v. Davis, supra*, 20 Cal.App.4th, at p. 1320; Gov. Code, § 13322.)
23 Further, DOF assists the Governor in preparing the budget which is ultimately submitted to the
24 Legislature. (*Tirapelle v. Davis, supra*, 20 Cal.App.4th, at p. 1320; Gov. Code, § 13337.)

25 DPA sent its April 28, 2008 Director’s Decision to the DOF for determination of whether
26 there are existing salary appropriations. (RJN, Decl. Garten, at Exhibits B, C.) On or about May 7,
27 2008, DOF advised DPA that no existing appropriations exist for the salary increases identified in
28 the April 28, 2008 Director’s Decision. (*Id.*, at Exhibit D.) Since DOF determined there are no

1 existing appropriations and since DPA cannot appropriate the monies, the Court cannot order for the
2 salary increases to be paid out of the 2007-2008 fiscal year. Thus, DPA performed its ministerial
3 duty by informing DOF of its Director's Decision to adjust the salaries of the fourteen scientist
4 classifications. DOF could amend the budgets of applicable state agencies to include appropriations
5 for the ensuing fiscal year. However, a bill, sponsored by CAPS, is already before the Legislature to
6 appropriate funds for the salary increases specified in DPA's Director's Decision. (See RJN, Decl.
7 Garten, at Exhibit E (AB 2519, Stats. 2008).)

8 **III.**

9 **DPA DID NOT ABUSE ITS DISCRETION WITH REGARDS TO**
10 **INCREASED SALARIES FOR FISCAL YEAR 2008-2009**

11 CAPS contends that if "DPA determines that it will increase salaries for the comparable
12 engineering supervisors, equivalent increases must be provided to the fourteen supervisory scientists
13 classifications." (CAPS' Brief, 11:10-12.) Aside from mere speculation, CAPS provides no support
14 that the comparable engineering supervisors have or will receive salary increases. Rather, the
15 decision to provide a salary increase for both the engineering and scientist supervisors is within
16 DPA's discretion, pursuant to Government Code section 19826, subdivision (a). DPA maintains
17 considerable discretion in establishing salaries and benefits for public employees, including
18 supervisorial employees. Setting salary compensation for public employees is a legislative function,
19 which the Legislature delegated to DPA in section 19826. (*Lowe v. California Resources Agency*
20 (1991) 1 Cal.App.4th 1140, 1151; *State Trial Attorneys' Assn. v. State of California* (1976) 63
21 Cal.App.3d 298, 303 [construing Gov. Code, § 18850, the predecessor to section 19826]; see also,
22 Gov. Code, §§ 19815.2, 19816.)

23 A writ of mandate will not lie to control discretion conferred upon a public officer or agency.
24 (*Shamsian v. Department of Conservation* (2006) 136 Cal.App.4th 621, 639-40.) Thus, contrary to
25 CAPS' assertions that placing additional increases in the 2008-2009 State Budget Act is a ministerial
26 duty, until such time DPA exercises its discretion with respect to setting additional salary increases,
27 there is nothing this Court can order.

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1 IV.

2 **DPA DID NOT ABUSE ITS DISCRETION BY NOT**
3 **AWARDING RETROACTIVE SALARY INCREASES**

4 CAPS seeks an order for retroactive salary increases to the 2005-2006 fiscal year. However,
5 CAPS provides no basis for a retroactive application.

6 First, CAPS never requested salary increases be retroactive to 2005-2006 in its complaint to
7 DPA for a quasi-legislative hearing and thus should be precluded from raising it here. (See RJN,
8 Decl. Garten, at Exhibit A.) Further, DPA did not make factual findings as to salary parity for 2005-
9 2006. Thus, CAPS has not exhausted its administrative remedies with respect to a retroactive
10 application of the salary increases, and as such, the Court lacks jurisdiction to decide whether the
11 salary increases should be retroactive to the 2005-2006 fiscal year. (See *Abelleria v. District Court*
12 *of Appeal* (1941) 17 Cal.2d 280, 292; *Campbell v. Regents of the University of California* (2005) 35
13 Cal.4th 311, 321—holding that exhaustion is a jurisdictional prerequisite to resort to the courts.)

14 Second, DPA is not mandated to provide salary increases retroactively. Government Code
15 section 19826 expressly provides “....The department *may* make a change in salary range retroactive
16 to the date of application of this change.” (Emphasis added; Gov. Code, § 19826, subd. (a); see
17 *Lowe v. California Resources Agency* (1991) 1 Cal.App.4th 1140, 1157-1158, holding that DPA has
18 discretion under section 19826 to make salary adjustments retroactive.) Accordingly, DPA does not
19 have a ministerial duty to award retroactive salary increases, and a writ of mandate will not lie to
20 control discretion conferred upon a public officer or agency. (*Shamsian v. Department of*
21 *Conservation, supra*, 136 Cal.App.4th at pp. 639-40.)

22 Finally, except for merely stating salary increases should be made retroactive, CAPS presents
23 no support, factual or legal, to support its argument. CAPS does not contend that DPA has in any
24 way abused its discretion nor does it provide any evidence that DPA acted arbitrarily and
25 capriciously in not awarding retroactive salary increases. Accordingly, there is no basis for this
26 Court to award retroactive salary increases.

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1 **CONCLUSION**

2 For the reasons set forth above, DPA Respondents respectfully request the Court deny
3 CAPS' Petition in its entirety.

4 Dated: August 25, 2008.

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6 Respectfully submitted,

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8 Chief Counsel

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11
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