

1 K. WILLIAM CURTIS
Chief Counsel, Bar No. 095753
2 WARREN C. STRACENER
Deputy Chief Counsel, Bar No. 127921
3 LINDA A. MAYHEW
Assistant Chief Counsel, Bar No. 155049
4 JENNIFER M. GARTEN
Labor Relations Counsel, Bar No. 232979
5 CHE I. JOHNSON
Legal Counsel, Bar No. 252112
6 Department of Personnel Administration
State of California
7 1515 S Street, North Building, Suite 400
Sacramento, CA 95814-7243
8 Telephone: (916) 324-0512
Facsimile: (916) 323-4723
9 E-mail: jennifergarten@dpa.ca.gov

10 Attorneys for Respondents DPA and Director Gilb

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

13 CALIFORNIA ASSOCIATION OF)
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.)
22)

Case No. 34-2008-00014476-CU-WM-GDS
Action Filed: June 27, 2008

**RESPONDENTS DPA AND DIRECTOR
GILB'S REPLY BRIEF TO SECOND
HEARING ON VERIFIED PETITION FOR
WRIT OF MANDATE AND COMPLAINT
FOR DECLARATORY RELIEF**

Date: April 24, 2009
Time: 10:30 a.m.
Dept: 33
Judge: Hon. Lloyd G. Connelly

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

23
24 Petitioner California Association of Professional Scientists (CAPS) seeks salary increases
25 under Government Code section 19826, subdivision (a) for fourteen supervisor scientist
26 classifications. However, Government Code section 19826, subdivision (a), expressly limits
27 Respondents Department of Personnel Administration's (DPA) and David Gilb's, Director of DPA,
28 (collectively Respondent DPA) authority to adjust salaries on the availability of existing

1 appropriations. DPA has no authority to adjust salaries for excluded employees if there is not an
2 existing appropriation for the salary increases. (Gov. Code, § 19826, subd. (a).)

3 Respondent Department of Finance (DOF) determined there are no existing appropriations
4 for the salary increase sought by CAPS, and that all of the monies in Budget Act Item 9800 are
5 obligated for purposes other than the supervisory scientist salary increases. (DOF Supplemental
6 Brief, 6:17-25; 7:1-12.) Accordingly, DPA is precluded from adjusting the salaries for the fourteen
7 supervisory scientists, until such time there is an existing appropriation. Thus, CAPS petition for
8 writ of mandate ends here, and the petition must be denied.

9 **A. DPA Has No Obligation To Seek An Appropriation**

10 There is nothing in Government Code section 19826, or in any other statute, that obligates
11 DPA to seek an appropriation for the salary increases, either by sponsoring a bill or adding the salary
12 increases to the budget act log for DOF's preparation of the proposed budget.

13 The rules governing statutory construction are well settled. The fundamental premise of
14 statutory interpretation is to ascertain and effectuate legislative intent. To determine statutory intent,
15 the court must first refer to the words of the statute. A maxim of statutory construction is that where
16 no ambiguity exists, the intent of the Legislature is to be gleaned from the words of the statute itself,
17 according to the usual and ordinary import of the language employed. (*Nolan v. City of Anaheim*
18 (2004) 33 Cal.4th 335, 340; *Buckley v. Cal. Coastal Com.* (1998) 68 Cal. App.4th 178, 188.) When
19 the language of the statute is clear and unambiguous, the court need go no further. It is only when
20 the language is susceptible of more than one reasonable interpretation that extrinsic aids may be
21 used. (*Nolan, supra*, 33 Cal.4th at p. 340.)

22 Here, the plain language of Government Code section 19826 limits DPA from adjusting
23 salaries in excess of existing appropriations. However, it does not mandate DPA to seek an
24 appropriation for excluded employees if there are no existing funds. Had the Legislature intended to
25 require DPA to seek an appropriation for excluded employee salary adjustments, it could have
26 included language similar to that of Government Code sections 3517.6 and 19829.5 which requires
27 DPA to present salary increases for rank and file employees agreed to in a memorandum of

28 ///

1 understanding to the Legislature for approval.¹ However, the Legislature did not choose to include
2 such language in Government Code section 19826, and it did not direct DPA to obtain an
3 appropriation for the excluded employee salary adjustments. Rather, the Legislature only required
4 DPA to consider “the prevailing rates for comparable service in other public employment and private
5 business” when adjusting salary ranges for excluded employees. (Gov. Code, § 19826, subd. (a).)
6 In fact, the Legislature limited DPA’s salary-setting authority by requiring an *existing* appropriation.
7 Accordingly, by not adjusting the supervisory scientist salaries, DPA is not violating Government
8 Code section 19826, subdivision (a), but, on the contrary, is abiding by its mandates.

9 **B. Assuming *Arguendo*, DPA’s Obligation To Seek An Appropriation Is**
10 **Discretionary, DPA Has Not Abused Its Discretion**

11 DPA has no mandatory or ministerial duty to seek an appropriation for the supervisory
12 scientist salary increases, nor does CAPS point to any such authority. However, assuming DPA has
13 a general authority to seek appropriations, a writ of mandate will not lie to control discretion
14 conferred upon a public officer or agency. (*Shamsian v. Department of Conservation* (2006) 136
15 Cal.App.4th 621, 639-40.) Nor has DPA abused any discretion in declining to seek an appropriation.

16 First, CAPS has not met its burden in demonstrating that DPA abused its discretion, nor does
17 CAPS even allege that DPA abused its discretion. Rather, CAPS merely states that DPA is required
18 to seek an appropriation under Government Code section 19826, without pointing to any language in
19 section 19286, or elsewhere, to support this contention.

20 Second, DPA satisfied its obligations under Government Code section 19826 by conducting
21 a quasi-legislative hearing and issuing its recommendation to increase the salaries of the fourteen
22 supervisory scientist classifications, if there was an existing appropriation. Government Code
23 section 19826 requires DPA to consider “the prevailing rates for comparable service in other public
24 employment and in private business” when adjusting salary ranges, but it also specifically limits
25 DPA from completing the salary adjustment if there is not an existing appropriation. There is no

26
27 ¹ Contrary to CAPS’ assertion (Supplemental Brief, 3:10-11), the Legislature is aware of, and
28 approves, the salary obligations in memoranda of understandings. (Gov. Code, §§ 3517.5, 3517.6,
19829.5.)

1 mandate that DPA seek an appropriation. “The payment of a salary to a state employee depends
2 upon the availability of an appropriation to pay the salary” and “the power of appropriation resides
3 exclusively in the Legislature.” (*White v. Davis* (2003) Cal.4th 528, 567; *Tirapelle v. Davis* (1993)
4 20 Cal.App.4th 1317, 1321.) Thus, DPA complied with Government Code section 19826.

5 Third, given the widely known economic crisis the State is currently experiencing, DPA
6 properly exercised its discretion in not seeking an appropriation, either through sponsoring a bill, or
7 including potential future increases on the Budget Act Log submitted for DOF’s consideration in
8 preparation of the proposed budget.

9 Fourth, there are many ways to put the appropriations before the Legislature for approval.
10 DOF could add it to the proposed budget.² Or, obviously, the Legislature could simply act on the
11 bill before it to implement the salary increases. CAPS has already sponsored an appropriation bill
12 for fiscal year 2007-2008 and a second bill for the current fiscal year, to implement the salary
13 increases. (Request for Judicial Notice (RJN), Declaration of Jennifer M. Garten (Decl. Garten-
14 RJN), at Exhibit E; Request for Judicial Notice in support of Opening Brief to Second Hearing
15 (RJN2), Decl. Garten-Opening Brief, at Exhibit 1.) The Legislature declined to act on the bill for the
16 2007-2008 legislative session, and has not yet acted on the current bill. (*Id.*) Thus, a request for an
17 appropriation is (and was) already before the Legislature, who, as the exclusive authority, can
18 appropriate monies for the salary increases as it sees fit.³

19 CAPS’ petition fails and must be denied. DPA performed its duties under Government Code
20 section 19826, subdivision (a) by conducting a quasi-legislative hearing and issuing its decision.
21 DPA then sought information as to an existing appropriation. DOF determined there was none.
22 Upon learning there was not an existing appropriation for the supervisory scientist salary increases,
23 DPA is precluded from further increasing salaries for supervisory scientists. No law compels DPA,
24

25 _____
26 ² However, as DOF pointed out in its supplemental brief, the Court cannot compel DOF to
27 exercise its discretion in a particular manner, and DOF, as the advisor to the Governor on fiscal
28 matters, cannot be required to make a budget proposal that it believes would jeopardize the fiscal
state of the State. (DOF supplemental brief, 12:17-22.) Therefore, this Court cannot order DOF, or
DPA, to include the salary increases in the proposed budget.

³ The Legislature cannot be compelled to appropriate money for the salary increases.
(*County of San Diego v. State of California* (2008) 164 Cal.App.4th 580, 594.)

1 or DOF, to seek an appropriation, nor has DPA abused any discretion with regard to any general
2 authority it may have to request appropriations. CAPS has simply failed to meet its burden in this
3 matter, and Respondent DPA respectfully requests this Court to deny CAPS' petition in its entirety.

4 Dated: April 8, 2009.

5
6 Respectfully submitted,

7 K. WILLIAM CURTIS
Chief Counsel

8 WARREN C. STRACENER
Deputy Chief Counsel

9
10
11 By: Jennifer M. Garten
12 JENNIFER M. GARTEN
13 Labor Relations Counsel
14 Attorneys for DPA Respondents
15
16
17
18
19
20
21
22
23
24
25
26
27
28