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California Association of Professional Scientists  
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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

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  
23

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

**SUPPLEMENTAL BRIEF IN SUPPORT  
OF PETITION FOR WRIT OF  
MANDATE AND COMPLAINT FOR  
DECLARATORY RELIEF**

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

Honorable Lloyd G. Connelly

24  
25 **I. INTRODUCTION**

26 The California Association of Professional Scientists (CAPS) filed this Petition for Writ  
27 of Mandate and Complaint for Declaratory Relief on June 27, 2008. Following briefing, a  
28 hearing on the Petition was held on September 18, 2008. The Court did not make any ruling on

1 the Petition at that hearing. CAPS was given the opportunity to utilize discovery available to it  
2 under the Code of Civil Procedure. The Court's verbally instructed the parties to file  
3 simultaneous briefs followed by simultaneous reply briefs. Reply Brief's will be each party will  
4 be filed on April 10, 2009. Although the matter was briefed prior to the September 19, 2008  
5 hearing, CAPS summarizes many of its arguments here for the Court's convenience.

6 The Petition contends that the Department of Personnel Administration (DPA) is  
7 obligated by law to pay employees in fourteen state supervisory scientific classifications the  
8 salaries as fixed by the DPA in its April 28, 2008 written decision. The April 28, 2008 DPA  
9 Decision is DPA's quasi-legislative salary setting response to CAPS' November 2006 challenge  
10 to the salary determinations for state supervisory scientists. The DPA Decision determined that  
11 because the work of state supervisory scientists and state supervisory engineers is comparable,  
12 that the salaries of supervisory scientists must be increased to return to the historical parity and  
13 comparable pay between supervisory scientist and supervisory engineers pay. The Petition seeks  
14 a definitive confirmation that the increased salaries are a legal obligation of the state.

15 The Petition further seeks that the increased salaries required by the April 28, 2008  
16 decision be paid by the State Controller as there are legislatively appropriated funds in the 9800  
17 Item of the 2008 - 2009 State Budget which are available to pay those increased salaries. Paying  
18 the increased salaries would not exceed available appropriations for salary increase purposes. As  
19 discussed below, funds are available that have been appropriated for salary increase purposes.  
20 The question is whether those funds may be used to pay the increases for state supervisory  
21 scientists, or whether a "specific appropriation" for these particular salary increases is required,  
22 as argued by the Department of Finance (Finance), before state supervisory scientists may be paid  
23 the increased salaries called for in the DPA April 28, 2008 Decision.

24 Finally, in the event the Court does not otherwise order the salaries paid, in the  
25 alternative, CAPS seeks an order that DPA and Finance seek an appropriation to fund this legal  
26 obligation. While CAPS acknowledges that the Court may not compel the Legislature to make  
27 an appropriation to fund the salary increases called for by the DPA April 28, 2008 decision, the  
28 Court can instruct the DPA and the Department of Finance to comply with existing law and meet

1 their acknowledged legal obligation by taking the necessary steps within their jurisdiction to  
2 obtain an appropriation to pay these legally mandated increased salaries.

3       When the Legislature granted the DPA the salary setting function by passing Government  
4 Code section 19826, it put DPA in a position to determine the salaries and thus the legal  
5 obligations of the state. Each year the DPA provides to Finance the funding amounts it needs to  
6 pay for new employee compensation items for approved memoranda of understanding and for the  
7 excluded employee pay plan by submitting a "Item 9800 Budget Act Log." (See Petitioner's  
8 Exhibit 5, to the December 5, 2008 Deposition of Timothy Lynn, Attachment A to the  
9 Declaration of Gerald James.) Under Government Code section 13322, Finance has a duty to  
10 include these items in the state Budget Act. The Legislature does not know the legal salary  
11 obligations within the approved memoranda of understanding and the pay plans for excluded  
12 state employees. Instead, this is a DPA function.

13       The Legislature's job is then to approve the payments for those obligations through an  
14 appropriation. By taking the position that a "specific appropriation" to fund these salary  
15 increases is required, and then doing nothing to present this legal obligation to the Legislature  
16 within the Budget Act Log and the 9800 Item for its determination, or to otherwise seek an  
17 appropriation – DPA and Finance are collectively violating the law requiring comparable pay for  
18 comparable work. Under Government Code sections 19826 and 13322, the Court may compel  
19 DPA and Finance to include the proposed funding in the 9800 Item of the Budget Act or  
20 separately for the Legislature's consideration.

21       It is clear the state has not complied with the law until the appropriate salaries are paid to  
22 the state scientists in the fourteen classifications. This action is therefore necessary to compel the  
23 state to pay the full salaries required by law for the current year and retroactively, and/or to  
24 compel the state employer to take action necessary to present to the Legislature a request for an  
25 appropriation sufficient to fund the increases.

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3 **II. ARGUMENT**

4 **A. DPA AGREES THAT IT HAS ADJUSTED THE SALARIES, MAKING**  
5 **DECLARATORY RELIEF AND A WRIT OF MANDATE APPROPRIATE**

6 It is not in dispute that the salaries of the employees in the fourteen state supervisory  
7 classifications have been determined by DPA in its April 28, 2008 decision. Government Code  
8 section 19826 is the statute giving the DPA the authority to establish and adjust salary ranges for  
9 each class and position in state service. In the decision, DPA set the salaries of the fourteen  
10 classifications consistent with the finding that the salaries must be comparable to fourteen  
11 specific engineering classifications. (Exhibit A to the Declaration of Christopher J. Voight, filed  
12 June 27, 2008.) In its previous filing opposing the writ, DPA stated that,

13 “the fixing or authorizing the fixing of the salary of a State officer or employee by  
14 statute is not intended to and does not constitute an appropriation of money for the  
15 payment of the salary. (Gov. Code §9610.) Thus, DPA’s decision to adjust the  
16 salaries for certain supervisory scientists classifications does not create an  
17 appropriation for those increases.”

18 (Respondent DPA and Director Gilb’s Opposition to Petition for Writ of Mandate, Page 5, lines  
19 12 - 16.)

20 DPA agrees it has fixed the salaries, but argues there is no appropriation to pay those  
21 increases. With DPA’s affirmation, CAPS is entitled to a declaration that the salaries as  
22 determined in the April 28, 2008 DPA Decision are the salaries that the employees are entitled  
23 to, subject to an appropriation. CAPS is further entitled to a writ of mandate directing  
24 compliance with the law to pay the salaries called for in the April 28, 2008 decision whenever  
25 compliance can be achieved without violating the salary setting statute’s restriction against  
26 adjustments in excess of existing appropriations. (Gov. Code §19826; *State Trial Attorneys’*  
27 *Assn. v. State of California* (1976) 63 Cal.App.3d 298, 305.)

28 DPA contends that CAPS never sought retroactivity to the 2005 - 2006 fiscal year in its  
request for a hearing and that there is no mandate to provide retroactivity to that year for the  
salary setting decision. The record is clear that CAPS demanded the salary increases sought here  
continuously, including 2005 - 2006. (See “Salary Relationship Issues”, November 29, 2005

1 Supervisors Proposal, Exhibit E the Declaration of Christopher J. Voight, filed June 27, 2008.)  
2 Within the delegation of salary setting authority, DPA lacked the discretion to set salaries in a  
3 manner inconsistent with the mandate of paying like pay for like work, therefore the retroactive  
4 application of the salary setting decision is mandatory, including for the 2005 - 2006 fiscal year.

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6 **B. THE INCREASED SALARIES MAY BE PAID WITHOUT EXCEEDING  
7 EXISTING APPROPRIATIONS FOR SALARY INCREASE PURPOSES  
8 AS NO "SPECIFIC APPROPRIATION" IS REQUIRED**

8 1. There is No Authority to Support Finance's Position that a Specific Appropriation  
9 is Required for Payment of the Increased Salaries

10 As part of the budget process, in the fall of each year, the DPA notifies Finance of its  
11 intent to increase salaries and benefits for certain groups of employees. DPA requests that  
12 Finance put that money into the Budget Item 9800 of the Governor's Proposed Budget.  
13 (Deposition of Timothy Lynn, Pg. 22, ln. 7 - 13, Attachment A to the Declaration of Gerald  
14 James.) DPA does this by providing Finance a "Budget Log" for employee compensation  
15 increases. DPA provides this Budget Log in the fall budget process and then again in connection  
16 with the May revision to the budget. (Deposition of Timothy Lynn, Pg. 29, ln. 16 - 21,  
17 Attachment A to the Declaration of Gerald James.)

18 The Budget Log breaks down the compensation and benefit increases by individual  
19 bargaining units and also by employees excluded from collective bargaining. (See Budget Log  
20 document titled "Item 9800 2007-08 Budget Act", Petitioner's Exhibit 2 to the Deposition of  
21 Timothy Lynn, Attachment A to the Declaration of Gerald James.) The total expenditures for  
22 compensation and benefit increases listed in the DPA Budget Log total matches the total in the  
23 9800 Item in the state Budget Act. (Deposition of Timothy Lynn, Pg. 33, ln. 22 - Pg. 34, ln. 6,  
24 Attachment A to the Declaration of Gerald James.)

25 Finance here takes the position that because the Budget Log and the 9800 Item match –  
26 unless the salary increases are specifically listed on the Budget Log, they cannot be paid. In  
27 response to an interrogatory regarding the availability of funds in the 9800 Item of the 2008-2009  
28 State Budget Act to pay the increased salaries for supervisory scientists, Finance responded that,

1 "Pursuant to the Department of Personnel Administration's (DPA) Budget Act  
2 Log for Fiscal Year 2008-2009 (see Bates Nos. DOF0001-0003), the monies  
3 appropriated for Budget Item 9800 are obligated; specifically, money that is  
4 required to be paid pursuant to the DPA Budget Act Log. The "grand total" for  
5 the Budget Item 9800, as reflected in the DPA Budget Act Log, are identical to the  
6 appropriation amounts in the 2008-2009 State Budget. A classification that is not  
7 contained in the DPA Budget Act Log will not receive any augmentation of  
8 compensation unless DPA (or the union representing that specific classification)  
9 sponsors a bill to amend the Budget Act and increase the Item 9800 appropriation.

6 As demonstrated in the Budget Act Log for 2008-2009, DPA did not make any  
7 provisions, nor did the Legislature appropriate monies for a salary increase for the  
8 THIRTEEN CLASSIFICATIONS OF SUPERVISORY SCIENTISTS. Consequently,  
9 there are no monies available in the Budget Item 9800 for any salary increase for the  
10 THIRTEEN CLASSIFICATIONS OF SUPERVISORY SCIENTISTS."

9 (Response to Special Interrogatory No. 27, Exhibit B to the Declaration of Gerald James.)

10 Finance therefore requires a "specific appropriation" before salary increases can be paid:

11 This position is not supported by the law. In approving the 2008 - 2009 State Budget Act  
12 (Assembly Bill 1751, Statutes of 2008), the Legislature appropriated funds for salary increases  
13 with the typical language for the 9800 Item, Provision 2, as follow:

14 "The funds appropriated in this item are for compensation increases and increases  
15 in benefits related thereto of employees whose compensation, or portion thereof,  
16 is chargeable to the General Fund, to be allocated by executive order by the  
17 Department of Finance to the several state offices, departments, boards, bureaus,  
18 commissions, and other state agencies, in augmentation of their respective  
19 appropriations or allocations, in accordance with approved memoranda of  
20 understanding or, for employees excluded from collective bargaining, in  
21 accordance with the salary and benefit schedules established by the Department of  
22 Personnel Administration."

19 (See Petitioner's Exhibit 6 to the Deposition of Timothy Lynn, Attachment A to the Declaration  
20 of Gerald James.) The only condition or restriction the Legislature has attached to the  
21 appropriation for employee compensation increases for excluded employees is that those  
22 appropriated funds for salary increases be paid in accordance with the salary schedule established  
23 by the DPA.

24 Fatal to Finance's position that a specific appropriation is required is the fact that the  
25 Legislature never approved the Budget Log for 2008 - 2009, or any other fiscal year. Looking at  
26 the approved budget, the particular allocations listed in the Budget Log are not listed anywhere in  
27 the Budget Act. (Deposition of Timothy Lynn, Pg. 35, ln. 1 - 6, Attachment A to the Declaration  
28 of Gerald James.) Instead, the Legislature approves a block of money for employee

1 compensation increases. The Department of Finance may believe that a specific appropriation is  
2 required, but cannot point to any provision in the Budget Act or law to support that position.

3 The court in *Tirapelle v. Davis* recognized that the Legislature does not provide a  
4 complete breakdown of how funds are spent. (*Tirapelle v. Davis* (1993) 20 Cal.App.4th 1317,  
5 1322.) Once the Legislature has authorized the use of these funds for salary increase purposes,  
6 “a court transgresses no constitutional principle when it orders the State Controller or other  
7 similar official to make appropriate expenditures from such funds. (*Mandel v. Myers* (1981) 29  
8 Cal.3d 531.)

9 2. The 9800 Item of the 2007 - 2008 State Budget Act contained amounts  
10 appropriated for employee compensation increases which should have been used  
11 to pay the increased salaries

12 In the 2007 - 2008 Fiscal Year, the 9800 Item of the State Budget Act contained amounts  
13 that were appropriated for salary increases which were not expended. Specifically, the 9800-001-  
14 0001 (General Fund) contained \$114,072,663 which was appropriated for employee  
15 compensation and was not spent. 9800-001-00494 (Other Unallocated Special Funds) contained  
16 \$38,534,693 which was appropriated for employee compensation and was not spent. 9800-001-  
17 0988 (Various Other Unallocated Nongovernmental Cost Funds) contained \$103,005,801 which  
18 was appropriated for employee compensation and was not spent. (See Petitioner’s Exhibit 3 to  
19 the Deposition of Timothy Lynn, Attachment A to the Declaration of Gerald James and  
20 Deposition of Timothy Lynn, Pg. 41, ln. 20 - Pg. 43, ln. 8.) At the expiration of the Fiscal Year,  
21 the General Fund monies reverted to the General Fund and these appropriations expired pursuant  
22 to the State Budget Act.

23 If Finance had properly exercised its statutory duties, it would have identified these  
24 available funds on May 7, 2008 when asked by DPA whether the increased salaries could be paid  
25 out of available appropriations for salary increases.

26 3. The 9800 Item of the 2008 - 2009 State Budget Act contains amounts  
27 appropriated for employee compensation increases which may be used  
28 to pay the increased salaries

The 9800 Item of the 2008 - 2009 State Budget Act contains \$124,111,000 general fund,  
\$135,800,000 special fund, and \$66,886,000 nongovernmental cost funds for employee

1 compensation increases. (See Petitioner's Exhibit 6 to the Deposition of Timothy Lynn,  
2 Attachment A to the Declaration of Gerald James.) Even though none of these funds have been  
3 expended from the 9800 Item as of December 2008, Finance takes the position that all of these  
4 expenditures are allocated pursuant to the Budget Act Log 2008 - 2009 and cannot be spent for  
5 other compensation increases. (See Petitioner's Exhibit 7 to the Deposition of Timothy Lynn,  
6 Attachment A to the Declaration of Gerald James and Deposition of Timothy Lynn, Pg. 55, ln. 9  
7 - 16.) If at the end of the 2008 - 2009 fiscal year, not all of the money or appropriation authority  
8 is used, it will be considered savings and revert to the General Fund for use in the next year's  
9 fiscal budget. (Response to Special Interrogatory No. 29, Exhibit B to the Declaration of Gerald  
10 James.)

11 CAPS is aware that at least one of the provisions of the 9800 Item has not been spent or  
12 encumbered. The Budget Log Act 2008 - 2009 contains a listing for "E48", "S09", and "M09",  
13 with an "Excluded 9 Total" of \$2,785,000 General Fund and \$36,154,000 Other Funds. (See  
14 Petitioner's Exhibit 7 (page 2 of 3) to the Deposition of Timothy Lynn, Attachment A to the  
15 Declaration of Gerald James.) Not all of those salary increases contemplated by this Budget Log  
16 item have been paid to the engineering employees by the DPA, even though the Budget Log lists  
17 July 1, 2008 as the effective date. (Paragraph 2, Declaration of Gerald James.) Since none of the  
18 9800 Item money had been moved as of December 2008, there is a strong possibility that other  
19 funds have been allocated for compensation increases and not spent. Finance's position that it  
20 does not have to concern itself with these balances because it requires a specific appropriation  
21 before authorizing increases and that any remaining balances are reverted pursuant to the Budget  
22 Act makes the fund balances a moving target which CAPS cannot pin down. Regardless, such  
23 there are currently funds available which have been approved for salary increases and are  
24 unspent, those funds must be used to pay the increased supervisory scientist salaries.

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1 **C. DPA and FINANCE CAN BE COMPELLED TO PLACE THE APPROPRIATION**  
2 **BEFORE THE LEGISLATURE**

3 The DPA salary setting decision is a “quasi-legislative” decision setting the salaries of the  
4 supervisory scientists involved and which involves the formulation of rules to apply in future  
5 cases. (*Lowe v. California Resources Agency* (1991) Cal.App.4th 1140, 1149.)

6 Despite DPA’s salary determinations and the state employer’s setting of the salaries at the  
7 new appropriate levels required by law, the full salaries of the fourteen classifications and the  
8 employees within those classifications have not been paid in the current fiscal year or any prior  
9 fiscal years, and neither the Department of Finance, nor the DPA has taken any action to seek  
10 funding for the salaries required to be paid. To allow DPA and Finance to demand a specific  
11 appropriation, while taking no action whatsoever to include the “needed” appropriation in the  
12 Budget Log, the proposed Budget Act, or to otherwise present the appropriation to fund the  
13 salary increases to the Legislature for its consideration, allows DPA and Finance to avoid paying  
14 the salaries required by law and prevents the state scientific supervisors from enforcing their  
15 rights to the salaries which DPA has already determined are legally obligated to be paid.

16 In *State Trial Attorneys’ Assn. v. State of California*, the court granted a writ of mandate  
17 directing compliance with the Section 18550 (now 19826) whenever compliance could be  
18 achieved without violating the statute’s restriction against adjustments in excess of existing  
19 appropriations. (*State Trial Attorneys’ Assn. v. State of California* (1976) 63 Cal.App.3d 298,  
20 305.) The court stated that the State Personnel Board could lawfully adjust salaries at issue in the  
21 expectation of adequate appropriations for the fiscal year 1977 - 1978. CAPS is entitled to a  
22 similar writ and order. DPA may be ordered to adjust the salaries in the expectation of adequate  
23 appropriations for the 2009 - 2010 fiscal year. Under Government Code sections 19826 and  
24 13322, the Court may compel DPA and Finance to include the proposed funding in the budget  
25 for the Legislature’s consideration.

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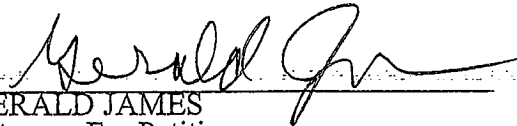
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III. CONCLUSION

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

Dated: March 27, 2009

  
GERALD JAMES  
Attorney For Petitioner  
California Association of Professional Scientists

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 March 27, 2009, I served the following documents:

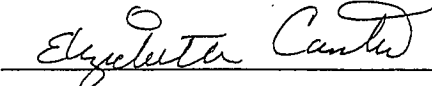
8 **DECLARATION OF GERALD JAMES IN SUPPORT OF PETITION FOR WRIT**  
9 **OF MANDATE AND COMPLAINT FOR DECLARATORY RELIEF**

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

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

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

24 I declare under penalty of perjury under the laws of the State of California that the  
25 foregoing is true and correct. Executed on March 27, 2009 at Sacramento, California.  
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Elizabeth Cantu