Case No. C077403 No Fee (Gov. Code, § 6103)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

CALIFORNIA ASSOCIATION OF PROFESSIONAL SCIENTISTS,

Plaintiff and Appellant,

v.

STATE OF CALIFORIA, DEPARTMENT OF HUMAN RESOURCES,

Defendant and Respondent.

On Appeal from the Superior Court, Sacramento County
Case No. 34-2014-00165420
The Honorable Raymond Cadei, Department 54

RESPONDENT'S BRIEF

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INTRODUCTION

Controlling judicial authority requires that the Legislature be "informed explicitly" of the terms in a bargained MOU, be provided with a fiscal analysis of the costs, and then approve or disapprove the agreement and expenditure with knowledge of the fiscal costs involved.

In this matter, an arbitrator misinterpreted and fundamentally misapplied the "contract protection" clause in the collectively bargained for Memorandum of Understanding (MOU) between the state and the California Association of Professional Scientists (CAPS), effective April 1, 2011 through July 1, 2013[1], and ordered the state to pay enhanced meal and lodging expenses to members of the CAPS based upon an agreement bargained years later between the state and another labor organization, the Service Employees International Union (SEIU). In construing the contract protection clause in CAPS's MOU as a pay parity provision that applied *in perpetuity* to all economic terms and conditions of employment subsequently bargained by *any other* bargaining unit and *at any time in the future*, the arbitrator's award unequivocally violates well established public policies set forth in the Ralph C. Dills Act (Dills Act) (Gov. Code, § 3512 et seq.)[2].

If permitted to stand, the award in this case would usurp the fundamental role of the Legislature to approve terms and conditions of employment, and to fund labor agreements between the state and exclusive representatives of state employees.

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[1] CAPS is the recognized exclusive representative for state employees in Bargaining Unit 10.

[2] Unless otherwise specified, all further statutory references shall be to the Government Code.

The trial court properly concluded that the arbitrator exceeded her powers because the award impinges on the Legislature's authority to approve terms and conditions of employment, and because the Legislature was not provided with a cost analysis of the expenditures associated with the meal and lodging enhancements at either the time the CAPS or the SEIU MOUs were approved by the Legislature. On appeal, CAPS recycles the same arguments already rejected by the trial court, and which should be rebuffed by this Court as well. CAPS' assertion that the Legislature actually considered the potential cost of increased meal and lodging reimbursement rates tied to the contract protection clause when it approved the CAPS' MOU is unavailing and not supported by the record in this case. Rather, the undisputed evidence demonstrates the Legislature was not provided with a fiscal analysis of the contract protection clause, including the costs of enhanced meal and lodging expenses for CAPS members, either when it approved the CAPS or the SEIU MOU years later. CAPS' claim that the Legislature need not specifically approve the additional meal and lodging expenses because available monies already exist to fund these expenses similarly fails as a matter of law. As set forth below, the law prohibits a state agency from diverting appropriated funds from their earmarked destinations and purposes.

Because the arbitration award mandates economic increases without the requisite legislative approval, the trial court's decision to vacate this award as contrary to public policy must be affirmed.

STATEMENT OF THE ISSUES ON APPEAL

1. Did the trial court correctly determine that the arbitrator's award violates public policy by usurping the Legislature's authority to explicitly approve terms and conditions of employment and to authorize the costs of labor agreements between the state and exclusive representatives?

2. Did the trial court correctly determine that Respondent did not waive its public policy arguments?

STATEMENT OF FACTS

In 2009, almost all of the state's 21 bargaining units' MOUs had expired and the state was seeking pension reform with all those units whose contracts were being negotiated. (JA, Vol. I, Tab 3, p. 00184.) Pension reform was one of the major areas of discussion with all units during these negotiations, known informally as the pension reform round of negotiations. (JA, Vol. I, Tab I, pp. 00040-00050.) In late March 2011, during the pension reform round of negotiations, the California Department of Human Resources (CalHR), the Governor's designee for purposes of collective bargaining, reached agreement with CAPS on an MOU, effective April 1, 2011 through July 2, 2013. (JA, Vol. I, Tab 3, pp. 00063-00176.) The parties agreed to a contract protection clause provision as part of this MOU, which provides in pertinent part as follows:

> A. If any other State bargaining unit(s) enter into an agreement with the State that does not have Pension Reform or provides a greater value/total compensation package than this agreement does, taking into account all "takeaways" or enhancement/"sweeteners", than [sic] CAPS (Unit 10) members shall receive the difference between the packages/agreements…
>
> B. The term of this article/section shall not apply to successor agreements previously reached with Units 2, 5, 6, 7, 8, 18 and 19.

(*Id.*, at p. 00160.)

When the tentative agreement for Article 20.4 of the MOU was signed at the end of March 2011, only four or five bargaining units reached agreement. (*Id.*, at p. 00184.) The intent of the 2011 contract protection clause was to provide assurance to CAPS's members that if they reached

agreement on that MOU they would not have to be concerned that one of the four or five remaining bargaining units would be provided with a better compensation package during *that round* of bargaining. (*Ibid*.) The pension reform round of bargaining concluded in 2011, after all bargaining units reached agreement on a successor MOU. (JA, Vol. I, Tab 4, p. 00201, Tab 3, p. 00184:3-6.)

In July 2013, CalHR and SEIU entered into a new round of negotiations. (*Id.*, at p. 00180.) Pursuant to Section 3517.8, the CAPS MOU provisions, including the contract protection clause, continued in effect after its expiration on July 1, 2013. (JA, Vol. I, Tab 1, p. 00021,) CalHR and SEIU agreed to a new MOU during this subsequent round of bargaining, effective July 2, 2013 through July 1, 2016. (*Ibid*.) In that MOU, the state agreed to increased meal and lodging reimbursement rates for SEIU members. (*Ibid*.)

On July 22, 2013, CAPS filed a contractual grievance, and claimed its contract protection clause entitled its members to the increased meal and lodging reimbursement rates negotiated by SEIU during the new round of negotiations. (*Id.*, at p. 00181.) The parties convened an arbitration hearing before arbitrator Catherine Harris on January 7, 2014. (*Id.*, at p. 00178.) During the arbitration, the state reiterated the contract protection clause was limited in its application to the 2011 pension reform round of negotiations. (*Id.*, at pp. 00187-00188.) However, CAPS contended the parties' contract protection clause should be applied broadly, and was not limited to increases bargained during the pension reform round of negotiations that concluded in 2011. (JA, Vol. II, Tab 11, p. 00516:12-17; JA, Vol. I, Tab 3, pp. 00186-00187.)

On May 5, 2014, the arbitrator issued an award granting CAPS's grievance. (*Id.*, at pp. 00178-00192.) In her award, she found the contract

protection clause was in fact a pay parity clause which entitled CAPS members to automatically enjoy the benefit of any other exclusive representative's subsequently negotiated increase to any term or condition of employment. (*Id.*, at pp. 00188-00192.) The arbitrator rejected the state's argument that the contract protection clause applied only during the 2011 pension reform round of negotiations and determined the clause lacked any expiration date, potentially operating into perpetuity. (*Ibid*.) The arbitrator ordered the state to increase meal and lodging reimbursement rates for CAPS members to conform to the increases received by SEIU in the 2013 round of negotiations. (*Ibid*.)

On June 25, 2014, CAPS filed a Petition to Confirm Arbitration Award in Sacramento County Superior Court. (JA, Vol. I, Tab 1, pp. 00008-00051.) On July 7, 2014, CalHR filed a Cross-Petition to Vacate the Arbitration Award. (JA, Vol. I, Tab 3, pp. 00057-00193.) Both parties had a full opportunity to submit a Memorandum of Points and Authorities, and supporting declarations, in support of their petitions.

On August 21, 2014, the trial court entered its Notice of Entry of Order granting CalHR's Cross-Petition to Vacate and denying CAPS's Petition to Confirm. (JA, Vol. II, Tab 18, p. 00569.) The trial court determined the arbitration award violated public policy because the Legislature was not provided with a cost analysis of the expenditures for the increased meal and lodging reimbursement rates at either the time the CAPS or SEIU MOUs were confirmed. (JA, Vol. II, Tab 18, p. 00569.) The trial court correctly concluded that the cost analysis provided to the Legislature did not include potential increased expenditures for enhanced meal and lodging reimbursement rates for CAPS members, either at the time the CAPS or the SEIU MOUs were submitted to the Legislature. (*Ibid*.) The court further rejected CAPS' argument that the Legislature

need not specifically approve such expenditures, finding the cases CAPS relied upon were inapposite.

CAPS filed the instant Notice of Appeal on September 18, 2014. (JA, Vol. II, Tab 19, pp. 00572-00574.) For the reasons set forth herein, this Court should affirm the trial court's decision.

STANDARD OF REVIEW

CAPS misstates the applicable standard of review by failing to mention that, while the Court reviews the trial court's order under a de novo standard, to the extent the trial court's order rests upon a determination of disputed factual issues, the Court applies the substantial evidence test to those issues.

The issue whether an award was made in excess of an arbitrator's contractual powers is a question of law, which is reviewed de novo where no extrinsic evidence was presented to the trial court or where there is no conflict in the extrinsic evidence. (*Reed v. Mutual Service Corp.* (2003) 106 Cal.App.4th 1359, 1364-1365; *Maggio v. Windward Capital Management Co.* (2000) 80 Cal.App.4th 1210, 1214; *Parsons v. Bristol Development Company* (1965) 62 Cal.2d 861, 865-866.)

However, where the trial court reaches a decision based upon its analysis of disputed extrinsic evidence, appellate courts apply the substantial evidence test to those issues. (*Malek v. Blue Cross of California* (2004) 121 Cal.App.4th 44, 55; *Reed v. Mutual Service Corp., supra*, 106 Cal.App.4th at 1365; *AFSME v. Metropolitan Water District* (2005) 126 Cal.App.4th 247, 257.) "We must accept the trial court's resolution of disputed facts when supported by substantial evidence; we must presume the court found every fact and drew every permissible inference necessary to support its judgment, and defer to its determination of credibility of the

witnesses and the weight of the evidence." (*Betz v. Pankow* (1993) 16 Cal.App.4th 919, 923.)

In this case, the trial court, in part, relied on extrinsic evidence in reaching the conclusion that the Legislature had not been provided with a cost analysis for enhanced meal and lodging reimbursement rates for CAPS members. To the extent the trial court based its decision on the extrinsic evidence presented by the parties, this court must apply a deferential standard of review. In addition, the trial court's decision is supported by the controlling legal authorities and should be affirmed for that reason as well.

ARGUMENT

I. THE TRIAL COURT CORRECTLY DETERMINED THE ARBITRATION AWARD MUST BE VACATED BECAUSE IT IMPINGES ON THE LEGISLATURE'S AUTHORITY

As the trial court correctly determined, the arbitration award in this case impermissibly orders increases to meal and lodging reimbursement rates for CAPS members that were not approved by the Legislature. None of the elements of the three-part test described in *California Statewide Law Enforcement Assn. v. Department of Personnel Administration* (*CSLEA v. DPA*) (2011) 192 Cal.App.4th 1 and *California Department of Human Resources v. Service Employees International Union, Local 1000* (*CalHR v. SEIU*) (2012) 209 Cal.App.4th 1420, more fully discussed below, have been satisfied. The Legislature was not "informed explicitly" that CalHR entered into an agreement to grant enhanced meal and lodging rates for CAPS members. Additionally, the Legislature was not provided with a fiscal analysis of the costs as required by the above-referenced court

opinions. Finally, the Legislature did not vote to approve or disapprove the agreement and expenditure with knowledge of the fiscal costs involved. As such, the trial court correctly found the award violates public policy because the Legislature was not provided with a cost analysis of the meal and lodging expenditures at either the time the CAPS or the SEIU MOUs were confirmed.

A. The Legislature Retains Ultimate Authority To Approve Terms And Conditions Of Employment For Represented Employees, And To Set The Compensation Of State Employees.

Under the California Constitution, the Legislature "may exercise any and all legislative powers which are not expressly or by necessary implication denied to it by the Constitution." (*Pacific Legal Foundation v. Brown* (1981) 29 Cal.3d 168, 180 citing *Methodist Hospital of Sacramento v. Saylor* (1971) 5 Cal.3d 685, 691.) The Legislature is vested with the entire law-making authority of the state, apart from the people's right of initiative and referendum. (*Methodist Hospital of Sacramento, supra,* 5 Cal.3d at p. 691 ["If there is any doubt as to the Legislature's power to act in any given case, the doubt should be resolved in favor of the Legislature's action"].)

It is well-established that "[u]nder the California Constitution it is the Legislature. . .that generally possesses the ultimate authority to establish or revise the terms and conditions of employment through legislative enactments…" (*Professional Engineers in California Government v. Schwarzenegger* (2010) 50 Cal.4th 989, 1015.) The Legislature exercises its constitutional authority over terms and conditions of employment for represented state employees through its approval and ratification of MOU's collectively bargained under the Dills Act. Pursuant to the Dills Act, the "Governor, or his representative as may be properly designated by law, [is

to] meet and confer in good faith regarding wages, hours, and other terms and conditions of employment with representatives of recognized employee organizations…" (Gov. Code, § 3517.) CalHR is the Governor's designated representative for purposes of meeting and conferring with state employee organizations. (Gov. Code, § 19814, subd. (g).) If the Governor and a recognized employee organization, e.g., CAPS, reach an agreement, the Dills Act requires the parties to "jointly prepare a written memorandum of such understanding which shall be presented, when appropriate, to the Legislature for determination." (Gov. Code, § 3517.5.)

In addition to its authority to approve terms and conditions of employment, the Legislature also retains ultimate authority to set compensation and approve expenditures arising from collective bargaining agreements negotiated between the State of California and state employee organizations. It is unambiguous that setting compensation for public employees is a legislative function. (*Lowe v. California Resources Agency* (1991) 1 Cal.App.4th 1140, 1151; *State Trial Attorneys' Assn. v. State of California* (1976) 63 Cal.App.3d 298, 303; see also, Gov. Code §§ 19815.2 and 19816.) Moreover, "[t]he power of appropriation resides exclusively in the Legislature." (*Tirapelle v. Davis* (1993) 20 Cal.App.4th 1317, 1321 citing to *California State Employees' Assn. v. State of California* (1973) 32 Cal.App.3d 103, 107-108.) The Legislature provides appropriations for the support of state agencies in the Budget Act. (*Ibid.*)

Since even the courts lack the power to compel the Legislature to appropriate or pay funds not yet appropriated, it is incongruous to conclude that parties to a collective bargaining agreement may vest an arbitrator with such authority. (*County of San Diego v. State of California* (2008) 164 Cal.App.4th 580, 598.) To conclude otherwise would be to sanction an unconstitutional delegation of legislative authority to a non-governmental

entity. (*Plastic Pipe & Fittings Assn. v. California Building Standards Com.* (2004) 124 Cal.App.4th 1390, 1410.) Absent clear evidence that the Legislature approved the receipt by CAPS members of increased meal and lodging rates bargained by other unions as discussed below, the arbitrator's decision violates the law and public policy.

B. An Arbitrator Lacks The Power To Issue An Arbitration Award Which Impinges On The Legislature's Authority.

Courts must vacate an arbitrator's award when it violates a well-defined public policy. (*Jordan v. Department of Motor Vehicles* (2002) 100 Cal.App.4th 431, 443; *Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 32; Code Civ. Proc., § 1286.2, subd. (a)(4).) To vacate an arbitration award on public policy grounds, a court must articulate "an explicit, well-defined and dominant public policy" ascertained by reference to "positive law" (e.g. legislation, implementing regulations or interpretative case law) rather than from general considerations of supposed public interests. (*Eastern Associated Coal Corp. v. United Mine Workers of America, District 17* (2000) 531 U.S. 57, 63.) Although an arbitration award is final and binding on the parties, it cannot bind the Legislature. (*Department of Personnel Administration*[3] *v. California Correctional Peace Officers Assn.* (*CCPOA v. DPA*) (2007) 152 Cal.App.4th 1193, 1203.)

The parties entered into their collectively bargained agreement pursuant to the Dills Act. (Gov. Code, § 3512 et seq.) In cases specifically interpreting the Dills Act, California courts have consistently ruled that

[3] CalHR has now taken over the collective bargaining functions of the former Department of Personnel Administration.

arbitrators lack jurisdiction to issue an award which impinges on the role of the Legislature. For example, in *CCPOA v. DPA*, the Third District Court of Appeal reviewed the validity of an arbitration award which interpreted an MOU provision relating to whether the parties had agreed to a cap on a "release time bank." (*CCPOA v. DPA, supra*, 152 Cal.App.4th at p. 1193.) In that case, the arbitrator found that the parties both intended to remove a cap on leave hours kept in a "release time bank" set forth in the MOU but, by mutual mistake, the parties failed to inform the Legislature of such understanding prior to the Legislature's approval of the MOU. (*Id*. at p. 1199.) The arbitrator subsequently ordered the cap lifted. (*Ibid*.) The appellate court vacated the arbitrator's award, finding that it violated public policy. (*Id*. at p. 1201.) In particular, the appellate court ruled that the arbitrator lacked the power to issue an award that conflicted with a Dills Act provision, namely Government Code section 3517.61. (*Ibid*.) Section 3517.61 mandates legislative approval of an MOU provision requiring the expenditure of funds. (*Ibid*.) Thus, the court held that the arbitrator's attempt to modify the terms of the MOU to conform to the parties' intent constituted an improper reformation in violation of public policy and in excess of the arbitrator's powers because the arbitrator ordered the cap on release time bank hours eliminated even though the Legislature had already approved the cap when it ratified the parties' MOU. (*Id*. at p. 1203.)

In *California Statewide Law Enforcement Assn. v. Department of Personnel Administration* (*CSLEA v. DPA*) (2011) 192 Cal.App.4th 1, the Third District Court of Appeal again vacated an arbitrator's award because it impinged on the Legislature's authority. In that case, the arbitrator interpreted an MOU provision as granting retroactive retirement benefits to certain state employees. (*CSLEA v. DPA, supra*, 192 Cal.App.4th at p. 16.) The arbitrator determined the parties agreed that certain Bargaining Unit 7

members would receive enhanced safety retirement benefits on a retroactive basis. (*Id*. at pp.9-11.) The appellate court vacated the arbitration award because the record demonstrated the Legislature did not contemplate retroactive application when it approved lucrative safety retirement benefits for the impacted employees. (*Id*. at p. 19.) While the appellate court deferred to the arbitrator's finding of fact that the negotiating parties had intended to apply safety member retirement benefits retroactively, it vacated the award for lack of legislative approval of the retroactive safety benefits as required by various Dills Act provisions. (*Id*. at p. 16, citing Gov. Code, §§ 3517, 3517.5, and 3517.61.) According to the court, the Legislature had to (1) be informed explicitly that DPA and CSLEA did enter into such an agreement, (2) be provided with a fiscal analysis of the cost of retroactive application of the agreement, and (3) with said knowledge, vote to approve or disapprove the agreement and expenditure. (*Id*. at p. 19.) "Consequently, to the extent that the arbitrator's award mandates the agreement be enforced without unequivocal legislative approval, it violates public policy . . . ." (*Id*. at p. 16.)

In yet another case, *California Department of Human Resources v. Service Employees International Union, Local 1000* (*CalHR v. SEIU*) (2012) 209 Cal.App.4th 1420, the court of appeal again vacated an arbitrator's award because it impinged on the authority of the Legislature. In that case, the arbitrator issued an award granting salary equity adjustments to certain nurse classifications by ruling the parties had agreed to a pay increase for certain prison medical employees, over and above separate, substantial pay increases that had already been ordered by a federal court. (*Id*. at p. 1427.) The appellate court once again vacated the arbitrator's award because it found the Legislature never exercised its authority by unequivocally approving the salary increases in addition to

salary increases ordered by a federal court. (*Id*. at pp. 1431-1435.) The court determined the arbitrator's award violated the Dills Act because the Legislature had not "explicitly approved" the additional pay increases as required by the Dills Act. (*Id*. at p. 1434.) The court of appeal reached this conclusion despite deferring to the arbitrator's finding that the negotiating parties had intended to grant the salary increases at issue. (*Id*. at p. 1430.) As the court concluded, "the [arbitration] award violates public policy because it mandates a fiscal result that was not explicitly approved by the Legislature." (*Id*. at p. 1434.)

All of these cases represent specific examples where a court has ruled an arbitrator lacks jurisdiction to issue an award which impinges on the authority of the Legislature to approve terms and conditions of employment, or to set compensation levels for state employees. These authorities provide authority for this Court to uphold the trial court's order vacating the arbitrator's award in this case as well.

C. Substantial Evidence Supports The Trial Court's Finding That The Award Violates Public Policy Because The Legislature Was Not Provided With A Cost Analysis Of The Meal And Lodging Expenditures.

As the trial court correctly determined, the arbitration award in this case impermissibly orders increases to meal and lodging reimbursement rates for CAPS members that were not approved by the Legislature. When CalHR submitted the CAPS MOU to the Legislature, as required by the Dills Act, the materials did not include costing related to section 20.4, the contract protection clause at issue here. (JA, Vol. I, Tab 6, p. 00304, ¶ 3; Vol. II, Tab 7, p. 00314 ¶ 3, and pp. 00315-00321.) Moreover, when CalHR submitted the SEIU MOU to the Legislature, only the cost for the enhanced meal and lodging reimbursement rates for SEIU members was

included. (JA, Vol. I, Tab 6, p. 00304, ¶ 4; JA, Vol. II, Tab 7, p. 00314, ¶ 5, and pp. 00341-00352.) The cost for CAPS members was not included and the Legislature was not informed the enhanced rates would also be given to CAPS members. (JA, Vol. I, p. 00304, ¶ 4; JA, Vol. II, Tab 7, p. 00314, ¶ 5, and pp. 00341-00352.) Additionally, the reports concerning these MOU's issued by the Legislative Analyst Office do not reference enhanced meal and lodging reimbursement rates for CAPS members. (JA, Vol. II, Tab 7, p. 00314, ¶¶ 4, 6, and pp. 00322-00341, 00353-00370.) The trial court appropriately relied upon this evidence in its ruling in this case. It cannot reasonably be disputed the Legislature never approved or appropriated funds to cover the enhanced meal and lodging reimbursement rates for CAPS members as ordered by the arbitrator.

Moreover, because the Legislature has not approved or appropriated funds for enhanced meal and lodging expense rates for CAPS members, the arbitration award ordering such increases intrudes upon the authority of the Legislature in several ways. First, the award undermines the authority of the Legislature to approve terms and conditions of employment because the Dills Act requires the parties to present the MOU to the Legislature for final approval. (Gov. Code, § 3517.5.) In this case, the Legislature has never been presented with, and has therefore never approved, the enhanced mileage and lodging reimbursement rates and associated cost for CAPS members either at the time the CAPS or the SEIU MOU was ratified.

Additionally, the award undercuts the Legislature's authority to approve expenditures, and to set compensation levels for state employees. The Dills Act specifically provides that "if any provision of the memorandum of understanding *requires the expenditure of funds*, those provisions of the memorandum of understanding may not become effective *unless approved by the Legislature* in the annual Budget Act." (Gov. Code

§ 3517.6 [emphasis added].) The enhanced meal and lodging reimbursement rates awarded by the arbitrator clearly require the expenditure of funds. Contrary to CAPS' assertion, the award must be vacated because the Legislature never approved such an expenditure.

The arbitration award also intrudes upon the power of the Legislature to appropriate monies. It is well-settled that "[t]he power of appropriation resides exclusively in the Legislature." (*Tirapelle v. Davis* (1993) 20 Cal.App.4th 1317, 1321, citing *California State Employees' Assn. v. State of California* (1973) 32 Cal.App.3d 103, 107-108.) The arbitrator lacked the power to appropriate monies by ordering the state to pay CAPS's members increased meal and lodging reimbursement rates. This arbitration award must be vacated because the Legislature did not appropriate funds for enhanced meal and lodging reimbursement rates for CAPS members.

D. CAPS Has Failed To Demonstrate That The Trial Court Erred In Vacating The Arbitration Award.

1. The Legislature Did Not Authorize The Enhanced Meal and Lodging Rates For CAPS Members Merely By Ratifying The CAPS MOU.

Although CAPS suggests that the Legislature somehow authorized the enhanced meal and lodging rates for its membership when it approved the parties' contract protection clause, this argument is without merit. The case precedent cited previously indicates the notice provided to, and approved by, the Legislature must be very specific. In *CSLEA v. DPA*, the Legislature had approved an MOU provision relating to retirement benefits, which the arbitrator interpreted as applying retroactively. (*CSLEA v. DPA*, *supra*, 192 Cal.App.4th at p. 16.) Nonetheless, the court vacated the arbitrators' award, finding that the Legislature's adoption of the MOU did

not constitute "unequivocal legislative approval." (*CSLEA v. DPA*, *supra*, 192 Cal.App.4th at p. 16.) The court ruled that the Legislature's ratification of the MOU did not satisfy the strict notice and approval requirements set forth in the Dills Act. (*Ibid*.)

Likewise, in *CalHR v. SEIU*, the Legislature had ratified an MOU including a provision requiring the state to pay salary equity adjustments to certain prison medical personnel, which the arbitrator interpreted as having to be paid notwithstanding the fact that the impacted employees had already been granted other pay raises by a federal court. (*CalHR v. SEIU*, *supra*, 209 Cal.App.4th at pp. 1429-1430.) The court similarly rejected the argument the Legislature had approved the pay raises at issue when it merely approved the MOU. (*Id*. at p. 1434.) The court determined the "Legislature's awareness of an ambiguity [in the MOU provision at issue] does not equate to approval of benefits…in excess of those *explicitly* presented to and approved by the Legislature." (*Ibid*., emphasis added.) The court therefore vacated the arbitration award, notwithstanding the fact that the Legislature had ratified the parties' MOU, including the provision at issue. (*Ibid*.)

The arbitration award must be vacated in this case as well. Although the Legislature generally approved the CAPS MOU when it was presented in 2011, including the contract protection clause contained therein, this does not change the fact that the Legislature never explicitly approved any meal and lodging rate increase for CAPS members. As the trial court correctly determined, the arbitration award violates public policy because the Legislature was not provided with a cost analysis of the expenditures at either the time the CAPS or the SEIU MOUs were confirmed. Legislative approval and funding of MOU provisions cannot occur unless the

Legislature is expressly and clearly informed of the provisions, and approves the provisions following a transparent process.

2. CAPS Failed To Present Any Evidence Demonstrating That The Legislature Explicitly Intended To Increase Meal And Lodging Rates For CAPS's Members.

CAPS also failed to present any evidence demonstrating that the Legislature explicitly intended to increase meal and lodging rates for CAPS members. In support of its contention that the Legislature somehow knew it was funding meal and lodging increases for CAPS members, CAPS highlights a two-sentence passage from a Legislative Analyst's Office (LAO) report dated April 1, 2011, briefly describing the contract protection clauses in the Bargaining Unit 9 and 10 [CAPS] MOUs. According to CAPS, the following two sentences sufficiently notice the Legislature of the fiscal impact that could and would result from the arbitrator's unlimited and open-ended interpretation of Article 20.4:

> Contract Protection Clause. The proposed MOUs include a contract protection provision. If any other bargaining unit were to enter into an agreement with the state that did not include pension reform or provided greater value/total compensation package that the proposed MOUs, then Units 9 and 10 would (with some exceptions) receive the difference between the agreements.

(AOB, p. 38; JA, Vol. II, Tab 9, p 00390; JA, Vol. II, Tab 11, p. 00469.)

As the trial court correctly determined, this report does not provide any *cost analysis* related to potential increased expenditures pursuant to Article 20.4. This passage from the LAO report merely summarizes the operative language of Article 20.4. CAPS's argument that it would be "impractical" to provide hypothetical scenarios resulting from an open-ended contract protection clause misses the point because the Legislature must still be provided the appropriate fiscal analysis before approving an

MOU. (JA, Vol. II, Tab 9, p. 00390; JA, Vol. II, Tab 17, p. 00561, ¶ 4.) Moreover, according to Ms. Shimazu, Chief of CalHR's Office of Fiscal Management and Economic Research, the Legislature was not provided costing information for Article 20.4 at either the time the CAPS or SEIU MOUs were confirmed. (JA, Vol. I, Tab 6, p. 00304, ¶ 3.) In the absence of such information, the Legislature could not have approved the broad, unspecific expenditure of public funds which the arbitration award now requires.

3. The Arbitrator Could Not Properly Order Expenditures From Already Existing Funds Which Had Previously Been Appropriated For Another Purpose.

CAPS's argument that a fiscal analysis was not required because the meal and lodging expense reimbursement rate increases for the CAPS MOU had already been appropriated for other purposes and currently exist in departments' operating budgets also lacks merit. (AOB, pp. 27-32, JA, Vol. II, Tab 9, pp. 00386-00389.) The mere availability of funds in departments' budgets does not alter the requirement the Legislature must have explicit knowledge of what it is approving and the related fiscal impact. The evidence in this case demonstrates that the Legislature historically provides oversight with regard to expenditure of funds that already exist in departmental operating budgets (otherwise known as "non-add" items). (JA, Vol. II, Tab 17, p. 00561, ¶ 4.)[4] Such fiscal oversight is necessary to ensure departments do not spend appropriated funds in ways

[4] As CAPS noted in its Opposition in the trial court, a "non-add" item is defined as "a numerical value that is displayed…for information purposes but is not included in computing totals[.]" (JA, Vol. II, Tab 9, p. 00388:1-19.)

other than their intended purpose. (*Ibid.*) Since the Legislature did not have such knowledge of the fiscal impact of the arbitrator's interpretation of Article 20.4, it could not have approved that Article and the expenditure of funds resulting from the arbitrator's award.

The law in this area is well-settled. In *Butt v. State of California* (1992) 4 Cal.4th 668, the California Supreme Court held a court invades the Legislature's constitutional authority by diverting appropriated funds from their earmarked destinations and purposes. (*Id.* at p. 698.) Although CAPS attempts to distinguish *Butt*, its argument that the Legislature need not specifically approve the expenditures in this case is unavailing. CAPS relies on *Carmel Valley Fire Protection District v. State of California* (1987) 190 Cal.App.3d 521 and *Long Beach Unified School District v. State of California* (1990) 225 Cal.App.3d 155, in support of its argument. However, the trial court correctly determined that those cases are inapposite because they do not involve an MOU approved by the Legislature but, rather a situation where a court ordered the state to reimburse a local district for costs incurred pursuant to a state mandate. Those cases do not provide an exception for the rule that the Legislature must be provided with a fiscal analysis of the cost of increased meal and lodging reimbursement rates.

4. Explicit Legislative Approval To Increase The Meal and Lodging Reimbursement Rates For Unit 9 Employees Was Required And Provided.

On appeal, CAPS continues to incorrectly assert that when SEIU members obtained an increase to their meal and lodging expense reimbursement rates, no legislative action was taken to implement the increase for Unit 9 members. (AOB, pp. 41-45 and JA, Vol. II, Tab 9, pp. 00391-00392.) According to CAPS, "No additional costing information

[besides the LAO's analysis, cited above] was provided to the Legislature regarding the implementation of the meal and lodging reimbursement rate increases [for Unit 9 members]." (JA, Vol. II, Tab 9, p. 00399; see also AOB, p. 44.)

As the trial court correctly found, the Legislature did, in fact, explicitly approve the increase in meal and lodging reimbursement rates for Unit 9 members, and did so after reviewing costing information related to those increases. CalHR submitted evidence in this case that SEIU's meal and lodging expense reimbursement rates increased in 2013 while the Unit 9 MOU was being negotiated. (JA, Vol. II, Tab 17, p. 00561, ¶ 5.) CalHR also submitted evidence that the Legislature was provided costing documents describing the fiscal impacts of a reimbursement rate increase for Unit 9 members, and approved the rate increase when it ratified the 2013-2015 Unit 9 MOU. It was only after reviewing these documents that the Legislature could properly reject or, in this case, approve the MOU and associated rate increase. (*Ibid.;* JA, Vol. II, Tab 16, p. 00550, ¶ 4 and pp. 00551-00559; Tab 17, p. 00561, ¶ 7.)

The trial court appropriately credited the evidence submitted by CalHR on this point over the evidence submitted by CAPS. CAPS submitted a declaration by Theodore Toppin, a CAPS lobbyist, who claimed to be "aware of no legislative action required to implement the increase in the Unit 9 meal and lodging reimbursement rates triggered by the invocation of the [Unit 9] Contract Protection Clause." However, as the trial court determined, "Mr. Toppin's 'awareness' is not sufficient to show that the Legislature did not approve the Unit 9 increases or receive additional costing information." It is not surprising that Toppin would not be aware of this fact because CalHR did not submit this costing information to any Unit 9 representative. (JA, Vol. II, Tab 17, p. 00562, ¶ 8.)

Additionally, Toppin's further statement, "No state bargaining unit's increase in meal and lodging expense reimbursement rates require a legislative appropriation" is simply incorrect. (JA, Vol. II, Tab 12, p. 00530, ¶ 12.) As a factual matter, CalHR presented evidence to the trial court that, if an increase in meal and lodging expense reimbursement rates results in expenditures that exceed that portion of a department's operating budget, a legislative appropriation must be obtained to fund the meal and lodging expense reimbursement rate. (JA, Vol. II, Tab 17, p. 00562, ¶ 9.) Additionally, as a legal matter, even if there are adequate existing funds in the budget and no additional appropriation were required, sufficient fiscal analysis must be provided to the Legislature in order for the Legislature to approve any MOU. "[A]n administrative agency is subject to the legislative power of the purse and 'may spend no more money to provide services than the Legislature has appropriated.'" (*Carmel Valley Fire Protection Dist. v. State* (2001) 25 Cal.4th 287, 300 [citation omitted].) Pursuant to the three-factor test set forth in *CSLEA v. DPA*, the Legislature never contemplated or explicitly approved the arbitrator's overly broad interpretation and application of Article 20.4.

II. CALHR'S PUBLIC POLICY ARGUMENTS ARE NOT WAIVED.

CAPS' contention that CalHR has waived its public policy arguments by failing to present them to the arbitrator also lacks merit. CAPS' assertion that CalHR did not raise its public policy arguments in arbitration is factually incorrect.

However, even if CalHR had not raised its public policy arguments at arbitration, important public policy matters, such as those involving the separation of powers doctrine and state labor relations matters, cannot be

waived as a matter of law.

A. CAPS's Assertion That CalHR Did Not Raise Its Public Policy Arguments In Arbitration Is Factually Inaccurate.

Contrary to CAPS's assertions, CalHR *did* raise its public policy arguments during the arbitration process. CalHR argued Article 20.4 violated public policy because it constituted a most favored nations clause encompassing all negotiated terms and conditions of employment without exception and in perpetuity. CalHR specifically referenced the destructive potential such interpretation would have on the parties' continuing obligation to bargain in good faith:

> The evidence is simply insufficient to meet CAPS' burden to demonstrate it is entitled not only to the travel and meal reimbursement increases SEIU negotiated in a subsequent MOU in June 2013, but any other economic benefits SEIU, or any other union achieves in any future MOU, until the end of time, without ever having to bargain with the state again.

(JA, Vol. II, Tab 11, p. 00513:1-4.) CalHR also noted CAPS's attempt to expand its grievance to cover not only the meal and lodging reimbursement increases it sought in the grievance, but any enhanced benefits whatsoever for the first time at arbitration:

> CAPS' grievance alleges Article 20.4 operates as a most favored nations clause that CalHR violated when it refused to grant CAPS' request to provide its members with enhancements SEIU negotiated to lodging and meal reimbursement rates in a successor agreement in June 2013. (Joint Ex. 1, pp. 1-4; Union Ex. U.) For the first time at arbitration CAPS appeared to have expanded its interpretation of Article 20.4 to cover any enhanced benefits negotiated by any union at any time in the future, without limitation.

(*Id.*, at p. 00516:12-17.)

Finally, CalHR argued CAPS's theory would lead to an "undeserved windfall" with the result that CAPS need not ever bargain further with the state. (*Id*. at pp. 00524-00525.) Because CalHR plainly raised its public policy arguments in arbitration, the assertion CalHR waived its arguments fails.

B. CAPS's Waiver Argument Fails To Consider Longstanding California Precedent And Misapplies The Law.

The arbitration award at issue in this case mandates a fiscal result not contemplated or approved by the Legislature, ignores the separation of powers doctrine and frustrates good faith bargaining. Courts have long held that issues like those here, which turn on matters of important public policy, may be raised for the first time on appeal. "The failure to make a timely and sufficient objection is of no moment where a grave matter of public policy is involved." (*People v. Rodriguez* (1943) 58 Cal.App.2d 415, 421.) "Appellate courts are more inclined to consider such tardily raised legal issues where the public interest or public policy is involved." (*Bayside Timber Co. v. Board of Supervisors* (1971) 20 Cal.App.3d 1, 4-5; see also, *Hale v. Morgan* (1978) 22 Cal.3d 388, 394; *Santillan v. Roman Catholic Bishop of Fresno* (2008) 163 Cal.App.4th 4, 12, fn. 10; *County of Orange v. Ivansco* (1998) 67 Cal.App.4th 328, 331, fn. 2.) Because CalHR's arguments rest on important public policy, they are not waived as a matter of law.

Even if CalHR had not previously raised its separation of powers argument in arbitration, which it did, CalHR properly raised its concerns to the trial court. CalHR contends the Legislature did not intend to ratify, and therefore did not ratify, MOU Article 20.4, as construed by the arbitrator. Questions of legislative intent, including whether the Legislature intended

to approve an expenditure of funds for an MOU, are outside an arbitrator's authority and jurisdiction. (*Wright v. Universal Maritime Service Corp.* (1998) 525 U.S. 70, 78-79; see also Article 9.12(E) of the MOU, stating, "The arbitrator shall not have the power to add to, subtract from, or modify this Agreement.") Instead, these questions are properly addressed by the courts. (*Wright v. Universal Maritime Service Corp., supra*, 525 U.S. 70, at 78-79.) The legislative intent behind its ratification of the MOU implicates public policy concerns that this Court alone may resolve.

For similar reasons, CAPS' reliance on *Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1 (*Moncharsh*), to argue CalHR's arguments should have been raised in arbitration is misplaced. Unlike the case at hand, *Moncharsh* involved a matter of *private* arbitration regarding a fee-splitting provision in an employment agreement, and was limited solely to whether the arbitration award should have been made binding as an expression of the parties' bargained-for intent. (*Id*. at p. 13; Code Civ. Proc., § 1280 et seq.) In contrast, CalHR's arguments involve the public policy implications of the Legislature's authority and responsibility to ratify and fund a state employee collective bargaining agreement, and whether the arbitrator's interpretation of Article 20.4 is consistent with what the Legislature intended to and did ultimately approve. *Moncharsh* does not support CAPS' argument because nothing in that case addressed these public policy considerations. This distinction invalidates CAPS's reliance on *Moncharsh*.

Moncharsh is irrelevant to the instant case for yet another reason. The passage cited by CAPS in its opening brief distinguished two types of claims, both of which challenge the legality of an arbitration agreement. However, CAPS fails to explain how challenging the legality of an arbitration agreement supports its waiver argument when CalHR does not

allege any portion of the MOU is illegal. CalHR is not challenging the legality of the MOU, it is challenging the arbitrator's award granting CAPS a retroactive increase that contradicts the intent of the Legislature. *Moncharsh* dealt with allegations that a fee-splitting provision contained in an arbitration agreement was unconscionable, not with allegations that the arbitrator exceeded her powers.

Additionally, as determined by the trial court, it would have been premature for the state to argue during the arbitration proceeding that the arbitration award violates public policy because the award had not yet been issued. (JA, Vol. II, Tab 17, p. 00567). The state could not have predicted the arbitrator would issue an award that usurps the role of the Legislature.

For all the foregoing reasons, the trial court correctly held that CalHR could not waive its public policy arguments as a matter of law.

CONCLUSION

The arbitrator's award violates the well-established public policy that it is the role of the Legislature to unequivocally approve all terms and conditions of employment and associated costs of a labor contract governing state employees. Furthermore, CalHR did not and could not waive these public policy arguments.

For all of the foregoing reasons, this Court should affirm the trial court's decision vacating the arbitration award in this matter.

Dated: October 14, 2016

Respectfully submitted,

FROLAN R. AGUILING
Chief Counsel

By: /s/ Kevin A. Geckeler
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Attorneys Defendant and Respondent

CERTIFICATE OF COMPLIANCE

I hereby certify that:

Pursuant to California Rule of Court, rule 8.204, subdivision (c)(1), the attached Appellant's Brief is proportionately spaced, has a typeface of 13 points or more in Times New Roman font, and contains 8,196 words, per the word count feature in Microsoft Word.

Dated: October 14, 2016

Respectfully submitted,

FROLAN R. AGUILING
Chief Counsel

By: /s/ Kevin A. Geckeler
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Attorneys for Respondent

PROOF OF SERVICE

CASE NAME: California Association of Professional Scientists V. Department of Human Resources
CASE NUMBER: 34-2014-00165420

I, Victoria Robinson, declare:

I am employed in the County of Sacramento, California. I am over the age of 18 years, and not a party to the within action. My business address is 1515 S Street, North Building Suite 500, Sacramento, California 95811-7258. I am readily familiar with my employer's business practice for collection and processing of correspondence for GSO, U.S. Mail, Fax Transmission and/or Personal Service.

On October 14, 2016, I caused the following documents to be served:

RESPONDENT'S BRIEF

on the parties listed as follows:

XX via electronic service through TrueFiling.

XX via electronic mail cdominguez@capsscientists.org

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on October 14, 2016, at Sacramento, California.

/s/ Victoria Robinson
Victoria Robinson