

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT**

CALIFORNIA ASSOCIATION OF)	Court of Appeal
PROFESSIONAL SCIENTISTS,)	Case No. C063118
)	
<i>Plaintiff and Respondent,</i>)	
)	
v.)	
)	
DEPARTMENT OF FINANCE;)	
ET AL.,)	
)	
<i>Defendants and Appellants.</i>)	
)	

On Appeal from the Superior Court, County of Sacramento
Honorable Lloyd G. Connelly
Case No. 34-2008-00014476 CU-WM-GDS

RESPONDENT'S BRIEF

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I.

INTRODUCTION

The Department of Finance (“Finance”) appeals from a judgment of the Sacramento County Superior Court granting a petition for writ of mandate in favor of the California Association of Professional Scientists (“CAPS”). Finance’s appeal presents a straightforward question. May Finance be compelled to present to the Legislature for its consideration funding for an increase of the salaries for certain state scientific employees which the Department of Personnel Administration (“DPA”) has determined is required by existing law? The trial court correctly answered “yes” and issued a writ against both DPA and Finance.

The State of California, through the DPA, made a determination that state law requires the salaries of employees in 14 state supervisory scientific classifications be comparable to the salaries of 14 state supervisory engineering classifications. Despite the salary determination by the DPA that the salaries must be comparable, the state did not pay the increased salaries. It is undisputed that the salary determination is properly within the jurisdiction of the DPA. Further, the amount of the salaries are not in dispute. The only issue raised by Finance on appeal is whether it must take steps to present the appropriation of funds recommendation to the

Legislature for its determination.

Neither DPA nor Finance took any action to pay or to seek funding for the state scientist salaries. CAPS sought declaratory relief regarding the amount of the salaries to be paid to supervisory scientists. CAPS also sought a writ of mandamus to compel the state to pay the increased salaries out of existing appropriations. Additionally, the writ sought to have the DPA and Finance include the funding required to increase the salaries of the 14 supervisory scientist classifications to the correlating supervising engineering classes in the proposed budget for the Legislature's consideration.

The trial court correctly ruled in favor of CAPS. Since the court found that the salary adjustments would require expenditures in excess of existing appropriations, the court held that DPA and Finance must take all feasible steps to present the recommended salary adjustments to the Legislature for consideration of whether to appropriate funds needed to make the adjustments. Specifically, DPA must inform the Legislature of the need for salary adjustments recommended on the basis of the statutory like-pay-for-like-work principle. Finance must include accurate information provided by DPA regarding the amount of funds needed for the recommended salary adjustments in the budget information sent to the

Legislature. The court found withholding that information from the Legislature and allowing the salary adjustments to founder would degrade the statutory like-pay-for-like-work principle in Government Code section 19826 and defeat the related legislative purpose in Section 18500.

DPA did not appeal the trial court's decision, Finance did appeal. The court properly found that DPA and Finance have a duty to implement a recommendation for adjustments to the salary ranges for 14 supervising scientist classifications in the state civil service. The writ properly commands Finance to follow the salary setting structure set up by the Legislature. Under this structure in Government Code sections 19826, 13320 and 13337, the Department of Personnel Administration and Finance are to submit to the Legislature, for its consideration, the amount of funding required to implement the DPA's salary determinations. For the reasons set forth herein, CAPS respectfully requests this Court affirm the ruling of the trial court.

II.

STATEMENT OF THE CASE

A. Statement of Facts

1. Salary Setting Through the Quasi-Legislative Hearing Before DPA

DPA is a California state agency created by the Legislature in 1981

for the purposes of managing the nonmerit aspects of the state's personnel system. (Gov. Code § 19815.2.) DPA has jurisdiction over the state's financial relationship with its employees, including matters of salary, layoffs, and nondisciplinary demotions. (*Tirapelle v. Davis* (1983) 20 Cal.App.4th 1317, 1322; Gov. Code §§ 19816, 19816.2, 19825, 19826.)

The Legislature has provided the DPA with the statutory authority to set salaries for employees excluded from collective bargaining, including employees designated as supervisors. The matter of setting employee compensation is a legislative function which, in this instance, the Legislature has delegated to the DPA. (*Tiraelle v. Davis, supra.*, 20 Cal.App.4th 1322 citing *Pacific Legal Foundation v. Brown* (1981) 29 Cal.3d 168, 189.) The DPA can act only to the extent and in the manner consistent with the legislative delegation of authority. As part of the salary setting delegation, the Legislature has stated that the salary ranges "shall be based on the principle that like salaries shall be paid for comparable duties and responsibilities." (Gov. Code § 19826.) This provision has been construed to mandate "horizontal parity among comparable positions throughout the civil service structure." (*State Trial Attorneys' Assn. v. State of California* (1976) 63 Cal.App.3d 298, 304.)

Historically, there has been horizontal parity between 14 supervisory

scientist classifications and 14 supervisory engineer classifications. In setting the salaries, the state (through the DPA since 1981) has historically paid the state supervisory scientists either the same, or consistently paid the scientific classifications five or ten percent lower, than comparable engineering classifications. (Clerk's Transcript 0040.)

Beginning in July 2005, the supervisory engineering classifications began receiving salary increases which were higher than those of the supervisory scientist classifications. Following additional salary increases for supervisory engineers in July 2006 which widened the pay gap between supervisory classifications that were once compensated comparably, CAPS initiated an administrative challenge to the salaries. (CT 0124.)

On November 3, 2006, CAPS, as a verified excluded employee organization and the representative of the state's professional scientist supervisors, challenged the salary ranges for 14 supervisory scientist classifications claiming that the pay violated the principle that "like salaries shall be paid for comparable duties and responsibilities." Specifically, CAPS contended that in setting the salaries for the challenged classifications, the DPA has violated the legislative mandate found in Government Code section 19826 which requires the state to pay like salaries for comparable work. (CT 0124.)

Then DPA Director David Gilb established an investigative hearing panel to hear the challenge to the salary structure and the claim for additional compensation. The panel was charged with investigating the claim that supervising scientists are performing comparable duties and have comparable responsibilities to certain supervising engineering classes. (CT 0046.)

Following four days of hearing including 31 witnesses, on April 28, 2008, the 22 page Director's Decision was issued by DPA. In the decision, the DPA adopted the investigation panel's factual summary of the witness testimony, exhibits and document review. The Director's Decision found that the testimony from witnesses working in the various classifications, and from managers and human resource personnel in agencies and departments using the classifications, indicates that the duties and responsibilities of supervising scientists and supervising engineers are sometimes identical and/or comparable in terms of organizational level and supervisory or managerial responsibility. The Decision noted that while the supervising and management duties and responsibilities were similar and comparable, the classifications when viewed as a whole were not identical. The Decision concludes that factual evidence presented by the claimants and the employing agencies established that the duties and responsibilities of the

subject supervising scientist classifications are similar but not identical to those assigned to the subject supervising engineer classifications. (CT 0039 - 0041.)

In the Director's Decision, the DPA adjusted supervising scientist classification salaries by increasing them to comparability with certain supervising engineering classifications, based on historical State Personnel Board documents that initially established classifications and historical pay scales. (CT 40 - 42.) These salary determinations are the product of the Director's salary setting consistent with his authority under Government Code section 19826 and are subject only to the availability of appropriations to pay the increase. (*Tirapelle v. Davis, supra.*, 20 Cal.App.4th at 1326.) DPA's "quasi-legislative" action of setting salaries involved the formulation of rules to be applied in future cases. (*Lowe v. California Resources Agency* (1991) 1 Cal.App.4th 1140, 1149, citing *Strumsky v. San Diego County Employees Retirement Assn.* (1974) 11 Cal.3d 28, 34-34-35, fn. 2.)

2. Finance Made a Determination That Funds for the Salary Increases Had Not Been Appropriated in Either Departmental Budgets or the Budget Act Item 9800.

DPA sent the April 28, 2008 Director's Decision to Finance with a cover letter transmitting the DPA's findings on the salary hearing under

Government Code section 19826. The letter also said that consistent with Section 19826, “Finance must make a determination on whether the recommended adjustments are within existing statutory appropriations.” (CT 043.)

Finance responded to DPA on May 7, 2008. The letter sent to DPA on behalf of the Director of Finance noted that DPA is prohibited from making adjustments to salaries that require expenditures in excess of existing appropriations. The letter stated that “Funds for the recommended salary increases for the 14 supervising salary classifications have not been appropriated in either department budgets or in Budget Act Item 9800.” (CT 210.)

3. Neither Finance nor DPA Took Any Further Action to Place the Amount Needed to Fund the Salary Determination Before the Legislature in the Budget Act Log or Elsewhere.

As part of the budget process, in the fall of each year, the DPA notifies Finance of its intent to increase salaries and benefits for certain groups of employees. DPA requests that Finance put that money into the Budget Item 9800 of the Governor’s Proposed Budget. (CT 0405, See Deposition of Timothy Lynn, Finance Assistant Program Budget Manager.) DPA does this by providing Finance a “Budget Log” for employee compensation increases. DPA provides this Budget Log in the fall budget

process and then again in connection with the May revision to the budget.

(CT 0412.)

The Budget Log breaks down the compensation and benefit increases by individual state employee bargaining units and also by employees excluded from collective bargaining. (CT 0456, See Budget Log document titled “Item 9800 2007-08 Budget Act”.) The total expenditures for compensation and benefit increases listed in the DPA Budget Log total typically matches the total in the 9800 Item in the state Budget Act. (CT 0405 - 0417.)

Mr. Lynn was produced by Finance in discovery as the person most knowledgeable regarding employee compensation and “9800 Item” issues. Mr. Lynn stated in his deposition regarding the preparation of the 9800 Item of the state budget, that “[t]he Director of the DPA is responsible for setting salaries for excluded employees.” (CT 0394.) Mr. Lynn responded that Finance does not conduct any independent investigation in including items in the 9800 Item, instead Finance relies upon the salary requirement information provided to it by the DPA. (CT 0393 - 0394.) According to Mr. Lynn,

“In the fall budget process and then again in the May 14th May revision process, the Department of Personnel provides us with a budget log for employee compensation increases. We build those totals into the budget based on that log, and it is very specific as to

what those compensation increases are for. That log is then shared with the legislature, legislative consultants, with the legislative analyst office, and the appropriations made through the legislative process are in accordance with that log, and so they are understanding what it is they're appropriating and for what purpose.” (CT 0412 - 0413.)

DPA did not include any supervisory scientist salary increases in the 2008 - 2009 Budget Act Log. (CT 0479.)

B. Procedural History

CAPS filed a verified petition for writ of mandate and request for declaratory relief on June 27, 2008. (CT 0017.) CAPS sought declaratory relief that employees in the 14 state scientific classifications are entitled to the salaries as determined by the DPA as set forth in the DPA Director's April 28, 2008 Decision. (CT 0018.) CAPS sought a writ compelling DPA to set the salaries consistent with the DPA Director's decision and then compelling Finance to determine whether the increased salaries can be paid out of existing appropriations. CAPS also sought a writ commanding State Controller John Chiang to pay the increased salaries. Finally, CAPS sought a writ commanding DPA and Finance to include the funding needed to increase state supervisory scientists' salaries in the proposed budget for the Legislature's consideration. (CT 0018 - 0019.) Finance and DPA each answered the petition. (CT 174; 212.)

Following briefing, the trial court held a hearing on September 19,

2008 where CAPS was granted leave to conduct discovery. (CT 289.)

Following discovery, the parties filed additional briefing and a hearing was held on April 24, 2009. The trial court issued judgment and a writ in favor of CAPS on July 28, 2009. The Judgment found that respondents DPA and Finance have a duty to implement a recommendation for adjustments to the salary ranges for 14 supervising scientist classifications in state civil service, made by Respondent DPA on April 28, 2008, pursuant to the principle in subdivision (a) of Government Code section 19826 “that like salaries shall be paid for comparable duties and responsibilities.” (CT 0683.)

After finding that the recommended increases would require expenditures in excess of existing appropriations in Budget Item 9800, the trial court held that respondents “must take all feasible steps to present the recommended salary adjustments to the Legislature for consideration of whether to appropriate funds needed to make the adjustments.” DPA is responsible for insuring like pay for like work, specifically under the like-pay-for-like-work principle stated in subdivision (a) of section 19826 and broadly under the legislative purpose stated in subdivision (c)(1) of Government Code section 18500, to provide a state civil service system in which positions involving comparable duties and responsibilities are

similarly classified and compensated. Pursuant to that statutory responsibility and legislative purpose, the trial court found DPA must inform the Legislature of the need for funds to make the salary adjustments recommended on the basis of the statutory like-pay-for-like-work principle. The trial court held that in preparing the Governor's proposed budget, Finance must include accurate information provided by DPA in a Budget Act Log or other document to the Legislature for its consideration in appropriating funds. Relying on *State Trial Attorneys' Association v. State of California* (1976) 63 Cal.App.3d 298, 303-305, the trial court found that withholding that information from the Legislature and allowing the recommended salary adjustments to founder would degrade the statutory like-pay-for-like work principle in statute.

The court issued a peremptory writ requiring Finance to "include accurate information furnished by Respondent Department of Personnel Administration about the amount of the funds needed for the salary adjustments in a Budget Act Log or other document presented to the Legislature for its consideration in appropriating funds for state employees' salary increases." The writ obligation for Finance is in place until either the Legislature appropriates the funds to implement the decision or until DPA determines in a quasi-legislative proceeding that the factual basis for the

recommended salary adjustments is no longer valid. (CT 0684 - 0685.)

III.

STANDARD OF REVIEW

The most fundamental rule of appellate review is that an appealed judgment or order is *presumed to be correct*. (*State Water Resources Control Bd. Cases* (2006) 136 Cal.App.4th 674, 836; Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2004) ¶ 8:15, pp. 8-4 to 8-5.) It is the appellant who bears the burden of overcoming that presumption. (*State Water Resources Control Bd. Cases, supra.*, 136 Cal.App.4th at 836.)

Where the trial court has decided a pure question of law, the appellate court examines the question de novo. (See *People v. Jackson* (2005) 128 Cal.App.4th 1009, 1018.) However, even in that situation, this does not mean the appellate court disregards the trial court's rationale for its decision. (*Ibid.*)

IV.

ARGUMENT

A. SALARY SETTING FOR EXCLUDED STATE EMPLOYEES IS EXCLUSIVELY WITHIN DPA'S JURISDICTION ONLY SUBJECT TO THE LEGISLATURE'S APPROVAL, REJECTION, OR ALTERATION

The power of appropriation resides exclusively in the Legislature.

(Tirapelle v. Davis, supra. 20 Cal.App.4th at 1321.) The matter of setting employee compensation is a legislative function that the Legislature accomplishes through a delegation of authority to the DPA. DPA's exercise of the quasi-legislative salary setting is subject to the ultimate authority of the Legislature to approve, reject or alter such exercise of authority through appropriate legislation. (*Id.* at pp. 1322 -1323, fn. 8.)

When the Legislature granted the DPA the salary setting function by passing Government Code section 19826, it authorized DPA to determine the salaries of excluded state employees, and thus the legal obligations of the state.

Utilizing the process described by Mr. Lynn of Finance, each year the DPA provides to Finance the funding amounts it needs to pay for new employee compensation items. (CT 0393.) This is consistent with Government Code section 19835.5 which requires each agency to call attention to the sums necessary for employee compensation and with Government Code section 13320 under which the Legislature requires every state agency to submit to Finance a complete and detailed budget setting forth all proposed expenditures for the year.

The Legislature may approve or may decline to approve the salary increase, but following the state's budget process, the Legislature must be

presented with the recommended salary increases for the 14 classifications of state scientists following DPA's finding that the salaries must be increased. As Mr. Lynn testified, the Budget Act Log information passed on to the Legislature for its consideration includes "increases for excluded employees ... ordered by the director of DPA." (CT 0393 - 0395, Lynn Deposition.)

B. FINANCE HAS A MINISTERIAL DUTY UNDER THE LAW WHICH MAY BE COMPELLED BY MANDATE

To obtain writ relief under Code of Civil Procedure section 1085, the petitioner must show there is no other plain, speedy, and adequate remedy; the respondent has a clear, present and ministerial duty to act in a particular way; and the petitioner has a clear, present and beneficial right to the performance of that duty. (*Morgan v. Bd. of Pension Comrs.* (2000) 85 Cal.App.4th 836, 842.) It generally is an abuse of discretion to deny writ relief where the petitioner has shown a substantial right to enforce or protect and there is no other plain, speedy or adequate remedy in the course of law. (*Powers v. City of Richmond* (1995) 10 Cal.4th 85, 114.)

Traditional mandate is appropriate to compel the performance of ministerial duties. (*Glendale City Employees' Assn., Inc. v. City of Glendale* (1975) 15 Cal.3d 328, 334 - 338.) A ministerial duty is one that is required to be performed in a prescribed manner under the mandate of legal

authority without the exercise of discretion or judgment. (*Id.* at p. 843.)

Where a statute clearly defines the specific duties or course of conduct that a governing body must take, that course of conduct becomes mandatory and eliminates any element of discretion.” (*Great W. Sav. & Loan Ass’n v. City of Los Angeles* (1973) 31 Cal.App.3d 403, 413.) .

Finance argues that the trial court erred in ordering a writ commanding Finance to act because Finance has no ministerial duty regarding excluded employee salaries. Setting employee compensation is reserved to the DPA in Government Code section 19826. However, Finance does have a statutory role and obligation in passing along required budget information to the Legislature for its determination. Once DPA has determined the salaries for employees excluded from collective bargaining, under Government Code sections 13322 and 13337, Finance has a ministerial duty to include these items in the proposed state budget or another acceptable vehicle.

This statutory scheme and method must be followed to ensure the Legislature can either approve the payments for the salary obligations identified by DPA through an appropriation or to reject proposed salary increases. Under Government Code sections 19826 and 13322, DPA and Finance may be compelled to include the proposed funding in the 9800 Item

of the Budget Act or separately for the Legislature's consideration. In a brief filed with the trial court, Finance conceded it has no power to set employee compensation, rather setting compensation is a legislative function which has been delegated to DPA. (CT 0508, Finance's Supp. Brief in Opp. to Petition for Writ of Mandate, p. 12, fn 7.) As such, the writ in no way infringes on Finance's authority regarding salary increases as Finance admits it has "no role" in independently determining the amount of employee compensation and simply includes DPA's Budget Act Log information in building the 9800 Item of the state budget. (CT 0393 - 0394.)

In *State Trial Attorneys' Assn. v. State of California*, this Court granted a writ of mandate directing compliance with Government Code section 18550 (now Government Code section 19826) whenever compliance could be achieved without violating the statute's restriction against adjustments in excess of existing appropriations. (*State Trial Attorneys' Assn. v. State of California* (1976) 63 Cal.App.3d 298, 305.) In that case this Court stated that the State Personnel Board could lawfully adjust salaries at issue in the expectation of adequate appropriations for the fiscal year 1977 - 1978. The trial court here issued a similar writ and order. Under Government Code sections 19826 and 13322, the Court may compel

DPA and Finance to include the proposed funding in the budget for the Legislature's consideration.

Finance claims it "acts as the advisor to the Governor on fiscal matters" and that "it is the Governor who ultimately makes the decision as to the budget proposal that is made to the Legislature, not Finance." (Appellant's Opening Brief, p. 12.) Finance concludes that "compelling Finance to make a recommendation that it believes could jeopardize the fragile fiscal state of our current and future budgets would necessarily require Finance to abandon its governmental role." (AOB, p. 12.) Finance attempts to create discretion where there is none. The Legislature has seen fit to provide DPA the salary setting function, not Finance. The Legislature could have said that proposed salary increases recommended by DPA (whether otherwise required by state law or not) will be reviewed by Finance, but the Legislature has not done so.

The law does not provide discretion to Finance to reject salary determinations made by the DPA. Instead, the Legislature has provided that Finance will assist the Legislature (and the Governor) in accomplishing the legislative function of appropriation. As discussed above, state agencies have "quasi-legislative" duties placed upon them to aid or assist the legislative process. The scope of an agency's quasi-legislative authority

had to be defined and limited by the Legislature, and the creation of such a power is a delegation of legislative authority, the exercise of which is legislative in character. (*Schabarum v. California Legislature* (1998) 60 Cal.App.4th 1205, 1223.) As this Court noted in *Schabarum*, in aid of the Legislature's exercise of the power of appropriation, every agency is required to prepare and submit a complete and detailed budget which, with the assistance of Finance, is utilized in the budget bill which must be submitted by the Governor and introduced in both houses of the Legislature. (*Schabarum v. California Legislature* (1998) 60 Cal.App.4th 1205, 1223.)

Even in assisting the Governor with preparation of the proposed budget bill, Finance does not have the discretion to undo the salary increases DPA has determined are required by state law. The proposed budget required under Government Code section 13337 "shall contain a complete plan and itemized statement of all proposed expenditures of the state provided by existing law or recommended by him or her." The salaries at issue here are not subject to any discretion as they are "provided by existing law" because they have been found by DPA to be legally required by Government Code section 19826. The proposed increases, which are a substantial right, are subject only to the availability of an appropriation to pay the increases. (*State Trial Attorneys' Assn. v. State of*

California, supra., 63 Cal.App.3d at 305.)

V.

CONCLUSION

It is not in dispute that state law requires that 14 classifications of state supervisory scientists salaries must be increased if an appropriation is available to pay the increased salaries. The trial court ruling correctly requires DPA and Finance to perform the ministerial tasks of presenting the required budget information to the Legislature. As the writ properly compels the action required to present this important question to the Legislature for its determination, Respondents respectfully request this Court affirm the judgment of the trial court.

Date: July 26, 2010

Respectfully submitted,



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