

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

**CALIFORNIA ASSOCIATION OF
PROFESSIONAL SCIENTISTS,**

Plaintiff and Respondent,

v.

DEPARTMENT OF FINANCE; ET AL.,

Defendants and Appellants.

Case No. C063118

Sacramento County Superior Court
Case No. 34-2008-00014476-CU-WM-GDS
The Honorable Lloyd G. Connelly, Judge

APPELLANT'S REPLY BRIEF

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INTRODUCTION

In its opposition brief, the California Association of Professional Scientists (CAPS) did not dispute the arguments set forth by the Department of Finance (Finance) that neither of the Government Code sections cited by the trial court imposed a ministerial duty on Finance to inform the Legislature that an appropriation was needed to fund pay raises for certain members of CAPS. Instead, CAPS urged this Court to find, based on different authorities, Government Code sections 13322 and 13337, that Finance has the desired ministerial duty. Neither of these newly-cited statutes was ever referenced by CAPS or by the trial court in its judgment as a basis for creating a ministerial duty, and, in any event, neither does.

Therefore, Finance respectfully requests that the judgment be reversed and peremptory writ of mandate vacated.

REPLY TO CAPS' FACTUAL SUMMARY

Contrary to the assertion made by CAPS in its opposition brief, no adjustments have been made to the supervising scientist classifications by virtue of the issuance of the Director's Decision. (CAPS' Opposition Brief (Opp. Br.), at p. 7.) In fact, the Director's Decision states it is "recommend[ing] salary adjustments" and that the recommendation is subject to Finance's determination of "whether the recommended pay adjustment is within existing salary appropriations." (CT 41-42.) In addition, the Department of Personnel Administration (DPA) repeatedly argued in its written briefs that it had no authority to make any salary adjustments to the classifications absent an existing appropriation by the Legislature. (CT 272-275, 293-294, & 647-648.) In short, no adjustments to the salaries for the 14 classifications have been made by DPA.

Additionally, CAPS misstates Finance's role in the budget process with respect to employee compensation increases. CAPS implies that Finance blindly relies upon the salary requirement information provided to it by DPA and does not conduct any independent investigation of the Budget Item 9800 amounts. (Opp. Br., at p. 9.) However, Tim Lynn, the Assistant Program Budget Manager at Finance, testified that he works with DPA to prepare estimates of employee compensation increases, and that Finance consults with the Governor's office when determining whether an employee compensation increase should be included in the budget. (CT 616 [Lynn Depo., at pp. 10:4-10, 11:9-19].) Moreover, Mr. Lynn explained that both DPA and Finance are part of the Governor's administration, and thus communicate regarding employee compensation issues; i.e., DPA asks the Governor to spend money on a particular employee increase and the Governor seeks advice from Finance to determine whether funding is available for the increase. (CT 619 [Lynn Depo., at pp. 23:22-24:15].)

LEGAL ARGUMENT

I. CAPS DID NOT ADDRESS THE LEGAL ARGUMENTS RAISED BY FINANCE IN ITS OPENING BRIEF.

In its opening brief, Finance argued that Government Code sections 18500 and 19826, the provisions cited by the trial court in support of its decision, do not create a ministerial duty for Finance to notify the Legislature of the need to appropriate money for salary increases. Finance argued that neither statute required Finance to take the specific action ordered by the trial court.

With respect to section 19826, Finance first argued that the statute only contains responsibilities that DPA is required to perform and does not include any reference to a duty that Finance is obligated to perform. (Appellant's Opening Brief (AOB), at pp. 6-7.) Finance next argued that

section 19826 operated in the manner in which the Legislature intended— i.e., that no salary adjustment could be made absent an existing appropriation—and thus the trial court was incorrect in finding that “withholding” information from the Legislature regarding the need for an appropriation would degrade the statutory like-pay-for-like-work principle embodied in the section. (AOB, at pp. 7-8.)

As for section 18500, Finance argued that, once again, the section makes no reference to any duty required to be performed by Finance, but rather expresses general legislative goals regarding the state personnel system. (AOB, at pp. 8-9.) Finance also argued that the statute expressly recognized that discretion must be exercised when determining whether a recommended salary increase is in the best interests of the state. (AOB, at pp. 9-10.) For example, when a fiscal emergency exists, it is likely in the best interests of the state not to increase employee compensation, and exercising such discretion does not violate the legislative goals of section 18500. (*Ibid.*)

CAPS did not address any of these legal arguments in their opposition brief. There was no attempt by CAPS to explain how either statute might contain a directive to Finance to take any of the action required by the trial court. While CAPS’ failure to respond to Finance’s arguments may not be, as a matter of law, a concession the arguments have merit (see *Kruger v. Department of Motor Vehicles* (1993) 13 Cal.App.4th 541, 546), at a minimum, it is a tacit admission that Finance’s arguments in its opening brief against the trial court’s ruling were sound.

II. NEWLY-CITED GOVERNMENT CODE SECTIONS 13322 AND 13337 DO NOT CREATE A MINISTERIAL DUTY FOR FINANCE TO RECOMMEND THAT THE LEGISLATURE APPROPRIATE MONEY FOR THE RECOMMENDED SALARY INCREASES.

Rather than relying upon the provisions cited by the trial court, CAPS contends that two other statutes—Government Code sections 13322 and

13337—create the ministerial duty for Finance to recommend that the Legislature appropriate money to fund the recommended salary increases. CAPS’ reliance on these statutes is misplaced for two reasons. First, neither of these statutes was relied upon by CAPS in the lower court proceedings as potentially establishing a ministerial duty on Finance, and they may not be raised for the first time on appeal. Second, even if CAPS’ current arguments were not waived by its failure to raise them in the trial court, the newly-cited statutes likewise create no ministerial duty for Finance to make any specific recommendation to the Legislature regarding the salary increases.

A. CAPS may not argue for the first time on appeal that Government Code sections 13322 and 13337 create a ministerial duty for Finance.

In its opposition brief, CAPS contends for the first time that sections 13322 and 13337 require Finance to include the recommended salary increases in the state budget. (Opp. Br., at p. 16.) But because CAPS never argued in the lower court proceedings that these two statutes created a ministerial duty for Finance, any such arguments are waived.

Parties are not permitted to “adopt a new and different theory on appeal. To permit [them] to do so would not only be unfair to the trial court, but manifestly unjust to the opposing litigant.” [Citation.]” (*In re Marriage of Broderick* (1989) 209 Cal.App.3d 489, 501; see also *Kolani v. Gluska* (1998) 64 Cal.App.4th 402, 411 [“Generally, failure to raise an issue or argument in the trial court waives the point on appeal.”].) In the proceedings below:

- CAPS did not rely on sections 13337 or 13322 in its petition for writ of mandate as a theory upon which a ministerial duty for Finance could be established.

- None of CAPS' three written briefs discussed the issue of whether section 13337 or 13322 created a ministerial duty for Finance.
- Neither of these code sections was discussed by the parties during the two oral arguments held before the trial court.
- Neither of these statutes was relied upon by the trial court in ruling that Finance had a ministerial duty to take the ordered action. In fact, neither statute was mentioned in the judgment or the peremptory writ of mandate.

For these reasons, Finance respectfully requests that this Court disregard CAPS' citation to sections 13322 and 13337 as a basis for arguing that Finance had a ministerial duty to inform the Legislature of the need to appropriate money for the recommended salary increases.

B. In any event, Government Code sections 13322 and 13337 create no ministerial duty for Finance to recommend funding for the salary increases.

Even if this Court were to entertain CAPS' untimely legal theory, neither section 13322 nor 13337 creates a ministerial duty for Finance to inform the Legislature of the need to appropriate money to fund the recommended salary increases.

1. Section 13322 does not create a ministerial duty for Finance to take any action to inform the Legislature of a need to appropriate money to fund the recommended salary increases.

In its opposition brief, CAPS implies that Finance can be compelled under section 13322 to revise the state budget to include a request for funding the recommended salary increases. (Opp. Br., at pp. 16-17.) However, section 13322 provides for alteration to the budget only in certain circumstances:

Until enactment of the budget act containing the appropriations funding the fiscal year budget, the department *may* revise, alter, or amend any fiscal year budget, if, in its opinion, revision, alteration or amendment *is required in the interest of the State*. The department shall notify the head of the State agency or court of any revision, alteration, or amendment of its fiscal year budget.

(Gov. Code, § 13322, emphasis added.) In short, Finance may, but is not required to, revise the state budget, if it is in the state’s best interest to do so.

The use of the word “may” in section 13322 indicates a legislative intent that Finance has the discretion to revise, alter, or amend the budget—it is not a mandatory obligation. (See *Lara v. Board of Supervisors* (1976) 59 Cal.App.3d 399, 407 [finding that “[a]lthough ‘may’ may be construed to be mandatory where the object to be obtained compels such a construction, or where that construction is necessary to give effect to the legislative intent, in the absence of such special circumstances; it should be interpreted as permissive or conferring discretion”].) As Finance discussed in its opening brief, it would not be appropriate for Finance to recommend that state employees receive a salary increase given the current fiscal emergency in the State of California. (See AOB, at p. 10.) Thus, since Finance has the discretion as to whether a revision, alteration or amendment to the budget is necessary, Finance cannot be compelled to exercise its discretion as to an alteration of the state budget by a writ of mandate. (See *US Ecology, Inc. v. State of California* (2001) 92 Cal.App.4th 113, 138 [holding that mandamus cannot be used to compel the exercise of discretion in a particular manner or to order a specific result when the underlying decision is purely discretionary].)

Moreover, the statute requires that Finance only make a revision to the budget if it is in the best interests of the state to do so.

Therefore, CAPS' contention that section 13322 mandates that Finance take action with respect to DPA's recommendation of a salary adjustment is without merit and should be rejected by this Court, if it is considered at all.

2. Section 13337 does not create a ministerial duty for Finance to take any action to inform the Legislature of a need to appropriate money to fund the recommended salary increases.

Section 13337 requires the Governor to submit a proposed budget to the Legislature that contains "a complete plan and itemized statement of all proposed expenditures of the state provided by existing law or recommended by him or her." (Gov. Code § 13337, subd. (a).) Relying on this statute, CAPS contends that because DPA determined that salary adjustments are "legally required by Government Code section 19826," Finance is required to include the money needed for the salary increases in the state budget proposal. (Opp. Br., at p. 19.) This contention, however, is without merit for two reasons.

First, section 13337 is devoid of any directive that Finance include DPA's recommended salary increases in the state budget proposal. Rather, the statute provides that the Governor may, if he or she so chooses, include any recommendations for the state budget. (Gov. Code, § 13337, subd. (a).) It does not, as CAPS contends, require that a specific recommendation made by a state agency be included in the state budget.¹

¹ In fact, the Governor acts in a legislative capacity when submitting the annual budget bill to the legislature and in approving it after its adoption. (Cal. Const., art. IV, §§ 10, 12; see *Jenkins v. Knight* (1956) 46 Cal.2d 220, 223; *Lukens v. Nye* (1909) 156 Cal. 498, 501-503.) Consequently, a writ could not issue against the Governor any more than a writ could issue against the Legislature to introduce a particular appropriation bill.

Second, CAPS' contention that DPA's salary recommendation made pursuant to section 19826 falls under the category of "all proposed expenditures of the state provided by existing law" and therefore must be included in the state budget is incorrect. As discussed by Finance in its opening brief, CAPS is not *entitled* to any relief under section 19826 because one of the two requirements of the statute was not met—specifically, that no adjustment be made in excess of an existing appropriation. Since there was no existing appropriation available to fund the recommended salary increase, no further action under the statute was authorized. Thus, DPA's recommendation cannot be considered "existing law" for the purposes of section 13337.

Accordingly, CAPS' contention that section 13337 mandates that Finance take action with respect to DPA's recommendation of a salary adjustment is without merit and should be rejected by this Court, again if it is considered at all.

CONCLUSION

Neither the statutes relied upon by the trial court in issuing its judgment (sections 19826 and 18500) nor the statutes discussed by CAPS for the first time on appeal (sections 13337 and 13322) create any ministerial duty for Finance to recommend that the legislature appropriate money to fund the salary increases for the 14 classifications of scientist supervisors. Moreover, requiring that Finance make a recommendation that may be fiscally unsound given the current budget crisis would require Finance to abdicate its role as the Governor's advisor on state fiscal and

budget matters. Consequently, the judgment and peremptory writ of mandate issued by the trial court were improper and must be reversed and vacated, respectively.

Dated: August 13, 2010

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached **APPELLANT'S REPLY BRIEF** uses a 13 point Times New Roman font and contains 2322 words.

Dated: August 13, 2010

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A handwritten signature in black ink, appearing to read "K. Graham". The signature is written in a cursive, flowing style.

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DECLARATION OF SERVICE BY U.S. MAIL

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No.: C063118

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is: 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550.

On August 16, 2010, I served the attached **APPELLANT'S REPLY BRIEF** by placing a true copy thereof enclosed in a sealed envelope with Golden State Overnight, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on August 16, 2010, at Sacramento, California.

Brooke C. Carothers

Declarant



Signature