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9  
10 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
11 COUNTY OF SACRAMENTO  
12  
13

14 **CALIFORNIA ASSOCIATION OF**  
15 **PROFESSIONAL SCIENTISTS,**

16 Petitioner,

17 v.

18 **STATE OF CALIFORNIA,**  
19 **DEPARTMENT OF PERSONNEL**  
20 **ADMINISTRATION; DAVID GILB,**  
21 **DIRECTOR OF DEPARTMENT OF**  
22 **PERSONNEL ADMINISTRATION;**  
23 **STATE OF CALIFORNIA DEPARTMENT**  
**OF FINANCE; MICHAEL GENEST,**  
**DIRECTOR OF FINANCE; STATE**  
**CONTROLLER JOHN CHIANG; and**  
**DOES 1 THROUGH 10, INCLUSIVE,**

24 Respondents.  
25  
26  
27  
28

34-2008-00014476-CU-WM-GDS

**FINANCE'S SUPPLEMENTAL BRIEF IN  
OPPOSITION TO PETITION FOR WRIT  
OF MANDATE**

Date: April 24, 2009  
Time: 10:30 a.m.  
Dept: 33  
Judge The Honorable Lloyd G.  
Connolly  
Trial Date none  
Action Filed: 6/27/2008

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1 discovery to determine the availability of funds to pay for the salary increase recommended by  
2 DPA pursuant to a Government Code section 19826 hearing. (Declaration of Deputy Attorney  
3 General Kimberly Graham (DAG Graham Dec.), at ¶ 3.)

4 Following the hearing, in November and December 2009, CAPS propounded special  
5 interrogatories and requests for production of documents upon Finance. (DAG Graham Dec., at ¶  
6 4.) CAPS also deposed Tim Lynn, the Assistant Program Budget Manager at Finance, and  
7 Franklin Marr, who was designated by DPA as the person-most-knowledgeable at DPA regarding  
8 state scientist salary recommendations. (*Ibid.*)

9 On February 13, 2009, CAPS served a “Notice of Second Hearing on Verified Petition for  
10 Writ of Mandate and Complaint for Declaratory Relief” (Notice). (DAG Graham Dec., at ¶ 5 &  
11 ex. 3.)

## 12 **FACTS AND LAW RELEVANT TO THIS OPPOSITION**

### 13 **I. CALIFORNIA’S BUDGET PROCESS**

14 The Constitution requires that the Governor submit a budget for the ensuing fiscal year to  
15 the Legislature by January 10 of each year. (Cal. Const., art. IV, § 12, subd. (e).) In addition, the  
16 Constitution permits the Governor to require a state agency, officer or employee to furnish  
17 whatever information is necessary for the budget’s preparation. (*Id.* at subd. (b).) The  
18 Governor’s proposed budget is introduced as a bill in both the Senate and the Assembly. (*Id.* at  
19 subds. (c)(1) & (2).) After the proposed budget has been issued to the Legislature, the Governor  
20 may issue a revised budget by no later than April 1 to propose changes to department budgets.  
21 (Gov. Code, § 13308, subd. (c).)<sup>2</sup>

22  
23  
24  
25 <sup>2</sup> There are two additional instances where Finance may submit changes to the Legislature  
26 regarding the proposed budget: (1) proposed adjustments to the Governor's Budget in  
27 appropriations for capital outlay, which are due on or before May 1st; and (2) any proposals to  
28 reduce expenditures to reflect updated revenue estimates, known as the “May Revise,” which is  
due on or before May 14th of each year. (Gov. Code, § 13308 subds. (c) & (d).) However,  
neither of these two instances are applicable in this case, and thus it is the April 1st deadline that  
applies here.

1 The Legislature has until midnight on June 15 to pass a budget. (Cal. Const., art. IV, §12,  
2 subd. (c)(3).) Once the Governor receives the budget bill from the Legislature, he has 12 days to  
3 either sign or veto the bill. (Cal. Const., art. IV, § 10, subd. (b)(3).)

4 **II. PROCESS FOR PROVIDING EMPLOYEE COMPENSATION INCREASES IN THE STATE**  
5 **BUDGET**

6 **A. DPA's Budget Act Log**

7 As noted above, prior to issuing his proposed budget, the Governor may require a state  
8 agency, officer, or employee to furnish information to assist in preparing the budget. (Cal. Const.,  
9 art. IV, § 12, subd. (b).) Accordingly, in the fall prior to the January 10 deadline, the Governor  
10 asks DPA to estimate how much money will be needed for compensation increases that have been  
11 negotiated through the collective bargaining process, and increases for excluded employees if  
12 such increases are ordered by the director of DPA (Deposition of Tim Lynn (Lynn Depo.),  
13 attached as Exhibit 2 to Graham Dec., at pp. 10:1-11:8, 11:24-12:13.) The calculated amounts are  
14 based upon the employee compensation increases that were agreed to by DPA and employee  
15 unions during the collective bargaining process and later approved by the Legislature.  
16 (Declaration of Tim Lynn (Lynn Dec.), at ¶ 3.)

17 DPA's estimated totals are presented to Finance in the form of a "Budget Act Log," which  
18 Finance reviews for accuracy and amends in order to include provisions over which DPA does  
19 not have responsibility, such as allocations for judicial salaries. (Lynn Depo., at pp. 29:10-30:1,  
20 31:24-32:13.) The "Budget Act Log" is then shared with the Legislature to use as a foundation  
21 for determining how much money is needed in the budget for employee compensation increases.  
22 (Lynn Depo., at pp. 29:10-30:1.)

23 The amounts contained on the DPA Budget Act Logs are considered "obligated" money by  
24 Finance – that is, money the state is required to pay pursuant to the various memorandums of  
25 agreement, side letters, etc., that have been negotiated by DPA and the employee unions and  
26 ratified by the Legislature. (Lynn Dec., at ¶ 6.)

27 The Budget Act Logs are important because they provide accountability and certainty that  
28 the money the Legislature has appropriated in the state budget is going to be used in a manner



1 consistent with current collective bargaining and excluded employee agreements. (Lynn Dec., at  
2 ¶ 7.) Once a budget is passed, the DPA's "Budget Log" is finalized and, if needed, the log is  
3 revised to reflect the final appropriation amounts contained in the state budget. (*Ibid.*)

4 **B. Budget Item 9800 – Funding Employee Compensation Increases**

5 In the state budget, baseline costs for employee compensation are included in individual  
6 department budgets. (Lynn Dec., at ¶ 8.) However, a different budget item – Budget Item 9800 –  
7 is used to appropriate money for employee compensation increases. (*Ibid.*) This includes  
8 increases associated with existing or new bargaining agreements<sup>3</sup> and cost increases for excluded  
9 employees that have received the approval of DPA's Director through a pay letter. (*Ibid.*)

10 Budget Item 9800 is the only place in the budget where an appropriation for employee  
11 compensation increases can be made. Since Fiscal Year 2007-2008, the Legislature has expressly  
12 stated that any money used for employee compensation increases must be included in Budget  
13 Item 9800 and nowhere else in the budget:

14 *It is the intent of the Legislature that all proposed augmentations for*  
15 *increased employee compensation costs, including, but not limited to,*  
16 *base salary increases, pay increases to bring one group of employees into*  
17 *a pay equity position with another group of public employees, and*  
18 *recruitment and retention differentials, be budgeted and considered on a*  
19 *comprehensive, statewide basis beginning with consideration of the*  
20 *2008–09 Budget Act. Therefore, the Legislature declares its intent to*  
21 *reject any proposed augmentations that are not included in Item 9800 in*  
22 *the 2008–09 Budget Act, given that this is the item where the funds to*  
23 *implement comprehensive statewide compensation policies, including*  
24 *those adopted pursuant to collective bargaining, are considered. This*  
25 *provision shall not apply to augmentations for increased employee*  
26 *compensation costs resulting from mandatory judicial orders to raise pay*  
27 *for any group of employees or augmentations for increased compensation*  
28 *costs, or approvals for departments to provide increased employee*  
*compensation levels, that are included in bills separate from the budget*  
*act.*

(See Request for Judicial Notice (RJN), attaching as exhibits 3, 4, and 5, respectively: Stats. 2007,  
ch. 171, pp. 744-748 [emphasis added]; Stats. 2008, ch. 268, pp. 718-723; and Stats. 2009, ch. 1,  
pp. 620-625.)

<sup>3</sup> For example, many units have contracts that provide for a cost-of-living increase on July 1 of each year, and the estimated cost of this increase is included in Budget Item 9800.

1 Budget Item 9800 contains three separate provisions – one for each of the three types of  
2 funds contained in the appropriation, i.e., general fund, special funds<sup>4</sup>, and non-governmental cost  
3 funds<sup>5</sup>. (Lynn Dec., at ¶ 9.) The budget bills permit Finance to transfer the money between the  
4 special fund and non-governmental cost fund; however, Finance cannot transfer funds to or from  
5 the general fund provision. (Lynn Depo., at pp. 17:2-18:4; see also Stats. 2007, ch. 171, pp. 744-  
6 748 (attached as Exhibit 3 to RJN); Stats. 2008, ch. 268, pp. 718-723 (attached as Exhibit 4 to  
7 RJN); Stats. 2009, ch. 1, pp. 620-625 (attached as Exhibit 5 to RJN).) Consequently, due to this  
8 statutory prohibition, Finance is prohibited from transferring funds from the special fund or  
9 nongovernmental cost funds of Budget Item 9800 to the general fund provision in order to cover  
10 the cost of a salary increase for a particular classification of employees. (Lynn Dec., at ¶ 9.)

11 Finance considers Budget Item 9800 a “pass through” appropriation, meaning that while the  
12 money is appropriated by the Legislature to Budget Item 9800 to fund employee compensation  
13 increases, Finance will issue executive orders allocating money from Budget Item 9800 to the  
14 individual departments who have employees entitled to receive a particular salary increase.  
15 (Lynn Dec., at ¶ 10.)

16 The money appropriated by the Legislature in Budget Item 9800 is “obligated” – it is  
17 money the state is legally required to pay in accordance with the negotiated agreements made  
18 between DPA and the employee unions and excluded employees, as reflected in the DPA Budget  
19 Act Logs. (Lynn Dec., at ¶ 11.) Employee compensation increases that are not provided for in  
20 the Budget Act Logs will not receive funding in Budget Item 9800 unless a bill to amend the  
21 Budget Act and increase the Item 9800 appropriation is passed by the Legislature and signed by  
22 the Governor. (*Ibid.*)

24 <sup>4</sup> A special fund is defined as a fund created by statute, or administratively pursuant to  
25 Government Code Section 13306, used to budget and account for taxes, licenses, and fees that are  
restricted by law for particular activities of the government. (Lynn Dec., at ¶ 9.)

26 <sup>5</sup> A nongovernmental cost fund is defined as a fund used to budget and account for  
27 revenues other than general and special taxes, licenses, and fees or certain other state revenues.  
28 Such funds are usually restricted by law for particular activities of government. (Lynn Dec., at ¶  
9.)

1           **C. Reversion of "Left-Over" Money to Originating Fund on June 30 of Each**  
2           **Fiscal Year.**

3           The information provided by DPA for the money needed in a particular year for employee  
4           compensation increases is an estimate. For example, employees unexpectedly leave state  
5           employment during the course of a fiscal year, and thus the need to fund those employees'  
6           compensation increases is no longer required. Consequently, not all of the money that is  
7           obligated in Budget Item 9800 is used in a given fiscal year. (Lynn Dec., at ¶ 12; see also Lynn  
8           Depo., at p. 35:7-22.) However, if there is "left-over" money in Budget Item 9800, it may not be  
9           used for an employee compensation increase that is not contained on the Budget Act Log; instead,  
10          the money reverts back to the state treasury at the end of the fiscal year to be used for the next  
11          fiscal year's budget. (Lynn Dec., at ¶ 12; see also See Stats. 2005, ch. 38, pp. 655-657 (attached  
12          as Exhibit 1 to RJN); Stats. 2006, ch. 47, pp. 708-712 (attached as Exhibit 2 to RJN); Stats. 2007,  
13          ch. 171, pp. 31, 744-748 (attached as Exhibit 3 to RJN); Stats. 2008, ch. 268, pp. 718-723  
14          (attached as Exhibit 4 to RJN); See Stats. 2009, ch. 2, pp. 620-625 (attached as Exhibit 5 to RJN).)

15           **III. OVERVIEW OF EMPLOYEE COMPENSATION IN PRIOR AND CURRENT FISCAL YEARS**

16           **A. Employee Compensation Increase Provisions in Fiscal Years 2005-2006,**  
17           **2006-2007, and 2007-2008**

18           In fiscal years 2005-2006, 2006-2007, and 2007-2008, money was appropriated for  
19           employee compensation increases through Budget Item 9800. (See Stats. 2005, ch. 38, pp. 655-  
20           657 (attached as Exhibit 1 to RJN); Stats. 2006, ch. 47, pp. 708-712 (attached as Exhibit 2 to  
21           RJN); Stats. 2007, ch. 171, pp. 31, 744-748 (attached as Exhibit 3 to RJN).) By law, any money  
22           that was not allocated through executive orders in prior fiscal years for employee compensation  
23           increases reverted to the fund provision (i.e., general fund, special fund, or nongovernmental cost  
24           fund) as of June 30th of the applicable fiscal year. (*Ibid.*) Consequently, there are no "left-over"  
25           funds from the fiscal years 2005-2006, 2006-2007, and 2007-2008 available for any employee  
26           compensation increases for scientist supervisors.

27           **B. Employee Compensation Increase Provisions in the Budget for Fiscal Year**  
28           **2008-2009**

1 On September 23, 2008, the Governor signed Assembly Bill 1781, which provided the  
2 budget for 2008-2009 fiscal year. (Stats. 2008, ch. 268.) In the 2008-2009 State Budget Act,  
3 money was appropriated to the three funds in Budget Item 9800 as follows: \$124,111,000 in  
4 general fund, \$135,800,000 in special funds, and \$66,886,000 in nongovernmental funds. (See  
5 Stats. 2008, ch. 268, § 2.00, pp. 718-723 (attached as Exhibit 4 to RJN).) Because the money  
6 appropriated for Budget Item 9800 is based on the needs projections contained in the Budget Act  
7 Log, the money is “obligated” for specific purposes. (Lynn Dec., at ¶ 11 & ex. 2.) In fact, the  
8 “grand total” for employee compensation increases that are permitted for this fiscal year, as  
9 reflected in the DPA Budget Act Log, are identical to the appropriation amounts in 2008-2009  
10 State Budget. (Lynn Dec., at ¶ 11 & ex. 2; see also Stats. 2008, ch. 268, § 2.00, pp. 718-723  
11 (attached as Exhibit 4 to RJN).)

12 Following the passage of the state budget, on December 19, 2008, the Governor declared a  
13 state fiscal emergency and ordered the Legislature to assemble in special session to address this  
14 fiscal emergency. (RJN, at ex. 6.) In response to the Governor’s order, the Legislature passed an  
15 amended budget for fiscal year 2008-2009 on February 20, 2009. (Stats. 2009, ch. 2.) Not  
16 surprisingly, there was no provision in the amended Budget Item 9800 for employee  
17 compensation increases. As a result, the amounts listed in the prior paragraph for Budget Item  
18 9800 are still applicable for the remainder of the 2008-2009 fiscal year and are obligated pursuant  
19 to the DPA Budget Act Log.

### 20 **C. Budget for Fiscal Year 2009-2010**

21 While in the special session regarding the budget for fiscal year 2008-2009, the Legislature  
22 also passed a budget for fiscal year 2009-2010. (See Stats. 2009, ch. 1.) In the 2009-2010 State  
23 Budget Act, very limited amounts of money were appropriated to the three funds in Budget Item  
24 9800 as follows: \$44,533,000 in general funds, \$51,832,000 in special funds, and \$25,529,000 in  
25 nongovernmental fund. (See Stats. 2009, ch. 2, pp. 620-625 (attached as Exhibit 5 to RJN).)  
26 Again, because the money appropriated for Budget Item 9800 is based on the needs projections  
27 contained in the Budget Act Log, the money is “obligated” for specific purposes. (Lynn Dec., at  
28

1 ¶11 & ex. 3.) The amount of employee compensation increases permitted for this fiscal year  
2 (amounts for which an appropriation exists) are identical to the amounts requested in the DPA  
3 Budget Act Log. (Lynn Dec., at ¶ 11 & ex. 3; see also Stats. 2009, ch. 2, pp. 620-625 (attached as  
4 Exhibit 5 to RJN).)

5 In April and May of this year, the Legislature will likely make amendments to the budget  
6 for the 2009-2010 fiscal year. (Lynn Dec., at ¶ 13.) However, Finance does not anticipate that  
7 there will be any change to the appropriations made in Budget Item 9800, as the amounts that  
8 contained in the budget item were already determined by DPA pursuant to agreements negotiated  
9 through the collective bargaining process. (*Ibid.*)

#### 10 **IV. PENDING LEGISLATION**

11 CAPS is currently seeking the Legislature's help in obtaining a salary increase for the  
12 scientist supervisors in accordance with the recommendations issued by DPA in April 2008. On  
13 February 26, 2009, Assembly Member Ira Ruskin introduced Assembly Bill 790 for the purposes  
14 of modifying Budget Item 9800 to provide sufficient funds to make the salary determinations at  
15 issue in this litigation. (Assem. Bill No. 790 (2009-2010 Reg. Session), attached as Exhibit 7 to  
16 RJN.) The bill is expected to be heard in an Assembly committee on March 29, 2009. (*Ibid.*)

#### 17 **LEGAL STANDARD FOR A TRADITIONAL WRIT OF MANDATE**

18 Mandamus lies to compel the performance of a clear, present, and ministerial duty where  
19 the petitioner has a beneficial right to performance of that duty. (*Carrancho v. California Air*  
20 *Resources Board* (2003) 111 Cal.App.4th 1255, 1264-65.) To warrant relief by writ of mandate,  
21 a petitioner must demonstrate that the public entity had a ministerial duty to perform, that is, a  
22 duty that the entity is required to perform in a prescribed manner without any exercise of  
23 judgment or opinion concerning the propriety of the act. (*California Ass'n for Health Services at*  
24 *Home v. Department of Health Services* (2007) 148 Cal.App.4th 696, 704).

25 An action in ordinary mandamus is proper where the claim is that an agency has failed to  
26 act as required by law, and it will issue only to compel the performance of an act specially  
27 enjoined by law. (*Conlan v. Bonta* (2002) 102 Cal.App.4th 745, 752; *Wallace v. Board of*  
28

1 *Education of City of Los Angeles* (1944) 63 Cal.App.2d 611, 616.) Courts have held that if a  
2 statute that clearly defines the specific duties or course of conduct that a governing body must  
3 take, it creates a ministerial duty and eliminates any element of discretion. (*Rodriguez v. Solis*  
4 (1991) 1 Cal.App.4th 495, 504-05; *Great Western Sav. & Loan Assn. v. City of Los Angeles*  
5 (1973) 31 Cal.App.3d 403, 413.) “In short, where a statute requires an officer to do a prescribed  
6 act on a prescribed contingency, his functions are ministerial.” (*People ex rel. Fund American*  
7 *Companies v. California Ins. Co.* (1974) 43 Cal.App.3d 423, 431-432.)

## 8 LEGAL ARGUMENT

### 9 I. FINANCE HAS NOT SHIRKED A MINISTERIAL DUTY OWED TO CAPS

10 As stated above, CAPS has failed to meet its burden to establish that Finance has a  
11 ministerial duty to perform the acts it is requesting. Specifically, CAPS cannot demonstrate that  
12 Finance has a duty to (1) make any determination whether there are funds in existing  
13 appropriations to pay for CAPS desired salary increases or (2) recommend that the Legislature  
14 make additional appropriations to provide money for CAPS in future budget negotiations.  
15 (Notice, at p. 2:14-16, 21-23.) CAPS cannot identify any statute that requires the Department of  
16 Finance to take the actions it demands. On the contrary, the legal pleadings filed by CAPS are  
17 completely devoid of a reference to any statute that would create a ministerial duty for Finance to  
18 take such actions.

19 A review of the Government Code provisions that govern the role of the Department of  
20 Finance, confirms that there is no ministerial duty for Finance to perform the acts requested by  
21 CAPS. (Gov. Code., § 13000 et seq.) Finance’s primary responsibility is to “supervis[e] over all  
22 matters concerning the financial and business policies of the state.” (*Tirapelle v. Davis* (1993) 20  
23 Cal. App.4th 1317, 1320-21.) Finance does not decide how state money is spent; rather, that duty  
24 resides exclusively with the Legislature. (*Humbert v. Dunn* (1890) 84 Cal. 57, 58 [noting that the  
25 California Constitution’s provision “that no money shall be drawn from the treasury but in  
26 consequence of appropriations made by law is intended to secure to the legislative department of  
27 the government the exclusive power of deciding how, when, and for what purpose public funds  
28

1 shall be applied in carrying on the government.”].<sup>6</sup> The remedy that CAPS seeks may only be  
2 obtained from the Legislature by way of an appropriation. (*See County of San Diego v. State of*  
3 *California* (2008)164 Cal.App.4th 580, 612-13 [stating that Civil Code section 3523, which states  
4 “for every wrong there is a remedy . . . does not permit a remedy through the courts when the  
5 remedy is with the Legislature.”].) CAPS has acknowledged that relief from the *Legislature*, and  
6 not the courts, is proper in this case by seeking legislation to implement DPA’s recommended  
7 salary increases. (Assem. Bill No. 790 (2009-2010 Reg. Session), attached as Exhibit 7 to RJN.)

8 **A. Even If Finance Had a Responsibility to Determine if there was Money to**  
9 **Fund the Salary Increases, Finance Has Already Met Its Responsibility**  
10 **and Determined that there is No Money.**

11 CAPS has not provided a single reference to a statute or case that obligates Finance to  
12 determine whether the salary increases recommended by DPA can be paid from existing  
13 appropriations. However, even assuming that Finance has a “generic responsibility[y]” (see Hrg.  
14 Trans., at pp. 18:24-19:1) to inform DPA as to the availability of funds to pay the DPA  
15 recommended salary increases; that “duty” has already been performed.

16 In a letter dated May 7, 2008, the Director informed DPA that it was not permitted to make  
17 any salary adjustments that would exceed existing appropriations, and that there was no money in

18 <sup>6</sup> At the earlier hearing on the petition, CAPS suggested that Finance had a duty pursuant  
19 to Government Code section 19826 to determine whether the salary increases recommended by  
20 DPA can be paid from existing appropriations. However, this suggestion is completely without  
21 merit. To the contrary, the Government Code provision cited by CAPS actually describes *DPA’s*  
22 *obligations* to adjust salaries for public employees:

23 The [DPA] shall establish and adjust salary ranges for each class of  
24 position in the state civil service subject to any merit limits contained in  
25 Article VII of the California Constitution. The salary range shall be  
26 based on the principle that like salaries shall be paid for comparable  
27 duties and responsibilities. In establishing or changing these ranges,  
28 consideration shall be given to the prevailing rates for comparable service  
in other public employment and in private business. [DPA] shall make no  
adjustments that require expenditures in excess of existing appropriations  
that may be used for salary increase purposes. [DPA] may make a  
change in salary range retroactive to the date of application of this  
change.

(Gov. Code, § 19826, subd (a).) This statute applies only to DPA and makes no reference to  
Finance.

1 either the department budgets or the Budget Act Item 9800 to cover the recommended salary  
2 adjustments. In other words, by checking to see if any money existed in 9800 that could be used  
3 to give CAPS salary increases, Finance checked the only place in the budget that could possibly  
4 contain funds that could be used for this purpose.

5 At the initial hearing on CAPS' instant petition, the Court suggested that Finance had  
6 answered the "wrong question" by using the "wrong standard" when responding to DPA's letter  
7 of inquiry concerning the availability of funds for the recommended salary increases. (Hrg.  
8 Trans., at pp. 19:3-20:1, 23:19-25.) Nevertheless, Finance's response (as detailed in the  
9 preceding paragraph) was correct based on the language contained in the budget bills for fiscal  
10 years 2008-2009 and 2009-2010. That language states it is the *express intent of the Legislature*  
11 *that any and all employee compensation increases must be appropriated through Budget Item*  
12 *9800.* (See Stats. 2008, ch. 268, pp. 718-723; Stats. 2009, ch. 1, pp. 620-625.) Given the  
13 language contained in the budget acts, Finance was legally prevented from "looking" anywhere  
14 other than Budget Item 9800 for a salary increase for the scientist supervisors.

15 Moreover, Finance is unable to change the amounts in Budget Item 9800 to provide money  
16 for the recommended salary increases for the scientist supervisors. The amounts contained in  
17 Budget Item 9800 are *obligated* for certain purposes in accordance with the information contained  
18 on the DPA Budget Act Logs. Thus, if there was no provision for a salary increase for the  
19 scientist supervisors on the DPA Budget Act Logs for 2008-2009 and 2009-2010 fiscal years,  
20 then there was no money that Finance could make available in the Budget Item 9800 for the  
21 recommended salary increases. Additionally, the language in the budget bills confirms that in  
22 order to receive the recommended salary increases, the scientist supervisors must persuade the  
23 Legislature to amend Budget Item 9800. (See Stats. 2008, ch. 268, pp. 718-723 [augmentations  
24 to employee compensation permitted if included in bills separate from the Budget Act]; Stats.  
25 2009, ch. 1, pp. 620-625 [same].) Not surprisingly, CAPS has taken this exact approach and  
26 found a legislator willing to sponsor a bill to implement the DPA Director's Decision. (See  
27 Assem. Bill No. 790 (2009-2010 Reg. Session).)  
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1           **B. Any Recommendation by Finance Regarding Upcoming Budget**  
2           **Negotiations is an Exercise Of Pure Discretion, and Cannot Be Compelled**  
3           **By Writ of Mandate.**

4           CAPS seeks an order compelling Finance to make a specific recommendation to the  
5           Legislature that funding for the salary increases be included in the budget negotiations. This is an  
6           improper request for at least two reasons.

7           First, while mandamus will lie to compel a public official to perform an official act required  
8           by law (Code Civ. Proc., § 1085), it may not be used to control an exercise of discretion, i.e., to  
9           compel an official to exercise discretion in a particular manner. (*People v. Karriker* (2007) 149  
10          Cal.App.4th 763, 774.) Although a court may issue a writ of mandate requiring legislative or  
11          executive action to conform to the law, it may not substitute its discretion for that of legislative or  
12          executive bodies in matters committed to the discretion of those branches. For example, in  
13          *Serrano v. Priest* (1976) 18 Cal.3d 728, the California Supreme Court noted that “the courts may  
14          not order the Legislature or its members to enact or not to enact, or the Governor to sign or not to  
15          sign, specific legislation ....” (*Id.* at p. 751.) Similarly, although a court may order a legislative  
16          body to perform a nondiscretionary ministerial act, it may not control an official’s discretion.  
17          (*Glendale City Employees' Assn., Inc. v. City of Glendale* (1975) 15 Cal.3d 328.)

18          Here, CAPS’ request seeks to force Finance to make a specific “recommendation” to the  
19          Legislature. The relief sought would require Finance to exercise its discretion in a particular  
20          manner, which, as described above, is contrary to law. Moreover, Finance acts as the advisor to  
21          the Governor on fiscal matters.<sup>7</sup> Thus, compelling Finance to make a recommendation that it  
22          believes could jeopardize the fragile fiscal state of our current and future budgets would require  
23          Finance to abandon its governmental role.

24  
25          <sup>7</sup> Finance does not have the power to set employee compensation. Instead, “that is a  
26          legislative function which ... the Legislature has delegated to the [Department of Personnel  
27          Administration].” (*Tirapelle, supra*, 20 Cal.App.4th at p. 1322, fn. 8 (citing *Pacific Legal*  
28          *Foundation v. Brown* (1981) 29 Cal.3d 168, 189, 193).) “In general, DPA has jurisdiction over  
29          the state’s financial relationship with its employees, including matters of salary....” (*Tirapelle,*  
30          *supra*, 20 Cal.App.4th at p. 1322.)

1 Second, a recommendation by Finance will not provide the relief CAPS desires by way of  
2 its writ – namely, a substantial salary increase. Assuming, *arguendo*, that Finance did  
3 recommend that the salary increases be appropriated in Budget Item 9800, there is no guarantee  
4 that the Legislature will comply with Finance’s recommendation.<sup>8</sup> Moreover, Finance provides  
5 its advice to the Governor, who ultimately makes the decision as to the budget proposal that is  
6 made to the Legislature. (Cal. Const., art. IV, § 12, subd. (e); see also *Tirapelle v. Davis* (1993)  
7 20 Cal. App.4th 1317, 1320-21 [discussing Finance’s role in state government].) This is yet  
8 further evidence that Finance has no ministerial duty to make a recommendation to the  
9 Legislature as suggested by CAPS.

10 Consequently, a writ of mandamus to compel any recommendation by Finance to the  
11 Legislature regarding the funding of a salary increase for scientist supervisors must be rejected.

12 **II. UNDER THE FACTS PRESENTED BY THIS CASE THE COURT IS WITHOUT AUTHORITY**  
13 **TO CHANGE THE STATE BUDGET.**

14 The Court has suggested that the parties consider whether the court, pursuant to *Mandel v.*  
15 *Myers* (1981) 29 Cal.3d 531 and *Butt v. California* (1992) 4 Cal.4th 668, could alter the state  
16 budget in order to provide the funding for the salary increases recommended by DPA for scientist  
17 supervisors. (Hrg. Trans., at pp. 21:20-22:8.) But, in this case, there is no justification for the  
18 exercise of the court’s limited authority to change the state budget to provide the salary increases  
19 for the following reasons.

20 \_\_\_\_\_  
21 <sup>8</sup> Nor can the Legislature be compelled to pass legislation appropriating money for a  
22 specific purpose. (See *County of San Diego, supra*, 164 Cal.App.4th at p. 594 [trial court order  
23 that the Legislature appropriate money to satisfy the state's reimbursement obligations through  
24 future legislation violated the separation of powers doctrine].) With respect to the budgeting  
25 process, case law indicates that the courts must refrain from interfering with the Legislature’s  
26 decisions unless the action exceeds the scope of the governmental body’s authority or is so  
27 unreasonable as to be an abuse of discretion as a matter of law. (*Carmel Valley Fire Protection*  
*Dist. v. State* (2001) 25 Cal.4th 287, 300 [denying a writ to compel state to grant fire district’s  
28 claim for reimbursement because only Legislature is empowered to withdraw funding and  
suspend state operations].) In fact, *City of Sacramento v. California State Legislature* (1986) 187  
Cal.App.3d 393, the Court of Appeal stated that “the broader rule is that mandamus will not lie to  
compel the Legislature to enact any legislation” and that while “[the] separation of powers does  
allow for some incidental overlap of function, . . . judicially compelled enactment of legislation is  
not an incidental overlap; it is the very exercise of legislative power itself.” (*Id.* at pp. 397, 399.)

1 First, as noted in the previous argument sections, the language of Budget Item 9800 makes  
2 it clear that it is the express intent of the Legislature that any and all employee compensation  
3 increases must be appropriated through Budget Item 9800. (See Stats. 2008, ch. 268, pp. 718-723;  
4 Stats. 2009, ch. 1, pp. 620-625.) Moreover, the court may not change the amounts of Budget Item  
5 9800 to provide money for the salary increases for the scientist supervisors because that money is  
6 *obligated* for certain purposes pursuant to the DPA Budget Act Log.

7 Second, because of the legal requirement that all employee compensation increases be  
8 appropriated through Budget Item 9800, it is not possible for any other budget item (whether or  
9 not there are any available money in those budget items) to be used to fund the recommended  
10 salary increases. (See Stats. 2008, ch. 268, pp. 718-723; Stats. 2009, ch. 1, pp. 620-625.) And for  
11 this reason, CAPS cannot identify any other budget item that may be used as a funding source to  
12 pay for the salary increases.

13 Third, the facts of *Mandel* do not support the application of its holding in this case. In  
14 *Mandel*, a plaintiff was a prevailing party in a lawsuit that included an award of \$25,000 in  
15 attorney fees against the defendant state agency. (*Mandel, supra*, 29 Cal.3d at p. 537.) The  
16 plaintiff twice attempted to collect her fee award by filing a claim with the Board of Control, who  
17 approved the claim each time and included the claim amount in bills that were introduced in the  
18 Legislature. (*Id.* at pp. 537-538.) However, each time, the Legislature deleted any appropriation  
19 for the claim amount. (*Ibid.*) The plaintiff subsequently filed a motion seeking an order to  
20 facilitate payment and enforcement of the attorneys' fee award. (*Ibid.*) The *Mandel* Court  
21 ordered payment of the attorneys' fees award paid out of the appropriations made for the state  
22 agency in the state's budget, noting that there was a "catch-all" appropriation in the budget that  
23 made such money generally available for the payment of legal expenses. (*Id.* at p. 543-545.)

24 The factual situation in *Mandel* differs dramatically from the facts in this case in the  
25 following ways. First, *Mandel* involved a relatively small amount of money that was required to  
26 be reimbursed to the plaintiff pursuant to a court judgment. (*Mandel, supra*, 29 Cal. 3d. at p. 537,  
27 550-551.) In this case CAPS seeks nearly \$7.6 million dollars in order to increase the salaries for  
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1 the scientist supervisors for one fiscal year. (See Declaration of Christopher Voight in Support of  
2 Verified Petition for Writ of Mandate (Voight Dec.), at ¶ 11 & ex. C.) The substantial amount of  
3 money needed in this case to fund the salary increases would dramatically disrupt the fabric of  
4 our state budget and fiscal stability. Second, in *Mandel*, the state conceded that there *were* funds  
5 to support the court order. (*Id.*, at p. 543.) Here, there is no money in Budget Item 9800 to fund  
6 the salary increases. Third, the *Mandel* Court found there was an historical basis to support the  
7 payment of the fees at issue; namely, that there had been numerous occasions where state  
8 agencies routinely authorized the payment of court awarded attorneys' fees out of the agency's  
9 operating budget. (*Id.* at p. 544-545.) Whereas in this case, there has been no showing that state  
10 agencies can pay for salary increases out of their operating budgets. Fourth, and perhaps most  
11 significantly, this case does not involve the enforcement of a *court* order, as was the case in  
12 *Mandel*. (*Id.*, at p. 537.) Instead, it involves the enforceability of a departmental  
13 "recommendation" based on a statute that provides absolutely no direction as to its enforceability  
14 or how an employee group is able to obtain funding for a recommended salary increase. For  
15 these reasons, the holding in *Mandel* is not applicable and cannot be utilized to obtain funding for  
16 the recommended salary increases.

17 Much more analogous to the facts of this case is the Supreme Court's holding in *Butt v.*  
18 *California*. (*Butt, supra*, 4 Cal.4th 668.) In *Butt*, the lower court ordered that funds from a school  
19 program and the Oakland Unified School District be used to aid another school district. (*Id.*, at  
20 pp. 675-677.) The Supreme Court concluded that the lower court erred in approving the diversion  
21 of funds from appropriations that were clearly intended by the Legislature to be used for other  
22 purposes, and thus not generally available in the manner in which the lower court had ordered.  
23 (*Id.*, at pp. 701-702.) The *Butt* Court also noted that the holding in *Mandel* does not permit court-  
24 ordered diversion of an appropriation away from a clear, narrow and valid purpose specified by  
25 the Legislature. (*Id.*, at p. 700.)

26 In the instant matter, the holding of *Butt* supports a finding that changing the appropriation  
27 in Budget Item 9800 would not be proper. The Legislature has appropriated money to Budget  
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1 Item 9800 for a specific purpose – the money needed in order to comply with existing contractual  
2 obligations as detailed on the DPA Budget Act Log. Thus, the money is not “generally available”  
3 for use by CAPS for the salary increases since they are obligated for other purposes. Additionally,  
4 the Legislature has expressly stated its intent that the appropriation in Budget Item 9800 must  
5 contain any and all employee compensation increases. (See Stats. 2008, ch. 268, pp. 718-723;  
6 Stats. 2009, ch. 1, pp. 620-625.) Thus, the money is not available for any purpose other than that  
7 contained in the DPA Budget Act Log.

8 In short, the facts of this case do not justify the court’s use of its limited authority to change  
9 the state budget in order to provide the salary increases for the scientist supervisors.

### 10 CONCLUSION

11 CAPS petition fails for four primary reasons. First, CAPS has not identified any ministerial  
12 duty that Finance is obligated to perform. Second, even if Finance has a responsibility to  
13 determine whether there were existing appropriations to pay for the salary increases that CAPS  
14 seeks, Finance has already made a determination and there is no money in the past or current state  
15 budgets to pay for the recommended salary increases. Third, any recommendation by Finance  
16 regarding upcoming budget negotiations is an exercise of discretion, the exercise of which cannot  
17 be compelled by writ of mandate. Fourth, and finally, *Mandel* is inapposite to the facts of this  
18 case and the court may not change the state budget to provide the recommended salary increases.

19 CAPS has not met its burden, despite being given ample opportunity to conduct discovery,  
20 of showing that Finance has a ministerial duty to determine if there is money to fund the  
21 recommended salary increases made by DPA pursuant to Government Code section 19826, or to  
22 recommend that the Legislature provide the increases in future legislation. Moreover, the facts  
23 demonstrate that the money contained in Budget Item 9800 is not available to pay for the  
24 recommended salary increases – a fact that cannot be rebutted by CAPS.

25 For all of these reasons, Finance respectfully requests that this Court deny CAPS’ petition  
26 for writ of mandate in its entirety.

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Dated: March 26, 2009

Respectfully Submitted,

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