

**Department 29  
Superior Court of California  
County of Sacramento  
720 Ninth Street  
Timothy M. Frawley, Judge  
Lynn Young, Clerk**

**Friday, February 27, 2009, 1:30 p.m.**

<b>DAVID A. GILB, et al.</b>  v.  <b>JOHN CHIANG, et al.</b>  <hr/> <b>CALIFORNIA ATTORNEYS, ADMINISTRATIVE LAW JUDGES, AND HEARING OFFICERS IN STATE EMPLOYMENT, et al.</b>	<b>Case Number: 34-2008-8000026</b>
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**Proceedings:     Petition for Writ of Mandate; Complaint for Injunctive and Declaratory Relief**

**Filed By:         Christopher E. Thomas, Labor Relations Counsel, State of California, Department of Personnel Administration, Attorneys for Petitioners**

The following shall constitute the Court's tentative ruling on the above-entitled matter. The tentative ruling shall become the ruling of the Court unless a party desiring to be heard so advises the clerk of this Department no later than 4:00 p.m. on the court day preceding the hearing, and further advises the clerk that such party has notified the other side of its intention to appear.

**TENTATIVE RULING**

This action arises out of the State of California's fiscal year 2008-09 budget impasse. In this action, which was filed before the State passed its FY 2008-09 budget, Petitioners Gilb and the Department of Personnel Administration ("DPA") seek to prevent the State Controller from paying state employees their full salaries in the absence of a budget or, more particularly, to compel the Controller to reduce or suspend the payment of state employee wages and salaries in the manner set forth in the DPA's "Pay Letter." Subsequent to the filing of this action, the California Legislature passed a budget for FY 2008-09. Nevertheless, Petitioners continue to seek relief in this action, namely, an order

requiring the Controller to make any and all necessary adjustments to the state payroll system to ensure the Controller can comply with the law during the next budget impasse.

Although the Court concludes this case is technically moot, the Court exercises its discretion to resolve the substantive issues raised in the petition and complaint. The Court concludes that the State Controller was legally obligated to comply with DPA's Pay Letter and reduce the salaries of state employees during the budget impasse.

### Background Facts and Procedure

Article IV, section 12 of the California Constitution requires the Legislature to pass a budget bill by midnight of June 15 each year. (Cal. Const. art. IV, § 12.) In recent years, however, the timely adoption of a budget has been the exception, rather than the rule. The California Legislature has failed to pass a budget by the June 15 constitutional deadline in thirty-two of the last forty years, and the State has operated without a budget until at least August 1 in eight of the last seventeen years.

In *White v. Davis* (2003) 30 Cal.4th 528, the California Supreme Court decided the substantive question whether the State Controller is authorized to pay non-exempt state employees their full and regular salaries during a budget impasse. The Court held that while state employees working during a budget impasse have a protected right to the ultimate payment of their full salary for work performed during the budget impasse, state employees do not have a contractual right actually to receive payment of their full salaries prior to the enactment of an applicable appropriation, and state law does not authorize the Controller to disburse state funds to such employees until an applicable appropriation has been enacted. (*Id.* at pp. 564-572.)

On the other hand, the California Supreme Court concluded that, by virtue of the supremacy clause, the State is obligated during a budget impasse to comply with the minimum requirements of the federal Fair Labor Standards Act ("FLSA"). (*Id.* at p. 579.) The Court did not resolve the extent to which FLSA applies to different categories and classes of state employees, or the extent to which compensation required under the FLSA may fall short of any particular employee's regular salary. (*Id.* at p. 575 fn. 22.) But the Court did provide guidance of what FLSA generally requires with regard to the amount of salary that must be paid to non-exempt employees during a budget impasse. In short, the Court concluded, to comply with FLSA during a budget impasse, the State must timely pay non-exempt employees who do not work overtime at least the minimum wage rate for all straight hours worked by the employee; and, for non-exempt employees who do work overtime, the State must timely pay employees their full salary for all straight time worked plus one and one-half times their regular rate of pay for overtime. (*Id.* at p. 578.)

In sum, the California Supreme Court concluded in *White v. Davis* that the Controller is not authorized to pay salaries to State employees in the absence of a state budget or other available appropriation, except as minimally required by federal law.

For fiscal year (FY) 2008-09, the Legislature again failed to meet the June 15 constitutional deadline to pass a budget. As a result, the State's budget for FY 2008-09 expired on June 30, 2008.

Thereafter, on July 31, 2008, Governor Schwarzenegger (the "Governor") issued an Executive Order directing the Department of Finance ("DoF") and Department of Personnel Administration ("DPA") to work with the Controller to develop and implement the necessary mechanisms, including, but not limited to, pay letters and computer programs, to comply with the California Supreme Court's decision in *White v. Davis*. The Executive Order also directed all state agencies and departments to cease and desist authorizing any overtime for employees effective July 31, 2008, except for certain critical services and functions of state government deemed exempt by the administration, or in emergency situations.

In a letter to the Governor dated July 31, 2008, the Controller declared his intent to refuse to comply with the Governor's Executive Order and to continue to provide full pay to all state employees, irrespective of whether there is an available appropriation.

On August 5, 2008, DPA issued Pay Letter 08-23 (the "Pay Letter") instructing the Controller to reduce the salaries of various state employees pending the adoption of a budget, as follows:

- (1) Pay all non-exempt state employees (Workweek Group 2) the federal minimum wage (excepting employees of the specified departments and programs expressly excluded from the scope of the Pay Letter due to the critical nature of the work performed and the reasonable expectation of overtime work);<sup>1</sup>
- (2) Pay all Executive, Administrative, and Professional (EAP) employees (Workweek Group E), except employees covered by Code of Federal Regulations §§ 541.303 and 541.304, the minimum salary required by FLSA to preserve the EAP exemption;
- (3) Pay no salary to all employees covered by Code of Federal Regulations §§ 541.303 and 541.304 (i.e., bona fide teachers and bona fide practitioners of law or medicine), and all employees who are covered by FLSA.

On or about August 7, 2008, DPA drafted three additional pay letters, each representing a different means of implementing the general direction of the Pay Letter, and met with the Controller to discuss those options.

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<sup>1</sup> The departments and programs excluded from the Pay Letter are: Business, Transportation and Housing (California Highway Patrol and Department of Transportation), Food and Agriculture (Agriculture Security and Emergency Response), Veterans Affairs (whole department), Health and Human Services (Department of Developmental Services and Department of Mental Health), Military (whole department), Office of Emergency Services (whole department), and Resources (Department of Water Resources, Department of Forestry, Department of Parks and Recreation, California Conservation Corps, Office of Spill Prevention, Department of Fish and Game).

On August 8, 2008, DPA sent a memorandum to the Controller requesting a response regarding the three options presented by DPA.

By letter dated August 11, 2008, the Controller requested additional time to consider the options presented by DPA.

On August 11, 2008, Petitioners Gilb and DPA filed the instant petition and complaint ("Petition").

### Request for Judicial Notice and Evidentiary Objections

Petitioners' Request for Judicial Notice is granted. The Controller's evidentiary objection is overruled.

### Discussion

#### A. Should the Petition be dismissed as moot?

As a preliminary matter, the Court must consider whether the instant Petition should be dismissed as moot.

Petitioners filed this Petition on August 11, 2008, before the State passed its FY 2008-09 budget. At that time, Petitioners were seeking the following relief: (1) a writ of mandate compelling the State Controller to comply with the DPA's Pay Letter and prohibiting the Controller from paying state employees' wages and salaries in the absence of a budget bill or other lawful appropriation, except as minimally required by federal law; (2) a declaratory judgment that the Controller is legally prohibited from paying state employees in the absence of a budget or other available appropriation, except as minimally required by FLSA; and (3) an injunction enjoining the Controller from paying state employees in a manner inconsistent with the Pay Letter and the decision in *White v. Davis*.

On September 23, 2008, the Legislature passed a budget for FY 2008-09, and on February 20, 2009, the Legislature passed a budget for the fiscal year beginning July 1, 2009.

The Controller argues that the passage of a State budget moots DPA's claims and renders it impossible for the Court to grant effective relief in this case.

Petitioners contend the case is not moot because the Court may still grant effective relief in this case by issuing a writ compelling the Controller to take any actions necessary (including adjustments to the State payroll system) to enable the Controller to comply with the law during future budget impasses.

Moreover, even if the Petition is technically moot, Petitioners argue the Court has inherent discretion to decide the issues raised by the Petition because they are issues of

broad public importance that are likely to recur and are not easily susceptible of judicial review.

The Court agrees with the Controller that this matter is technically moot. The gravamen of the Petition is that the Controller has a ministerial duty to comply with the DPA's Pay Letter and refrain from paying state employees in the absence of a budget (or other available appropriation) except as required by federal law. Inasmuch as the budget impasse that prompted the Pay Letter has ended, the question whether the Controller has a duty to comply with the DPA's Pay Letter is no longer at issue.

Petitioners' attempt to recast the relief they seek is unavailing. The requirements for issuance of a traditional writ of mandate are: (1) a clear, present, and usually ministerial duty of the defendant to do an act which the law specifically requires; and (2) a clear, present, and beneficial right of the plaintiff to performance of that duty. (Civ. Proc. Code § 1085.) A writ of mandamus will not issue to enforce an abstract right and mandamus does not lie to prevent the performance of future acts or for mere anticipated or possible refusal to perform future duty.<sup>2</sup> (*Genser v. McElvy* (1969) 276 Cal.App.2d 709, 711; *Diller v. Flynn* (1964) 226 Cal.App.2d 449, 453; *Kirstowky v. Superior Court* (1956) 143 Cal.App.2d 745, 749.) Further, mandamus ordinarily does not lie to compel the doing of an act in a particular manner where an agency has discretion to decide on the manner of its performance. (*Ridgecrest Charter School v. Sierra Sands Unified School Dist.* (2005) 130 Cal.App.4th 986, 1002.) In this case, the only present duty that DPA purportedly seeks to enforce – namely, the Controller's duty to "take any actions necessary to . . . comply with the law during the next budget impasse" – is both abstract and discretionary. Therefore, mandamus is not proper to enforce it.

While the Court agrees this proceeding is technically moot, the Court has discretion to decide the issues raised in the Petition. There is an exception to the rule requiring dismissal of a moot case when it presents issues of public importance that are likely to recur, especially when, because of their limited duration, the issues are not easily susceptible of judicial review. (*Californians for Fair Representation – No on 77 v. Superior Court* (2006) 138 Cal.App.4th 15, 22-23; *State Bd. of Educ. v. Honig* (1993) 13 Cal.App.4th 720, 742.) Under these circumstances, the court may exercise an inherent discretion to resolve the issues raised in a proceeding even if the matter is moot as to the particular parties in the proceeding. (*Id.*)

It cannot be disputed that this case presents issues of broad public interest, and that, because of their limited duration, these issues are not easily susceptible of judicial review. The critical question, therefore, is whether the controversy presented here is likely to recur, or whether the circumstances of this case are so unique that a decision by the Court would amount to an elaborate academic endeavor with no practical import. If

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<sup>2</sup> A writ of prohibition, unlike a writ of mandamus, is a preventative remedy. But a writ of prohibition is only proper to restrain judicial action. A ministerial act cannot be restrained by writ of prohibition. (Cal. Civ. Proc. Code § 1102; *Water Users Assn. v. Board of Directors* (1973) 34 Cal.App.3d 131, 135; *Aronoff v. Franchise Tax Board* (1963) 60 Cal.2d 177, 181-182; *Strumsky v. San Diego County Employees Retirement Ass'n* (1974) 11 Cal. 3d 28, 42-44.)

no purpose but delay would be served by treating the Petition as moot, the Court may proceed to decide the case on the merits.

The Controller suggests that the issues presented in this proceeding are not likely to recur because the DPA's Pay Letter was issued in the specific context of the 2008-09 budget impasse. Even if there is another state budget impasse, the Controller asserts there is no guarantee the DPA's instructions to the Controller will be the same. For example, the DPA may change the Workweek Group definitions, or change the amount, timing, of manner of payment to the employees in the Workweek Groups.

While it is true there is no guarantee that future pay letters will be identical to the Pay Letter at issue here, the Court is convinced that the basic issues are likely to recur: namely, (1) whether non-exempt state employees should be paid the applicable minimum federal wage; (2) whether exempt Executive, Administrative and Professional employees subject to the salary basis requirements of FLSA should be paid the applicable minimum salary required by FLSA; and (3) whether exempt employees who are covered by the Code of Federal Regulation sections 541.303 and 541.304 and not subject to the FLSA salary basis test (i.e., bona fide teachers, and bona fide practitioners of law or medicine), and employees who are not covered by FLSA, should not be paid any salary or wages until after adoption of a state budget. The fact that DPA might change the particular Workweek Group definitions – such as by altering the list of departments and programs excluded from the minimum wage requirements – does not undermine the Court's conclusion that the principal issues in this case are likely to recur. Accordingly, the Court may, and does, exercise its discretion to resolve the issues raised by the Petition.

The Court now proceeds to consider the substantive issues raised in the Petition.

B. Was the Controller required to comply with the Pay Letter?

The fundamental issue in this case is whether the Controller was required to comply with the DPA's Pay Letter and reduce or suspend the payment of state employee wages and salaries during the FY 2008-09 budget impasse.

Petitioners contend, based on the California Supreme Court's holding in *White v. Davis*, that the State is not authorized to pay state employees their salaries prior to the enactment of an appropriate appropriation,<sup>3</sup> except as minimally required by federal law. Petitioners further allege that because DPA is charged with the authority to administer and enforce the laws concerning personnel and employee compensation, DPA had the authority to issue the Pay Letter to implement the Court's holding in *White v. Davis*. Petitioners allege that the Controller had a duty to comply with the DPA's instructions and that the Controller lacks the authority to review and approve or reject DPA's decisions. By refusing to comply with the DPA's Pay Letter, Petitioners argue, the Controller not only violated Article XVI, section 7 of the California Constitution, Government Code sections

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<sup>3</sup> For purposes of simplicity, the Court treats a self-executing provision of the California Constitution as an available appropriation. In addition, the Court uses the term "salaries" to refer to both "salaries" and "wages."

1231.1, 9610, and 12440, but that he also interfered with DPA's lawful authority to administer and enforce the laws governing state employee compensation. Accordingly, Petitioners seek a writ of mandate and declaratory and injunctive relief compelling the Controller to comply with the DPA's Pay Letter implementing *White v. Davis*.

The Controller disputes he must comply with the instructions in the DPA's Pay Letter.<sup>4</sup> The Controller asserts that, in the course of his duties, he has an independent right to supervise and review the DPA's decisions and to disregard decisions that he concludes are not "authorized by law." The Controller argues that because he determined DPA's Pay Letter directs action that may result in violations of federal law (FLSA), the Controller was authorized to disregard the Pay Letter and issue warrants for payment of sums in excess of the amounts approved by DPA.

The Court concludes that the Controller's powers are not so broad. Some background is necessary to understand the Court's conclusion.

California, like virtually every other state, employs a divided executive in that our State Constitution divides the executive powers of state government among several constitutional officers.<sup>5</sup>

In California, the Controller is a state constitutional officer who is elected at the same time and place and for the same term as the Governor. (*Tirapelle v. Davis* (1993) 20 Cal.App.4th 1329; Cal. Const. Art. V, § 11.)

The constitutional nature of the Controller's office implies that there is a basic irreducible residuum of core duties vested in the Controller to act as the general accountant of the State that imposes some limits on the legislative power to prescribe the duties of the office. Implicit in this constitutional structure is the concept the Legislature may not, by mere statute, alter the core functions of the office, either by adding duties foreign to the office, or taking away duties that naturally belong to it. (See McGinley, *Separation of Powers, State Constitutions & the Attorney General: Who Represents the State?* (1997) 99 W.Va.L.Rev. 721, 762-763.)

Subject to these slender constitutional limitations, however, the California Constitution follows a minimalist approach, leaving it primarily to the Legislature to define the functions and duties of the office of the Controller. (*Tirapelle, supra*, at p. 1327.) In *Tirapelle*, the Third Appellate District Court of Appeal expressly held that the Legislature has "wide discretion" in defining the duties and functions of the office. (*Id.*) Thus, the Court focuses its analysis on the statutes defining the Controller's duties.

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<sup>4</sup> Intervenors join in the arguments of the Controller filed in opposition to the Petition.

<sup>5</sup> The historical purpose in establishing a divided executive was to weaken the power of the chief executive and further an intrabranched system of checks and balances, apparently due to a colonial aversion to royal governors who possessed unified executive powers. (See Marshall, *The Most Dangerous Branch? Mayors, Governors, Presidents, and the Rule of Law: A Symposium on Executive Power: Essay: Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive* (2006) 115 Yale L.J. 2246, 2251.)

The statutes governing the Controller's fiscal duties relevant to this case are Government Code sections 12410 and 12440. Section 12410 provides that the Controller shall superintend the fiscal concerns of the State and audit all claims of the State for "correctness, legality, and for sufficient provisions of law for payment." (Cal. Gov. Code § 12410.) Section 12440 provides that the Controller shall draw warrants on the Treasurer for the payment of money directed by law to be paid out of the State Treasury, but that a warrant shall not be drawn unless authorized by law and unless unexhausted specific appropriations provided by law are available to meet it. (Cal. Gov. Code § 12440.)

Although in some circumstances the Controller's duties may involve discretionary or fact-finding powers, "the greater part of the duties devolved upon him by the law are of a . . . purely ministerial character." (*Tirapelle, supra*, at p. 1330.) For example, the Controller has no discretion to refuse the issuance of warrants when the amount of an expenditure is set by law or entrusted to the discretion of another agency or branch of government. (*Id.* at p. 1329.)

In *Tirapelle*, the Court considered the Controller's announced intent to disregard salary reductions established by DPA and issue warrants for the payment of state employee salaries in excess of the amounts approved by DPA. The Controller argued that, by virtue of his audit power, he had the power to ensure that expenditures are authorized by law. Because he had determined DPA had failed to act in accordance with Government Code § 19826, the Controller argued he could refuse to implement DPA's salary decisions. The Court did not agree.

The Court held that the Controller had no power to refuse to implement DPA's salary decisions. (*Id.* at pp. 1332-1335.) According to the Court, "since the Controller has not been given powers of supervision over the DPA nor the power to review its decisions, the extent of his authority to disregard orders of the DPA in the performance of his audit function is limited by fundamental principles of jurisdiction." (*Id.* at p. 1333.) Decisions by a tribunal with fundamental jurisdiction over an issue – even erroneous decisions – must be challenged in the normal course of judicial review, and may not be collaterally attacked or ignored. (*Id.*) The Controller's duty to ensure that expenditures are authorized by law does not include the power to review and approve or reject decisions of a department vested by the Legislature with authority over such expenditures. (*Id.* at p. 1335.) Rather, "[w]here a department or agency acts within the authority delegated to it by the Legislature, the Controller must defer to the agency or department and leave review of the decision to the courts and/or the Legislature." (*Id.*)

Because the DPA has jurisdiction over the non-merit aspects of the State's personnel system and the State's financial relationship with its employees, (*see, e.g.*, Cal. Gov. Code §§ 19815.2, 19815.4, 19816, 19816.2, 19825, 19826), the Court held that the Controller had no authority to refuse to implement DPA's salary setting determinations. The Court characterized the Controller's Government Code § 19826 objections as a mere objection to the manner in which DPA exercised its authority, not implicating DPA's fundamental authority to act. (*Tirapelle, supra*, at p. 1336.)

*Tirapelle* is instructive because the only difference between the Controller's position in *Tirapelle* and the Controller's position here is that, in *Tirapelle*, the Controller contended DPA failed to act in accordance with state law, whereas in this case, the Controller contends DPA may have failed to act in accordance with federal law. This is a distinction without a difference. *Tirapelle* establishes that the Controller must follow the decisions of DPA so long as DPA is acting within the fundamental authority delegated to it by the Legislature. (*Id.* at p. 1344.)

In issuing the subject Pay Letter, DPA was acting within the scope of the fundamental authority delegated to it by the Legislature. Thus, the Controller was not authorized to disregard the Pay Letter on the grounds it may result in violations of FLSA, particularly where, as here, the FLSA violations are mere theoretical possibilities.

The Controller's "infeasibility" defense also lacks merit.<sup>6</sup> The Controller argues that if compliance with DPA's Pay Letter is, as a practical matter, too difficult or expensive, compliance should be excused. However, the Controller does not cite any authority excusing a state agency or officer from complying with a mandatory duty because compliance would be difficult or costly. Moreover, this objection reflects a disagreement with the wisdom of DPA's decision, rather than a challenge to DPA's fundamental subject matter jurisdiction.

The Controller's final contention is that DPA lacks standing to request the relief it seeks because DPA does not have the authority to adjust the salaries of state employees or to direct the Controller how to operate the state payroll system. The simple answer to this contention is that DPA's Pay Letter does not alter the salaries of employees or seek to direct the Controller how to operate the state payroll system.

In addition to joining the Opposition filed by the Controller, Intervenor California Attorneys, Administrative Law Judges, and Hearing Officers in State Employment ("CASE") raises two additional arguments, namely that (i) the Pay Letter ignores some state employees are paid out of special funds, and (ii) requiring exempt employees to work indefinitely without any pay would violate the state and federal constitutional contract clauses. These arguments are rejected for the reasons stated in DPA's Reply Memorandum.

In sum, the Court concludes that the Controller's duty to audit claims did not give him authority to disregard DPA's Pay Letter. Because DPA was acting within the scope of its delegated authority, the Controller was required to defer to the DPA's decision and leave review of the decision to the courts and/or the Legislature.

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<sup>6</sup> The Controller does not argue that compliance with the DPA's Pay Letter would be impossible under the current payroll system, only that compliance would be difficult and costly, and may result in violations of the FLSA. Accordingly, the Court has no occasion to consider whether impossibility would be a valid defense.

As noted above, in *White v. Davis* the California Supreme Court provided guidance as to its understanding of what is generally required of the State to comply with FLSA during a budget impasse. But questions as to the particular amount, timing, and manner of payment that FLSA requires to be paid to the different categories and classes of state employees cannot be determined in the abstract and, therefore, this Court does not purport to address those issues here.

C. Conclusion

For the reasons discussed above, the Court concludes that Petitioners are entitled to a declaratory judgment that the Controller was obligated to comply with the DPA's Pay Letter and reduce/suspend the payment of state employee wages and salaries during the FY 2008-09 budget impasse. In contrast, Petitioners' request for injunctive and mandamus relief shall be denied.

In the event that this tentative ruling becomes the final ruling of the Court, counsel for Petitioners is directed to prepare a formal judgment consistent with this Court's ruling; submit it to opposing counsel for approval as to form; and thereafter submit it to the Court for signature and entry of judgment in accordance with Rule of Court 3.1312.