

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by)	BOARD DECISION
)	
STATE PRISON MEDICAL CARE SYSTEM)	PSC No. 08-04
RECEIVER)	
)	
From the Executive Officer's February 14,)	September 3, 2008
2008 Disapproval of Six Personal Services)	
Contracts for Recreational and Occupational)	
Therapist Services by the Department of)	
Corrections and Rehabilitation)	

APPEARANCES: Cliff L. Tillman Jr., Business Agent, on behalf of American Federation of State, County, and Municipal Employees Local 2620, AFL-CIO; Martin H. Dodd, Attorney, Futterman & Dupree LLP, on behalf of J. Clark Kelso, Receiver for the California State Prison Medical Care System.

BEFORE: Sean Harrigan, President, Richard Costigan, Vice President; Maeley Tom, and Patricia Clarey, Members.

DECISION

This matter is before the State Personnel Board (SPB or Board) after J. Clark Kelso, the Receiver for the California State Prison Medical Care System (Receiver), appealed from the Executive Officer's February 14, 2008 decision disapproving six personal services contracts (Contracts) entered into between the California Department of Corrections and Rehabilitation (CDCR) and private firms for recreational and occupational therapist services to be performed at various CDCR institutions.¹ The term of each of the Contracts was from July 1, 2005 through June 30, 2008.

In this decision, the Board approves the Contracts.

¹ CDCR did not file an appeal of the Executive Officer's decision.

BACKGROUND

CDCR utilizes occupational therapists to provide specialized recreational therapy services for inmates in need of such services. These therapeutic interventions are designed to promote social interaction, encourage profitable and appropriate use of leisure time, and provide preparation for re-entry into the general population or other levels of treatment. CDCR asserted before the Executive Officer that it had historically had a difficult time filling its occupational therapist positions, and that this difficulty was related to a variety of factors, including the need for CDCR to compete with the local marketplace for a limited number of candidates. CDCR has maintained an examination bulletin open for continuous filing for the occupational therapist classification, and the advertised examination includes an annual bonus to accept employment at specific institutions. Moreover, in January 2002, CDCR entered into a stipulation for settlement in *Plata v. Schwarzenegger, et al.*,² that requires CDCR to use registry or contract services to alleviate the shortage of available civil service staff at various CDCR institutions in order to ensure that inmates receive constitutionally adequate health care. The Board takes official notice of the fact that CDCR is currently under federal receivership with respect to the provision of inmate health care, as administered by the Receiver. The Contracts at issue herein provide for temporary/relief occupational therapist services on an as-needed basis to fill temporary vacancies, substitute for full-time employees while on vacation and/or extended sick leave, or provide temporary services when CDCR is under exceptional workload conditions.

² U.S. District Court, N.D. Calif., Case No. C-01-1351 THE.

Although the Contracts specified Government Code section 19130(b)(10) as the justification for contracting out, in its submission to the Executive Officer, the Department did not specifically identify which exemption(s) it was relying upon to justify the Contracts. Based upon the arguments set forth by CDCR as outlined above, the Executive Officer analyzed the Contracts under Government Code section 19130(b)(3).

PROCEDURAL HISTORY

By letter dated October 18, 2007, pursuant to Government Code section 19132 and SPB Rule 547.59 et seq., AFSCME requested SPB to review the Contracts for compliance with Government Code section 19130, subdivision (b). After receiving the submissions of the parties, the Executive Officer issued a decision dated February 14, 2008, finding that CDCR had failed to establish good cause for approval of the Contracts under the exception set forth in Government Code section 19130, subdivision (b)(3).

On March 13, 2008, the Receiver appealed to the Board from the Executive Officer's decision. The Receiver filed his opening brief on April 16, 2008. In that brief, the Receiver requested that the Board consider additional evidence that was not presented to the Executive Officer. That evidence consisted of a declaration setting forth recruitment efforts taken by CDCR in 2006, 2007 and 2008 in an effort to hire civil service employees for the classification of Occupational Recreational Therapist. AFSCME did not file a brief on appeal. By letter dated May 7, 2008, the Receiver reiterated his request that the Board consider the additional evidence and approve the Contracts.

At its meeting on June 10, 2008, the Board heard oral argument and took the matter under submission. Following that meeting, the Board afforded AFSCME the opportunity to respond to the additional evidence submitted by the Receiver in support of the appeal, and for the Receiver to reply.

On June 26, 2008, AFSCME submitted its response. On June 27, 2008, the Receiver submitted his reply.

The Board has reviewed the entire record for this case, including the oral and written arguments submitted by the parties, and now issues the following decision.

ISSUE

The following issues are before the Board for review:

1. Whether the Board should consider additional evidence offered by the Receiver that was not presented by CDCR to the Executive Officer.
2. Whether sufficient justification has been submitted to show that the Contract is justified under Government Code section 19130?

POSITIONS OF THE PARTIES

In her February 14, 2008 Decision, the Executive Officer found that the Department had failed to provide sufficient information to establish that the contracted services are not available within the civil service, and disapproved the Contracts. Specifically, the Executive Officer found that the Department had failed to present any evidence demonstrating that it had made reasonable efforts to recruit civil service occupational therapists, such as attending job/career fairs, posting job

flyers at appropriate schools, or advertising in local or professional publications, prior to entering into the Contracts.

The Receiver asserts that, given AFSCME's failure to object to the consideration of additional evidence, the Board has the discretion to consider the evidence proffered by the Receiver to establish that, despite its recruitment efforts, CDCR was unable to hire employees through the civil service, thereby justifying the Contracts under Government Code section 19130(b)(3).

In its submission to the Executive Officer, AFSCME asserted that, although the Contracts were executed pursuant to the provisions of Government Code section 19130(b)(10), the services to be performed under the Contracts are not of such an "urgent, temporary, or occasional nature that the delay incumbent in their implementation under civil service would frustrate their very purpose." Instead, AFSCME asserted, the Contracts are being used to fill vacant positions that CDCR has been unable to fill through its normal recruitment efforts, and that the contractors perform the same work under the same conditions as civil service employees.³ In response to the Board's invitation to respond to the Receiver's request to consider additional evidence, AFSCME stated: "We would very much like to partner with the Receiver to fill vacancy [sic] and as we have in the past agreed on a date (we propose nine months) February 1, 2009 to have the positions filled and the contracts rescinded."

³ As indicated above, the Executive Officer analyzed the Contracts under Government Code section 19130(b)(3).

LEGAL PRINCIPLES

In *Professional Engineers in California Government v. Department of Transportation*,⁴ the California Supreme Court recognized that, emanating from Article VII of the California Constitution, is an implied “civil service mandate” that prohibits state agencies from contracting with private entities to perform work that the state has historically and customarily performed and can perform adequately and competently. Government Code section 19130 codifies the exceptions to the civil service mandate recognized in various court decisions. The purpose of SPB's review of contracts under Government Code section 19130 is to determine whether, consistent with Article VII and its implied civil service mandate, state work may legally be contracted to private entities or whether it must be performed by state employees.

Government Code section 19130, subdivision (b) (3), authorizes a state agency to enter into a personal services contract when:

[t]he services contracted are not available within civil service, cannot be performed satisfactorily by civil service employees, or are of such a highly specialized or technical nature that the necessary expert knowledge, experience, and ability are not available through the civil service system.

In order to justify contracting out under Government Code section 19130(b) (3), the burden is on the department to establish either: (1) that there are no civil service job classifications to which it could appoint employees with the requisite

⁴ (1997) 15 C.4th 543, 547.

expertise needed to perform the required work; or (2) that it was unable to successfully hire suitable candidates for any of the applicable classifications.⁵

Government Code section 19130, subdivision (b)(10), authorizes a state agency to enter into a personal services contract with a private contractor when:

The services are of such an urgent, temporary, or occasional nature that the delay incumbent in their implementation under civil service would frustrate their very purpose.

In order to justify a contract under Government Code section 19130(b)(10), a state agency must provide sufficient information to show: (1) the urgent, temporary, or occasional nature of the services; and (2) the reasons why a delay in implementation under the civil service would frustrate the very purpose of those services.⁶

Title 2, California Code of Regulations, sections 547.66 – 68 govern the process for Board review of the Executive Officer's decision to approve or disapprove a personal services contract. Title 2, California Code of Regulations, section 547.66 provides, in relevant part:

... The board will decide the appeal upon the factual information, documentary evidence, and declarations submitted to the executive officer before he or she issued his or her decision. *Upon the objection of a party*, the board will not accept additional factual information, documentary evidence, or declarations that were not previously filed with the executive officer if the board finds that the submission of this additional factual information, documentary evidence, or declarations would be unduly prejudicial to the objecting party.

(Emphasis added.)

⁵ *In the Matter of the Appeal by SEIU*, PSC No. 05-03, at p. 8.

⁶ *California State Employees Association* (2003) PSC No. 03-02 at p. 3; *State Compensation Insurance Fund* (2003) PSC No. 03-02 at p. 14.

DISCUSSION

Consideration of Additional Evidence

Upon the objection of a party, SPB Rule 547.66 prohibits the Board from considering additional factual information, documentary evidence, or declarations that were not previously filed with the Executive Officer, if to do so would be unduly prejudicial to the objecting party. In the absence of an objection, however, the Board may consider such evidence.

Despite having been afforded multiple opportunities to do so, AFSCME has not objected to the Board's consideration of the additional evidence offered by the Receiver. The evidence is relevant to the issue of whether justification for the Contracts exists under Government Code section 19130(b)(3). Therefore, the Board accepts the Receiver's evidence into the record for consideration in this appeal.

Justification for Contracts

The Receiver has provided evidence of CDCR's efforts to recruit employees for the civil service classification of Occupation/Recreational Therapist during 2006, 2007 and 2008. Those efforts included hosting workshops throughout the state to promote and advertise vacant positions within CDCR's various institutions, contacting colleges and universities with therapist programs, and advertising on online websites for workshops and specific therapist career opportunities. In addition, the Receiver provided evidence that, despite those efforts, there exists a 34% vacancy rate for therapists at CDCR institutions.⁷

⁷ The Board notes that AFSCME has not challenged the adequacy of the evidence provided by the Receiver concerning CDCR's recruitment efforts.

The evidence provided by the Receiver establishes that CDCR has been unable to successfully hire civil service occupational/recreational therapists, despite having made reasonable recruitment efforts. Accordingly, the Contracts are justified under Government Code section 19130(b)(3).⁸

CONCLUSION

While CDCR failed to establish before the Executive Officer that it had made reasonable, good faith efforts to hire civil service employees to perform the duties contemplated under the Contracts, the Receiver has, without objection from AFSCME, supplied the Board with sufficient evidence to establish CDCR's recruitment efforts undertaken by CDCR to fill the positions through the civil service during the term of the Contracts. Therefore, the Contracts are justified under Government Code section 19130, subdivision (b)(3). The Board expects that CDCR will continue to make every effort to hire civil service employees to perform the services covered by the Contract.

ORDER

The Board finds that Contract Nos. ICM 05020, ICM 05056, ICM 05057, ICM 05058, ICM 05059, ICM 05060, entered into by the Department of Corrections and Rehabilitation for the provision of recreational and occupational therapist services are justified under Government Code section 19130, subdivision (b)(3).

Accordingly, the Contracts are hereby approved.

⁸ Given this conclusion, the Board does not consider whether the Contracts may be justified under any other subdivision of Government Code section 19130(b).

STATE PERSONNEL BOARD⁹

Sean Harrigan, President
Richard Costigan, Vice President
Maeley Tom, Member
Patricia Clarey, Member

* * * * *

I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on September 3, 2008.

Suzanne M. Ambrose
Executive Officer
State Personnel Board

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⁹ Member Sheehan did not participate in this decision.