

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by)
)
**American Federation of State, County,)
and Municipal Employees Local 2620,)
AFL-CIO (AFSCME))
)
from the Executive Officer's May 11,)
2009, Approval of Personal Services)
Contracts for Psychologist and Social)
Worker Services by the California)
Department of Corrections and)
Rehabilitation)
_____)**

PSC No. 09-04

RESOLUTION

August 11, 2009

WHEREAS, the State Personnel Board (Board) has considered carefully the findings of fact and Decision issued by the Executive Officer in SPB File No. 09-022(b) on May 11, 2009, approving the above-entitled matter, as well as the written and oral arguments presented by AFSCME and the California Department of Corrections and Rehabilitation (Department) during the Board's August 11, 2009, meeting.

IT IS RESOLVED AND ORDERED that:

1. The findings of fact and conclusions of law of the Executive Officer in said matter are hereby adopted by the State Personnel Board as its Decision in the case on the date set forth below.
2. A true copy of the Executive Officer's Decision shall be attached to this Resolution for delivery to the parties in accordance with the law.
3. The Department is urged to communicate and join efforts with AFSCME in recruiting civil service employees to perform psychologist and social worker services.

4. Adoption of this Resolution shall be reflected in the record of the meeting and the Board's minutes.

* * * * *

The foregoing Resolution was made and adopted by the State Personnel Board in PSC No. 09-04 at its meeting on August 11, 2009, as reflected in the record of the meeting and Board minutes.



May 11, 2009

James A. Willis, Staff Counsel III
Department of Corrections & Rehabilitation
Office of Legal Services
P.O. Box 942883
Sacramento, CA 94283-0001

Cliff L. Tillman, Jr.
Business Agent
AFSCME, Local 2620, AFL-CIO
555 Capitol Mall, Suite 1225
Sacramento, CA 95814

Re: Request for Review of Proposed or Executed Personal Services Contracts for Psychologist Services (Contract Nos. ICM06132, ICM06200, ICM03261, ICM06201, ICM06202, ICM06203, ICM06204, ICM06205, ICM06206, ICM06207, ICM06208, ICM06209, ICM06210, ICM06211, ICM06212, ICM06213, ICM06214, ICM06215, ICM06216 and ICM06218) Promulgated by the Department of Corrections and Rehabilitation
[SPB File No. 09-022(b)]

Dear Messrs. Willis and Tillman:

By letter dated February 24, 2009, the American Federation of State, County, and Municipal Employees Local 2620, AFL-CIO (AFSCME) asked, pursuant to Gov. Code § 19132 and Title 2, Cal. Code Regs., § 547.59 *et seq.*, the State Personnel Board (SPB) to review for compliance with Gov. Code § 19130(b), the above-listed contracts entered into by the Department of Corrections and Rehabilitation (Department) for Psychologist and Clinical Social Worker services (hereinafter "Contracts").

On March 9, 2009, the SPB notified the Department that AFSCME had requested that SPB review the Contracts, and informed the Department that it had until March 30, 2009, to submit its response to the SPB. The Department thereafter requested, and received, a continuance until April 24, 2009 to submit its response. The SPB received the Department's response on April 24, 2009. AFSCME thereafter had until May 5, 2009, to submit its reply to the Department's response. AFSCME filed its reply on May 1, 2009, after which the matter was deemed submitted for review by the Executive Officer.

For those reasons set forth below, I find that Contract No. ICM03261 is not subject to review, as it expired prior to AFSCME seeking review from the SPB. With respect to Contract Nos. ICM06132, ICM06200, ICM06201, ICM06202, ICM06203, ICM06204, ICM06205, ICM06206,

ICM06207, ICM06208, ICM06209, ICM06210, ICM06211, ICM06212, ICM06213, ICM06214, ICM06215, ICM06216 and ICM06218, I find that those contracts are authorized under the provisions of Government Code section 19130(b)(3). As a result, those Contracts are approved.

Legal Standard

In *Professional Engineers in California Government v. Department of Transportation*,¹ 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.

Position of the Parties

Department Position:

The Department submitted documentary evidence establishing that Contract No. ICM03261 had expired prior to AFSCME requesting that the SPB review the Contract for compliance with the provisions of Government Code section 19130. As a result, the Department asserts that AFSCME’s request that the SPB review the Contract for compliance with Section 19130 must be dismissed.

The Department further asserts that the remaining contracts are authorized under the provisions of Government Code sections 19130(b)(3), (6) and (10), because: the Department has been unable to hire a sufficient number of civil service psychologists to meet its needs, despite having engaged in good-faith recruitment efforts; the nature of the work is such that Government Code standards for emergency appointments apply; and, the services are urgently needed as a result of federal court orders mandating that the Department provide a specified level of mental health care to inmates.

The Department maintains that, despite having engaged in numerous, good faith recruitment efforts during the previous year, it has been unable to successfully recruit an adequate number of civil service psychologists to meet its needs. Those recruitment efforts include:

- Advertising on the following internet sites: CareerBuilder (on-going); Yahoo Hot Jobs (on-going); SPB’s Hot Jobs and VPOS; and the Department’s internet and intranet.

¹ (1997) 15 Cal.4th 543, 547.

- Attending numerous job fairs, including the following: Eight Psychologist Association conferences (168 contacts made); Three psychologist job fairs (32 contacts made); Three presentations at Alliant University School of Psychology (16 contacts made).
- Advertising in *Monitor on Psychology* and *The National Psychologist*.
- Conducting a remote location campaign involving seven newspaper agencies over a six-month period.

Given its inability to hire a sufficient number of civil service psychologists, despite having made reasonable, good faith recruitment efforts to do so, the Department maintains that the Contracts are permissible under the provisions of Government Code section 19130(b)(3).

The Department also maintains that the Contracts are authorized under the provisions of Government Code section 19130(b)(6) because the federal court in *Coleman v. Schwarzenegger* (2007 WL 2122636 (E.D. Cal) ordered the Department to provide a specified level of mental health care to inmates incarcerated in California, and the court-ordered level of care can only be provided by the Department utilizing contract psychologists, given its unsuccessful efforts to recruit a sufficient number of civil service psychologists to perform those duties. As such, the Department maintains the Contracts are justified because the standards for emergency appointments have been satisfied.

For similar reasons, the Department contends that the Contracts are permitted under the provisions of Government Code section 19130(b)(10), as the contracted-for services are urgently needed due to the federal court order, and the Department's inability to recruit a sufficient number of civil service psychologists, despite having made reasonable, good faith efforts to do so.

AFSCME Position:

AFSCME asserts the following in challenging the propriety of the Contracts:

- The Contracts were executed pursuant to Government Code section 19130(b)(10), but did not include specific and detailed factual information as justification for its use as required by Title 2, Cal. Code Regs., section 547.60; rather, it merely restated the language of Section 19130(b)(10) which permits personal services 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."
- There is nothing urgent, temporary, or occasional about the use of the Contract. Instead, the Contract is being used to fill vacant civil service positions that CPHCS has been unable to fill through its normal recruitment efforts. The contractor performs the same work, in the same settings, and under the same conditions as civil service employees and the contractor has worked in this capacity for several years.
- AFSCME acknowledges and appreciates the clarification of the expired contract. AFSCME initially requested a copy of all existing contracts impacting Bargaining Unit 19 from the Department, and subsequently received all that was in the appeal to the SPB.

- It is not true that Psychologists traditionally come to the State as a second career and that civil service pensions are less appealing. In many respects, it is the opposite. Psychologists come to the State as a primary career and enjoy the benefits of health care and defined pension.
- Psychologists within the State civil service do take advantage of flexible work schedules, including, but not limited to, alternative work schedules.
- Contractors are not hesitating to accept civil service positions based on the threat of lay-offs. AFSCME agrees and accepts that the State is going through a budget crisis; however, if there are lay-offs, the order of lay-offs starts with contract workers, not civil service workers.
- In many respects, there are barriers established for existing contractors that make it difficult, if not impossible, to move from a Contract worker to a civil service worker.

Analysis

At the time that AFSCME filed its challenge to the Contract with the SPB on February 27, 2009, Contract No. ICM03261 had already expired. Although the SPB will retain jurisdiction over a contract that expires *after* the SPB has commenced its review of the contract, that is not the situation present here. Instead, the Contract expired *prior* to AFSCME filing its challenge and, as a result, the SPB will not review the Contract No. ICM03261 for compliance with Government Code section 19130(b).²

With respect to the remaining Contracts, I find that the Department has provided sufficient information to demonstrate that it has made reasonable, good faith attempts to recruit and hire a sufficient number of civil service psychologists to meet its needs but, despite those efforts, it has been unsuccessful in doing so. The Department has attended numerous job fairs and professional conferences, has visited college campuses, and has advertised in local, regional and national media. In short, the Department has acted responsibly in attempting to locate and recruit civil service psychologists. As a result, I find that Contract Nos. ICM06132, ICM06200, ICM06201, ICM06202, ICM06203, ICM06204, ICM06205, ICM06206, ICM06207, ICM06208, ICM06209, ICM06210, ICM06211, ICM06212, ICM06213, ICM06214, ICM06215, ICM06216 and ICM06218 are authorized under the provisions of Government Code section 19130(b)(3). Having so concluded, no determination need be made as to whether the Contracts are also permissible under the provisions of Government Code sections 19130(b)(6) or (10).

Conclusion

AFSCME did not file its challenge to Contract No. ICM03261 until after that Contract had already expired. Because the SPB does not retain jurisdiction to review expired contracts unless the contract challenge is filed prior to the expiration of the contract, AFSCME's challenge to that Contract must be dismissed. The Department also established that it has been unable to fill all of its vacant civil service psychologist positions, despite having made reasonable good faith efforts

² See PSC No. 04-02, pp. 7-9.

Executive Officer Decision

SPB File No. 09-022(b)

May 11, 2009

Page 5 of 5

to do so. Consequently, I find that Contract Nos. ICM06132, ICM06200, ICM06201, ICM06202, ICM06203, ICM06204, ICM06205, ICM06206, ICM06207, ICM06208, ICM06209, ICM06210, ICM06211, ICM06212, ICM06213, ICM06214, ICM06215, ICM06216 and ICM06218 are authorized under the provisions of Government Code section 19130(b)(3).

This letter constitutes my decision to dismiss AFSCME's challenge to Contract No. ICM03261, and to approve Contract Nos. ICM06132, ICM06200, ICM06201, ICM06202, ICM06203, ICM06204, ICM06205, ICM06206, ICM06207, ICM06208, ICM06209, ICM06210, ICM06211, ICM06212, ICM06213, ICM06214, ICM06215, ICM06216 and ICM06218. Any party has the right to appeal this decision to the five-member State Personnel Board pursuant to SPB Rule 547.66. Any appeal should be filed no later than 30 days following receipt of this letter in order to be considered by the Board.

Sincerely,

/s/ SUZANNE M. AMBROSE

SUZANNE M. AMBROSE

Executive Officer