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The foregoing Resolution was made and adopted by the State Personnel Board in PSC No. 09-05 at its meeting on August 11, 2009, as reflected in the record of the meeting and Board minutes.



CALIFORNIA STATE PERSONNEL BOARD

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May 4, 2009

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Pam Manwiller  
Director of State Programs  
AFSCME, Local 2620, AFL-CIO  
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Sacramento, CA 95814

Re: Request for Review of Proposed or Executed Personal Services Contracts for  
Psychologist Services (Contract Nos. 08-3016 – Scripps Psychological;  
08-3018 – Andrew Renouf)  
**[SPB File No. 09-001(b)]**

Dear Mr. Burton and Ms. Manwiller:

By letter dated January 5, 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), two contracts entered into by the Department of Social Services (Department) for psychologist services (Contract Nos. 08-3016 – Scripps Psychological; and 08-3018 – Andrew Renouf) (hereinafter “Contracts”). The terms of the contracts are from July 1, 2008 through June 30, 2010.

On January 12, 2009, the SPB notified the Department that AFSCME had requested that SPB review the Contracts, and informed the Department that it had until February 2, 2009, to submit its response to the SPB. The Department thereafter requested, and received, a continuance until April 14, 2009, to file its response. The SPB received the Department’s response on April 14, 2009. AFSCME thereafter had until April 24, 2009, to submit its reply to the Department’s response. To date, no reply has been received from AFSCME. As a result, the matter was deemed submitted for review by the Executive Officer with no reply having been filed by AFSCME.

For those reasons set forth below, I find that neither Contract No. 08-3016 nor Contract No. 08-3018 are authorized under the provisions of Government Code section 19130(b)(3) or (10). Consequently, both Contracts are disapproved.

### **Legal Standard**

In *Professional Engineers in California Government v. Department of Transportation*,<sup>1</sup> 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.

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#### **Government Code section 19130(b)(3)**

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

The 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.

The Board’s decision, *In the Matter of the Appeal by SEIU*, made clear that, in asserting the exemption contained in section 19130(b)(3), the burden is on the contracting department to establish either: (1) that there are no civil service job classifications to which it could appoint employees with the requisite expertise needed to perform the required work; or (2) that it was unable to successfully hire suitable candidates for any of the applicable classifications.<sup>2</sup>

#### **Government Code section 19130(b)(10)**

Government Code section 19130(b)(10) authorizes a state agency to enter into a personal services contract 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 personal services contract under section 19130(b)(10), the contracting department must provide sufficient information to show: (1) the urgent, temporary, or occasional

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<sup>1</sup> (1997) 15 Cal.4th 543, 547.

<sup>2</sup> PSC No. 05-03, at p. 8.

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.<sup>3</sup>

### **Position of the Parties**

#### **Department Position:**

The Department asserts that the Contracts are justified under the provisions of Government Code section 19130(b)(3) and (10) because there is no current civil service classification for the needed services and, even if such a classification was available, conflict-of-interest issues would necessitate contracting out the services. The Department further asserts the services are urgent, temporary or occasional in nature.

The Department utilizes the services of psychologists in conducting adoption planning. Such services are needed on a variety of levels, including analyzing the possible termination of parental rights, determining whether an individual can properly parent a child, and evaluating children with special placement needs. Psychologists may also be required to testify as expert witnesses in administrative and court proceedings.

Department psychologists must have extensive experience dealing with adoption issues, must have a valid license as a psychologist, and must have a Ph.D. in psychology from an approved school of medical psychologists association. Additionally, Department psychologists must possess five years of post-graduate experience in the diagnosis and treatment of emotional and mental disorders of children, and three years of experience in performing psychological evaluations of children "where adoptions are critical."

Department psychologists must also possess knowledge or skills in the following areas: child development; the ability to make accurate assessments of intelligence; a working knowledge of learning disabilities; mental retardation; developmental abnormalities; parenting techniques; how to predict parental capacity in adoption settings; the lifelong effects of adoption on children, adoptive families and birth parents; child assessment, child bonding and attachment; the diagnosis and treatment of emotional disturbances due to neglect and physical, sexual and emotional abuse in children. All of the foregoing services are required on an as-needed basis.

There are currently no classes of employment within the Department that even come close to fulfilling the needed psychological services noted above. Instead, these services are clearly highly specialized, requiring unique knowledge and experience. As such, the Contracts are permissible under Section 19130(b)(3). Moreover, because of the sporadic nature of the services, the Contracts are authorized under the provisions of section 19130(b)(10).

Furthermore, at the time the Contracts were executed, it was believed that a large increase in the number of successful adoptions might lead to an increase in the Department's adoptions staff and financing. As a result, the Department was concerned that hiring Department psychologists

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<sup>3</sup> PSN No. 05-04, at p. 7.

would lead to an incorrect perception that the Department was “rubber stamping” adoptions in an effort to obtain additional funding. The Department concluded, therefore, that the best way to handle the appearance of impropriety would be to contract with an independent contractor psychologist over whom the Department would exercise no influence.

AFSCME Position:

AFSCME did not file a reply disputing any information contained in the Department’s response. Instead, AFSCME asserted the following in challenging the propriety of each Contract:

- The contracts were executed pursuant to Government Code section 19130(b)(10), but do not include specific and detailed factual information as justification for their use as required by Title 2, Cal. Code Regs., section 547.60; rather, they merely restate 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 contracts. Instead, the contracts are being used to fill vacant civil service positions that the Department has been unable to fill through its normal recruitment efforts. The contractors perform the same work, in the same settings, and under the same conditions as civil service employees and many of these contractors have worked in this capacity for several years.

Analysis

Although the Department contends that civil service psychologist classifications do not require civil service employees to possess the education and experience necessary to supply the skills being provided by the contractors, the Department ignores that fact that those qualifications set forth in the official classification specifications are mere *minimum* requirements, and that nothing precludes the Department from attempting to recruit and employ those individuals who possess a higher level of education and experience. In short, the Department failed to explain why the broad minimum qualifications set forth in the official classification specifications somehow preclude the Department from hiring psychologists who possess qualifications above those minimally required for appointment to the classification. Because the Department failed to establish that existing civil service psychologist classifications and, more particularly, the Psychologist (Clinical) classification, are inadequate to perform those duties contemplated under the Contracts, and because the Department failed to present any information demonstrating that it engaged in reasonable, good faith efforts to hire civil service psychologists prior to entering into the Contracts, it is determined that the Contracts are not authorized under the provisions of section 19130(b)(3).

With respect to the Department’s assertions that the Contracts are necessary to prevent the appearance of a conflict of interest in the Department’s review of adoption applications, as an initial matter it is noted that any such purported conflict of interest does not constitute a contracting out exception under section 19130(b)(3) or (10). Moreover, the Department failed to

establish why a contract psychologist would somehow be less subject to influence than would a permanent civil service psychologist. Presumably, a contract psychologist would want to be favorably perceived by the Department if he or she wanted to continue to work for the Department in the future, whereas a civil service employee, who is entitled to the full panoply of civil service protections, would not necessarily have such concerns. Therefore, the Department's assertions that the Contracts are necessary due to conflict of interest issues is not persuasive.

Finally, although the Department asserts that the services provided under the Contracts are occasional in nature, the Department presented no information to support such a contention.<sup>4</sup> While the occasional nature of the Contract services *may* be inferred from the fact that Contract No. 08-3016 contemplates that a maximum of \$4,000.00 worth of services will be rendered under the Contract in any given year, while Contract No. 08-3018 contemplates that a maximum of \$15,000.00 worth of services will be rendered under the Contract in any given year, no information was provided to establish why such services could not be performed by a part-time civil service employee, or a permanent intermittent civil service employee. Consequently, the Department failed to establish that the Contracts are permissible pursuant to the provisions of section 19130(b)(10).

### **Conclusion**

The Department failed to present sufficient information to establish that existing civil service psychologist classifications are inadequate for the Department to be able to hire sufficiently qualified civil service psychologists to perform those duties contemplated under the Contracts. Similarly, the Department failed to establish that the Contracts are justified under any provision of Government Code section 19130(b) due to perceived conflicts of interest that might arise if the Department did not contract out for the services in question. Nor did the Department present sufficient information to establish that the occasional need for the services is such that it is not feasible for the Department to hire part-time or permanent intermittent psychologists to perform the Contract duties. As a result, I find that neither Contract No. 08-3016 nor Contract No. 08-3018 are authorized under the provisions of Government Code sections 19130(b)(3) or (10).

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<sup>4</sup> It is noted that the Department's brief cites to Exhibit C in support of its assertion that the needed services are sporadic in nature. The cited information is, however, actually contained in Exhibit F. More importantly, the Exhibit presented no specific information in support of the assertion in question.

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This letter constitutes my decision to disapprove Contract Nos. 08-3016 and 08-3018. 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