

**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 4, 2009, )  
Approval of Personal Services Contracts )  
for Pharmacist Services by the )  
Department of Social Services )

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**PSC No. 09-08**

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. 09-004(b) on May 4, 2009, approving the above-entitled matter, as well as the written and oral arguments presented by AFSCME and the California Department of Social Services (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 pharmacist 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. 09-08 at its meeting on August 11, 2009, as reflected in the record of the meeting and Board minutes.



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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 Contract for  
Pharmacist Services (Contract No. 07-3031 – Pharmaceutical Systems)  
**[SPB File No. 09-004(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), a contract entered into by the Department of Social Services (Department) for pharmaceutical services (Contract No. 07-3031 – Pharmaceutical Systems) (hereinafter “Contract”). The term of the contract is from July 1, 2007 through June 30, 2009.

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 Contract No. 07-3031 is authorized under the provisions of Government Code section 19130(b)(3). Consequently, the Contract is approved.

**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.

**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 Contract is 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. The Department further asserts the services are intermittent in nature.

The Department regulates group homes, child care centers, residential facilities for the elderly, small family home services for the mentally disordered and developmentally disabled, adult rehabilitation facilities, foster family homes, and non-medical facilities.

Pharmacists utilized by the Department are required to have a valid California Pharmacist license, and to provide consultation and evaluation services related to the above-listed facilities. Mainly, the pharmacist assists in determining issues related to care by providing the following specific services: participate in complaint investigations and provide interpretation of evaluator's findings during the facilities evaluation process; give expert testimony in administrative hearings as well as in various courts; and, provide document reports of findings and recommendations.

The Department does not employ any pharmacists or have a classification of employment related thereto. Consequently, the request for these services falls within Government Code section 19130(b)(3), in that there are no current Department employees performing such services, and the position requires necessary, expert skills and knowledge not possessed by any current classification.

Additionally, all of the above-listed duties are provided on a regional, intermittent, on-call basis, up to an annual cost of \$25,000.00 per year. Although the Department considered employing civil service pharmacists, the Department ultimately determined that doing so would not be cost-effective, as the services provided by the pharmacist would be intermittent (on-call, as needed). The Department further determined that the pharmacist's time would not justify a half or full-time position, as only \$15,412.48 has been billed to the Contract to date. The Contract is, therefore, permitted under section 19130(b)(10).

#### **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:

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

- 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**

A review of existing civil service classifications reveals that there are currently four specific Pharmacist classifications: Pharmacist I; Pharmacist I, Departments of Mental Health and Developmental Services; Pharmacist II; and Pre-Licensed Pharmacist. None of the above-listed classifications appear to contemplate the type of duties required under the Contract. Instead, the civil service pharmacist classifications generally require the performance of duties such as preparing, manufacturing and dispensing drugs and pharmaceutical preparations in a medical setting, whereas the Department utilizes pharmacists to review facility records to determine if a facility's clients are receiving appropriate pharmacological care. Therefore, the Department is correct that existing civil service classifications are inadequate to serve the Department's needs. Moreover, because only \$15,412.48 has been expended on Contract services since July 1, 2007, it does not appear that the Department has such a significant need for the services so as to warrant the Department seeking the creation of a new civil service classification that meets the Department's needs. As a result, I find that the Contract is justified under the provisions of section 19130(b)(3).

### **Conclusion**

The Department presented sufficient information to demonstrate that existing civil service classifications are insufficient to meet the Department's pharmacist needs, and that the Department does not possess such a need for pharmacist services so as to justify the creation of a new civil service classification that would meet the Department's pharmacist needs. Consequently, I find that the Contract is justified under the provisions of Government Code section 19130(b)(3).

Executive Officer Decision  
SPB File No. 09-004(b)  
May 4, 2009  
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This letter constitutes my decision to approve Contract No. 07-3031. 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