



CALIFORNIA STATE PERSONNEL BOARD

801 Capitol Mall • Sacramento, CA 95814

In the Matter of the Appeal by)	PSC No. 10-03
)	
AMERICAN FEDERATION OF STATE,)	RESOLUTION
COUNTY, AND MUNICIPAL)	
EMPLOYEES LOCAL 2620, AFL-CIO)	July 20, 2010
(AFSCME))	
)	
from the Executive Officer's March 26,)	
2010, Decision approving the Personal)	
Services Contracts (PSC No. 10-03) for)	
Pharmacist Services [SPB File No. 10-)	
001(b)])	

WHEREAS, the State Personnel Board (Board) has carefully considered the Decision issued by the Executive Officer in SPB File No. 10-001(b) on March 26, 2010, approving the above-referenced contracts, as well as the written arguments presented by AFSCME¹ and the written and oral arguments presented by the Receiver's Office during the Board's July 6, 2010, meeting.

IT IS RESOLVED AND ORDERED that:

1. The Decision of the Executive Officer is 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; and
3. Adoption of this Resolution shall be reflected in the record of the meeting and the Board's minutes.

¹ AFSCME elected to submit its argument on its brief only.

* * * * *

The foregoing Resolution was made and adopted by the State Personnel Board in PSC No. 10-03 at its meeting on July 20, 2010, as reflected in the record of the meeting and Board minutes.



March 26, 2010

Ms. Pam Manwiller
Director of State Programs
AFSCME, Local 2620, AFL-CIO
555 Capitol Mall, Suite 1225
Sacramento, CA 95814

Mr. Roscoe L. Barrow II, Staff Counsel IV
Receiver's Office of Legal Affairs
California Prison Health Care Services
P.O. Box 4038, Suite 660-215
Sacramento, CA 95812-4038

Re: Request for Review of Proposed or Executed Personal Services Contract for Pharmacist Services Promulgated by Receiver's Office
[SPB File No. 10-001(b)]

Dear Ms. Manwiller and Mr. Barrow:

By letter dated January 5, 2010, the American Federation of State, County, and Municipal Employees Local 2620, AFL-CIO (AFSCME) asked the State Personnel Board (SPB or Board) to review for compliance with Government Code section 19130, a group of pharmacist services contracts promulgated by California Department of Corrections and Rehabilitation (CDCR). The request for review is made under Government Code section 19132 and California Code of Regulations, title 2 (2 CCR), section 547.59 et seq. AFSCME also served the request on the Receiver's Office (Receiver).

On February 9, 2010, the Receiver acknowledged the receipt of AFSCME's January 5, 2010, letter, and claimed that the contracts fall under the authority of the Receiver pursuant to *Plata v. Schwarzenegger (Plata)* (N.D.Cal. Case No. C01-1351 TEH).¹

The contracts in question are Pharmacist Services contracts: ICHC 08120, ICHC 08289, ICHC 08290, ICHC 08291, ICHC 08292, ICHC 08294, ICHC 08295, ICHC 08296, ICHC 08297, ICHC 08298, ICHC 08299, ICHC 08300, ICHC 08301, ICHC 08302, ICHC 08303, ICHC 08304, ICHC 08305, ICHC 08306, ICHC 08307, ICHC 08308, ICHC 08309, and ICHC 08310; and Pharmacist-in-Charge (PIC) Services contracts: ICHC 08311, ICHC 08312, ICHC 08313,

¹ The Court appointed the Receiver to exercise all powers vested by law in the Secretary of CDCR as they relate to the administration, control, management, operation, and financing of the California prison medical health care system.

ICHC 08314, ICHC 08315, ICHC 08317; ICHC 08310; ICHC 08119, ICHC 08259, ICHC 08260, ICHC 08261, ICHC 08262, ICHC 08265, ICHC 08266, ICHC 08267, ICHC 08268, ICHC 08269, ICHC 08270, ICHC 08271, ICHC 08272, ICHC 08273, ICHC 08274, ICHC 08275, ICHC 08276, ICHC 08277, ICHC 08278, ICHC 08279, ICHC 08281, ICHC 08282, ICHC 08283, ICHC 08286, ICHC 08280, and ICHC 08284.² (Collectively Contracts.)

On February 18, 2010, the Receiver submitted its response to AFSCME's request for review of the pharmacist services contracts. On February 26, 2010, AFSCME submitted its reply. AFSCME did not challenge the Receiver's jurisdiction over the contracts.

For the reasons set forth below, it is concluded that the Contracts are permissible under Government Code section 19130, subdivision (b)(3).

Position of AFSCME

AFSCME asserts that the Contracts in question were executed pursuant to Government Code section 19130, subdivision (b)(10) and that they cannot be justified because they are not of urgent, temporary, or occasional nature that required immediate implementation.

Position of CDCR

The Receiver asserts that AFSCME failed to present evidence in compliance with California Code of Regulations, title 2 (2 CCR), section 547.61, and that the contracts are justified under Government Code section 19130, subdivision (b)(3) and (10).

Analysis

1. Whether the Contracts promulgated by the Receiver are permitted pursuant to Government Code section 19130, subdivision (b)(3) and (10).

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. (*Professional Engineers in California Government v. Department of Transportation* (1997) 15 Cal.4th 543, 547.) 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

² Both AFSCME and the Receiver acknowledged that Pharmacist Services Contract No. ICHC 08310, PIC Services Contract No. ICHC 08280, and PIC Services Contract No. ICHC 08284 were not fully executed. As such, they are not subject to SPB's review.

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) provides that a personal services contract is permissible 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.

The Board has made clear that, in asserting the exemption contained in subdivision (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. (*In the Matter of the Appeal by SEIU* (2008) PSC No. 08-10.)

Government Code section 19130, subdivision (b)(10) provides that a personal services contract is permissible when:

[T]he 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 subdivision (b)(10), the contracting department 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. (*In the Matter of the Appeal by California Attorneys, Administrative Law Judges and Hearing Officers in State Employment (Case)* (2005) PSC No. 05-04.)

The Receiver asserts that the Contracts are justified under Government Code section 19130, subdivision (b)(3), because the CDCR has engaged in repeated, good faith efforts to hire civil service employees to fill its vacant Pharmacist positions. More specifically, the Receiver asserts it has engaged in the following recruitment efforts:

- CDCR placed advertisements for civil service pharmacy classifications in print media sources and online sources. Print media sources included professional journals, such as Pharmacy Week, California Pharmacist, U.S. Pharmacist, as well as several other professional journals; and local newspapers in communities surrounding institutions with

vacancies. Online sources included career sites such as CareerBuilder, Yahoo Hot Jobs, Monster, and professional associations.

- CDCR has enlisted assistance from Maxor National Pharmacy Services (Maxor) to provide pharmacy management services to the California Prison Health Care Receivership Corporation (CPR), CDCR, and California Prison Health Care Services (CPHCS). Prior to centralization of the hiring process in mid-2008, Maxor met weekly initially and then monthly with CPR and the *Plata* workforce staff to review staffing efforts. Maxor provided subject matter expert support in recruitment and hiring activities including advertising in professional journals, participating in professional meetings, and reaching out to colleges of pharmacy. For example, in July 2007, Maxor sent 32,000 recruitment letters to California licensed pharmacists, announcing CDCR pharmacist position vacancies. Maxor also provided subject matter expertise for establishing the processes centralizing the pharmacy hiring for purposes of improving the overall recruitment and hiring efforts.
- Since the inception of the centralized hiring process in mid-2008, more than 125 candidates have been interviewed to fill vacant pharmacist positions, resulting in the hiring of more than 40 civil service pharmacy staff.

The Receiver provided that despite its best efforts, it has been unable to fill all of its vacancies. For instance, for the period of March 2008 through June 2008, the average vacancy is 74% for Pharmacist I and 12% for Pharmacist II. There were only six persons hired into Pharmacist I and Pharmacist II classifications from January 2008 to April 2008.

The Department further asserts that the contracts are justified under the provisions of Government Code section 19130, subdivision (b)(10), as the services are used "to fill temporary vacancies, substitute for full-time CDCR employees while on sick leave, or provide temporary services when appropriate staffing levels cannot be maintained with civil service staff."

AFSCME's reply brief did not address the Receiver's contentions under Government Code section 19130, subdivision (b)(3). It reiterated its position that the contracts were executed pursuant to Government Code section 19130, subdivision (b)(10), but do not include specific and detailed factual information as justification for their use as required by California Code of Regulations, title 2, section 547.60. AFSCME asserts that there is nothing urgent, temporary, or occasional about the use of the contracts, and that the Contracts are being used to fill vacant civil service positions that CDCR has been unable to fill through its normal recruitment efforts. AFSCME alleges that 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. AFSCME did not present any evidence to support its argument.

Based on the evidence, SPB is satisfied that the Receiver presented sufficient information to establish that it has engaged in reasonable, good faith recruitment efforts designed to fill CDCR's vacant pharmacist positions. Despite those efforts, however, CDCR still is experiencing a significant shortage of civil service pharmacists. In addition, as the Receiver pointed out, AFSCME acknowledged that the Contracts were being used to "fill vacant positions that CDCR has been unable to fill through its normal recruitment efforts." As a result, the Contracts are justified under the provisions of Government Code section 19130, subdivision (b)(3).

The Receiver, however, did not establish that the Contracts were justified under Government Code section 19130, subdivision (b)(10). Even though the Contracts were to substitute for full-time CDCR employees while on leave or to provide temporary services when appropriate staffing levels cannot be maintained, these situations, according to the Receiver, have long been in existence due to its inability to fill civil service pharmacist positions. In short, they are not rare occurrences of urgent, temporary, or occasional nature so as to justify private contracting.

Conclusion

The Contracts are approved under Government Code section 19130, subdivision (b)(3).

The parties have a right to appeal this decision to the five-member State Personnel Board pursuant to California Code of Regulations, title 2, section 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