CALIFORNIA
STATE PERSONNEL BOARD

801 Capitol Mall Sacramento, CA 95814 | www.spb.ca.gov

Governor Edmund G. Brown Jr.

In the Matter of the Appeal by California State Compensation Insurance Fund From the Executive Officer's September 23, 2015, Decision Disapproving the Personal Services Contract for Legal Services [SPB File No. 15-0018(b)]	PSC No. 16-01 (SPB File No. 15-0018(b)) **NOTICE OF ERRATA**

The Board Decision and Order issued by the State Personnel Board on March 3, 2016, is hereby corrected to read as follows on Page 1:

APPEARANCES: Patrick Whalen, General Counsel, on behalf of the California Attorneys (CASE), Administrative Law Judges, and Hearing Officers; Judith Sapper, Attorney on behalf of State Compensation Insurance Fund (State Fund).

BEFORE: Kimiko Burton, President; Patricia Clarey and Maeley Tom, Members.

Additionally, pages 4 and 5 are corrected to read as follows:

IT IS RESOLVED AND ORDERED that:

1. The attached September 23, 2015, Decision of the Executive Officer is hereby adopted by the State Personnel Board as its decision with the aforementioned opinion incorporated.

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2. For future purposes, State Fund is advised to provide adequate notice to CASE.

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STATE PERSONNEL BOARD

Kimiko Burton, President
Patricia Clarey, Member
Maeley Tom, Member

* * * * *

Date: 4/28/16

ALVIN GITTISRIBOONGUL
Executive Office/(Delegate)

ATTACHMENT

STATE
PERSONNEL
BOARD

801 Capitol Mall Sacramento, CA 95814 | www.spb.ca.gov

Governor Edmund G. Brown Jr.

September 23, 2015

Judith Sapper, Assistant Chief Counsel
State Compensation Insurance Fund
Legal Department
5880 Owens Drive, Third Floor, Building B
Pleasanton, CA 94588-3900

Patrick Whalen, General Counsel
CASE
1231 I Street, Suite 300
Sacramento, CA 95814

Re: CASE's Request for Review of State Compensation Insurance Fund's Legal Service Contract with Sheppard Mullin Richter & Hampton LLP under Government Code Section 19130(b)
SPB File No. 15-0018(b)

Dear Counsel:

Pursuant to Government Code section 19132 and California Code of Regulations, title 2, section 547.58 et seq., on May 21, 2015, the California Attorneys, Administrative Law Judges, and Hearing Officers in State Employment (CASE) requested the State Personnel Board (SPB) to review and disapprove a legal services contract entered into between the State Compensation Insurance Fund (State Fund) and the law firm of Sheppard Mullin Richter & Hampton (Sheppard).

SPB notified State Fund of CASE's request. Both State Fund and CASE requested continuances to file their respective briefs with the SPB. Upon finding good cause, the SPB granted the requests for continuances. Thereafter, State Fund filed its response on or about July 20, 2015, and CASE filed its reply on or about August 5, 2015. The matter was then deemed submitted.

For the reasons set forth below, SPB disapproves the contracts on the basis that they are not justified under Government Code section 19130, subdivision (b)(3) or (b)(5).[1]

[1] State Fund claimed that the contract is justified under Government Code section 19130, subdivision (b)(3), (b)(5), (b)(8) and (b)(10). However, State Fund did not offer any evidence or make any argument with regard to subdivision (b)(8) or (b)(10). Therefore, this decision will only discuss the contract's permissibility under subdivision (b)(3) and (b)(5).

BACKGROUND AND THE PARTIES' POSITION

State Fund contracted with Sheppard to defend a lawsuit filed by Pacific Aviation. Pacific Aviation, a company providing customer services for airlines, procured a workers' compensation insurance policy through State Fund. Pacific Aviation's complaint alleged that State Fund engaged in a pattern and practice of overpaying claims filed by Pacific Aviation's injured workers, unjustly increasing Pacific Aviation's premiums, thereby causing financial damages. The complaint further alleged that State Fund, through its attorney, Isabel Lallana (Lallana), Attorney IV, willfully and in bad faith prevented Pacific Aviation from auditing claims files to determine the extent of the alleged improper practices.

State Fund contends that the contract is justified under Government Code section 19130, subdivision (b)(5),[2] to protect against a conflict of interest because Lallana, the only State Fund attorney who is capable of handling the litigation, may become a witness or even a named defendant in this litigation. State Fund further contends that the contract is justified under subdivision (b)(3) because state civil service attorneys are unable to satisfactorily perform the legal services needed for this litigation. In addition, State Fund requests that CASE's request for review be dismissed on the ground that CASE failed to present specific allegations as required by California Code of Regulations, title 2, section 547.61.

CASE argues that it has satisfied the requirement under California Code of Regulations, title 2, section 547.61, and State Fund seeks to improperly shift the burden of justifying the contract to CASE. CASE further argues that the contract must be disapproved because State Fund failed to provide requisite notice to CASE as prescribed by sections 19132 and 11045. Substantively, CASE argues that State Fund offered no evidence of conflict of interest, and that State Fund's attorneys' inability to handle the lawsuit, alone, does not justify contracting out.

DISCUSSION AND DECISION

Preliminary Issues

In order to determine whether State Fund's contract with Sheppard conformed to section 19130, the SPB must first determine the following preliminary issues: Whether CASE's request for review complied with California Code of Regulations, title 2, section 547.61, and, whether the contract can be disapproved because State Fund failed to provide requisite written notification to CASE under sections 19132 and 11045.

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[2] Unless otherwise specified, all statutory references are to the Government Code, and all references to subdivision(s) will be to subdivision(s) under Government Code section 19130.

1. State Fund's request to dismiss CASE's contract challenge on the ground CASE failed to meet its burden to make specific allegations under California Code of Regulations (CCR), title 2, section 547.61.

CCR, title 2, section 547.61 provides in pertinent part:

> (a) Any employee organization that represents state employees may request that the board review a contract proposed or executed by a state agency pursuant to Government Code § 19130(b) by filing with the board and serving upon the state agency a written request for review. The employee organization's request for review shall identify the contract to be reviewed and include the following:
>
> (1) specific and detailed factual information that demonstrates how the contract fails to meet the conditions specified in Government Code § 19130(b); and,
>
> (2) documentary evidence and/or declarations in support of the employee organization's position.

State Fund alleged that CASE provided no specific and detailed factual information with evidentiary support to show how the contract failed to meet section 19130, subdivision (b), and therefore, CASE's request for review should be summarily dismissed.

The SPB disagrees. CASE, through the declaration of its General Counsel Patrick Whalen, specifically identified the *Pacific Aviation* litigation for which the legal services were contracted out. CASE clearly stated that the type of legal work is not exempt under section 19130, because the contracted services neither achieved any cost-savings for the State, nor exceeded the knowledge, experience and expertise of civil service attorneys, whom CASE exclusively represents. Therefore, CASE provided sufficient specific and detailed factual information in its request for review.

Moreover, unlike most civil cases where the complainant, as the moving party, bears the initial burden of proof, (*Thatcher v. Lucky Stores, Inc.* (2000) 79 Cal.App.4th 1081, 1086), in contract challenges under section 19130, even though the employee organizations initiate the request for review, the State has the burden of proving that the contracts are legally justified. *State Compensation Ins. Fund v. Riley* (1937) 9 Cal.2d 126, 134-135.) In this case, much of the information regarding the challenged contract is only known to and controlled by State Fund. Therefore, to require CASE to offer more specific information beyond what it has done would make the contract challenge virtually impossible, and would in effect unreasonably shift the burden of proof to CASE. Accordingly, CASE's request for review is sufficient as State Fund is

made aware of the specific contract being challenged, the basis for the challenge, and the employee classification being impacted by the contract. As such, the SPB deems that CASE's challenge meets the requirement of a factual pleading, sufficient for State Fund to fully prepare its defense.

2. CASE's request to disapprove State Fund's contract with Sheppard on the ground State Fund failed to provide adequate notification under sections 19132 and 11045.

Section 19132, subdivision (b)(1), requires that, prior to the execution of the contract, a state agency must give the impacted employee organization(s) advance written notice of any personal services contract it intends to execute pursuant to Section 19130, subdivision (b). Section 11045, subdivision (a)(2), provides that a state agency that is not required to obtain the consent of the Attorney General, give written notice to CASE of any proposed contract for legal services five business days before the execution of the contract.[3] Section 11045, subsection (d), further specifies the information the notice must include. It is as follows:

(1) A copy of the complaint or other pleadings, if any, that gave rise to the litigation or matter for which a contract is being sought, or other identifying information.
(2) The justification for the contract, pursuant to subdivision (b) of Section 19130.
(3) The nature of the legal services to be performed.
(4) The estimated hourly wage to be paid under the contract.
(5) The estimated length of the contract.
(6) The identity of the person or entity that is entering into the contract with the State.

CASE contends that State Fund failed to provide specific facts to support its "bland assertion of justification" under subdivision (b), and requests that the contract be disapproved on that basis.[4] State Fund described its "customary process for analyzing the need for legal services," but did not argue that it had satisfied the requirements under sections 19132 and 11045, when providing notice to CASE.

The SPB notes here that the Legislature authorized the Department of General Services (DGS) to establish a process to certify the notification required under subdivision (b)(1). (Gov.

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[3] State Fund is not required to obtain the consent from the Attorney General to utilize State Fund's in-house counsel. (Gov. Code, § 11041, subd. (a).)

[4] It appeared that State Fund provided notification of the contract to CASE on April 15, 2015, two days *after* Sheppard confirmed with State Fund its representation on the *Pacific Aviation* lawsuit. However, CASE did not make the argument that State Fund's notice was untimely in violation of subdivision (a)(2). As such, the timeliness of the notification is not discussed in this decision.

Code, § 19132, subd. (b)(3)). Accordingly, it is within the DGS's jurisdiction, not the SPB's, to review the adequacy of a state agency's contract notification to the employee organization. The SPB, however, disagrees with CASE that the remedy for not complying with the above statutory notification requirement is disapproval of the contract. The maxim that "for every wrong there is a remedy" applies only to those wrongs for which the law authorizes or sanctions redress. (Civ. Code, § 3523; *Mega Life & Health Ins. Co. v. Superior Court* (2009) 172 Cal. App. 4th 1522.) The SPB's authority to disapprove a contract stems from section 19130, and the SPB is without authority to disapprove a contract based on the state agency's noncompliance with sections 19132 and 11045.[5] As such, the SPB declines to summarily disapprove a contract on the basis of inadequate notification.

Justification of State Fund's Contract with Sheppard

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.) Section 19130 codifies the exceptions to the civil service mandate recognized in various court decisions. The purpose of the SPB's review of contracts under 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.

To justify a personal services contract under section 19130, a department must provide specific and detailed factual information demonstrating that one or more of the statutory exceptions within the subdivisions of section 19130 apply. The agency seeking the personal services contract bears the burden of establishing applicability of the exception. (*State Compensation Ins. Fund v. Riley, supra,* 9 Cal.2d 126, 134-135.)

1. Justification under section 19130, subdivision (b)(5)

Subdivision (b)(5) authorizes contracting out when:

> The legislative, administrative, or legal goals and purposes cannot be accomplished through the utilization of persons selected pursuant to the regular civil service system. Contracts are permissible under this criterion to protect against a conflict of interest or to insure independent and

[5] While CASE's request to disapprove the contract on that ground is denied, the Board nonetheless believes that sections 19132 and 11045 serve an important purpose in protecting the civil service merit system, and the SPB expects that state agencies, including State Fund, adhere to the statutory requirements in notifying CASE of their proposed contracts for legal services.

> unbiased findings in cases where there is a clear need for a different, outside perspective. These contracts shall include, but not be limited to, obtaining expert witnesses in litigation.

State Fund asserts that the contract is justified under section 19130, subdivision (b)(5) because the contract was executed to protect against a conflict of interest. State Fund stated that Pacific Aviation's complaint specifically cited to a series of communications its attorneys had with State Fund attorney Lallana, in which Lallana allegedly denied Pacific Aviation's access to its employees' workers' compensation claims files. State Fund argues that a conflict of interest would arise if Lallana continued to represent State Fund in the lawsuit as she would "have to balance the duty to protect the confidentiality of the attorney-client relationship and the duty of loyalty to her client against the need to explain her own actions. Therefore, State Fund contends, that this "classic conflict of interest" makes it necessary for State Fund to contract out legal defense of the lawsuit.

CASE, on the other hand, contends that the conflict does not exist because Lallana's communications with Pacific Aviation was made on behalf of State Fund, which attorneys do regularly. CASE's argument misses the mark. The complaint alleged that Lallana's communications with Pacific Aviation were "per se bad faith behavior." It is not entirely unlikely that Lallana would be named as a defendant in a lawsuit and be subject to potential personal liability for her statements. As a co-defendant in the lawsuit, Lallana would be placed a situation where her loyalties are divided. (*People v. Hardy* (1992), 2 Cal. 4th 86, 136.) As such, there is need for State Fund to protect against that the conflict of interest with Lallana, its current attorney.

However, a potential conflict of interest with one of its attorneys does not automatically justify State Fund to contract out. In order to meet the conditions of subdivision (b)(5), a state agency must show either that civil service personnel, not a particular civil service employee, would have a conflict performing the contracted services or that there is a clear need for a different or outside perspective to ensure independent and unbiased findings. (*In the Matter of the Appeal by Department of Personnel Administration (DPA)* (2001) PSC No. 00-01). In *DPA*, the Board provided that when one civil service employee has a conflict of interest in a particular matter, the matter can be referred to another employee in that classification. If all employees in one state agency have a conflict, then the matter can be referred to employees in another state agency who can competently handle the matter. (*Ibid.*, at p. 22, fn. 23.) Similarly, in the case of *In the Matter of the Appeal by State Compensation Insurance Fund* (2001) PSC No. 00-03, the SPB disapproved a contract under subdivision (b)(5) on the ground that State Fund failed to show all civil service attorneys had impermissible conflicts of interest to defend State Fund in the lawsuit. The civil service mandate means the State, as a whole, must use civil service employees whenever those employees can perform the State's work adequately and competently. (*In the Matter of the Appeal by Department of Pesticide Regulation* (2002) PSC No. 01-09.)

This case is no different: in order for State Fund to justify contracting out under subdivision (b)(5), State Fund must prove that no civil service employee exists to defend it in the *Pacific Aviation* lawsuit, or that there is a clear need for a different or outside perspective to ensure independent and unbiased findings. State Fund failed to provide any evidence that all of its in-house attorneys have a conflict in this case or that it would not be able to obtain representation from other civil service attorneys from other state agencies. Neither was any evidence offered to show there is a clear need for a different or outside perspective. As such, State Fund's contract must be disapproved.[6]

2. Justification under section 19130, subdivision (b)(3)

State Fund next contends that the contract is justified under section 19130, subdivision (b)(3), because the services contracted for are not available within civil service, cannot be satisfactorily performed 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.)

Although State Fund asserts that it has met both criteria of the test, it did not present any evidence or argue that there are no civil service job classifications to which State Fund could appoint attorneys to competently handle this litigation.[7]

Instead, State Fund argues that no State Fund attorneys other than Lallana have the requisite knowledge, experience, and expertise to defend the *Pacific Aviation* lawsuit. To support its position, State Fund states that defending the lawsuit requires a number of skills including understanding workers' compensation policies, calculation of premiums, claims material and associated privacy laws, locating and using claims experts, as well calculating damages. (Declaration of Betty Quarles (Quarles), Assistant Chief Counsel.) State Fund further asserts that "[b]ad faith workers' compensation insurance cases require highly technical and specialized knowledge, experience and expertise." (*Ibid.*) State Fund's position is not

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[6] State Fund's argument regarding whether there are other civil service attorneys capable of handling the lawsuit is intertwined with its argument under subdivision (b)(3), which will be discussed in detail *infra*.

[7] The SPB notes that the State's Attorney classification specification covers a broad range of areas of legal practice where a state department could appoint civil service attorneys. (http://www.calhr.ca.gov/state-hr-professionals/pages/5778.aspx)

persuasive. State Fund failed to explain why, as the largest workers' compensation carrier in the State, it does not have any other attorneys handling the areas of practice that appear to be regular and customary areas of legal practice involving worker's compensation. Further, State Fund acknowledged that, for the past five years, it has budgeted "considerable funds" to provide its Corporate Legal Department attorneys with trainings on "a broad range of topics" covering both procedure and substantive areas of legal practice "through nearly every conceivable medium" and has specifically arranged with various law firms to "do formal training," including "one-on-one mentoring," "on topics such as antitrust and bad faith." (Declaration of Judith Sapper, Deputy Chief Counsel.) With such extensive and elaborate training, it is difficult to understand why State Fund's in-house litigation team could not handle the lawsuit.

Even assuming State Fund does not have civil service attorneys who are capable of handling this lawsuit, as alleged, State Fund nonetheless is required to demonstrate 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.) A subdivision (b)(3) justification is met if State Fund can present evidence to show that it was unable, despite reasonable, good-faith efforts, to successfully recruit employees into existing classifications. (*In the Matter of the Appeal by Service Employees International Union Local 1000* (2005) PSC No. 05-03.) State Fund failed to do so.

State Fund asserted that it "did not have the ability to timely hire additional in-house attorneys... due to the constraints of the civil service hiring system...." Through the declaration of Rosemarie Morales, State Fund's Corporate legal Department and Executive Manager, State Fund asserted that its job vacancies were posted on the "Vacancy Notices" section of the State Fund Website as well as the California Department of Human Resources (CalHR) website, and that its legal office hiring project is expected to continue through the end of 2015 or early 2016, or until all vacant positions are filled. State Fund further offered that in January 2015, at the expiration of the two-week application period, State Fund received 29 applications for the Santa Ana area Attorney D[8] position and 16 applications for the Attorney D positions in Pleasanton and Oxnard areas. However, State Fund did not offer any evidence as to its specific efforts recruiting attorneys with requisite knowledge and experience unique to the *Pacific Aviation* lawsuit. At a minimum, State Fund needs to present specific evidence to show the following recruitment efforts at the time it contracted with Sheppard: the vacancies announcements for Attorney positions intended for defending the *Pacific Aviation* lawsuit, the time period for accepting applications, the number of applications it received, and the reason why no applicants qualified for the position. Without demonstrating any effort in recruiting attorneys capable of handling the lawsuit in question, State Fund cannot, in good faith, state that it attempted

[8] There are four levels in the State's Attorney Series, including Attorney, Attorney III, Attorney IV, and Attorney V, with increasing responsibilities and pay. Within the Attorney classification, there are four levels: A, B, C, and D.

diligently but was unable to timely hire attorneys, or fault the State hiring system for its failure to recruit.

State Fund lauded the superior qualifications of Sheppard and its partner James Burgess (Burgess) in particular. State Fund asserts that Burgess has been recognized as a Southern California Super Lawyer for a number of consecutive years and has acquired vast knowledge and unique expertise defending civil actions involving bad faith claims-handling for State Fund and other workers' compensation insurance carriers. The contractor's expertise, however, is not at issue in this case. The pertinent issue is whether there are qualified state attorneys who can handle this litigation or whether State Fund could hire attorneys to perform similar duties. The fact that State Fund's own attorney Lallana in addition to a former State Fund attorney who had "a rapport" with Pacific Aviation's law firm would have been able to handle the lawsuit indicates that State Fund is capable of retaining civil service attorneys to handle complex lawsuits such as the one at issue.

Further, State Fund asserted that Mr. Burgess had been representing State Fund in bad faith insurance claims-handling lawsuits "when the Los Angeles Corporate Legal Department was just forming." (Lallana Declaration.) While no evidence was presented as to when State Fund's Los Angeles Corporate Legal Office was formed, it appears from the context of State Fund's arguments that Mr. Burgess has represented State Fund on various cases including bad faith insurance claims-handling litigation since the early 1990's, if not earlier. (See exhibits attached to Lallana Declaration.) Mr. Burgess' biographical information provided by State Fund indicates that a significant portion of Mr. Burgess' expertise was developed through representing State Fund. It is disconcerting to the SPB that State Fund did not provide any explanation why, in over 20 years, it has been unable to acquire the requisite knowledge and experience in-house. State Fund's long-term reliance on outside counsel to perform legal services without developing internal expertise is precisely what the civil service mandate under the California Constitution article VII prohibits. Furthermore, if there is any justification for State Fund to utilize Mr. Burgess' expertise, State Fund failed to articulate why additional attorneys from Sheppard, rather than State Fund's own attorneys, are also contracted to handle the *Pacific Aviation* litigation.[9]

The SPB has made it clear that the failure of the State to employ sufficient civil service personnel to perform the State's business cannot be used to create an exemption to the civil service mandate. (*In the Matter of the Appeal by California Highway Patrol* (2007) PSC No. 06-05.) When State Fund presented no competent evidence of its effort to recruit attorneys to handle the *Pacific Aviation* litigation, its mere assertion that it lacked in-house resources is not justification for contracting out. As such, State Fund's argument under subdivision (b)(3) fails.

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[9] According to the contract, in addition to Mr. Burgess' discounted rate of $531 per hour, three other associates charge State Fund discounted rates at $217, $280, and $353, respectively.

CONCLUSION

Based on foregoing reasons, State Fund's contract with Sheppard is disapproved. State Fund is directed to fully utilize the available resources within the civil service, and/or make a good faith, diligent effort to recruit attorneys with requisite knowledge and experience in order to facilitate a smooth transition of the cases from private law firms to civil service.[10]

The parties have a right to appeal this decision to the five-member State Personnel Board under 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,

SUZANNE M. AMBROSE
Executive Officer

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[10] State Fund stated that a new attorney with litigation experience applicable to the *Pacific Aviation* lawsuit joined the Los Angeles Corporate Legal unit in June 2015, and that State Fund expects either that the *Pacific Aviation* suit will be resolved before [the new attorney] is trained" or that the new attorney would be able to "handle that type of case on his own" within months of joining State Fund. (Quarles Declaration.) As such, it appears that State Fund expected that either the lawsuit will be resolved relatively quickly or that the lawsuit will be competently handled by its new in-house counsel. State Fund's assessment suggests that the discontinuation of the contract at the time of this decision should not cause disruption detrimental to State Fund's defense in this lawsuit. Nonetheless, the SPB cautions that State Fund take immediate and necessary steps to ensure the smooth transition of the lawsuit from the contractor to civil service attorneys.

STATE PERSONNEL BOARD

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Governor Edmund G. Brown Jr.

In the Matter of the Appeal by California State Compensation Insurance Fund From the Executive Officer's September 23, 2015, Decision Disapproving the Personal Services Contract for Legal Services [SPB File No. 15-0018(b)]	PSC No. 16-01 (SPB File No. 15-0018(b)) **BOARD DECISION AND ORDER**

APPEARANCES: Patrick Whalen, General Counsel, on behalf of the California Attorneys, Administrative Law Judges, and Hearing Officers; Judith Sapper, Deputy Chief Counsel, on behalf of the State Compensation Insurance Fund.

BEFORE: Kimiko Burton, President; Lauri Shanahan, Vice President; Patricia Clarey and Maeley Tom, Members.[1]

The California Attorneys, Administrative Law Judges, and Hearing Officers in the State Employment (CASE) sought the State Personnel Board's (SPB) disapproval of a legal services contract under Government Code section 19130.[2] The State Compensation Insurance Fund (State Fund) hired Sheppard, Mullin, Richter, & Hampton, LLP (Sheppard) to defend against a lawsuit filed by Pacific Aviation, a company that purchased workers' compensation coverage with State Fund. The lawsuit alleged that State Fund engaged in a pattern and practice of overpaying claims filed by the company's injured workers resulting in routine increases in the premiums for coverage. The complaint also alleged that one of the State Fund's attorneys, Isabel Lallana, willfully and in bad faith prevented Pacific Aviation from auditing claim files to

[1] Member Richard Costigan recused himself from the deliberation or consideration of this matter.
[2] All references are to Government Code unless otherwise noted.

determine the extent of the alleged improper practice. Pacific Aviation was represented by Roxborough, Pomerance, Nye & Adreani.

State Fund asserted that the contract was necessary under section 19130, subdivision (b)(3), because the services are of such specialized nature that it is not available within the civil service. State Fund also asserted that the contract was permissible under section 19130, subdivision (b)(5), to protect against a conflict of interest. The Executive Officer did not find the contract justifiable under either subdivision and disapproved the contract.

The Board has carefully considered the decision issued by the Executive Officer in SPB File No. 15-0018(b) dated September 23, 2015, as well as the written and oral arguments presented by State Fund and CASE during the Board's January 7, 2016, meeting. The Board agrees with the Executive Officer that State Fund failed to demonstrate that the contract is justified under subdivisions (b)(3) or (b)(5).

In *Professional Engineers in California Government v. Department of Transportation* (1997) 15 Cal.4th 543, 547, the California Supreme Court recognized that an implied "civil service mandate" emanates from Article VII of the California Constitution, which prohibits state agencies from contracting with private entities to perform work that state civil service employees have historically and customarily performed and can perform adequately and competently. This Board takes seriously this implied civil service mandate that work is to be performed by state civil service employees. The Board finds that State Fund failed to demonstrate that it exhausted all reasonable avenues for procuring the necessary services through the civil service.

In determining whether there were other civil service employees experienced to handle this lawsuit, it appears that State Fund limited its search to just its Los Angeles Corporate Legal Unit: "[n]one of the other attorneys *in Los Angeles Corporate Legal* [] handled a claims mishandling lawsuit on their own." [Emphasis added.] There are, however, other Corporate Legal units within State Fund. There are units in San Francisco, Santa Ana, Pleasanton, Orange County and Oxnard. There is no evidence that State Fund ever evaluated whether any of its civil service attorneys in these locations possessed the requisite degree of knowledge, experience, and expertise necessary to defend State Fund.

CASE argued that it is incredulous for State Fund to assert that there are no civil service attorneys within State Fund besides Lallana who are capable or possess the requisite degree of skill and knowledge allegedly needed for this lawsuit. The Board finds merit in CASE's assertion. State Fund's own declarations indicate that, at a minimum, it has other experienced civil service attorneys who may have been able to handle the matter. "Two attorneys who were very experienced and had extensive backgrounds in claims mishandling" "transferred into State Fund Workers' Compensation Legal units." (Quarles Decl., ¶ 2.) Even the attorney who had a "rapport with the Roxborough firm and had been successful in resolving disputes and minimizing the risk of litigation" remained employed by State Fund. (Quarles Decl., ¶ 4.) That attorney had transferred to the Workers' Compensation Legal unit. (*Id.*) Clearly, there are civil service employees with the knowledge, skill, expertise, experience, or ability needed to perform the required work within State Fund. State Fund, however, offers no explanation as to why it could not assign these attorneys to handle the lawsuit at least

on a temporary basis while it recruits other qualified candidates into its ranks. Failing to make any endeavor in that regard, State Fund cannot justify its contract.

Additionally, State Fund failed to demonstrate how the services being provided are of such a highly specialized or technical nature that expert knowledge, unique experience, and ability are required. State Fund generally asserts that contracting out was necessary "[b]ecause of Roxborough's long history of litigation against State Fund and prior trial verdicts of substantial damages, punitive damages and injunctive relief." A general justification that Plaintiff's counsel who filed the suit are formidable opponents as they have obtained significant results or verdicts against State Fund on similar claims, without more, is not a proper justification. Again, CASE makes a persuasive point. State civil service attorneys have diverse backgrounds, experience, and skill sets. Many of them, including those within the Attorney General's Office, represent the State on complex class actions, matters of significant public policy, and have opposed similarly formidable attorneys. To allow State Fund to simply state that the opposing counsel is formidable as a basis for contracting out is to render the requirements of Government Code section 19130, subdivision (b), meaningless.

IT IS RESOLVED AND ORDERED that:

1. The attached September 23, 2015, decision of the Executive Officer is hereby adopted by the State Personnel Board as its decision with the aforementioned opinion incorporated.

2. For future purposes, State Fund is advised to provide adequate notice to CASE when it submits proposed legal services contracts to the Department of General Services for review under Government Code section 11045.

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STATE PERSONNEL BOARD

Kimiko Burton, President
Lauri Shanahan, Vice President
Patricia Clarey, Member
Maeley Tom, Member

* * * * *

The foregoing Board Decision and Order was made and adopted by the State Personnel Board at its meeting on March 3, 2016, as reflected in the record of the meeting and Board minutes.

SUZANNE M. AMBROSE
Executive Office

DECLARATION OF SERVICE

Case Name: In the Matter of the Appeal by California State Compensation Insurance Fund

SPB Case No.: 15-0018(b)

PSC Case No.: 16-01

I am a citizen of the United States and employed in the County of Sacramento. I am over the age of eighteen years and I am not a party to the within action. My business address is California State Personnel Board, Chief Counsel's Office, 801 Capitol Mall – Legal - MS-53, Sacramento, CA 95814.

On March 21, 2016, I served the attached **BOARD DECISION AND ORDER**, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, by mail delivery at Sacramento, California, addressed as follows:

Judith D. Sapper, Esq.
SCIF
Corporate Legal
5880 Owens Drive, Third Floor
Pleasanton, CA 94588-3900

Patrick Whalen, CASE General Counsel
The Law Offices of Brooks Ellison
1231 I Street, Suite 300
Sacramento, CA 95814

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed at Sacramento, California on March 21, 2016.

C. RUBIO
Declarant

C. Rubio
Signature

DECLARATION OF SERVICE

Matter Name: California Attorneys, Administrative Law Judges and Hearing Officers (CASE) v. California State Compensation Insurance Fund (SCIF)

SPB File No.: 15-0018(b)

PSC No.: 16-01

I am a citizen of the United States and employed in the County of Sacramento. I am over the age of eighteen years and I am not a party to the within action. My business address is California State Personnel Board, Chief Counsel's Office, 801 Capitol Mall – Legal - MS-53, Sacramento, CA 95814.

On April 28, 2016, I served the attached **NOTICE OF ERRATA**, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, by mail delivery at Sacramento, California, addressed as follows:

Judith D. Sapper, Corporate Legal
State Compensation Insurance Fund
5880 Owens Drive, Third Floor, Building B
Pleasanton, CA 94588-3900
Representative for SCIF

Patrick Whalen, General Counsel
CASE
1231 I Street, Suite 300
Sacramento, CA 95814
Representative for CASE

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed at Sacramento, California on April 28, 2016.

C. RUBIO
Declarant

C. Rubio
Signature