

In the Matter of the Appeals by California
Department of Corrections and Rehabilitation,
California Correctional Health Care Services,
Receiver's Office of Legal Affairs
and
American Federation of State, County, and
Municipal Employees, Local 2620

Case No. PSC 19-0015(b)

BOARD DECISION AND ORDER

From the Executive Officer's July 12, 2019,
Decision Approving in Part and Disapproving in
Part the Personal Services Contract for Medical
Services

APPEARANCES: Robert Gaultney, Attorney IV, on behalf of California Department of Corrections and Rehabilitation; Andrew Baker, Esq., Beeson, Tayer & Bodine, APC., on behalf of the American Federation of State, County, and Municipal Employees, Local 2620.

BEFORE: Lauri Shanahan, President; Shawnda Westly, Vice President; Mona Pasquil Rogers, Kathy Baldree, and Kimiko Burton, Members.¹

DECISION

In April 2019, the American Federation of State, County, and Municipal Employees, Local 2620 (AFSCME) requested that the State Personnel Board (SPB or Board) review and disapprove, under Government Code section 19130, a personal services contract entered into by the California Department of Corrections and Rehabilitation, California Correctional Health Care Services, Receiver's Office of Legal Affairs (CCHCS)² and Management Solutions, Inc. The purpose of the contract was to

¹ Vice President Westly and Member Pasquil Rogers arrived at the hearing shortly before the close of Respondent's opening argument. Westly and Pasquil Rogers listened to the audio recording of the Respondent's argument as part of their deliberation.

² The contract was entered into by CDCR. However, CDCR's authority and role in executing and managing the contract is being exercised by CCHCS, operating under the Receiver. The Receiver position was established pursuant a federal court order and vested with all powers of the Secretary of

provide various medical services by healthcare professionals in the private sector to prison inmates within the jurisdiction of California Department of Corrections and Rehabilitation (CDCR). The contract was originally entered into in 2014, and is currently set to expire April 30, 2020, after several renewals. It is undisputed that the contracted services are those routinely performed by civil service employees in the classifications of Physician's Assistant, Pharmacist, Registered Dietitian, Physical Therapist, Occupational Therapist, and Optometrist.

The question before the Executive Officer was whether the contract was exempt from the general prohibition against private contracting under Government Code section 19130.

On July 12, 2019, the Executive Officer issued a decision approving the contract with respect to medical services similar to the duties performed by civil service employees in the classifications of Physician's Assistant, Pharmacist, and Registered Dietitian under Government Code section 19130, subdivision (b)(3).³ The Executive Officer determined that CCHCS, after exercising reasonable recruiting efforts, was unable to hire suitable civil service employees in those classifications for its ongoing demands for medical services. The Executive Officer disapproved the portion of the contract for private medical services that could be performed by civil service employees in the classifications of Physical Therapist, Occupational Therapist, and Optometrist.

CCHCS and AFSCME each appealed to the Board those portions of the Executive Officer's decision that were unfavorable to them.

CDCR related to inmate health care. (*Plata v. Brown* (2006) U.S. Dist. Ct., N. Dist., CA., No. C01-1351 THE; Order Appointing Receiver.)

³ All statutory references are to Government Code section 19130 unless otherwise noted.

Having considered the parties' written and oral arguments as well as the record below, the Board now issues the following Board Decision and Order approving the contract with respect to Physician's Assistant and Registered Dietitian services and disapproving the remainder of the contract.

SUMMARY OF THE PARTIES' POSITIONS

CCHCS's Appeal

CCHCS acknowledged that each medical discipline included in the contract corresponds to existing civil service classifications routinely utilized by CCHCS. CCHCS contends that, in spite of its best efforts, it has not been able to successfully recruit enough civil service employees for those classifications. In addition, for the Pharmacist classification, CCHCS offers that it has fully filled all of its civil service Pharmacist positions and that the contracted pharmacist services are necessary to satisfy unmet demands beyond what its civil service pharmacists are able to provide.

CCHCS contends that the allocation of additional pharmacist positions is contingent on the actions of other governmental departments and agencies, which are beyond CDCR's or CCHCS' control. Furthermore, CCHCS also asserts that aggressive recruitment is unlikely to resolve the historical vacancy problems facing CCHCS due to the significant pay disparity between the civil service classifications as compared to the private sector.

CCHCS submitted declarations by its management personnel to support its arguments. AFSCME objected to the declarations on the basis that they are not admissible pursuant to California Code of Regulations, title 2, section 547.66, which

precludes the Board from considering the declarations if the declarations provide additional information previously not filed with the Executive Officer and if such submission would be unduly prejudicial to the objecting party.

AFSCME's Appeal

AFSCME argues that, contrary to its representation, CCHCS has made very little recruitment effort to fill the long-term vacancies of medical staff whose services are in great need to maintain adequate healthcare for prison inmates. Even in classifications such as Pharmacists where CCHCS claimed to have filled 100% of the vacancies, CCHCS still used 120,000 hours of contracted pharmacist services in 2018, equivalent to 58 full time pharmacists, signifying the need for more civil service Pharmacists.

DISCUSSION

The California Supreme Court has long 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; *State Compensation Ins. Fund v. Riley* (1937) 9 Cal.2d 126, 135 [employment of an outside attorney by State Compensation Insurance Fund violated the predecessor to Article VII of the California Constitution, establishing the principle requiring services to be performed under the civil service is mandatory if the services are of such a nature that they can be performed adequately by civil service employees].)

Section 19130 codifies the exceptions to the civil service mandate recognized in various court decisions. The purpose behind 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 pursuant to section 19130, a department must provide specific and detailed factual information, supported by documentary evidence or declarations, demonstrating that one or more of the statutory exceptions within the subdivisions of section 19130 apply. (2 Cal. Code Reg., § 547.62, subd. (b).) The agency contracting out the personal services bears the burden of establishing applicability of the exception. (*State Compensation Ins. Fund v. Riley, supra*, 9 Cal.2d at pp. 134-135.)

The pertinent subdivision of section 19130 in this appeal is subdivision (b)(3). Under this subdivision, a department may contract for services that are unavailable within the 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. In order to establish such a justification, the contracting agency must establish that either: (1) no civil service job classifications exist to which the department could appoint employees with the requisite expertise needed to perform the required work; or (2) the department was unable to successfully hire suitable candidates for any of the applicable classifications. (*Service Employees International Union, Local 1000* (2005) PSC No. 05-03, at p. 8; *Department of Pesticide Regulation* (2001) PSC No. 01-09, at pp. 12-13.)

The Board has held that, to satisfy the requirement that the department was unable to successfully hire suitable candidate, a state department must demonstrate that it has made reasonable and good-faith efforts to recruit employees into those existing classifications. (*Service Employees International Union, Local 1000, supra*, PSC No. 05-03.)

Here, the challenged contract involves personal services related to six civil service classifications: Physician's Assistant, Pharmacist, Registered Dietitian, Physical Therapist, Occupational Therapist, and Optometrist. AFSCME made no argument against the Executive Officer's approval with respect to the contracted Physician's Assistant services. The Board deems the Executive Officer's contract approval in that regard unchallenged, and therefore no further discussion is necessary.

Physical Therapist, Occupational Therapist, and Optometrist Services

With regard to the contracted services that parallel the civil service classifications of Physical Therapist, Occupational Therapist, and Optometrist, CCHCS makes no argument or factual showing that it was unable to hire civil service employees in those classifications after it made a reasonable and good faith effort to do so. Instead, CCHCS argues that, given the historically low rate of filling vacancies in those classifications, any effort would be too time-consuming and futile.

CCHCS' argument defies logic. A department cannot reasonably assess whether or not it is able to hire sufficient number of employees to accomplish necessary tasks if it does not make any effort to do so. In other words, without showing that it made reasonable and good faith efforts to recruit civil service employees in those

classifications, CCHCS's speculation that it would take CCHCS "months if not years to post the openings, interview, orient, and train the new staff before they could be qualified to perform their duties" is insufficient to establish that it was unable to hire civil service employees. (Grace Song's August 5, 2019, Declaration, paragraph 4.)

Further, even if considerable effort is necessary in order to recruit civil service staff, CCHCS is legally obligated to do so. Here, CCHCS has been utilizing contracted physical therapist, occupational therapist, and optometrist services on an ongoing basis since 2014, yet it has not presented any demonstrable evidence of its efforts during those years to recruit or hire corresponding civil service employees in those classifications. Without such showing, the SPB can only assume that little or woefully inadequate effort was extended to recruit civil service employees in those classifications.

Were CCHCS allowed to contract out civil service jobs simply because it did not see fit to engage in any recruitment efforts, the civil service mandate, which 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, would be an empty directive. The practice of outsourcing civil service work with little or no regard to economy or efficiency in accordance with the state's merit system would create a state work environment dominated by independent contractors. The state government's reliance on independent contractors, rather than state work force, is precisely what the voters intended to eliminate when they adopted article VII of the California Constitution and its predecessor. (*Professional Engineers v. Department of*

Transportation, supra, 15 Cal. 4th 543, 564.) CCHCS' reliance on the contractor for Physical Therapist, Occupational Therapist, and Optometrist services rather than the civil service workforce, typifies the practice prohibited by the California Constitution. As such, the Board cannot acquiesce to such contracting out that would compromise the civil service mandate.⁴

Pharmacist Services

The parties' argument before the Board centered on the legality of the contracted pharmacist services. CCHCS argues that, since it has filled 100% of its vacant civil service pharmacist positions, it should be legally permitted to contract out additionally needed services. AFSCME, on the other hand, argues that CCHCS should allocate more civil service Pharmacist positions as its needs for pharmacists is plainly evident based on CCHCS' use of 12,000 hours in 2018 for contracted services, which is equivalent to staffing 58 full-time pharmacists.

The Board has historically disfavored personal services contracts when the need for those services is due to the state's own actions. In *Department of Pesticide Regulation (DPR), supra*, PSC No. 01-09, the Board held that the subdivision (b)(3) exception permitting contracts for services does not apply when the services could be performed through the civil service system, but not enough civil service employees are currently employed to perform those services, (*DPR* at p. 13). In that case, DPR asserted that it relied on other state agencies to perform the services and that, since the services from other state agencies were no longer available, DPR should be allowed to

⁴ The Board did not rely on CCHCS' declarations to reach its conclusion and therefore, AFSCME's objection to the declarations pursuant to California Code of Regulations, title 2, section 547.66, need not be addressed here.

utilize similar services from the private sector without establishing civil service positions. The Board disagreed, and held that DPR must fulfill its obligation under section 19130 to provide an adequately-staffed civil service workforce to perform the duties that civil service employees can perform adequately and competently.

Later, in *California Highway Patrol (CHP) (2006) PSC No. 06-05*, the Board found that CHP failed to take steps to restore funding for its positions, and thus held that the CHP's failure to allocate sufficient civil service staff positions to perform necessary work did not justify the private contracting of work traditionally performed by the state civil service employees. The Board pointedly stated that CHP created an artificial need for private contractors by refusing to hire sufficient numbers of civil service employees to perform its work, and then relied upon the workforce shortage it had created to justify the hiring of private contractors.

Such is the case here. CCHCS knew, at least since the inception of the contract in 2014, that its pharmacist staffing levels were inadequate to service the needs of the prison inmate population, yet it did not take any action to obtain additional positions. Instead, it resorted to a private contractor to fill its needs at a higher cost.⁵ CCHCS argues that it was not entirely within its control to obtain additional Pharmacist positions, and that it was up to the State Controller's Office (SCO) to make that determination. While it may be true that CCHCS does not have the sole authority when it comes to establishing civil service positions, it is undisputed that, as a state department, CCHCS has an obligation to initiate and follow through with the process of establishing civil

⁵ The contract price was redacted by CCHCS. AFSCME did not object to the redaction. However, CCHCS does not dispute AFSCME's assertion that contracting out is more expensive than utilizing civil service employees.

service positions that will meet the needs of the department. Here, CCHCS provided no evidence to show that it requested allocation of additional Pharmacist positions or took any steps at securing the necessary funding for the additional positions. Since CCHCS was able to fill all of its Pharmacist vacancies, it is reasonable to assume that, similarly, it would be able to recruit additional Pharmacists had it established more positions. To this end, CCHCS' private contracting of Pharmacist services was not a result from any legitimate lack of available or obtainable qualified personnel justified under subdivision (b)(3), but from its practice of maintaining an inadequate level of civil service staff. (*Professional Engineers in California Government v. Department of Transportation, supra*, 15 Cal. 4th 543, 571-572.) Therefore, the evidence establishes that CCHCS, by failing to create the needed number of civil service Pharmacist positions and retaining a long-term contract outsourcing extensive Pharmacist services, created an artificial need for private contracting. Accordingly, the Board cannot, under the law, allow such a contract to continue.

Registered Dietitian

AFSCME disputes the Executive Officer's finding that CCHCS has provided substantial evidence of its extensive and ongoing recruitment efforts for Registered Dietitians. AFSCME argues that it conducted a general Google search of the vacant positions, which yielded only one link to a CalCareers.com listing for one vacancy with the Department of Developmental Services, unrelated to CDCR.

The Board disagrees. AFSCME's "Google search" was contained in its legal argument, not offered in a declaration. It is a fundamental legal principle that a party

may not, under the guise of argument, assert as facts matters that were not properly admitted. (*People v. Davenport* (1985) 41 Cal. 3d 247, 288.) Here, AFSCME improperly attempted to furnish specific facts to support its argument without a proper declaration. The Board is not legally permitted to take into consideration as fact the purported "Google search" result. On other hand, CCHCS established before the Executive Officer that it had made a substantial effort to advertise Registered Dietitian positions. Specifically, CCHCS regularly attended nutrition and dietetic conferences and advertised the positions at local job fairs, the Academy of Nutrition and Dietetics and Food and Nutrition Conferences and Expositions, the California Dietetic Association, Hire Heroes USA, Health eCareers, Indeed, LinkedIn, Zip Recruiter, the Military Officer's Association of America, Allied Health Careers, and Food and Nutrition Journal. In addition, the vacancies were also posted on the State career website (CalCareers.com). Despite its efforts, the fill rate for this position remained low. Thus, CCHCS has demonstrated that it was unable to successfully hire suitable candidates despite its reasonable and good-faith efforts, satisfying the exemption under subdivision (b)(3). (*Service Employees International Union, Local 1000, supra*, PSC No. 05-03.) As such, the contract is approved with respect to Registered Dietitian services.

Lastly, CCHCS minimally argued that the contract was justified under subdivision (b)(10), which authorizes a state agency to contract out personal services when the services are of an "urgent, temporary, or occasional" nature that the delay in recruiting qualified civil service employees would frustrate their very purpose. CCHCS made no new argument in advocating this position. It is unexceptional knowledge that medical

services are often time-sensitive. However, as the Executive Officer pointed out, the contract was not utilized for the purpose of attending to occasional, temporary, urgent, or unexpected matters, but was utilized on a routine and ongoing if not daily basis since 2014, due to CCHCS' inability to fill civil service positions. As such, the contract is not justified under subdivision (b)(10).

CONCLUSION AND ORDER

The civil service mandate established under Article VII of the California Constitution prohibits state agencies from contracting out work that civil service employees can perform adequately and competently, unless the contract is permissible under the enumerated exceptions provided in section 19130. The evidence in this case established that CCHCS was justified under subdivision (b)(3), in contracting out services that correspond to those performed by civil service incumbents in the classifications of Physician's Assistant and Registered Dietitian. CCHCS has failed to justify contracting out work that can be performed by civil service employees in the classifications of Pharmacist, Physical Therapist, Occupational Therapist, and Optometrist, and the contract is therefore disapproved with regard to those areas.

The Board, however, is aware and mindful of the substantial impairment to the inmate healthcare the discontinuation of the contract is likely to cause and the necessary time for CCHCS to transition from private contracting to civil service jobs that will enable civil service employees to perform the related duties competently and

effectively. As such, the Board will allow the contract to continue until it expires on April 30, 2020.⁶

In the meantime, CCHCS must, however, make a diligent and concerted effort in replacing outsourced jobs with civil service employees. A quick return to contracting out these civil service jobs would be disfavored as Government Code section 19135 prohibits a state agency from circumventing or disregarding the Board's action by entering into another contract for the same or similar services or to continue the services that were the subject of the contract disapproved by the Board.

This is not to say that CCHCS is forever barred from contracting out for vital medical services. CCHCS must, however, be able to present evidence that would sufficiently justify its future contracting needs under the provisions specified in Government Code section 19130. At a minimum, CCHCS must present evidence that it has taken all diligent and appropriate steps to secure the needed civil service positions, actively recruited to fill its vacancies, and took appropriate steps to fully utilize the available civil service work force, but remains unable to provide the necessary services with its existing civil service work force. Such convincing evidence was absent in this case.

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STATE PERSONNEL BOARD

Lauri Shanahan, President
Shawnda Westly, Vice President
Mona Pasquil Rogers, Member

⁶ AFSCME also stated that it would not object to an additional 90-day extension to allow CDCR to fill the vacancies without undue disruption of inmate patient services.

I hereby certify that the State Personnel Board made and adopted the foregoing Board Decision and Order at its meeting on January 16, 2020.



SUZANNE M. AMBROSE
Executive Officer