BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by **CALIFORNIA STATE EMPLOYEES ASSOCIATION** From the Acting Executive Officer's decisions dated December 12, 1997 and February 17, 1998 approving three contracts (for janitorial, food and laundry services, respectively) which the Department of Veterans Affairs executed in regard to the Veterans Home in Barstow	**BOARD DECISION** **PSC NO. 98-04** September 1-2, 1998

APPEARANCES: Harry J. Gibbons, Attorney, on behalf of California State Employees Association; Craig L. Stevenson, Chief Counsel, on behalf of Department of Veterans Affairs.

BEFORE: Florence Bos, President; Richard Carpenter, Vice President; Lorrie Ward, Ron Alvarado and James Strock, Members.

DECISION

The California State Employees Association ("CSEA") has appealed from the Acting Executive Officer's decisions dated December 12, 1997 and February 17, 1998, which approved three contracts that the Department of Veterans Affairs ("DVA") executed for services to be rendered to residents of the Veterans Home in Barstow ("VHB"): (1) Contract No. 95001 with Anelica Health Care Services Group, Inc. for laundry services (the "Laundry Contract"); (2) Contract No. 95005 with Pedus Food Services, Inc. for food services (the "Food Contract"); and (3) Contract No. 95007 with Pace/Paul A. Courtney Enterprises for janitorial services (the "Janitorial Contract"). (The Laundry Contract, Food Contract and Janitorial Contract are hereinafter sometimes referred to collectively as the "Contracts.")

The Acting Executive Officer's decisions found that: (1) the Janitorial Contract and Food Contract met the requirements of Government Code § 19130(a) and the

applicable regulations; and (2) the Laundry Contract was justified under the conditions set forth in Government Code § 19130(b)(8).

In this decision, the State Personnel Board ("SPB" or the "Board") finds that it has the jurisdiction to review the Contracts and sustains the Acting Executive Officer's decisions approving the Contracts.

PROCEDURAL HISTORY

By letter dated June 5, 1996, CSEA asked the Board, pursuant to Government Code § 19132, to review the Contracts for compliance with Government Code § 19130.[1] On July 19, 1996, SPB sent a memorandum to DVA asking whether the Contracts were let under Government Code § 19130(a) or § 19130(b); if the Contracts were let under §19130(a), SPB asked DVA to show how all 11 requirements of that section were met; if the Contracts were let under § 19130(b), SPB asked DVA to state which of the 10 conditions of that section applied and provide DVA's rationale for contracting in lieu of using civil service employees.

By a memorandum dated August 13, 1996, DVA responded to SPB's request for information. In that memorandum, DVA contended that the Contracts were entered into under the provisions of Government Code § 19130(b)(2)[2] because providing services at VHB was a new state function, and the Legislature had authorized the performance of the work at VHB by independent contractors via the budget process.

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[1] CSEA's June 5, 1997 letter also asked SPB to review a contract for security services DVA had entered into with Inter-Con Security Systems, Inc. That contract is not before the Board for review.

[2] Government Code § 19130(b)(2) permits a state agency to enter into a personal services contract with a private contractor when:

> The contract is for a new state function and the Legislature has specifically mandated or authorized the performance of the work by independent contractors.

Thereafter, DVA sent to SPB a copy of Chapter 590 of Statutes 1996 (AB 2973) ("Chapter 590") which was enacted into law in September 1996. Chapter 590, among other things: (1) found that VHB was a new state function; (2) provided that work at VHB could be performed by the use of independent contractors; and (3) ratified DVA's use of independent contractors before the enactment of Chapter 590.

On October 31, 1996, an SPB staff employee sent a copy of Chapter 590 by fax to CSEA. On the fax transmittal cover sheet, the staff employee wrote:

I'm faxing a copy of the legislation that was passed authorizing the veterans home in Barstow to run its operation pursuant to independent contractors. This should close out your request that SPB review these contracts. Call me if you have any questions or concerns.

By memorandum dated October 23, 1997, DVA asked SPB to review the Contracts to determine whether they complied with Government Code § 19130(a). In that memorandum, DVA explained that CSEA had challenged the constitutionality of Chapter 590 in court in CSEA and Juleen Stenzel v. DVA et al., Sacramento County Superior Court Case No. 96CS02064 ("Stenzel").[3]

By memorandum dated November 6, 1997, DVA submitted additional support for its argument that the Contracts complied with Government Code § 19130(a).

On November 13, 1997, SPB received a copy of a court order signed on November 4, 1997 (the "First Court Order") in Stenzel which, among other things, provided that SPB was to complete its analysis of the Contracts' compliance with Government Code § 19130(a) and submit a written report to the court no later than November 26, 1997.

[3] SPB is not a party in Stenzel.

By memorandum dated November 13, 1997, SPB requested that CSEA submit its response to DVA's October 23 and November 6 memoranda. By memorandum dated November 17, 1997, SPB requested additional information from DVA relevant to the issue of the Contracts' compliance with Government Code § 19130(a).
DVA responded to SPB's November 17, 1997 request by memorandum dated November 21, 1997. SPB requested follow-up information from DVA by memorandum dated November 25, 1997.

On November 26, 1997, SPB submitted its written analysis of the issue of the Contracts' compliance with Government Code § 19130(a), together with a cover letter, to the court in Stenzel. SPB's analysis concluded that the Laundry Contract did not comply with the Board's Regulation found at California Code of Regulations, Title 2, § 279.2, which implements Government Code § 19130(a). SPB's analysis also stated that SPB did not have sufficient information to make a determination as to whether the Janitorial Contract or the Food Contract complied with Government Code § 19130(a). In its letter, SPB asked that DVA provide certain additional information.

By memorandum dated December 9, 1997, DVA submitted the additional information requested by SPB on November 26, 1997.
On December 9, 1997, SPB sent a copy of DVA's December 9, 1997 memorandum to CSEA with a request that CSEA submit any further comments it may have as to the Contracts no later than December 11, 1997. On December 11, 1997, CSEA submitted additional comments refuting the Contracts' compliance with Government Code § 19130(a).

On December 12, 1997, SPB submitted the Acting Executive Officer's decision, together with a cover letter, to the Stenzel court. In that decision, the Acting Executive Officer approved the Janitorial Contract as meeting the statutory and regulatory requirements for cost-savings contracts and disapproved the Laundry and Food Contracts for failing to meet those requirements.

On January 22, 1998, DVA sent a memorandum to SPB asking SPB to review the Food Contract again for compliance with Government Code § 19130(a) in light of new prevailing wage rate information.

On January 23, 1998, a hearing was held by the court in Stenzel. After hearing oral argument, the court issued a written Order on Petition for Writ of Mandate dated January 30, 1998 (the "Second Court Order") which ruled that: (1) notwithstanding the Legislature's findings in Chapter 590, VHB did not represent a new state function; (2) the Board should review the additional materials dated January 22, 1998 that DVA had submitted respecting the Food Contract and render a decision on that Contract by February 18, 1998; and (3) DVA had until February 2, 1998 to submit additional materials to SPB in support of the Laundry Contract, and SPB should review those new materials and issue its decision as to the Laundry Contract by February 18, 1998.

On January 30, 1998, DVA submitted a memorandum to SPB which contended that the Laundry Contract was justified under Government Code § 19130(b)(8). CSEA submitted its opposition to DVA's January 22, 1998 and January 30, 1998 memoranda on February 4, 1998.

By letter dated February 17, 1998, the Executive Officer issued his decision which: (1) approved the Food Contract, finding that it was in compliance with Government Code § 19130(a) and consistent with the purpose and intent of Title 2, § 279.2 of the California Code of Regulations; and (2) approved the Laundry Contract, finding that it met the conditions of Government Code § 19130(b)(8).

By letter dated March 16, 1998, CSEA appealed the Acting Executive Officer's decision dated December 12, 1997 approving the Janitorial Contract and his decision dated February 17, 1998 approving the Food and Laundry Contracts to the Board.

ISSUES

This appeal raises the following issues:

Jurisdictional Issues

1. Does the Board have jurisdiction to review the Food Contract and Laundry Contract for compliance with Government Code § 19130(a) when DVA did not follow the procedures set forth in Government Code § 19131?

2. Was DVA entitled to more than one decision on the Contracts' compliance with Government Code § 19130(a) or § 19130(b)?

3. Was CSEA's appeal to the Board from the Acting Executive Officer's December 12, 1997 decision approving the Janitorial Contract timely?

Substantive Issues

1. Assuming the Board has jurisdiction, are the Food and Janitorial Contracts justified under Government Code § 19130(a) and the regulations promulgated by the Board thereunder?

2. Assuming the Board has jurisdiction, is the Laundry Contract justified under Government Code § 19130(b)(8)?

3. Assuming the Food and Janitorial Contracts are justified under Government Code § 19130(a), what are their respective effective dates?

DISCUSSION

Jurisdictional Issues

The Board has jurisdiction to review the Food and Janitorial Contracts for compliance with Government Code § 19130(a) even though DVA did not comply with the requirements of Government Code § 19131.

A state agency may enter into a personal services contract with a private contractor justified on cost savings grounds if that contract meets the conditions set forth in Government Code § 19130(a) and the regulations promulgated by the Board thereunder. Government Code § 19131 and Public Contract Code § 10337(b) set forth procedures for: (1) a state agency to notify the Board of its intention to enter into a cost savings contract under Government Code § 19130(a); (2) an employee organization, such as CSEA, to seek Board review of such a contract for compliance with Government Code § 19130(a); and (3) the Board to review a challenged contract to determine whether it meets the requirements of Government Code § 19130(a) and the Board's regulations.

Government Code § 19131 provides:

Any state agency proposing to execute a contract pursuant to subdivision (a) of Section 19130 shall notify the State Personnel Board of its intention. All organizations that represent state employees who perform the type of work to be contracted, and any

person or organization which has filed with the board a request for notice, shall be contacted immediately by the State Personnel Board upon receipt of this notice so that they may be given a reasonable opportunity to comment on the proposed contract. Departments or agencies submitting proposed contracts shall retain and provide all data and other information relevant to the contracts and necessary for a specific application of the standards set forth in subdivision (a) of Section 19130. Any employee organization may request, within 10 days of notification, the State Personnel Board to review any contract proposed or executed pursuant to subdivision (a) of Section 19130. The review shall be conducted in accordance with subdivision (b) of Section 10337 of the Public Contract Code. Upon such a request, the State Personnel Board shall review the contract for compliance with the standards specified in subdivision (a) of Section 19130.

Section 10337(b) provides, in relevant part, as follows:

> The State Personnel Board shall direct any state agency to transmit to it for review any contract proposed or executed pursuant to subdivision (a) of Section 19130 of the Government Code, if the review has been requested by an employee organization notified pursuant to Section 19131 of the Government Code. The review shall occur prior to any review conducted by the Department of General Services. The board shall restrict its review to the question as to whether the contract complies with the provisions of subdivision (a) of Section 19130 of the Government Code and any additional standards and controls established pursuant to subdivision (a) of this section.
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> The board may disapprove the contract only if it determines that the contract does not comply.

In enacting Government Code § 19131 and Public Contract Code § 10337(b), the Legislature intended that a state agency notify SPB whenever it proposes to enter into a cost savings contract. See, California State Employees' Association v. State of California ("California State Employees' Association") (1988) 199 Cal. App. 3d 840, 852.

DVA did not notify SPB under Government Code § 19131 or Public Contract Code § 10337(b) of its intentions to enter into the Janitorial and Food Contracts before executing them. CSEA asserts that, since DVA did not give the Board prior notice of its intention to enter into the Contracts, the Board does not have the statutory authority to review the Contracts for compliance with Government Code § 19130(a) after they were executed. While the Board agrees with CSEA that, to fully comply with the intent of Government Code § 19131 and Public Contract Code § 10337(b), DVA should have provided SPB with notice of its intention to enter into the Janitorial and Food Contracts before executing them, as explained below, the Board finds that DVA's failure to comply with Government Code § 19131 does not deprive the Board of jurisdiction to review the Janitorial and Food Contracts for compliance with Government Code § 19130(a).

Government Code § 19131 and Public Contract Code § 10337(b). Government Code § 19131 and Public Contract Code § 10337(b) set forth the procedures the Board must follow when reviewing personal services contracts entered into on cost savings grounds for compliance with Government Code § 19130(a) and the Board's regulations. Public Contract Code § 10337(b) makes clear that the Board's only role under these statutes is to determine whether a disputed contract meets all the conditions set forth in Government Code § 19130(a) and the Board's regulations.

Although Government Code § 19131, by using the word "shall," imposes a requirement upon a state agency to notify the Board whenever it intends to enter into a cost savings contract, it is not clear from the statute that this notice requirement is mandatory. A statute will be deemed to be "mandatory" when the failure to comply with an obligatory procedural step will have the effect of invalidating the governmental action to which the procedural requirement relates. If the action is not invalidated by a failure to comply with the procedural step, the statute will be deemed to be "directory."[4]

While Government Code § 19131 requires that a state agency notify the Board of its intention to enter into a cost savings contract under Government Code § 19130(a), it does not provide for any consequence or penalty that the Board must enforce for noncompliance. There is no language included in these sections that provides that a state agency's failure to comply with the statute's procedural requirements will have the effect of invalidating any contract the state agency may execute without prior notice to the Board . Thus, while Government Code § 19131 imposes an obligatory notice requirement upon a state agency, such requirement appears to be directory and not mandatory.

Stringent requirements for cost savings contracts. Government Code § 19130(a) and Board regulations found at California Code of Regulations, Title 2, §§ 279.1 et seq. set forth numerous conditions with which a state contract must comply in order to be justified as a cost savings contract. These requirements are quite detailed and comprehensive. In reviewing the Janitorial and Food Contracts for compliance with Government Code § 19130(a) and the applicable Board regulations, the Board has

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[4] See California Correctional Peace Officers Association v. State Personnel Board (1995) 10 Cal. 4th

applied the same strict requirements that it applies to all other cost savings contracts it reviews.

The Board finds that it surely could not have been the Legislature's intent that state contracts that comply with these strict requirements should not be permitted to remain in effect merely because the state agency failed to provide SPB with prior notice of its intention to enter into them. Such a result would run contrary to the Legislature's purpose in enacting Government Code § 19130(a). See, California State Employees' Association, supra, 199 Cal. App. 3d at p. 853.

The Stenzel court orders. The Board reviewed the Contracts for compliance with Government Code § 19130(a) at the direction of the court in Stenzel, in accordance with the First and Second Court Orders. CSEA made the same argument to the court in Stenzel as it is now making to the Board: that the Board does not have the authority to review retroactively the Contracts for compliance with Government Code § 19130(a). The court rejected this argument. While the court in Stenzel determined that VHB did not represent a new state function, it also found that DVA did not give the Board prior notice under Government Code § 19131 because it had relied, in good faith, upon its initial determination, as ratified by the Legislature in Chapter 590, that VHB was a new state function.

CSEA contends that DVA could not have entered into the Contracts in good faith in reliance upon Chapter 590 because Chapter 590 was not enacted until after the Contracts were executed. While CSEA is correct that Chapter 590 was enacted after DVA entered into the Contracts, it does not necessarily follow that DVA did not,

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therefore, act in good faith when it failed to notify the Board that it intended to execute the Contracts under Government Code § 19130(a).

As DVA contends, it entered into the Contracts based upon a report prepared by the Governor's Commission on a Southern California Veterans Home that recommended that support services should be contracted. In addition, the Legislature had budgeted for contracting, and not for the hiring of state personnel, to perform these services. Although Chapter 590 was not enacted until after the Contracts were executed, it ratified DVA's belief that the Contracts represented new state functions. Based upon these factors, the Board agrees with the court in Stenzel that DVA entered into the Contracts in good faith based upon its belief that VHB represented a new state function.

For all the foregoing reasons, the Board finds that it is not deprived of jurisdiction to review the Janitorial and Food Contracts for compliance with Government Code § 19130(a) merely because DVA requested such review after it had executed the Contracts.

Under the circumstances presented by this case, it was appropriate for the Acting Executive Officer to issue more than one decision on the Contracts' compliance with Government Code § 19130.

CSEA contends that it was not appropriate for the Board's then Acting Executive Officer to issue more than one decision on the Contracts' compliance with Government Code § 19130 in response to CSEA's request for review. CSEA asserts that DVA was required to raised all its justifications for the Contracts in response to the Board's memorandum dated July 19, 1996. CSEA claims that DVA's failure to justify the

Contracts on any grounds other than Government Code § 19130(b)(2) in August, 1996 when it responded to the Board's July 19, 1996 request barred it from raising any additional justifications for the Contracts thereafter.

In addition, CSEA contends that the fax transmittal sent by an SPB staff employee on October 31, 1996 constituted a decision by the Board approving the Contracts as justified under Government Code § 19130(b)(2). CSEA asserts that, after it received this fax, DVA was barred from seeking further decisions from the Board with respect to the Contracts' compliance with any other criteria set forth in Government Code § 19130. CSEA contends, that, if a state agency is allowed to raise a "new issue" each time the Executive Officer issues a decision on a contract, then the agency will be entitled to as many decisions on a contract as there are separate criteria in Government Code § 19130.

As set forth below, the Board disagrees with CSEA's contentions and finds that, given the unique facts presented by this case, it was appropriate for the Acting Executive Officer to issue the decisions that he did.

The October 31, 1996 fax transmittal. Contrary to CSEA's contentions, the October 31, 1996 fax transmittal from a Board staff employee did not constitute an Executive Officer decision approving the Contracts under Government Code § 19130(b)(2). The fax was not signed by the Executive Officer; it did not include any language explicitly approving the Contracts. In the October 31, 1996 fax transmittal, a Board staff employee summarily stated that Chapter 590 "should close out [CSEA's] request that SPB review" the Contracts, and asked CSEA to call her if it had "any questions or concerns." The record does not indicate that CSEA ever called to request

clarification of the meaning and effect of the October 31, 1996 fax transmittal. The Board finds that the Acting Executive Officer was not precluded by the October 31, 1996 fax transmittal from issuing his December 12, 1997 and February 17, 1998 decisions.

The court's orders. The Acting Executive Officer's December 12, 1997 decision was issued at the direction of the court in Stenzel pursuant to the First Court Order. The Acting Executive Officer's February 17, 1998 decision was issued at the request of the court pursuant to the Second Court Order. The Board finds that it was proper for the Acting Executive Officer to issue his December 12, 1997 and February 17, 1998 decisions in light of these court orders.[5]

CSEA's participation. Before the Acting Executive Officer issued his December 12, 1997 and February 17, 1998 decisions, CSEA was given an opportunity to oppose DVA's requests for Board approval of the Contracts. Since CSEA was informed of DVA's repeated requests for approval of the Contracts and given a full opportunity to respond to those requests, CSEA was not prejudiced by the Acting Executive Officer's issuing more than one decision in this matter.

CSEA's appeal from the Acting Executive Officer's December 12, 1997 decision was not untimely CSEA filed its appeal as to all the Contracts on March 16, 1998. The Acting Executive Officer's decision approving the Janitorial Contract was issued on December 12, 1997. Thus, CSEA's appeal was filed more than 30 days after the Acting Executive Officer approved the Janitorial Contract. DVA has questioned whether CSEA's appeal from the approval of the Janitorial Contract was timely.

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[5] Since SPB was not a party in Stenzel, it was not bound by the court's orders. However, SPB made every effort to comply with the court's directions and requests.

The Acting Executive Officer's December 12, 1997 decision did not inform the parties of their right to appeal that decision to the full Board. The Acting Executive Officer's February 17, 1998 decision, which approved the Laundry and Food Contracts, informed the parties that they could appeal that decision to the Board within 30 days after the decision's date. CSEA filed its appeal as to all three Contracts within 30 days after the February 17, 1998 decision was issued.

While it is incumbent upon parties to be aware of appeal deadlines without the Board's having to inform them of such deadlines in its decisions, in this instance, the Board finds that the Acting Executive Officer's failure to include in his December 12, 1997 decision any information as to the availability of an appeal from the approval of the Janitorial Contract may have mislead CSEA as to its appeal rights at that time. The Board, therefore, finds that CSEA's appeal was not untimely.

Substantive Issues

The Food and Janitorial Contracts are justified under Government Code § 19130(a) and the Regulations promulgated by the Board thereunder.

The industry rate for the Food Services Supervisor I. CSEA contends that DVA did not properly establish the industry rate for the position of Food Services Supervisor I under the Food Contract. As set forth below, the Board disagrees with CSEA's contentions.

Government Code § 19130(a)(2) provides:

> Proposals to contract out work shall not be approved solely on the basis that savings will result from lower contractor pay rates or benefits. Proposals to contract out work shall be eligible for approval if the contractor's wages are at the industry's level and do not significantly undercut state pay rates.

To implement Government Code § 19130(a)(2), the Board has adopted Rule 279.2,[6] which, in relevant part, provides as follows:

> When a Personal Services Contract is based on cost savings, a contractor's wages shall be at or above the industry's level and shall not undercut the State's pay rate for comparable work by more than 15%, except that if in a nonmetropolitan area of the State the contractor's rate of pay is more than 15% below the state rate, the contract may be approved if the contractor's rate of pay is closer to the State rate that it is to the comparable industry rate in the local area. In no case shall a contractor's wages be more that 25% below the State's pay rate. Comparison of wages for this purpose shall not include the cost of benefits. …
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> (c) The term "industry rate" as used in this section means the prevailing rate of pay for the type of work in question in the local area where the contract would be let, as measured by reliable and statistically representative wage surveys such as those conducted by the Bureau of Labor Statistics or the Department of Industrial Relations.

When it initially provided information as to the "industry rate" for the Food Services Supervisor I classification in October and November 1997, DVA relied upon prevailing rate information maintained by the State's Employment Development Department ("EDD") for Orange County.

The Acting Executive Officer, in his December 12, 1997 decision, disapproved the Food Contract, finding that it failed to meet the requirements of Rule 279.2 because the contractor's hourly wage for Food Services Supervisor I[7] was less than the industry level, and yet not closer to the state rate than it was to the comparable industry rate in the local area.

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[6] California Code of Regulations, Title 2, § 279.2.

[7] Food Services Supervisor I was the only classification in the Food Contract as to which the Acting Executive Officer raised industry rate concerns. Neither the Acting Executive Officer nor CSEA has questioned the propriety of the wages paid to the other classifications included in the Food Contract.

In February 1998, when DVA resubmitted its request that the Board review the Food Contract for compliance with Government Code § 19130(a) and Rule 279.2, it submitted "industry rate" information for Food Services Supervisor I which it had obtained by conducting its own wage survey in the Barstow area.

CSEA contends that, in contravention of Rule 279.2(c), DVA did not use a reliable and statistically representative wage survey to determine the wage rate for Food Services Supervisor I. CSEA asserts that DVA was unable to obtain wage survey information from "reputable organizations" because DVA wanted to narrowly define the "industry rate" as wages paid in the immediate vicinity of Barstow, which was too constricted an area. CSEA asserts that DVA's survey was neither "reliable" nor "statistically representative" as required by Rule 279.2, because it covered only the city of Barstow, an area that was too narrowly defined. CSEA also asserts that DVA's wage survey was not proper because it was conducted by DVA, whose business is operating veterans homes and not conducting wage surveys and who, as a party to this matter, obtained the "answer it wanted."

In response to CSEA's contentions, DVA asserts that there was no wage rate information available for Barstow or the County of San Bernardino (where Barstow is located) for the classification in question. DVA asserts that the wage rate information available for Orange County was not applicable or appropriate because Orange County is a large, metropolitan area with many employment opportunities and Barstow is a small, isolated, non-metropolitan area with few and low income employment opportunities. DVA also contends that the Orange County "wage information did not address the wage structure paid in long term health care provided in skilled nursing

facilities, residential homes, convalescent hospitals or acute care hospitals." DVA claims that the wage information it obtained through its own survey was more appropriate and applicable for the Food Contract than the Orange County information maintained by EDD.

In his February 17, 1998 decision, the Acting Executive Officer approved the Food Contract stating:

> In regard to the food services contract, I concur with the concerns you identified in your memorandum of January 22, 1998 regarding the use of Orange County wage data as an indicator of the industry rate in the nonmetropolitan area of Barstow, which is in San Bernardino County. I further find that, in the absence of wage surveys conducted by the Bureau of Labor Statistics or the Department of Industrial Relations for the Barstow area, you have made a good faith effort to obtain reliable and representative wage survey data regarding the "industry rate" in that area. The data you have submitted as to the food services contract complies with the conditions set forth in Government Code section 19130(a) and is consistent with the purpose and intent of 2 CCR 279.2.

Reviewing all the information submitted by the parties, the Board concludes that the Acting Executive Officer's decision was correct. DVA was faced with a dilemma: there was no available wage survey data for the classification of Food Services Supervisor I maintained by the Bureau of Labor Statistics, the Department of Industrial Relations or any similar public entity for the Barstow area; the wage survey information maintained by EDD for Orange County was not appropriate for the non-metropolitan area of Barstow. From the detailed information provided by DVA as to how it conducted its wage survey, the Board finds that DVA made a diligent and good faith effort to assemble comprehensive and relevant industry rate data in the pertinent area. The Board, therefore, agrees with the Acting Executive Officer's conclusion that the data DVA submitted with respect to the industry rate for Food Services Supervisor I met the

requirements of Government Code § 19130(a) and was consistent with the purpose and intent of Board Rule 279.2.

The requirements of Government Code § 19130(a)(11). Government Code § 19130(a)(11) provides that personal services contracting is permissible to achieve cost savings when:

> The potential economic advantage of contracting is not outweighed by the public's interest in having a particular function performed directly by state government.

CSEA contends that the Food and Janitorial Contracts do not meet the requirements of Government Code § 19130(a)(11) because the Governor's Commission on a Southern California Veterans Home listed seven reasons why contracting was contrary to the public interest, and warned that the quality of veterans' care would suffer if a "lowest-bidder" and "profit-driven" mentality was adopted. CSEA asserts that the Governor's Commission report shows that the "pubic interest in having a particular function performed by the civil service" outweighs the "potential economic advantage of contracting."

DVA argues that CSEA has mischaracterized what the report of the Governor's Commission stated. According to DVA, the seven negative factors cited by CSEA pertained to the total privatization of the facility; the Governor's Commission recommended contracting for support services, as DVA is doing.

A review of the report of the Governor's Commission indicates that DVA's reading of the report is correct: the Commission raised concerns about the complete privatization of VHB; it recommended, however, that support services be contracted "to the maximum extent feasible."

There has been no evidence presented to the Board which shows that the public's interest in having the services described in the Food and Janitorial Contracts performed directly by state government outweighs the potential economic advantage of contracting. The Board, therefore, finds that the Food and Janitorial Contracts meet the requirements of Government Code § 19130(a)(11).

Costs of litigation and lobbying. Government Code § 19130(a)(1)(C) provides:

> In comparing costs, there shall be included in the cost of a contractor providing a service any continuing state costs that would be directly associated with the contracted function. These continuing state costs shall include, but not be limited to, those for inspection, supervision, and monitoring.

CSEA asserts that, in order to comply with Government Code § 19130(a)(1)(C), DVA should have included in the costs of the Food and Janitorial Contracts, the costs DVA has incurred in lobbying the Legislature for, defending and justifying these Contracts. CSEA argues that DVA's failure to follow from the outset the procedures set forth in Government Code § 19131 for obtaining SPB approval of cost savings contracts resulted in expensive complications such as special legislation, extensive litigation and repeated trips to the Board and its Executive Officer, which could have been avoided if DVA had followed these procedures. CSEA asserts that, if DVA had asked the Board to review these Contract as cost savings contracts in 1996, DVA and the taxpayers would have had a prompt and inexpensive determination of their rights.

According to DVA, CSEA is claiming that, if CSEA chooses to engage in prolonged administrative and court actions to challenge a contract, no matter what the ultimate resolution may be, the costs which the state agency incurs responding to such

prolonged actions should be included in determining that the contract is not cost-effective. DVA contends that CSEA's position makes no sense.

As set forth in Government Code § 19130(a)(1)(C), the term "continuing state costs" relates solely to the costs directly associated with the contracted function, in this case, the costs associated with providing food and janitorial services. It does not relate to continuing lobbying and legal costs to defend the Contracts generally from challenge. Such lobbying and legal costs are more in the nature of "indirect overhead costs," which are excluded from an agency's costs by Government Code § 19130(a)(1)(B), which provides:

> In comparing costs, there shall not be included the state's indirect overhead costs unless these costs can be attributed solely to the function in question and would not exist if that function was not performed in state service. Indirect overhead costs shall mean the pro rata share of existing administrative salaries and benefits, rent, equipment costs, utilities, and materials.

The Board, therefore, agrees with DVA that a state agency cannot be asked to anticipate in its calculations of the expected costs of a contract justified on cost savings grounds possible future costs the agency may incur in defending and justifying that contract. A state agency simply cannot know at the outset of a contract whether and to what extent a union may challenge the contract under Government Code § 19130. Although the Board agrees that the review process could have been shortened significantly if DVA had informed the Board at the outset that the Contracts were justified under Government Code § 19130(a), the Board finds that Government Code § 19130(a)(1)(C) does not impose upon an agency the requirement that it predict in its

cost justifications all costs that it might subsequently incur if a union were to decide to challenge that contract at any time in the future.

The Laundry Contract is justified under Government Code § 19130(b)(8).

> Government Code § 19130(b)(8) permits a state agency to enter into a personal services contract with a private contractor when:
> The contractor will provide equipment, materials, facilities, or support services that could not feasibly be provided by the state in the location where the services are to be performed.

The Acting Executive Officer approved the Laundry Contract under Government Code § 19130(b)(8), stating that:

> Given the present absence of a laundry facility, the time required to obtain Federal funding and the substantial start up costs, I conclude it is not feasible for the state to provide the equipment, materials and facilities at Barstow for laundry services.

According to CSEA, DVA's refusal to build the facilities and purchase the equipment the civil service needs to perform its work does not constitute "infeasibility" for the purposes of Government Code § 19130(b)(8). CSEA asserts that it is possible for DVA to build laundry facilities at VHB, but it has decided not to do so because it considers the investment too costly and is afraid construction may disrupt parking. CSEA contends that a state agency should not be allowed to take refuge behind the phrase "not feasible" whenever it does not wish to incur the expense of building facilities or providing tools and equipment traditionally used by civil service employees. CSEA argues that the exception set forth in Government Code § 19130(b)(8) should apply only where the state would otherwise have to purchase equipment or facilities that are not part of its traditional functions.

DVA contends that, since the Legislature had not budgeted for a laundry facility at VHB when the veterans home was originally built, a laundry facility was not included. DVA asserts that it would be unduly expensive for DVA to build a laundry facility now, a major capital expenditure, in light of the less expensive alternative of contracting out. The Board disagrees with CSEA's interpretation of Government Code § 19130(b)(8): there is no language in Government Code § 19130(b)(8) which limits its applicability to only those services which the state has not traditionally performed. Since there is no such limiting language, Government Code § 19130(b)(8) may be relied upon to justify a state contract whether that contract is for a new state function or a service traditionally performed by the state.

This is not an instance where an agency has employees in place who need upgraded equipment to replace obsolete tools and the agency decides to contract out the services the employees are currently performing rather than supply the upgraded equipment. DVA did not include laundry facilities when it constructed VHB. As set forth above, the Board has determined that DVA acted in good faith when it built VHB assuming that support services, such as laundry services, legally could be contracted. To provide laundry services at VHB using civil service employees, an entire new laundry facility would have to be built where it does not now exist. The Acting Executive Officer determined that, given the substantial costs that would have to be expended, it is not feasible for DVA to build a new laundry facility in the already completed VHB in light of the much less costly alternative of contracting for the services. The Board agrees with the Acting Executive Officer's conclusions and finds that, under the particular

circumstances of this case, DVA's contracting for laundry services is justified under Government Code § 19130(b)(8).

The effective date of the Food and Janitorial Contracts is the date the Contracts were executed.

Public Contract Code § 10337(d) provides:

> Contracts subject to State Personnel Board review under this section shall not become effective unless and until approval is granted.

CSEA argues that, if the Board finds that the Janitorial and Food Contracts meet the requirements of Government Code § 19130(a), the Board should determine that, pursuant to Public Contract Code § 10337(d), they were, at a minimum, illegal until they were approved on December 12, 1997 and February 17, 1998, respectively.

DVA disagrees with CSEA's contentions. In support of its position, DVA relies upon the argument SPB made in its Opposition to the petition for writ of mandate in Duffy v. California Board of Control et al, ("Duffy"), Sacramento County Superior Court Case No. 97CS02788. In that opposition, SPB argued that, if SPB approves a cost savings contract under Government Code § 19130(a), the contract should be deemed to be effective from the date of its execution (or, if the contract provides for a different effective date, from that effective date).

As the Board stated in its opposition in Duffy, under Public Contract Code § 10337, all personal services contracts are subject to being reviewed by SPB for compliance with Government Code § 19130. However, a personal services contract is only reviewed under Public Contract Code § 10337 if SPB is requested to conduct such review or if SPB decides independently to review such contract under Public Contract

Code § 10337(a). If an employee organization does not request that SPB review a state contract and SPB does not initiate review independently, SPB may never review such contract. If SPB does not review a state contract under Public Contract Code § 10337, that contract will never receive SPB's approval that it complies with Government Code § 19130.

Since the Legislature clearly could not have intended that state contracts which are not reviewed can never become effective, Public Contract Code § 10337(d) cannot be interpreted to mean that state contracts are only effective from and after SPB has granted its approval. If Public Contract Code § 10337(d) were interpreted as CSEA contends, an employee organization could prevent all state contracts from ever becoming effective simply by never requesting that SPB review them. Clearly, this would be an absurd result that the Legislature never would have intended. As the California Supreme Court stated in People v. Ledesma (1997) 16 Cal. 4th 90, 95, it is "a settled principle of statutory interpretation that language of a statute should not be given literal meaning if doing so would result in absurd consequences which the Legislature did not intend."

To make sense, Public Contract Code § 10337(d) must be interpreted to mean that, if SPB has been requested to review a cost savings contract under Government Code § 19130(a) and SPB approves that contract, that contract will be deemed to be effective from the date of its execution (or if the contract itself provides for a different effective date, from that effective date).

For the foregoing reasons, the Board finds that the Food and Janitorial Contracts were effective from the dates they were respectively executed (or, if the Contracts provide for different effective dates, from those respective effective dates).

CONCLUSION

For the foregoing reasons, the Board approves the Contracts.

STATE PERSONNEL BOARD

Florence Bos, President
Richard Carpenter, Vice President
Lorrie Ward Member
Ron Alvarado, Member
James Strock, Member

* * * * *

I hereby certify that the State Personnel Board made and adopted the foregoing Decision at its meeting on September 1 - 2, 1998.

_____
Walter Vaughn
Executive Officer
State Personnel Board

[DVA-CSEA-PSC98-04-F]