

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by)
)
 DEPARTMENT OF PERSONNEL) **BOARD DECISION**
 ADMINISTRATION) **PSC NO. 00-01**
)
) April 4, 2000
 From the Executive Officer's decision dated)
 December 21, 1999 disapproving Contract)
 No. S9840129)
)

APPEARANCES: Steven B. Bassoff, Attorney, on behalf of the Association of California State Attorneys and Administrative Law Judges; Linda D. Buzzini, Labor Relations Counsel, on behalf of the Department of Personnel Administration.¹

BEFORE: Florence Bos, President; Ron Alvarado, Vice President; Richard Carpenter, William Elkins and Sean Harrigan, Members.

DECISION

The Department of Personnel Administration (DPA) appealed from the Executive Officer's decision dated December 21, 1999, which disapproved DPA's Contract No. S9840129 (Contract) with Alexander Cohn (Cohn) for "mini-arbitration services." In this decision, the State Personnel Board (SPB or Board) finds that DPA has not shown that the Contract is justified under Government Code §§ 19130(b)(2), (3), or (5). The Board, therefore, sustains the Executive Officer's decision disapproving the Contract.

¹ Ronald Yank, counsel for CDF Firefighters, also addressed the Board in support of the Contract during oral argument.

BACKGROUND

DPA retained Cohn under the Contract to arbitrate disciplinary disputes between members of State Bargaining Unit 8 (Unit 8) and the Department of Forestry and Fire Protection (Department) pursuant to Unit 8's Memorandum of Understanding (MOU). The Unit 8 MOU provides that minor adverse actions (suspensions of five days or less or the equivalent) will be heard by a Board of Adjustment (BOA), a panel comprised of two management representatives, two union representatives, and a fifth member. Pursuant to the Contract, Mr. Cohn will act as that fifth member. Unit 8's minor adverse actions will be resolved by majority vote of the BOA. The BOA's decision will be final and binding. The disciplined employees will not be able to appeal the BOA's decision to SPB.

SPB's administrative law judges (ALJs) have been adjudicating disciplinary disputes between state employers and their employees for over 50 years.

PROCEDURAL HISTORY

By letter dated June 23, 1999, pursuant to Government Code § 19132, the Association of California State Attorneys and Administrative Law Judges (ACSA) asked SPB to review the Contract for compliance with Government Code § 19130(b).

By letter dated July 13, 1999, DPA asked SPB to defer ruling on the Contract until after Judge Connelly had issued his ruling in ACSA v. DPA, Sacramento Superior Court Case No. 99CS00260, a writ of mandate action that ACSA had filed challenging the constitutionality of that portion of the Unit 8 MOU and its implementing legislation that governs the arbitration of disciplinary proceedings.

ACSA wrote to the Board on August 6, 1999 opposing DPA's request that SPB defer its decision on the Contract.

By memorandum dated August 16, 1999, SPB's Personnel Resources and Innovations Division (PRID) denied DPA's deferral request, and asked DPA to submit information showing that the Contract complied with Government Code § 19130(b).

On September 10, 1999, DPA submitted to the Board a copy of the Contract and its justification for the Contract under Government Code §§ 19130(b)(2), (3)² and (5). In its letter, DPA asked the Board to issue subpoenas to: (1) all Board members; (2) the Board's Executive Officer; (3) the Board's Chief Counsel; (4) the Board's Chief Administrative Law Judge; (5) Board Staff Counsel Dorothy Egel; and (6) all current and past SPB ALJs. DPA also asked the Board to assign the investigation of this matter to another agency in light of, among other things, the Board's institution of legal proceedings against DPA with respect to the arbitration of Unit 8 disciplinary disputes in the matter of SPB v. DPA, Sacramento Superior Court Case No. 98CS03314, and SPB's appearance as amicus curiae in ACSA v. DPA.

By memorandum dated September 17, 1999, the Board's Executive Officer denied DPA's requests for a hearing, the issuance of subpoenas, and the recusal of the Board in this matter.

ACSA submitted its response to DPA's Contract justification on November 1, 1999.

² In its September 10, 1999 memorandum, DPA did not specifically refer to Government Code §§ 19130(b)(2) and (3); it did, however, use the language set forth in those two subdivisions when justifying the Contract.

The Executive Officer issued his decision on December 21, 1999 disapproving the Contract. DPA appealed that decision to the Board.

The Board has reviewed the record, including the written arguments of the parties, and heard the oral arguments of the parties, and now issues the following decision.

ISSUES

Did SPB staff improperly prevent DPA from presenting evidence and creating a record?

Did SPB's Executive Officer abuse his discretion by not delegating his authority to review the Contract to another agency?

Did ACSA deprive the Board of jurisdiction by first bringing an action in superior court?

Is the Contract justified under Government Code § 19130(b)(2)?

Is the Contract justified under Government Code § 19130(b)(3)?

Is the Contract justified under Government Code § 19130(b)(5)?

DISCUSSION

SPB staff did not improperly prevent DPA from presenting evidence and creating a record

DPA asserts that SPB staff improperly prevented DPA from presenting evidence and creating a record in this matter by refusing either to issue the numerous subpoenas DPA requested or to schedule this matter for an evidentiary hearing. As explained below, DPA misconstrues the requirements of applicable law.

In Professional Engineers in California Government v. Department of Transportation (PECG v. Caltrans),³ 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 the state has historically and customarily performed and can perform adequately and competently. Government Code § 19130 codifies the exceptions to the civil service mandate that various court decisions have recognized. Before a state agency can legally enter into a personal services contract, it must show that the contract is justified under one of the exceptions included in Government Code § 19130.⁴ In other words, before DPA executed the Contract, it should have compiled information and evidence that showed that the Contract was justified under Government Code § 19130(b).⁵ As set forth below, applicable law does not require that DPA be granted an evidentiary hearing

³ (1997) 15 Cal.4th 543, 547.

⁴ Effective May 3, 1999, the Board adopted regulations which set forth the procedures governing contract disputes. See Title 2, California Code of Regulations, §§ 547.59 et seq. As part of those regulations, the Board adopted Board Rule 547.60, which provides:

When a state agency requests approval from the Department of General Services for a contract let under Government Code Section 19130(b), the agency shall include with its contract transmittal a written justification that includes specific and detailed factual information that demonstrates how the contract meets one or more of the conditions specified in Government Code Section 19130(b).

Although the Contract was entered into before this rule became effective, this rule merely reflects a previously existing Board policy.

⁵ As can be seen from the documents DPA submitted, before it entered into the Contract, DPA completed a Department of General Services (DGS) Contract Transmittal form. Section 17 of that form requires a state agency to check whether its is justifying the transmitted contract under either Government Code § 19130(a) or 19130(b), and to explain its justification if it has checked Government Code § 19130(b). Although DPA apparently did not check either box on its Contract Transmittal for the Contract, it inserted the following justification in Section 17 of that Transmittal: “This contract is for professional legal services. The legal goals and purposes cannot be accomplished through the utilization (sic) of persons selected pursuant to the regular civil service system (Gov. Code sec. 19130(b)(5)).”

in this matter to compile the information and evidence that it should have compiled before it entered into the Contract.

Because DPA let the Contract under Government Code § 19130(b), the procedures set forth in Government Code § 19132 and Public Contract Code § 10337(c) apply. In accordance with Government Code § 19132,⁶ an employee organization, such as ACSA, may ask the Board to review a contract that a state agency has let under Government Code § 19130(b). Pursuant to Public Contract Code § 10337(c), the review of that challenged contract is delegated to the Board's Executive Officer, unless the Executive Officer determines that the requesting employee organization has shown good cause for an evidentiary hearing:

... The board shall delegate the review of such a contract to the executive officer of the board. If the employee organization requests it, the executive officer shall grant the employee organization the opportunity to present its case against the contract and the reasons why the contract should be referred to the board for a hearing. Upon a showing of good cause by the employee organization, the executive officer shall schedule the disputed contract for a hearing before the board for the purpose of receiving evidence and hearing arguments concerning the propriety of the disputed contract. The executive officer shall approve or disapprove the contract or refer it to the board for a hearing within 30 days of its receipt. ... (Emphasis added.)

⁶ Government Code § 19132 provides:

The State Personnel Board, at the request of an employee organization that represents state employees, shall review the adequacy of any proposed or executed contract which is of a type enumerated in subdivision (b) of Section 19130. The review shall be conducted in accordance with subdivision (c) of Section 10337 of the Public Contract Code. However, a contract that was reviewed at the request of an employee organization when it was proposed need not be reviewed again after its execution.

The Board has interpreted these statutory provisions in Board Rules 547.64 and 547.65.⁷ Pursuant to Rule 547.64(a), the Executive Officer may refer a contract dispute for an evidentiary hearing before an ALJ or other authorized Board representative if the Executive Officer determines that the employee organization has established good cause therefore. In accordance with Rule 547.65(b), in order to establish good cause, an employee organization must show that “there are disputed issues of material fact regarding the contract that must be resolved before a determination is made as to whether the disputed contract meets the criteria of Government Code Section 19130 and that an evidentiary hearing is necessary to resolve these disputed issues of material fact.” If an employee organization does not establish good cause for an evidentiary hearing, the review proceeds as an investigation.

Neither the applicable statutes nor the Board’s regulations grant a state agency that has let a contract under Government Code § 19130(b) the right to an evidentiary hearing to compile evidence to justify that contract.

In this case, because ACSA did not request an evidentiary hearing, and there was no showing that there were disputed issues of material fact that needed to be resolved by an evidentiary hearing before the Board’s Executive Officer issued his decision,⁸ no evidentiary hearing was required under the law. In response to SPB

⁷ Title 2, California Code of Regulations, §§ 547.64 and 547.65.

⁸ DPA’s only argument in favor of an evidentiary hearing is that such a hearing was necessary for it to develop its evidence in support of the Contract and to create a record. DPA has never argued, nor has it shown, that there were disputed issues of material fact that needed to be resolved by an evidentiary hearing before a decision could be rendered on the Contract. The parties in this case have generally agreed upon the relevant underlying facts; they have only disputed the application of the law to those facts.

staff's August 16, 1999 request, DPA could have presented through declarations and briefs any evidence it wished to submit to the Board in support of the Contract. SPB staff did not improperly prevent DPA from presenting evidence and creating a record in this case.

SPB's Executive Officer did not abuse his discretion by not delegating his authority to review the Contract to another agency

DPA asserts that Government Code § 18654 allows SPB's Executive Officer to delegate his authority to another appointing power, and that that statute is intended for situations where there is an actual or perceived conflict of interest. According to DPA, such a conflict existed in this matter.

On September 10, 1999, DPA asked SPB to delegate its authority in this matter to another state agency. DPA states that it made this request because SPB and its employees had an interest in ACSA's request to invalidate the Contract: SPB is interested in retaining authority to review disciplinary actions, and its employees are interested in continuing to conduct disciplinary hearings. DPA asserts that SPB's Executive Officer abused his discretion by deciding this matter, instead of delegating it to another state agency pursuant to Government Code § 18654. DPA's assertions misinterpret the requirements of applicable law.

Government Code § 18654⁹ permits, but does not require, the Board's Executive Officer to further delegate any matters that have been delegated to him to "his subordinates or

⁹ Government Code § 18654 provides:

The intention of the Legislature is hereby declared to be that the executive officer shall perform and discharge under the direction and control of the board the powers, duties, purposes, functions, and jurisdiction vested in the board and delegated to him by it.

to an appointing power he designates, unless by board rule or express provision of law he is specifically required to act personally.”

As set forth above, under Government Code § 19132 and Public Contract Code § 10337(c), the Board is required to review a state contract executed pursuant to Government Code § 19130(b) when such review is requested by an employee organization.¹⁰ Public Contract Code § 10337(c) specifically delegates the review of a disputed contract to the Board’s Executive Officer, and requires that the Executive Officer either render a decision on a disputed contract himself or refer the matter for hearing.¹¹

The Board is the only administrative agency with statutory authority to review contracts for compliance with Government Code § 19130(b). There are no exceptions set forth in Government Code § 19132 or Public Contract Code § 10337(c) that would permit either the Board or its Executive Officer to delegate their responsibilities under the law to another agency. Where, as here, an administrative body has a statutorily-mandated duty to act, and is the only entity with statutory authority to act, even the fact

Any power, duty, purpose, function, or jurisdiction which the board may lawfully delegate shall be conclusively presumed to have been delegated to the executive officer unless it is shown that the board by affirmative vote recorded in its minutes specifically has reserved the same for its own action. The executive officer may redelegate to his subordinates or to an appointing power he designates, unless by board rule or express provision of law he is specifically required to act personally.

¹⁰ Public Contract Code § 10337(c), in relevant part, provides:

A contract proposed or executed pursuant to subdivision (b) of Section 19130 of the Government Code shall be reviewed by the State Personnel Board if the board receives a request to conduct such a review from an employee organization representing state employees.

¹¹ Public Contract Code § 10337(c), in relevant part, provides:

.... The board shall delegate the review of such a contract to the executive officer of the board.... The executive officer shall approve or disapprove the contract or refer it to the board for a hearing....

that the body may have an interest in the result does not disqualify it from acting.¹² Since the Board is statutorily required to review the Contract in response to ACSA's request, it must do so in accordance with the law, notwithstanding any interest DPA may believe SPB to have in the outcome of that review.

Furthermore, because Public Contract Code § 10337(c) specifically delegates the mandated contract review to the Board's Executive Officer, the Executive Officer was required to review the Contract for compliance with Government Code § 19130(b) once he determined that an evidentiary hearing was not required. Government Code § 18654 prohibits the Board's Executive Officer from further delegating any obligation personally imposed upon him under the law. The Executive Officer did not abuse his discretion by not delegating his authority to review the Contract to another agency, but, instead, properly fulfilled his obligations under governing law.

**The Board has not been deprived of jurisdiction to review the Contract
for compliance with Government Code § 19130(b)**

DPA asserts that the Superior Court has exclusive jurisdiction over this matter because ACSA filed ACSA v. DPA several months before it requested review of the Contract by SPB. According to DPA, ACSA v. DPA seeks to invalidate the Unit 8 discipline procedure because it allegedly violates Article VII of the California Constitution. Government Code § 19130(b) codifies decisional law under Article VII. Consequently, DPA argues, the subject matter and issues presented in this case are the same as those advanced by ACSA in the Superior Court. DPA contends that,

¹² See, Hongsathavij v. Queen of Angels/Hollywood Presbyterian Medical Center (1998) 62 Cal.App.4th 1123, 1142-1143.

because SPB and the Superior Court have concurrent jurisdiction in this matter, ACSA deprived the Board of jurisdiction by first bringing an action in the Superior Court; to find otherwise, raises the prospect of inconsistent findings and contradictory decisions.

As set forth above, Government Code § 19132 and Public Contract Code § 10337(c) require that the Board review a state contract executed pursuant to Government Code § 19130(b) when such review is requested by an employee organization. ACSA properly invoked Board review under those statutory provisions when it requested that the Board review the Contract in this case.

Under Public Contract Code § 10337(c), the Board's sole responsibility when its jurisdiction has been properly invoked by an employee organization is to determine whether the challenged contract complies with Government Code § 19130(b):

Any such review shall be restricted to the question as to whether the contract complies with the provisions of subdivision (b) of Section 19130 of the Government Code.

Thus, the Board's sole responsibility in this matter is to review the Contract for compliance with those subdivisions of Government Code § 19130(b) that DPA has asserted justify the Contract. In accordance with the governing statutes, the Board cannot and will not determine whether the procedures set forth in the Unit 8 MOU for resolving minor adverse actions against Unit 8 employees are constitutional. Moreover, the sole remedy available to the Board is to disapprove the Contract under Public Contract Code § 10337(c); it cannot invalidate as unconstitutional any of the provisions of the Unit 8 MOU.

As Judge Connelly explained in his Ruling on Submitted Matter (Ruling on Submitted Matter) issued on December 22, 1999,¹³ ACSA's petition for writ of mandate in ACSA v. DPA:

challenged the MOU procedures in this mandate proceeding solely on the grounds that the MOU grievance and arbitration procedures used private arbitrators to perform work within the experience and capability of state administrative law judges and thereby violated the restriction in article VII against contracting outside the state civil service.¹⁴

According to the court's own interpretation of the ACSA v. DPA lawsuit, ACSA asked it to determine whether the disciplinary provisions of the Unit 8 MOU were constitutional. As a remedy, ACSA has asked the court to invalidate those MOU provisions as unconstitutional. There is nothing in the Ruling on Submitted Matter that indicates that the court believed that ACSA also had asked it to review the Contract for compliance with Government Code § 19130.

Thus, both the nature of the Board's review and the scope of its available remedy in this case are different from the nature of the court's review and the scope of its available remedies in ACSA v. DPA. ACSA's prior filing of ACSA v. DPA did not divest the Board of its obligation under Government Code § 19132 and Public Contract Code § 10337(c) to review the Contract for compliance with Government Code § 19130(b).

Moreover, although DPA asserts that ACSA's prior filing of ACSA v. DPA deprived the Board of jurisdiction to review the Contract, DPA has not filed any document with the Board to indicate that it ever asked the court in ACSA v. DPA to stay the Board's proceedings in this matter or to determine that the scope of the court's

¹³ The Board takes official notice of Judge Connelly's Ruling on Submitted Matter.

¹⁴ Ruling on Submitted Matter, p. 1, n.1.

jurisdiction precluded the Board from reviewing the Contract for compliance with Government Code § 19130(b). In the absence of a court stay prohibiting the Board from proceeding in this matter, the Board must comply with its obligations under Government Code § 19132 and Public Contract Code § 10337(c) and review the Contract for compliance with Government Code § 19130(b).

The Contract is not justified under Government Code § 19130(b)(2)

Government Code § 19130(b)(2) authorizes a state agency to enter into a personal services contract with a private entity 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.

Government Code § 19130(b)(2) permits contracting only for “a new state function not previously conducted by any state agency and performed by contract under legislative direction and authority.”¹⁵ In order to meet the requirements of Government Code § 19130(b)(2), the Contract must satisfy both of the subdivision’s two conditions: (1) the Contract must be for a “new state function” at the time it was executed; and (2) the Legislature must have specifically mandated or authorized the performance of the work by an independent contractor.¹⁶

ACSA contends that the Contract does not satisfy the first condition of Government Code § 19130(b)(2) because the contracted services do not constitute a “new state function.” According to ACSA, the service Cohn is to provide under the Contract is the adjudication of minor adverse actions for civil service employees. ACSA

¹⁵ California State Employees Association v. Williams (1970) 7 Cal.App.3d 390, 401 (Williams).

¹⁶ Department of Transportation v. Chavez (1992) 7 Cal.App.4th 407, 416 (Chavez).

contends that this is not a “new state function” because civil service employees – SPB ALJs - have conducted disciplinary hearings for state employees for over 50 years. DPA contends that the “mini-arbitration” work that Cohn will be performing under the Contract with respect to minor adverse actions is not the same function that is currently being performed by SPB ALJs. Under the Contract, Cohn will act as an independent member of a panel that is charged with resolving employee grievances and enforcing the parties’ collective bargaining agreement. According to DPA, arbitrating disciplinary disputes in this manner is not a function that has ever been performed by state employees.

To qualify as a “new state function” under Government Code § 19130(b)(2), a contracted service must constitute a new program or activity not previously performed by any existing agency of state government to ensure that no civil service employees will be displaced.¹⁷ In order to be a “new state function,” the contracted service must truly comprise a new governmental activity, it cannot merely be “a new technique for performing an existing function.”¹⁸

The function being performed under the Contract is the adjudication of minor adverse actions taken by the Department against its Unit 8 employees. For the past 50 years, this function has been conducted by SPB ALJs following the procedures set forth in the State Civil Service Act¹⁹ and the regulations promulgated by SPB thereunder.

¹⁷ Chavez, 7 Cal.App.4th at pp. 414-415; Williams, 7 Cal.App.3d at pp. 399-400. See also, Professional Engineers in California Government v. Department of Transportation (1993) 13 Cal.App.4th 585, 593. (“Under the ‘new state function’ test, courts will ask whether the contracted services displace existing state civil service functions or, instead, embrace a new state activity or function.”)

¹⁸ PECG v. Caltrans, 15 Cal.4th at p. 571.

¹⁹ Government Code § 18500 et seq.

The “mini-arbitration” procedures for minor adverse actions set forth in the Unit 8 MOU merely comprise a new method by which the adjudicatory functions previously conducted by SPB ALJs will be performed by the BOA. Such procedures do not constitute a new state function, but merely a new technique for performing a long-standing state function. If implemented, this new technique for performing an existing function would result in the displacement of the SPB ALJs who are currently performing that function for the state, which is antithetical to the principles of Government Code § 19130(b)(2).

DPA asserts that, by inserting the adjudication of disciplinary disputes into a collective bargaining agreement and providing for it by arbitration instead of SPB review, it has thereby created a new state function. DPA misconstrues the law. In PECG v. Caltrans, the California Supreme Court ruled that the Legislature did not create a new state function simply by adopting a statute that provided for an “enriched blend” of private contracting to meet the responsibilities historically performed by Caltrans employees, and then labeling that “enriched blend” a new state function. The court found that, no matter what the Legislature may have labeled them, the new procedures for developing highway projects were just a new method for providing an existing state function.

Similarly, the mere fact that DPA and CDF Firefighters may have bargained for new procedures for adjudicating minor adverse actions in the Unit 8 MOU does not thereby make that old state function into a new one. The services provided by Cohn under the Contract comprise a new way of performing an existing state function, not a “new state function” as that term was defined in Williams and explained in PECG v.

Caltrans. Because the contracted services do not constitute a “new state function,” the Contract does not meet the first condition set forth in Government Code § 19130(b)(2). ACSA also contends that the Contract does not meet the second condition of Government Code § 19130(b)(2) because the Legislature did not specifically mandate or authorize that the contracted services be performed by an independent contractor.

DPA contends that the Legislature’s approval of the Unit 8 MOU as provided in Assembly Bill (AB) 1291 constituted sufficient authorization for the purposes of Government Code § 19130(b)(2).

In order to meet the requirements of Government Code § 19130(b)(2)’s second condition, the Legislature must explicitly authorize the contracting of the contracted services to an independent contractor.²⁰ AB 1291 does not contain any provisions that specifically mandate or authorize the contracting of the fifth position on the BOA to an independent contractor. The general legislative approval of the Unit 8 MOU does not constitute the specific mandate or authorization for contracting required under the second condition of Government Code § 19130(b)(2). The Contract, therefore, does not meet the second requirement of Government Code § 19130(b)(2).

DPA has failed to show that the Contract complies with Government Code § 19130(b)(2).

The Contract is not justified under Government Code § 19130(b)(3)

Government Code § 19130(b)(3) authorizes a state agency to enter into a personal services contract with a private entity when:

The services contracted are not available within civil service, cannot be performed satisfactorily by civil service employees, or are of such a highly specialized or technical nature that the necessary expert knowledge, experience, and ability are not available through the civil service system.

Under Government Code § 19130(b)(3), a state agency may hire a private entity to perform state work when the contracted services meet any one of the following three conditions: (1) they are not available within civil service; (2) they cannot be performed satisfactorily by civil service employees; or (3) they are of such a highly specialized or technical nature that the necessary expert knowledge, experience or ability are not available through the civil service system.

DPA asserts that the Contract complies with Government Code § 19130(b)(3) because the neutral panel member services that Cohn will be providing are not available within civil service. DPA cites to a number of ways that the services to be provided by Cohn under the Contract are different from the services now being provided by SPB ALJs, including: (1) Cohn will be working for the parties to the MOU, while SPB ALJs work for the Board; (2) the BOA on which Cohn will sit will render final and binding decisions, while SPB ALJs render only proposed decisions subject to Board review; and (3) unlike SPB ALJs, Cohn, when rendering his decisions, will not be bound by the Board's precedential decisions or the civil service rules promulgated by the Board. DPA contends that these differences in the way the BOA will be reviewing discipline when compared to the way the Board now reviews discipline show that the services to be

²⁰ See, e.g., Williams, 7 Cal.App.3d at p. 400; Chavez, 7 Cal.App.4th at p. 414; Professional Engineers in California Government v. Department of Transportation, 13 Cal.App.4th at p.594 (“We note that the Legislature specifically authorized Caltrans to ‘solicit proposals and enter into agreements with private entities’ to construct the demonstration projects.”)

provided by Cohn under the Contract are not available in the civil service. The Board disagrees.

As set forth above, the services to be provided under the Contract are the adjudication of minor adverse actions taken by the Department against its Unit 8 employees. The adjudication of minor disciplinary disputes between state agencies and their employees has been conducted by SPB ALJs for over 50 years. The mere fact that, under the Unit 8 MOU, these services will be provided in a different manner from the way they are now generally being performed by SPB ALJs does not mean that the services themselves are not available in civil service. The Contract, therefore, does not meet the first condition set forth in Government Code § 19130(b)(3).

DPA next asserts that the Contract meets the second condition of Government Code § 19130(b)(3) because Board ALJs cannot satisfactorily perform the services Cohn will provide under the Contract. Under the second condition of Government Code § 19130(b)(3), a state agency may enter into a personal services contract with an independent contractor when civil service employees cannot perform the contracted services “satisfactorily,” in other words, adequately and competently. DPA has submitted no information that shows either that SPB ALJs have not adequately and competently adjudicated disciplinary disputes in the past under the existing civil service rules, or that they could not adequately and competently adjudicate such disputes under the new procedures set forth in the Unit 8 MOU.

SPB ALJs are currently adjudicating minor adverse actions under alternative procedures set forth in the Unit 5 and Unit 19 MOUs. DPA asserts that the Board’s revocation under the Unit 19 MOU of an ALJ proposed decision in Brian Margolis, SPB

Case No. 98-5195,²¹ shows that Board ALJs cannot satisfactorily perform the functions of the arbitrator under the Unit 8 MOU. In that matter, the Board rejected a proposed decision and revoked the minor adverse action taken by the Department of Rehabilitation against Mr. Margolis in accordance with the provisions of the Unit 19 MOU. The crux of DPA's argument seems to be that the mere fact that the Board rejected a proposed decision and revoked an adverse action shows that Board ALJs could not adequately perform the services of the fifth member of the Unit 8 MOU. DPA's argument is not well-taken.

The Board revoked the Margolis proposed decision in accordance with the authority granted to it under the California Constitution and the Unit 19 MOU. The fact that the Board exercised its constitutional authority to revoke an adverse action in accordance with the Unit 19 MOU does not mean that the SPB ALJ who rendered that proposed decision did not adequately and competently adjudicate the disciplinary dispute before him, or that SPB ALJs, or other civil service employees, could not adequately perform the "mini-arbitration" services described in the Contract. Thus, DPA has not shown that SPB ALJs, or other civil service employees, could not perform the contracted services adequately and competently.

DPA also argues that the Contract is justified under Government Code § 19130(b)(3) because Cohn can perform the contracted services more efficiently and simply, and less expensively than civil service employees. According to DPA, the BOA panel decisions are expedient because the parties are limited to 15 minute

²¹ As requested by DPA, the Board takes official notice of its file in Brian Margolis, SPB Case. No. 98-5195.

presentations, and it is expected that the BOA will resolve most disputes the same day they are heard. The hearings before SPB are more time-consuming and expensive. And because the union pays one-half of Cohn's fees for participating as a member of the BOA, DPA asserts that it is less expensive overall for the state, which pays the entire costs of SPB appeals. In making these arguments, DPA misconstrues the scope of Government Code § 19130(b)(3).

First, it is not the Board's role in this matter to review whether the process that the Unit 8 MOU sets forth for adjudicating minor adverse actions taken against Unit 8 employees is more efficient or less costly than the existing civil service system. The Board's only role in this matter is to review whether DPA may contract with a private contractor to fill the position of the fifth member on the BOA consistent with Government Code § 19130(b).

Second, if DPA wished to assert that the state will save money by filling the fifth position on the Unit 8 BOA with a private contractor rather than a civil service employee, it should have followed the procedures set forth in Government Code § 19131 and Public Contract Code § 10337(b) and sought to justify the Contract as a cost-savings contract under Government Code § 19130(a). Because DPA did not properly invoke Government Code § 19130(a) as justification for the Contract, it cannot now claim that the Contract is a cost-savings contract.

Finally, DPA has not submitted any information that shows that Cohn can serve as the fifth member of the BOA any more efficiently or effectively than a state employee could, or that that position is so highly specialized or technical in nature that the necessary expert knowledge, experience or ability are not available through the civil

service system. DPA has, therefore, failed to show that the Contract is justified under Government Code § 19130(b)(3).

The Contract is not justified under Government Code § 19130(b)(5)

Government Code § 19130(b)(5) authorizes a state agency to enter into a personal services contract with a private entity 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 unbiased findings in cases where there is a clear need for a different, outside perspective.

DPA asserts that the Contract is justified under Government Code § 19130(b)(5) because SPB ALJs cannot act independently of the Board and are rank-and-file employees of the state, which is one of the parties to all disciplinary disputes. According to DPA, these facts show that SPB ALJs do not have the outside perspective of an independent contractor.

Government Code § 19130(b)(5) allows a state agency to contract with a private contractor when legislative, administrative or legal goals respecting the state agency cannot be accomplished through the use of civil service personnel. In order to meet the conditions of Government Code § 19130(b)(5), a state agency must show either that civil service personnel 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. DPA has not shown that either of these conditions exist in this case.

First, while many of SPB's ALJs are rank-and-file state employees,²² this fact, standing alone, does not create a conflict of interest for those ALJs adjudicating minor adverse actions involving Unit 8 employees. Pursuant to Government Code § 19574, it is an employee's appointing power that takes adverse action against an employee and is a party to the adverse action appeal, not the state in general. Because it is the Department that will be prosecuting the minor adverse actions against its Unit 8 employees, an SPB ALJ will not have a conflict of interest merely because he or she is ultimately an employee of the state.²³ DPA has, therefore, failed to show that SPB ALJs would have an impermissible conflict of interest performing the contracted services.²⁴

Second, DPA has not shown that the different, outside perspective of a private contractor is needed to ensure independent and unbiased findings in Unit 8 disciplinary disputes. DPA has provided no information that demonstrates that SPB ALJs have any biases against or in favor of either the Department or Unit 8 employees that would cause them to be incapable of rendering independent and unbiased decisions if they were to sit as the fifth member on the BOA.²⁵

²² The Board's Chief Administrative Law Judge is not a rank-and-file state employee.

²³ If an SPB ALJ has a conflict of interest in a particular adverse action because of a prior relationship with either the appointing power or the disciplined employee, the parties may ask that ALJ to recuse him or herself and, in the event of a recusal, the Board will refer that matter to another ALJ. If the Board determines that all of its ALJs have a conflict adjudicating an adverse action, then the Board may refer the matter to the Office of Administrative Hearings to provide an administrative law judge to conduct an evidentiary hearing and prepare a proposed decision for Board review.

²⁴ If SPB ALJs were found to have a conflict of interest hearing minor adverse actions against Unit 8 employees merely because the state is both the ALJs' and the employees' ultimate employer, it would mean that SPB ALJs also would have a conflict of interest hearing any adverse actions against any civil service employees under existing civil service rules. Clearly, this argument has no merit.

²⁵ If SPB ALJs were found to be unable to issue independent and unbiased findings in minor adverse actions against Unit 8 employees merely because they and those employees are civil service employees, it would mean that SPB ALJs also would be unable to issue independent and unbiased findings in any adverse actions against any civil service employees under existing civil service rules. Once again, this argument clearly has no merit.

DPA has, therefore, failed to show that the Contract is justified under Government Code § 19130(b)(5).

CONCLUSION

The Board finds that DPA has failed to justify the Contract under either Government Code §§ 19130(b)(2), (3) or (5). The Board, therefore, sustains the Executive Officer's decision disapproving the Contract.

STATE PERSONNEL BOARD

Florence Bos, President
Ron Alvarado, Vice President
Richard Carpenter, Member
William Elkins, Member
Sean Harrigan, Member

* * * * *

I hereby certify that the State Personnel Board made and adopted the foregoing Decision at its meeting on April 4, 2000.

Walter Vaughn
Executive Officer
State Personnel Board

[DPA-ACSA-00-01-dec]