



## **BACKGROUND**

CDCR administers California's prison and parole systems. It operates institutions and offices throughout the State, with a workforce of approximately 60,000 employees. Between June 2022 and February 2023, current or former employees filed the following seven complaints suing CDCR over various employment disputes:<sup>1</sup>

- On June 23, 2022, Brent Gearhart (Plaintiff Gearhart) filed a Complaint against CDCR in the Sacramento County Superior Court. Plaintiff Gearhart alleges CDCR: failed to engage in the interactive process and retaliated against them in violation of the Fair Employment and Housing Act (FEHA); and retaliated against them in violation of the California Family Rights Act (CFRA). They demand a jury trial, injunctive relief, damages, and attorney's fees and costs.
- On July 14, 2022, Timothy Plevack (Plaintiff Plevack) filed a Complaint against CDCR in the San Joaquin County Superior Court. Plaintiff Plevack alleges CDCR violated FEHA by discriminating and retaliating against them, failing to reasonably accommodate, and failing to engage in the interactive process. They demand a jury trial, damages, lost earnings, and attorney's fees and costs.
- On or about July 20, 2022, Laura Kraft (Plaintiff Kraft) filed a Complaint against CDCR and CDCR employee Kevin Loe in the Sacramento County Superior Court. Plaintiff Kraft alleges CDCR violated Government Code section 12940 by: discriminating against them, harassing them, and retaliating against them; failing to reasonably accommodate; and failing to engage in the interactive process. They demand a jury trial, damages, injunctive relief, and attorney's fees and costs.
- On or about August 19, 2022, Rooney Hogan (Plaintiff Hogan) filed a Complaint against CDCR, Platinum Empire Group, Inc, Healthcare Staffing, Inc, and Management Solution, LLC in the Solano County Superior Court. Plaintiff Hogan alleges that CDCR: harassed and discriminated against them, failed to accommodate, failed to engage in the interactive process, and failed to prevent harassment, discrimination, and retaliation in violation of Government Code section 12940; retaliated against them in violation of FEHA; interfered with their right to medical leave and retaliated against them in violation of CFRA; failed to pay minimum wages, overtime wages, and wages owed, and failed to provide accurate, itemized wage statements in violation of the Labor Code; and engaged in unlawful and unfair business practices in violation of the Business

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<sup>1</sup> The record before the Board includes an additional employment dispute complaint, filed by Shaniece Camarillo (Plaintiff Camarillo) on January 21, 2022, in the Solano County Superior Court. However, the record does not include a related personal services contract. Absent evidence that CDCR executed a contract concerning Plaintiff Camarillo's Complaint, it is irrelevant to this matter.

and Professions Code. They demand a jury trial, damages, penalties, restitution, and attorney's fees and costs.

- On November 15, 2022, Maribel Hinojosa, Monica Lopez, Jamie Rodriguez, and Octavio Jauregui (Hinojosa Plaintiffs) filed a Complaint against CDCR and CDCR employees Brad Beard and Anthony Montemayor. The Hinojosa Plaintiffs allege that CDCR: discriminated against them, harassed them, retaliated against them, and failed to prevent those harms in violation of FEHA; and discriminated and retaliated against them in violation of CFRA. They demand a jury trial, damages, and attorney's fees and costs.
- On January 31, 2023, Ryan Crowley (Plaintiff Crowley) filed a Complaint against CDCR in the Sacramento County Superior Court. Plaintiff Crowley alleges that CDCR: engaged in whistleblower retaliation in violation of Labor Code section 1102.5; and retaliated against them in violation of Government Code section 12940. They demand a jury trial, damages, and attorney's fees and costs.
- On February 11, 2023, Anthony Roadman (Plaintiff Roadman) filed a Complaint against CDCR in the United States District Court for the Eastern District of California. Plaintiff Rodman alleges CDCR: discriminated against him, failed to prevent discrimination, and failed to engage in interactive process in violation of Government Code section 12940; and discriminated against them in violation of the Americans with Disabilities Act. They demand a jury trial, damages, and attorney's fees and costs.

Additionally, on February 15, 2023, the American Civil Liberties Union Foundation of Northern California (ACLU NorCal) filed a Petition for Writ of Mandate against CDCR in the San Francisco County Superior Court. The ACLU NorCal alleges CDCR failed to comply with California Public Records Act when it refused to release records or released redacted records. The ACLU NorCal seeks production of records, specific justification for any withheld records, and attorney's fees and costs.

Under Government Code section 11040, CDCR may not be represented in a judicial adjudicative proceeding by any counsel other than the Office of the Attorney General (OAG), unless the OAG provides its written consent.<sup>2</sup> CDCR accordingly requested OAG representation concerning the eight matters described above.

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<sup>2</sup> Section 11040 provides, in relevant part:  
(b) As used in this article:

Historically, the OAG accepts representation for CDCR on all employment litigation matters, assigning such cases to attorneys in its Employment and Administrative Mandate section (EAM). However, in 2022 and 2023 EAM experienced a significant increase in vacancies. In January 2021, the section had 111 authorized positions and 8 vacancies. One year later in January 2022, it had 112 authorized positions and 13 vacancies. By July 2022, it had 115 positions and 21 vacancies. The trend continued through the end of the year, as in November 2022 the number of vacancies increased to 26. And by April 2023, EAM had 115 positions and 28 vacancies. Thus, over about 15 months from January 2022 to April 2023, EAM's vacancy rate rose from 11.6% to 24.3%.

The OAG attempted to hire qualified candidates to fill those vacancies. The Civil Division Chief and EAM's Senior Assistant Attorney General met monthly with the Attorney Hiring Unit and the Recruiting Unit to address the matter. They gave high priority to contacting potential applicants with relevant experience, screening applications weekly, and expediting reference checks and interviews. In 2022, the OAG issued approximately 24 job control postings seeking to hire attorneys for EAM. Those job control postings frequently yielded small applicant pools and often drew no viable candidates. Despite making some hires in 2022, the number of vacancies continued to climb due to unsuccessful hiring efforts and continued attrition.

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- (1) "In-house counsel" means an attorney authorized to practice law in the State of California who is a state employee, including an excluded or exempt employee, other than an employee of the Office of the Attorney General.
  - (2) "Outside counsel" means an attorney authorized to practice law in the State of California who is not a state employee, including an excluded or exempt employee.
  - (c) Except with respect to employment by the state officers and agencies specified by title or name in Section 11041 or when specifically waived by statute other than Section 11041, a state agency shall obtain the written consent of the Attorney General before doing either of the following:
    - (1) Employing in-house counsel to represent a state agency or employee in any judicial or administrative adjudicative proceeding.
    - (2) Contracting with outside counsel.

The net loss in attorneys negatively impacted EAM's ability to accept new matters into its caseload. Attrition also exacerbated the problem, because existing caseloads were redistributed among the fewer number of remaining attorneys. Due to the high number of vacancies, in July 2022 EAM was temporarily authorized to return some cases to client agencies due to insufficient resources.<sup>3</sup> Accordingly, EAM began considering incoming matters on an individual basis to determine whether it had sufficient resources available to accept the case. EAM did not reject all new matters, and continued to accept some employment litigation representation for CDCR. However, it declined to represent CDCR in the eight matters at issue here, and consented to CDCR using counsel other than the OAG. Those rejections occurred over an eight-month period, as follows: in August 2022, the Complaints by Plaintiffs Kraft, Hogan, and Plevack; in December 2022, the Hinojosa Plaintiffs' Complaint; in February 2023, Plaintiff Gearhart's Complaint; and in March 2023, the Complaints by Plaintiffs Crowley and Roadman, and the ACLU NorCal's Petition.<sup>4</sup>

The OAG's letters to CDCR concerning each case cited a lack of resources as the reason for authorizing CDCR to utilize counsel other than the OAG, stating either, "The Employment and Administrative Mandate Section currently has insufficient staff to accept new employment cases in certain areas in light of its existing caseload," or, "Because of existing attorney vacancies, this office currently lacks sufficient attorney resources to represent CDCR in this matter." If all the positions authorized for EAM had been filled, it would have been able to accept representation for CDCR in those eight matters. The

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<sup>3</sup> That authorization expired on June 30, 2023, but was subject to extension.

<sup>4</sup> The record before the Board also includes a March 2023 letter from the OAG authorizing CDCR to utilize counsel other than the OAG concerning a complaint filed by Rashaun Dean (Plaintiff Dean) in the Kern County Superior Court. However, the record does not include a related personal services contract. Absent evidence that CDCR executed a contract concerning Plaintiff Dean's Complaint, it is irrelevant to this matter.

OAG intends to continue its efforts to fill vacancies and return to its practice of representing CDCR on all employment litigation matters.

CDCR employs approximately 200 attorneys in its Office of Legal Affairs.<sup>5</sup> The Office of Legal Affairs is organized into 14 teams, each of which is dedicated to different aspects of CDCR's internal needs for legal support and advice. Those needs generally concern ensuring operations are conducted consistent with legal requirements, incorporating court mandates and other new legal requirements into existing procedures, and proactively identifying needs for operational changes. The areas of law CDCR attorneys work with include healthcare, public contracting, accounting services, construction management, facilities planning, class action lawsuits, regulatory work, and employee discipline. Some CDCR attorneys liaison with litigation counsel, providing judicial litigation support such as identifying relevant documents and witnesses, and serve as client representatives for CDCR in settlement negotiations or at trials. And some attorneys, such as those on the Employment Advocacy and Prosecution Team, conduct administrative litigation. However, CDCR does not task its attorneys with conducting judicial litigation.

Attorneys in the Office of Legal Affairs maintain full workloads, and additionally are expected to be immediately available to address issues that arise during day-to-day CDCR operations. In 2021 and 2022 CDCR's need for internal legal services increased, particularly due to increased activity in ongoing class action lawsuits. On January 10, 2022, CDCR submitted a Budget Change Proposal for fiscal year 2022–2023 seeking funding for six additional attorneys, as well as eight support staff, for its Class Action Team. In justification CDCR explained that staff was unable to meet the current workload

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<sup>5</sup> Specifically, 31 Attorneys, 82 Attorney III's, 19 Attorney IV's, 2 Attorney V's, and 28 supervising or managing attorneys.

and the additional positions would “right-size” staff commensurate with the workload.<sup>6</sup>

Diverting CDCR attorneys from their ordinary assigned duties and existing workloads would negatively impact their ability to attend to CDCR’s legal needs.

After receiving the OAG’s consent to utilize counsel other than the OAG in the eight matters at issue, CDCR contracted with private law firms for legal services. CDCR executed the eight contracts over a nine-month period from September 2022 to May 2023, as follows:

- On September 22, 2022, CDCR signed Agreement Number C5611127 with Cregger Law, LLP, concerning Plaintiff Plevack’s Complaint. The contract term is from August 4, 2022, to June 30, 2024, and the maximum value is \$69,215.00.
- On December 12, 2022, CDCR signed Agreement Number C5611225 with Nield Law Group, NPC, concerning Plaintiff Kraft’s Complaint. The contract term is from September 1, 2022, to June 30, 2025, and the maximum value is \$171,965.00.
- On December 21, 2022, CDCR signed Agreement Number C5611194 with Burke, Williams & Sorensen, LLP, concerning Plaintiff Hogan’s Complaint. The contract term is from September 1, 2022, to June 30, 2025, and the maximum value is \$157,150.00.
- On February 28, 2023, CDCR signed Agreement Number C5611385 with Burke, Williams & Sorensen, LLP, concerning the Hinojosa Plaintiff’s Complaint. The contract term is from January 3, 2023, to June 30, 2025, and the maximum value is \$176,770.00.
- On April 25, 2023, CDCR signed Agreement Number C5611515 with Longyear & Lavra, LLP, concerning Plaintiff Gearhart’s Complaint. The contract term is from February 22, 2023, to June 30, 2026, and the maximum value is \$46,790.00.
- On May 5, 2023, CDCR signed Agreement Number C5611513 with McNamara, Ambacher, Wheeler, Hirsig & Gray, LLP, concerning Plaintiff Crowley’s Complaint. The contract term is from March 9, 2023, to June 30, 2025, and the maximum value is \$138,610.00.

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<sup>6</sup> The Class Action Team does not litigate in class action lawsuits. It sees to various tasks attendant to class actions, such as liaising with litigation counsel, conducting monitoring, and otherwise ensuring compliance with court orders. CDCR’s request for additional attorneys seeks to provide the Class Action Team with resources not only to properly manage the current workload, but to expand its ability to proactively manage class actions by implementing long-term solutions, with the goal of terminating existing class actions and preventing future litigation.

- On May 11, 2023, CDCR signed Agreement Number C5611557 with Kronick, Moskovitz, Tiedman & Girard, APC, concerning the ACLU NorCal's Petition. The contract term is from April 3, 2023, to June 30, 2025, and the maximum value is \$122,250.00.
- On May 31, 2023, CDCR signed Agreement Number C5611554 with Andrada & Associates Professional Corporation, concerning Plaintiff Roadman's Complaint. The contract term is from March 21, 2023, to June 30, 2025, and the maximum value is \$149,650.00.

Each of the eight contracts is for comprehensive legal services covering all aspects and phases of litigation, including appellate proceedings.<sup>7</sup> The contracts range in value from \$46,790 to \$176,770, and have an aggregate maximum value of \$1,148,850.

At some point between May 2, 2023, and June 16, 2023, CDCR contacted three other state agencies to request legal representation for CDCR on the eight matters—the California Department of General Services (DGS), the California Department of Human Resources (CalHR), and the California Department of Transportation (Caltrans). None of the three departments were able to represent CDCR on any matter.

### **PROCEDURAL HISTORY**

On May 2, 2023, the California Attorneys, Administrative Law Judges, and Hearing Officers in State Employment union (CASE) requested SPB review the eight contracts for legal services executed by CDCR, pursuant to California Code of Regulations, title 2,

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<sup>7</sup> Each contract provides that:

The Contractor's legal representation shall include, but not be limited to:

1. Legal research and review of all documents and other evidentiary materials;
2. Investigative, secretarial, and clerical support services necessary to perform the legal representation in a professional manner;
3. Develop strategy and tactics in complex disputes or litigation;
4. Draft and file pleadings, discovery motions, dispositive motions, pre-trial and post-trial motions, and appellate briefs;
5. Respond to legal correspondence;
6. Prepare and attend all law and motion hearings, discovery proceedings, hearings on orders to show cause, writs, trials, and administrative hearings;
7. Prepare and attend all settlement conferences and mediations;
8. Conduct and participate in trial proceedings; and
9. Prepare for and attend all appellate proceedings.



section 547.64.<sup>8</sup> CASE asserted the OAG's "perfunctory assertion" that it lacked resources was an insufficient basis for the contracts, as the Board has consistently held that lack of staffing is not a valid justification for outsourcing under Government Code section 19130. CASE requested that the contracts be disapproved. CDCR filed a Response.

The Executive Officer considered the parties' arguments and exhibits, and issued a decision on August 21, 2023. The Executive Officer determined that the contracts were not justified under Section 19130 subdivisions (b)(3) or (b)(10), and accordingly disapproved them.

CDCR timely appealed the Executive Officer's decision. The SPB set a briefing schedule and set the matter for oral argument at its January 11, 2024, Board Meeting.

CDCR filed an Initial Brief, reasserting, among other arguments, that the contracts are justified under Section 19130, subdivisions (b)(3) and (b)(10). CDCR also filed a Compendium of Evidence containing 24 Exhibits, including 6 new exhibits not submitted to the Executive Officer. CASE filed a Response Brief, which argued the contracts were not justified and objected to CDCR's additional exhibits. CDCR filed a Reply Brief.

Oral argument on this matter was heard as scheduled at the January 11, 2024, Board Meeting. Because this matter is an appeal from the Executive Officer's decision, the Executive Officer recused themselves from any deliberation or discussion in this matter. The Legal Office was also recused, as it assisted the Executive Officer with their decision-making process.

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<sup>8</sup> CASE also challenged a contract in a ninth matter, *Camarillo v. CDCR*. However, as noted above in footnote 1, the record before the Board does not include a contract concerning Plaintiff Camarillo's Complaint.

## **ISSUES**

The following issues are before the Board for consideration:

- (1) Should CASE's objection to CDCR's additional exhibits be sustained?
- (2) Are CDCR's contracts for legal services authorized under Government Code section 19130, subdivision (b)(3)?
- (3) Are CDCR's contracts for legal services authorized under Government Code section 19130, subdivision (b)(10), or any other provision?

## **DISCUSSION**

### **I. Preliminary Matters**

#### **A. Additional Exhibits Submitted on Appeal**

CDCR's Compendium of Evidence submitted to the Board on appeal includes six exhibits that were not part of the record before the Executive Officer. Specifically: Exhibit 19, the Executive Officer's decision; Exhibit 20, a supplemental declaration by EAM Senior Assistant Attorney General Chris Knudson (Knudson) providing an update on EAM's staffing situation; Exhibit 21, CDCR population projections for adult institutions, parolees, and juvenile institutions for Spring 2023; Exhibit 22, numbers of active State employees by department from the State Controller's Office; Exhibit 23, Plaintiff Plevack's Complaint; and Exhibit 24, a Minute Order concerning Plaintiff Plevack's Complaint scheduling a settlement conference and date for assigning a jury trial.

CDCR argues the additional exhibits should be admitted because they are not unduly prejudicial to CASE. With the exception of Exhibit 20 (Knudson's supplemental declaration), CDCR asserts the Executive Officer's decision relied upon the information contained in the exhibits. As to Exhibit 20, CDCR states that Knudson merely provides an update concerning hiring efforts occurring after the Executive Officer's decision. CASE objects to the new exhibits, arguing that allowing supplemental evidence on appeal provides CDCR with a "free trial" to test their arguments before the Executive Officer

before shoring up arguments and assembling evidence for the “real trial” before the Board. CASE asserts such piecemeal presentation is prejudicial because it leaves CASE scrambling to counter new information. CDCR replies that the additional evidence it provided is minimal, and reiterates that it is primarily either information incorporated into the Executive Officer’s decision or public information equally available to CASE. CDCR emphasizes that Knudson’s supplemental declaration concerns the same type of information contained in their original declaration, which was submitted to the Executive Officer.

As a general rule, the Board will decide personal services contract appeals based on the record submitted to the Executive Officer. (Cal. Code Regs., tit. 2, § 547.66.) Upon objection, additional evidence or information will be rejected if it is unduly prejudicial to the objecting party. (*Ibid.*)

Failing to submit a substantial record before the Executive Officer only to later assemble evidence before the Board is grounds for rejecting new information. Compiling evidence in the first instance on appeal subverts the review process and prejudices the opposing party by preventing issues from being fully developed during the initial adjudication. The parties are responsible for substantiating their positions before the Executive Officer. (Cal. Code Regs., tit. 2, §§ 547.61, subds. (a)(1)–(2), 547.62, subds. (a)–(b).) Whether manipulative or inept, failure to do so will not be tacitly excused through allowing record expansion on appeal. Those concerns, however, do not appear in the case at hand. CDCR submitted a substantial evidentiary record before the Executive Officer, including numerous documents and five supporting declarations. CDCR’s submission of additional exhibits on appeal thus is not a run-around on its obligation to meaningfully develop the evidence before the Executive Officer.

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CDCR's additional evidence is not otherwise unduly prejudicial to CASE. It is primarily uncontroversial, background-type information that does not strike at the heart of the issues. The notable exception is Knudson's supplemental declaration, which is substantive and concerns a central issue—the OAG's staffing situation and hiring efforts.<sup>9</sup> But that supplemental declaration follows from Knudson's original declaration, which addressed the same matters and was submitted to the Executive Officer. It is apparent from the record that the OAG's staffing and hiring were fairly put at issue below. Thus, CDCR is not introducing entirely novel evidence. Additionally, it appears that CASE did not counter Knudson's original declaration by presenting any contrary evidence. It is therefore unclear how CDCR submitting further information along the same lines unfairly disadvantages CASE, and CASE has not articulated any particular difficulty in responding or other resulting disadvantage. Indeed, rather than disputing Knudson's supplemental declaration, CASE cited it in its own Response Brief.

For these reasons, the six additional exhibits CDCR submitted on appeal are not unduly prejudicial to CASE. They are therefore accepted.

## **II. The Implied Civil Service Mandate and Personal Services Contracts**

The California Supreme Court has recognized that Article VII of the California Constitution provides for an implied "civil service mandate." (*Prof. Engineers in Cal. Government v. Dept. of Transportation* (1997) 15 Cal.4th 543, 547.) This mandate "emanates from an implicit necessity for protecting the policy of the organic civil service mandate against dissolution and destruction." (*Cal. State Employees Assn. v. Williams* (1970) 7 Cal.App.3d 390, 397.) In effect, the implied civil service mandate prohibits state

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<sup>9</sup> Knudson's supplemental declaration, dated October 27, 2023, attests that: as of September 30, 2023, due to continued hiring efforts the number of vacancies in EAM has been reduced to 16; EAM's temporary authorization to return cases to client agencies expired on June 30, 2023, and has not been extended; and EAM is once again accepting all new matters for client agencies, including CDCR.

agencies from contracting with private entities to perform work that is historically and customarily performed by, and can adequately and competently be performed by, the civil service workforce. (*Prof. Engineers in Cal. Government, supra*, 15 Cal.4th at p. 547.)

That personal services contract prohibition, however, is subject to exceptions. The Legislature has set forth standards for the use of personal service contracts in Government Code section 19130. Personal service contracts are permissible to achieve cost savings under the criteria of Section 19130, subdivision (a), and for other non-cost-savings reasons as designated under Section 19130, subdivision (b).

An employee organization such as CASE may request that the Board review a personal services contract for compliance with Section 19130. (Gov. Code, § 19132; Cal. Code Regs., tit. 2, §§ 547.61, 547.70.) The Board has delegated such review to the Executive Officer, subject to appeal to the Board. (Pub. Contract Code, § 10337, subd. (c); Cal. Code Regs., tit. 2, § 547.66; *Dept. of Personnel Admin. (2000) PSC No. 00-01*, p. 6.) The scope of the 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. (*CASE (2005) PSC 05-01*, p. 4.)

The department seeking the personal services contract bears the burden of establishing applicability of an exception. (*State Compensation Ins. Fund v. Riley (1937)* 9 Cal.2d 126, 134–135; Cal. Code Regs., tit. 2, § 547.60.) To meet that burden, the department must provide specific and detailed factual information demonstrating that one or more of the statutory exceptions within the subdivisions of Section 19130 apply. (Cal. Code Regs., tit. 2, § 547.62, subd. (b)(1).) The department must provide a copy of the disputed contract, as well as documentary evidence, or declarations, or both, supporting its position. (*Id.* at § 547.62, subds. (a), (b)(2).)

CDCR asserts the eight personal services contracts challenged by CASE are justified under Section 19130, subdivisions (b)(3) and (b)(10), as well as other provisions.

**A. Government Code Section 19130, Subdivision (b)(3)**

Section 19130, subdivision (b)(3) provides that personal service contracts are permissible where:

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.

To meet that exception, CDCR 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. (*State Compensation Ins. Fund* (2015) PSC No. 16-02, p. 22 [citing *SEIU, Local 1000* (2008) PSC No. 05-03, p. 8; *Dept. of Pesticide Regulation* (2001) PSC No. 01-09, pp. 12–13].)

Under the first prong of inquiry, CDCR has not shown that there are no existing civil service job classifications suitable for handling judicial litigation. The Deputy Attorney General (DAG) series is dedicated to “perform[ing] a wide variety of legal work concerned with representing the State, most of its officers, departments, boards, commissions, and other such bodies before the state and federal courts,” including “preparing pleading and other legal materials for trials, hearings, and other legal proceedings,” and “presenting criminal and civil cases at trial (jury and nonjury).”<sup>10</sup> DAG III’s “are assigned difficult litigation and handle cases that may be appealed to the highest courts;” DAG IV’s and V’s “are assigned litigation of great difficulty and handle cases that are likely to be appealed to the highest courts;” and DAG

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<sup>10</sup> Deputy Attorney General series classification specification available at: <https://www.calhr.ca.gov/state-hr-professionals/pages/5730.aspx>

Supervisors “may personally perform the most difficult and complex litigation.”

Additionally, incumbents in the Attorney series “perform a broad range of legal work such as but not limited to preparing and litigating civil, administrative and/or criminal cases before boards, commissions and the courts,” and may “represent departments in hearings and litigation.”<sup>11</sup> An Attorney III “may independently conduct complex and difficult hearings and trials;” an Attorney IV “may be assigned sensitive and difficult litigation and handle cases that may be appealed to the highest courts;” and an Attorney V may “independently perform the most difficult and complex legal work and litigation.”

Despite the existence of these classifications, CDCR argues the judicial litigation services it needed were not available within the civil service because the OAG declined representation due to lack of resources and CDCR’s own attorneys do not conduct judicial litigation. Those circumstances do not justify outsourcing. The mere circumstance that the OAG declined representation due to lack of resources is insufficient, because capable employees could properly be appointed to the DAG series. Similarly, that CDCR has not tasked its current attorney workforce with judicial litigation is not determinative, because CDCR could properly appoint capable employees to the Attorney series. CDCR makes no assertion that the litigation services it needed are so unique or complex as to be beyond the scope of the capabilities encompassed by the DAG or Attorney series classifications. And indeed, the evidence shows that DAG’s routinely provide such litigation services. The evidence thus establishes that classifications suitable for performing the needed judicial litigation services exist within the civil service.

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<sup>11</sup> Attorney series classification specification available at: <https://www.calhr.ca.gov/state-hr-professionals/pages/5797.aspx>

Turning to the second prong of inquiry, here CDCR adequately demonstrated inability to successfully hire suitable candidates to those classifications. The evidence establishes that the OAG had a sufficient number of authorized positions for EAM, but a high number of those positions were vacant—the vacancy rate steadily climbed from 11.6% in January 2022 to 24.3% by April 2023. The OAG made diligent efforts to fill those vacancies, making recruiting and hiring a priority and issuing approximately 24 job control postings in 2022. But those efforts frequently yielded small and unsatisfactory candidate pools, while EAM continued to experience attrition. By July 2023, EAM could no longer handle the entire workload from its client agencies, despite the OAG’s reasonable hiring efforts.<sup>12</sup>

It is noted that CDCR did not attempt to hire new employees into the Attorney series to meet its need for judicial litigation services. While the Board requires reasonably diligent hiring efforts, it will not demand exhaustive efforts or efforts that are unlikely to produce positive results. Here, the evidence shows that the OAG was struggling to find suitable candidates for EAM. There is no good reason to suppose that CDCR would have been successful in hiring litigators while the OAG was unable to do so.

For these reasons, CDCR has demonstrated that although classifications appropriate to perform the work exist, suitable candidates could not be appointed despite reasonably diligent hiring efforts.

CASE argues the OAG’s lack of adequate staffing does not justify outsourcing, emphasizing that the Board has consistently held “Government Code § 19130(b)(3) 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.” (*Dept.*

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<sup>12</sup> There is no evidence suggesting that the OAG’s hiring efforts were not legitimate, good faith attempts to fill EAM positions.



*of Pesticide Regulation, supra*, PSC No. 01-09 at pp. 12–13.) That holding remains valid. Where the civil service workload has outgrown the existing workforce, the solution is to bolster the civil service to match that workload. Such may be accomplished through creating more positions in appropriate classifications, or by filling vacancies in existing positions. Departments may not continually resort to outsourcing rather than creating and filling needed civil service positions—doing so would degrade the civil service in precisely the manner prohibited by the implied civil service mandate.

However, the Board has further developed its holding and, as noted above, explained that Section 19130, subdivision (b)(3) may apply where the staffing shortage is due to an inability to hire a sufficient number of employees to perform the needed work despite legitimate, good faith hiring efforts. (*SEIU, supra*, PSC No. 05-03 at p. 8; *see also, Prof. Engineers in Cal. Government, supra*, 15 Cal. 4th at pp. 567, 571–572, and *Cal. Correctional Peace Officers Assn. v. Schwarzenegger* (2008) 163 Cal.App.4th 802, 823). In such cases, the inadequate staffing is not a State-created shortage and the problem cannot be readily remedied by creating new positions. Indeed, in the matter at hand the OAG had an adequate number of positions allocated to EAM, and even increased the number of positions during 2022 from 112 to 115. The evidence was undisputed that if the positions in EAM had been filled, it would have been able to accept all the work that CDCR contracted out. The fundamental problem, thus, was not a lack of authorized positions. Nor was it neglecting vacancies. Rather, the crux of the problem was an inability to fill existing positions despite diligent efforts.

Concerning the availability of litigation services within the civil service, the Board has also stated that “a state agency has an obligation to request that an agency other than the OAG provide legal representation only to the extent that that other agency offers such legal representation.” (*Internat. Union of Engineers* (2002) PSC No. 02-02, p. 9.)

There is no evidence in the record here as to whether any agencies other than the OAG were offering legal representation services. Nonetheless, CDCR inquired after legal representation services from three other departments, DGS, CalHR, and Caltrans. None of those departments were able to assist CDCR. CASE suggests that CDCR must seek assistance from every department, board, and commission in the civil service. As there are over 112 State departments, boards, and commissions, that suggestion is unreasonable. While CDCR did not make many inquiries, it directed its inquiries to large departments with reasonable potential for being able to offer assistance. CDCR could have made further inquiries—particularly among departments, like Caltrans, that are authorized to represent themselves without consent from the OAG and thus are likely to employ attorneys with litigation experience. (Gov. Code, § 11041.) But, CDCR's efforts are satisfactory.

And finally, where the OAG declines legal representation due to lack of staffing despite reasonable hiring efforts, and reasonable efforts to obtain representation through another state agency are unsuccessful, a department must also consider the availability of its own attorneys. The Board recognizes that CDCR is one of the many departments not authorized to represent itself in judicial adjudicative proceedings without the OAG's consent. (Gov. Code, §§ 11040–11042.) And that as a result of the OAG historically declining to grant such consent, CDCR currently does not task its own attorney workforce with judicial litigation and has not developed litigation resources. The OAG declining representation does not inherently justify outsourcing legal services. Neither does the circumstance that CDCR does not currently utilize its own attorneys for judicial litigation. If CDCR's attorney workforce is reasonably available to handle the legal representation,

then it must do so.<sup>13</sup>

CDCR presented evidence that the attorneys in its Office of Legal Affairs are occupied with full workloads, and that in 2022 CDCR requested additional positions to address an increasing workload. Under those circumstances absorbing a caseload of unfamiliar litigation work would be detrimental to CDCR attorneys' existing workload and ability to fulfill CDCR's other needs for legal services. The Board is satisfied that CDCR attorneys were not reasonably available to divert from their ordinary tasks to a judicial litigation caseload.

In sum, CDCR has met its burden of presenting specific and detailed factual information demonstrating that the contracted legal services were not available within the civil service by showing that: (1) reasonably diligent hiring efforts to classifications appropriate for providing the needed legal services were unsuccessful; (2) reasonable efforts to obtain the needed legal services from departments other than the OAG were unsuccessful; and (3) CDCR's own attorney workforce was not reasonably available to provide the needed legal services. CDCR's eight contracts for legal services were therefore justified under Section 19130, subdivision (b)(3).

**B. Government Code Section 19130, Subdivision (b)(10), and Other Provisions**

CDCR additionally argues that the eight contracts were justified under Government Code section 19130, subdivision (b)(10) (which permits contracting when "[t]he services are of such an urgent, temporary, or occasional nature that the delay incumbent in their

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<sup>13</sup> CDCR's argument that Government Code section 11040 outright prohibits it from employing attorneys for judicial litigation is not well taken. Nothing in Section 11040 prohibits CDCR from developing and utilizing its own judicial litigation team, provided that the OAG consents. Indeed, CDCR attorneys currently conduct administrative litigation even though Section 11040 applies equally to administrative adjudicative proceedings. CDCR thus could take a similar course with respect to judicial adjudicative proceedings. If, for example, the OAG decided to manage its resources differently and permanently decline representation on a particular type of judicial litigation, CDCR would be required to adjust its practices and prepare to accept that expected caseload. Contracting out would not be an acceptable solution when CDCR could create and fill Attorney positions to handle the work.

implementation under civil service would frustrate their very purpose”); Section 19130, subdivision (b)(2) (which allows outsourcing when “[t]he contract is for a new state function and the Legislature has specifically mandated or authorized the performance of the work by independent contractors”); and because of potential conflicts should a CDCR attorney represent both the department and individual employees. Because the Board finds the contracts were justified under Section 19130, subdivision (b)(3), it declines to consider CDCR’s additional arguments.

**CONCLUSION**

The Board finds that CDCR has submitted adequate information to show that the eight contracts entered into between CDCR and various law firms for legal services are authorized under Government Code section 19130, subdivision (b)(3). The Board therefore approves the contracts.

\* \* \* \* \*

**STATE PERSONNEL BOARD**

Shawnda Westly, President  
Kathy Baldree, Vice President  
Kimiko Burton, Member  
Ana Matosantos, Member  
Dr. Gail Willis, Member

\* \* \* \* \*

I hereby certify that the State Personnel Board made and adopted the foregoing Decision at its meeting on April 8, 2024.



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Amy Friedman  
Administrative Law Judge  
State Personnel Board

## PROOF OF SERVICE BY E-MAIL

Re: *California Department of Corrections and Rehabilitation v. CASE*  
SPB Case No.: 23-0028(b)-PSC  
Board Decision PSC No. 24-02

I, Caroline Molumby, declare:

I am over the age of 18 years and not a party to this action. I declare that I am employed by the California State Personnel Board, 801 Capitol Mall, Sacramento, California 95814.

On April 16, 2024, I caused the following document(s) to be served on the addressee:

**BOARD DECISION IN THE APPEAL FROM THE EXECUTIVE OFFICER'S  
AUGUST 21, 2023, DISAPPROVAL OF CONTRACTS BETWEEN THE  
CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION AND  
VARIOUS LAW FIRMS FOR LEGAL SERVICES**

**By Electronic mail** I caused such document(s), in electronic format, to be sent to the e-mail addresses listed below:

Samuel Richman  
Department of Justice  
300 South Spring Street, Suite 1702  
Los Angeles, CA 90013-1230  
Email: [Samuel.Richman@doj.ca.gov](mailto:Samuel.Richman@doj.ca.gov)

Patrick Whalen  
CASE  
123 I Street, Suite 300  
Sacramento, CA 95814  
Email: [patrick@patrickjwhalenlaw.com](mailto:patrick@patrickjwhalenlaw.com)

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on April 16, 2024, at Sacramento, California.

*Caroline Molumby*

Caroline Molumby  
Legal Analyst