

THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by

**California State Attorneys,
Administrative Law Judges, and
Hearing Officers in State Employment**

from the Executive Officer's July 27, 2024,
Approval of the Contract Between the
California Department of Justice and Lief,)
Cabraser, Heimann & Bernstein, LLP for)
Legal Services)

BOARD DECISION

PSC NO. 24-03

December 9, 2024

APPEARANCES: Patrick Whalen, General Counsel, on behalf of the California State Attorneys, Administrative Law Judges, and Hearing Officers in State Employment; Gabrielle H. Brumbach, Supervising Deputy Attorney General, on behalf of the California Department of Justice.

BEFORE: Kathy Baldree, Vice President; Kimiko Burton, Ana Matosantos, and Dr. Gail Willis, Members.¹

DECISION

The California State Attorneys, Administrative Law Judges, and Hearing Officers in State Employment (CASE) appealed from the State Personnel Board (SPB) Executive Officer's July 27, 2024, decision approving a contract for legal services between the California Department of Justice (DOJ) and Lief, Cabraser, Heimann & Bernstein, LLP (Lief Cabraser). Four of the five members of the State Personnel Board (Board) find that the DOJ has shown that the contract is authorized under Government Code section 19130, subdivision (b)(3).² The Board, therefore, approves the contract.

BACKGROUND

On September 15, 2023, the DOJ sued Exxon Mobil, Shell, Chevron, ConocoPhillips, British Petroleum, and affiliated subsidiaries, and the American Petroleum Institute in the

¹ President Shawnda Westly did not participate in this Decision.

² Hereinafter, all statutory references are to the Government Code unless otherwise indicated.

case of *People of the State of California ex rel. Rob Bonta, Attorney General of California v. Exxon Mobil Corporation et al.*, San Francisco County Case No. CGC-23-609134 (Exxon lawsuit.). The 135-page complaint alleged several causes of action including:

(1) Public Nuisance under the California Civil Code, (2) Equitable Relief under Government Code section 12607, for the protection of the natural resources of the State from pollution, impairment, or destruction, (3) Untrue or Misleading Advertising under the California Business and Professions Code, (4) Misleading Environmental Marketing in violation of Business and Professions Code section 17580.5, (5) Unlawful, Unfair, or Fraudulent Business Practices prohibited by Business and Professions Code section 17200, (6) Strict Products Liability, and (7) Negligent Products Liability – Failure to Warn.

That same day, the DOJ sent a letter to CASE, explaining that the DOJ did not have enough experienced attorneys to handle this complex litigation and that it was necessary to retain the services of Lieff Cabraser, a firm with extensive experience in prosecuting large scale consumer protection suits, to assist in this endeavor. The DOJ informed CASE that the contracted service is exempt under section 19130, subdivisions (b)(3), (b)(5), and (b)(10). The letter described that the contracted service encompasses typical attorney functions such as:

...advising on legal strategy and objectives; advising and assisting in discovery; coordinating with California state agencies and Department of Justice contract partners to develop evidence and expert testimony; identifying, retaining, and managing experts; coordinating with representatives of plaintiffs in climate nuisance litigation in California and nationwide; conducting legal research and drafting substantive motions and briefs; and appearing at conferences, settlement negotiations, hearings, and trials.

PROCEDURAL HISTORY

On November 27, 2023, CASE requested under Section 19132 and California Code of Regulations (Cal. Code Regs.), title 2, section 547.64, that the Executive Officer review and disapprove the contract for legal services entered into by the DOJ because the services contracted for can and should be provided by civil service employees. CASE argued that

the work to be performed under the contract could be adequately performed by existing DOJ attorneys, as well as by other attorneys employed by the state and, as such, the contract is not permissible under Section 19130, subds. (b)(3), (b)(5), or (b)(10).

The DOJ provided its Response on January 24, 2024, asserting that although it has assigned five experienced attorneys to the Exxon lawsuit, its attorneys lack sufficient experience and expertise in litigating such a massive lawsuit against an entire industry with nearly limitless legal resources at its disposal. Similarly, the DOJ does not have sufficient resources to assign a dedicated team of attorneys to handle the anticipated substantial surges in discovery that will occur during the litigation. Because Lief Cabraser possesses both the necessary expertise to assist the DOJ's assigned team of five attorneys in the litigation, and because Lief Cabraser can assign a dedicated team of attorneys to assist with the anticipated litigation surges, the DOJ contends the contract is permissible under Section 19130, subd. (b)(3), (b)(5), and (b)(10)

On February 13, 2024, CASE submitted its Reply to the Executive Officer, again reiterating its position that the DOJ failed to establish that state civil attorneys lack the requisite expertise to successfully litigate the Exxon lawsuit, or that the DOJ cannot locate a sufficient number of attorneys throughout the state civil service to assist with the anticipated surges in the litigation.

On July 27, 2024, the Executive Officer issued her decision in SPB Case No. 23-0052(b), finding that the contract was not justified under either Section 19130, subds. (b)(5) or (b)(10) but that the contract was justified under Section 19130, subd. (b)(3) and on that basis approved the contract.

CASE filed a timely notice of intent to appeal the Executive Officer's decision, and the SPB established a briefing and oral argument schedule for the parties. On August 30, 2024, CASE timely filed its Appeal wherein it again reiterated its arguments that although

the Exxon lawsuit is large and complex, the DOJ failed to establish that attorneys employed throughout the state civil service as a whole lack the requisite expertise to adequately litigate the matter or that there is an insufficient number of state attorneys available to assist the DOJ with the litigation. As such, CASE asserts the contract is not permissible under Section 19130, subd. (b)(3).

On September 20, 2024, the DOJ timely filed its Response to the Appeal asserting that although it is staffing the Exxon lawsuit with a team of five highly competent environmental litigators, it has never handled a case of this once-in-a-generation magnitude against an entire industry. The Exxon lawsuit names five of the largest oil companies operating in the world. Because of the Exxon lawsuit's massive size and unprecedented significance to the State of California, as well as the nearly unlimited legal resources that the oil industry can bring to bear in the lawsuit, the DOJ asserts it needs support in the form of expert knowledge, experience, and ability unavailable within the civil service to enable it to prevail. This includes a unique skill set amongst Lief Cabraser attorneys who have successfully litigated similar industry-wide challenges, including against Big Tobacco, the generic drug industry, Silicon Valley social media companies, and the opioids industry. Lief Cabraser also has extensive expertise in handling discovery occurring in multiple locations simultaneously and managing and synthesizing tens of millions of documents produced during the discovery process. The number of documents involved in the Exxon lawsuit will be more substantial and far exceed anything that the DOJ's most experienced assigned litigator has encountered in her nearly 40-year career. Because Lief Cabraser brings unique expertise in litigating massive consumer lawsuits such as the one at issue here, and because such expertise is lacking in the state civil service, the DOJ argues that the contract is permissible under Section 19130, subds. (b)(3), (b)(5), and (b)(10).

On September 27, 2024, CASE timely filed its Reply to the DOJ's Response asserting, among other things, that the DOJ was precluded from asserting that the contract was justified under Section 19130, subds. (b)(5) and (b)(10) because the DOJ did not file a timely appeal with the Board regarding the Executive Officer's findings that the contract was not permissible under those two subdivisions. CASE further argued that the DOJ has subsequently filed another massive lawsuit against Exxon Mobile alleging that Exxon Mobile engaged in deceptive practices regarding plastic waste. By voluntarily bringing such a significant legal action against Exxon Mobile while the instant Exxon lawsuit is pending against several of the world's largest oil companies, the DOJ cannot in good faith now contend that it lacks the requisite resources to litigate the legal action at issue here.

The case was thereafter re-designated as PSC No. 24-03 and submitted for oral argument before the Board during its regularly scheduled meeting on November 4, 2024.

Because this case concerns an appeal from the Executive Officer's decision, the Executive Officer recused herself from any deliberation or discussion in this matter. The Legal Office was also recused as it assisted the Executive Officer in her decision-making process.

ISSUES

The following issues are before the Board for consideration:

- (1) Is the DOJ's contract for legal services with Lieff Cabraser authorized by Section 19130, subds (b)(3), (b)(5), and/or (b)(10)?
- (2) Is the DOJ precluded from asserting that the contract is authorized under the provisions of Section 19130, subds. (b)(5) and/or (b)(10)?

DISCUSSION

The California Supreme Court has acknowledged that Article VII of the California Constitution provides for an implied "civil service mandate" that requires work that has

historically and customarily been adequately and competently performed by civil service employees to not be performed by private contractors. (*Professional Engineers in California Government v. Department 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.” (*California State Employees Ass’n v. Williams* (1970) 7 Cal.App.3d 390, 397.)

The implied civil service mandate is not, however, without exceptions. Instead, in Section 19130, the Legislature has set forth approximately 11 exceptions to the implied civil service mandate that permit state entities to enter into personal services contracts with outside organizations. Under Section 19130, subdivision (a), personal services contracts are permissible to achieve cost savings if certain stringent criteria are satisfied. Section 19130, subdivision (b) also provides ten non-cost-savings situations where personal services contracts are permissible. The provision at issue in this matter is Section 19130, subds. (b)(3), (b)(5), and (10).

An employee organization 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; *In the Matter of Dep’t 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. (*In the Matter of Cal. Atty., Admin. Law Judges, and Hearing Officers in State Employment* (2005) PSC 05-01, p. 4.)

The agency seeking the personal services contract bears the burden of establishing the applicability of the 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, a department must provide specific

and detailed factual information demonstrating that one or more of the statutory exceptions within the subdivisions of Section 19130 apply. (Cal. Code Regs., tit. 2, § 547.62, subd. (b)(1).)

Section 19130, subd. (b)(3)

Section 19130, subd. (b)(3) permits state entities to enter into personal services contracts when, “The services contracted are [1] not available within civil service, [2] cannot be performed satisfactorily by civil service employees, **or [3] 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.**” (Emphasis added.) Therefore, it must be determined whether the DOJ’s contract with Lief Cabraser satisfies any of the above-enumerated criteria.

CASE is correct that the Board held *In the Matter of the Appeal by the Department of Pesticide Regulation*, PSC No. 01-09 (2001) at pp. 12-13, that in order for a contract to be justified under Government Code § 19130(b)(3), it must be shown that:

...the services contracted are not available through the civil service system; i.e., there are no existing civil service job classifications through which a state agency could either appoint, or retain through other state agencies that offer services to state departments, employees with the knowledge, skills, expertise, experience or ability needed to perform the required work. 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. [Emphasis in original.]

In that case, the Department of Pesticide Regulation (DPR) argued that because it was precluded from hiring the necessary personnel to perform the contracted services (laboratory testing and analyses), it was required to rely upon other state agencies to conduct the requisite testing and analyses, utilizing state civil service scientists and technicians working in state laboratory facilities. In those instances where the other state entities did not have sufficient staff or laboratory facilities to conduct the required testing and analyses, the DPR argued that it was compelled to utilize outside contractors to perform

the needed services, particularly as the DPR had no control over those other agencies' budgets or hiring policies.

However, in its argument to the Board, the DPR did not establish that it made any effort to determine whether the contracted work could be performed through the use of civil service employees, either hired by DPR or other state entities. Instead, because the SPB had previously approved similar types of contracts entered into by the DPR, in its argument to the Board the DPR appeared to simply assume that the Board would summarily approve the contracts at issue in that case. Because the DPR did not establish that it made any effort to review options other than outside contracting for meeting its needs through the civil service system, the Board declined to approve the contracts under Section 19130(b)(3). In short, there was a failure of proof on the part of DPR that it made legitimate, good faith efforts to locate civil service attorneys to perform the needed work prior to entering into the contracts with outside vendors. Moreover, the DPR did not specifically argue that the services to be performed were "of such a highly specialized or technical nature that the necessary expert knowledge, experience, and ability are not available through the civil service system."

The instant case is distinguishable from the facts presented in PSC No. 01-09. Here, the DOJ is not contending that the state lacks a sufficient number of attorneys or facilities to perform the work contemplated under the contract. Instead, the DOJ argues that its existing attorneys lack the requisite expert knowledge and experience to successfully manage the unique issues inherent to the massive lawsuit the DOJ has brought against the oil industry. As such, this case is much more akin to the Board's decision in *CASE v. Department of Health Services (DHS)* (2005) PSC No. 05-01. There, the Board, relying upon the holding in *State Compensation Ins. Fund v. Riley, supra*, 9 Cal.2d at pp. 135-136, found that because the contractor brought to the table unique skills and expertise in

developing redesign options and drafting a Medicare waiver application that would comply with federal law – skills and expertise that the DHS lacked – the contract was permissible under subdivision (b)(3), subsection (3) because the contracted services were “of such a highly specialized or technical nature that the necessary expert knowledge, experience, and ability are not available through the civil service system.”

As such, at its core this is a relatively simple case. While the DOJ is staffing the Exxon lawsuit with its own team of five highly competent environmental litigators, sufficient evidence has been presented to establish that the DOJ has never before handled a case of this once-in-a-generation magnitude against an entire industry. The Exxon lawsuit names five of the largest oil companies operating in the world which have access to nearly unlimited resources to fight this lawsuit. Due to the Exxon lawsuit’s massive size and unprecedented significance to the State of California, where untold billions of dollars in damages are at stake, the DOJ has established that it needs support in the form of expert knowledge, experience, and abilities unavailable within the civil service to enable it to prevail. This missing expertise includes a unique skill set amongst Lieff Cabraser attorneys who have litigated similar industry-wide challenges, and also includes expertise in handling discovery occurring in numerous places simultaneously and managing and synthesizing tens of millions of documents. Indeed, the number of documents involved in the Exxon lawsuit will be more substantial and will far exceed anything that the DOJ’s most seasoned assigned litigator has previously encountered in her nearly 40-year career.

Nor is this a case where the DOJ can simply pluck attorneys from other of its divisions or from other state entities willing to assist the DOJ in this endeavor to work on various pieces of the lawsuit as the need arises. Instead, the DOJ has established that the litigation will not be a compilation of discrete tasks; rather, it will require a dedicated team of attorneys with experience in handling this sort of complex litigation and the factual and legal

complexities inherent to the Exxon lawsuit. Lief Cabraser can provide those dedicated resources.

The Board finds that the DOJ's contention that this level of expertise and dedicated resource commitment is what is needed to effectively litigate this "monster" of a lawsuit is reasonable. Moreover, because the DOJ is the foremost state legal entity responsible for litigating the most complex cases on behalf of the State of California, it was not unreasonable for the DOJ to conclude that if it lacks the requisite expertise to litigate this massively complex lawsuit, it is highly unlikely that attorneys from various other state entities would be able to fill the void that the DOJ's most seasoned litigators cannot fill.

Given the foregoing, the Board finds that the Executive Officer, following the rule set forth in *State Compensation Ins. Fund v. Riley* and PSC No. 05-01, *supra*, appropriately determined that because the DOJ established that Lief Cabraser brought with it unique experience in navigating the complex issues arising from a massive consumer tort litigation action – experience which even the DOJ's most experienced attorneys lack – the DOJ established that the contract is permissible under subdivision (b)(3) because the contracted services are of such a highly specialized or technical nature that the necessary expert knowledge, experience, and ability are not available through the civil service system. In other words, the Exxon lawsuit involves such a unique set of litigation challenges that the DOJ was justified in seeking outside legal expertise to assist it in prosecuting the lawsuit.

Similarly unpersuasive is CASE's argument that because the DOJ subsequently filed another massive lawsuit against Exxon Mobil seeking damages for the harm created by plastic pollutants generated by that corporation, it cannot now in good faith contend that it lacks the requisite resources or expertise to litigate the Exxon lawsuit at issue here. Indeed, the fact that the DOJ is undertaking yet another massive lawsuit against an oil company, without requesting outside assistance for that particular lawsuit, demonstrates that the DOJ

is not randomly requesting outside assistance simply because the Exxon lawsuit is complicated. Instead, it demonstrates that the DOJ, being fully conversant with its not unlimited resources and with the skill and experience of its own litigators, has reasonably determined that it needs outside expertise and resources to assist it in prosecuting this particular generational lawsuit.

Because the DOJ has presented sufficient evidence that none of its attorneys, even its most highly skilled and experienced litigators, possess the requisite expertise to successfully litigate this massive lawsuit without access to the specialized expertise and resources that Lief Cabraser brings with it, the contract is permissible under the provisions of Section 19130, subd. (b)(3).

Because the Board finds that the contract is permissible under the provisions of Section 19130, subd. (b)(3), the Board need not reach the issues of whether the contract is also permissible under the provisions of Section 19130, subds. (b)(5) or (b)(10), or whether the DOJ was permitted to challenge the Executive Officer's findings with respect to whether the contract was justified under those two subdivisions.

CONCLUSION

The Board finds that the DOJ has submitted adequate information to show that the contract entered into between the DOJ and Lief Cabraser for legal services is authorized by Section 19130, subd. (b)(3). The Board, therefore, approves the contract.

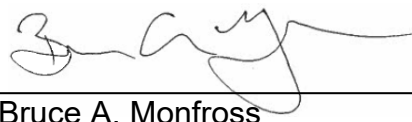
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STATE PERSONNEL BOARD

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 December 9, 2024.

A handwritten signature in black ink, appearing to read 'Bruce A. Monfross', written over a horizontal line.

Bruce A. Monfross
Chief Administrative Law Judge
State Personnel Board

PROOF OF SERVICE BY E-MAIL

Re: *CASE v. California Department of Justice*
SPB Case No.: PSC No. 24-03

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 December 18, 2024, I caused the following document(s) to be served on the addressee:

BOARD DECISION

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

Patrick Whalen
CASE
1231 I Street, Suite 300
Sacramento, CA 95814
Email: patrick@patrickjwhalenlaw.com

Gabrielle H. Brumbach
Department of Justice
300 South Spring Street, Suite 1702
Los Angeles, CA 90013-1230
Email: Gabrielle.Brumbach@doj.ca.gov
Arang.Chun@doj.ca.gov

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on December 18, 2024, at Sacramento, California.

Caroline Molumby

Caroline Molumby
Legal Analyst