

**BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA**

In the Matter of the Appeal by )  
**AMERICAN FEDERATION OF STATE,** )  
**COUNTY, AND MUNICIPAL** )  
**EMPLOYEES, LOCAL 2620 (AFL-CIO)** )  
from the Executive Officer's March 2, )  
2009, Approval of 14 Personal Services )  
Contracts for Pharmacist Services )  
Proposed or Executed by the )  
Department of Mental Health )

PSC No. 09-02

**RESOLUTION**

June 9, 2009

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**WHEREAS**, the State Personnel Board (Board) has considered carefully the findings of fact and Decision issued by the Executive Officer on March 2, 2009, in the above-entitled matter, as well as the written and oral arguments presented by the Department of Mental Health (Department) and the American Federation of State, County, and Municipal Employees, Local 2620 (AFL-CIO) (AFSCME), during the Board's June 9, 2009, meeting; and

**WHEREAS**, by said Decision the 14 personal services contracts for Pharmacist Services proposed or executed by the Department were approved;

**IT IS RESOLVED AND ORDERED** that:

1. The findings of fact and conclusions of law of the Executive Officer in said matter are hereby adopted by the State Personnel Board as its Decision in the case on the date set forth below;
2. A true copy of the Executive Officer's Decision shall be attached to this Resolution for delivery to the parties in accordance with the law; and

3. Adoption of this Resolution shall be reflected in the record of the meeting and the Board's minutes.

**STATE PERSONNEL BOARD<sup>1</sup>**

Anne Sheehan, President  
Richard Costigan, Vice-President  
Patricia Clarey, Member  
Sean Harrigan, Member

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The foregoing Resolution was made and adopted by the State Personnel Board in PSC No. 09-02 at its meeting on June 9, 2009, as reflected in the record of the meeting and Board minutes.

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<sup>1</sup> Member Maeley Tom did not participate in this Decision.



March 2, 2009

Gayathri Murthy, Senior Staff Counsel  
Department of Mental Health  
Office of Legal Services  
1600 Ninth Street, Room 433  
Sacramento, CA 95814

Pam Manwiller  
Director of State Programs  
AFSCME, Local 2620, AFL-CIO  
555 Capitol Mall, Suite 1225  
Sacramento, CA 95814

Re: Request for Review of Proposed or Executed Personal Services Contracts for Pharmacist Services (Contract Nos. 07-64162-001 (CSH) – Lead Staffing Corporation; 07-64162-002 (CSH) – ProPharma, Inc.; 07-64162-003 (CSH) – Drug Consultants, Inc.; 07-64162-004 (CSH) – Bay Area Doctors, Inc.; 08-48006 (NSH) – Pharm-Aid, Inc.; 08-48027 (NSH) – Trikuti Solutions, Inc.; 08-48028 (NSH) – Bay Span, Inc.; 08-48029 (NSH) – Bay Area Doctors, Inc.; 08-48030 (NSH) – ProPharma, Inc.; 08-48031 (NSH) – Pinnacle Medical Consultants; 08-48032 (NSH) – Drug Consultants, Inc.; 08-48033 (NSH) – TEG Staffing, Inc.; 08-48034 (NSH) – R.L. Klein & Associates; 08-48035 (NSH) RX Staffing & Solutions, Inc.)  
**[SPB File No. 09-012(b)]**

Dear Ms. Murthy and Ms. Manwiller:

By letter dated January 5, 2009, the American Federation of State, County, and Municipal Employees Local 2620, AFL-CIO (AFSCME) asked, pursuant to Gov. Code § 19132 and Title 2, Cal. Code Regs., § 547.59 *et seq.*, the State Personnel Board (SPB) to review for compliance with Gov. Code § 19130(b), 14 contracts entered into by the Department of Mental Health (Department) for Pharmacist services at Coalinga State Hospital (CSH) and Napa State Hospital (NSH) (Contract Nos. 07-64162-001 (CSH) – Lead Staffing Corporation; 07-64162-002 (CSH) – ProPharma, Inc.; 07-64162-003 (CSH) – Drug Consultants, Inc.; 07-64162-004 (CSH) – Bay Area Doctors, Inc.; 08-48006 (NSH) – Pharm-Aid, Inc.; 08-48027 (NSH) – Trikuti Solutions, Inc.; 08-48028 (NSH) – Bay Span, Inc.; 08-48029 (NSH) – Bay Area Doctors, Inc.; 08-48030 (NSH) – ProPharma, Inc.; 08-48031 (NSH) – Pinnacle Medical Consultants; 08-48032 (NSH) – Drug Consultants, Inc.; 08-48033 (NSH) – TEG Staffing, Inc.; 08-48034 (NSH) – R.L. Klein & Associates; 08-48035 (NSH) RX Staffing & Solutions, Inc.) (hereinafter “Contracts”). The contractors are Lead Staff Corporation, ProPharma, Inc., Drug Consultants, Inc., Bay Area Doctors, Inc., Pharm-Aid, Inc., Trikuti Solutions, Inc., Bay Span, Inc., Pinnacle Medical Consultants, Drug Consultants, Inc., TEG Staffing, Inc., R.L. Klein & Associates, and RX

Staffing. The terms of the contracts are through April 30, 2009 for all CSH contracts, and through June 30, 2009 for all NSH contracts.

On January 12, 2009, the SPB notified the Department that AFSCME had requested that SPB review the Contracts, and informed the Department that it had until February 2, 2009, to submit its response to the SPB. The Department thereafter requested, and received, a continuance until February 10, 2009, to file its response. The SPB received the Department's response on February 10, 2009. AFSCME thereafter had until February 20, 2009, to submit its reply to the Department's response. To date, no reply has been received from AFSCME. As a result, the matter was deemed submitted for review by the Executive Officer with no reply having been filed by AFSCME.

For those reasons set forth below, I find that the Contracts are authorized under the provisions of Gov. Code §§ 19130(b)(3). As a result, the Contracts are approved.

### **Legal Standard**

In *Professional Engineers in California Government v. Department of Transportation*,<sup>1</sup> the California Supreme Court recognized that, emanating from Article VII of the California Constitution, is an implied "civil service mandate" that prohibits state agencies from contracting with private entities to perform work that the state has historically and customarily performed and can perform adequately and competently. Government Code section 19130 codifies the exceptions to the civil service mandate recognized in various court decisions. The purpose of SPB's review of contracts under Government Code 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.

### **Government Code section 19130(b)(3)**

Government Code section 19130(b)(3) authorizes a state agency to enter into a personal services contract 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.

The Board's decision, *In the Matter of the Appeal by SEIU*, made clear that, in asserting the exemption contained in Section 19130(b)(3), the burden is on the contracting department to establish either: (1) that there are no civil service job classifications to which it could appoint

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<sup>1</sup> (1997) 15 Cal.4th 543, 547.

employees with the requisite expertise needed to perform the required work; or (2) that it was unable to successfully hire suitable candidates for any of the applicable classifications.<sup>2</sup>

Government Code section 19130(b)(10)

Government Code section 19130(b)(10) authorizes a state agency to enter into a personal services contract when:

The services are of such an urgent, temporary, or occasional nature that the delay incumbent in their implementation under civil service would frustrate their very purpose.

In order to justify a personal services contract under Section 19130(b)(10), the contracting department must provide sufficient information to show: (1) the urgent, temporary, or occasional nature of the services; and (2) the reasons why a delay in implementation under the civil service would frustrate the very purpose of those services.<sup>3</sup>

**Analysis**

Department Position:

The Department asserts that the Contracts are justified under the provisions of Government Code section 19130(b)(3) because the Department has engaged in repeated, good faith efforts to hire civil service employees to fill its vacant Pharmacist positions but, despite its best efforts, it has been unable to fill all of its vacancies. More specifically, the Department asserts it has engaged in the following recruitment efforts:

- The Department has a continuous examination for civil service pharmacist positions and has a job posting for vacant pharmacist positions.
- Over the past year, the Department has advertised on Careerbuilder.com and Craigslist, and has also advertised its vacancies in several newspapers and magazines, including the California Job Journal, the Los Angeles Times, the Los Angeles Times.com, the San Francisco Chronicle, and the Sacramento Bee.
- The Department has sent recruiters to 14 pharmacist-specific recruitment events, in addition to another 53 events that were for many other disciplines, including pharmacists.
  - Department recruiters collect a list of attendees who are interested in Department pharmacist positions, and the Department thereafter attempts to contact each individual. In addition, the Pharmacy Services Manager has attempted to contact a number of colleagues for recruitment purposes, and has attended Pharmacist Association conventions to recruit staff pharmacists.

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<sup>2</sup> PSC No. 05-03, at p. 8.

<sup>3</sup> PSN No. 05-04, at p. 7.

- In addition to offering continuous testing for its vacant pharmacist positions, CSH reimburses some relocation and interview expenses, and provides employees with a monthly recruitment and retention bonus of \$1,450.00.
- The civil service salaries for pharmacist at CSH and NSH – not including the civil service benefits package currently worth an additional 35.845 percent of an employee’s salary – meet or exceed the mean market wage for pharmacists, including those in public and private practice, in Fresno and Napa Counties, where CSH and NSH are located.

The Department further asserts that the contracts are justified under the provisions of Government Code section 19130(b)(10), as the services are of such an urgent and temporary nature that the delay incumbent in their implementation under civil service would frustrate their very purpose. According to the Department, it is plain that the provision of pharmaceutical services to its patients at CSH and NSH is urgently needed, and the delay in providing those services would frustrate the very purpose of providing health services at those institutions.<sup>4</sup> Moreover, because the Department is currently subject to several court orders and consent decrees mandating that a specified level of mental health care be provided at CSH and NSH, and because the Department has been unable to fill its vacant civil service pharmacist positions despite its best, good faith efforts to do so, the contracts are urgently needed. Finally, the Department contends that the Contracts are temporary in nature, as the Contracts will be terminated as soon as CSH and NSH are able to fill their vacant civil service pharmacist positions.

AFSCME Position:

AFSCME did not file a reply disputing any information contained in the Department’s response. Instead, AFSCME asserted the following in challenging the propriety of each Contract:

- The contracts were executed pursuant to Government Code section 19130(b)(10), but do not include specific and detailed factual information as justification for their use as required by Title 2, Cal. Code Regs., section 547.60; rather, they merely restate the language of Section 19130(b)(10) which permits personal services when, “The services are of such an urgent, temporary, or occasional nature that the delay incumbent in their implementation under civil service would frustrate their very purpose.”
- There is nothing urgent, temporary, or occasional about the use of the contracts. Instead, the contracts are being used to fill vacant civil service positions that the Department has been unable to fill through its normal recruitment efforts. The contractors perform the same work, in the same settings, and under the same conditions as civil service employees and many of these contractors have worked in this capacity for several years.

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<sup>4</sup> CSH currently has one licensed acute mental health care unit, seven licensed intermediate mental health care units that treat 373 patients, and nine residential mental health care recovery units that treat 450 patients. NSH is licensed to treat 151 acute psychiatric, 1175 intermediate care, and 36 skilled nursing patients.

Analysis:

The Department presented sufficient information to establish that it has engaged in reasonable, good faith recruitment efforts designed to fill its vacant pharmacist positions at CSH and NSH, including advertising in numerous publications, and attending numerous job fairs and professional conventions for the express purpose of recruiting pharmacists. Despite those efforts, however, it still is experiencing a significant shortage of civil service pharmacists. As a result, I find that the Contracts are justified under the provisions of Government Code section 19130(b)(3). Having so determined, no finding need be made addressing whether the Contracts might also be justified under the provisions of Section 19130(b)(10).

Conclusion

The Department presented sufficient information to demonstrate that Contract Nos. 07-64162-001 (CSH) – Lead Staffing Corporation, 07-64162-002 (CSH) – ProPharma, Inc., 07-64162-003 (CSH) – Drug Consultants, Inc., 07-64162-004 (CSH) – Bay Area Doctors, Inc., 08-48006 (NSH) – Pharm-Aid, Inc., 08-48027 (NSH) – Trikuti Solutions, Inc., 08-48028 (NSH) – Bay Span, Inc., 08-48029 (NSH) – Bay Area Doctors, Inc., 08-48030 (NSH) – ProPharma, Inc., 08-48031 (NSH) – Pinnacle Medical Consultants, 08-48032 (NSH) – Drug Consultants, Inc., 08-48033 (NSH) – TEG Staffing, Inc., 08-48034 (NSH) – R.L. Klein & Associates, and 08-48035 (NSH) RX Staffing & Solutions, Inc., are justified under the provisions of Government Code section 19130(b)(3), as the Department has been unable to fill its vacant civil service pharmacist positions despite having engaged in reasonable, good faith recruitment efforts.

This letter constitutes my decision to approve Contract Nos. 07-64162-001 (CSH), 07-64162-002 (CSH), 07-64162-003 (CSH), 07-64162-004 (CSH), 08-48006 (NSH), 08-48027 (NSH), 08-48028 (NSH), 08-48029 (NSH), 08-48030 (NSH), 08-48031 (NSH), 08-48032 (NSH), 08-48033 (NSH), 08-48034 (NSH), and 08-48035 (NSH). Any party has the right to appeal this decision to the five-member State Personnel Board pursuant to SPB Rule 547.66. Any appeal should be filed no later than 30 days following receipt of this letter in order to be considered by the Board.

Sincerely,

**/s/ SUZANNE M. AMBROSE**

SUZANNE M. AMBROSE  
Executive Officer