

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 (AFSCME))
)
from the Executive Officer's March 27,)
2008, Approval of a Personal Services)
Contract for Pharmacist at the Veterans)
Home of California, Barstow, California)
Department of Veterans Affairs)

PSC No. 09-03

RESOLUTION

July 21, 2009

WHEREAS, the State Personnel Board (Board) has considered carefully the findings of fact and Decision issued by the Executive Officer in SPB File No. 09-016(b) on March 27, 2009, approving the above-entitled matter, as well as the written and oral arguments presented by AFSCME and the Department of Veterans Affairs (Department) during the Board's July 7, 2009, meeting.

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.

* * * * *

The foregoing Resolution was made and adopted by the State Personnel Board in PSC No. 09-03 at its meeting on July 21, 2009, as reflected in the record of the meeting and Board minutes.



March 27, 2009

Nadine Tatum-O'Bannon
Contracts Office Manager
Department of Veterans Affairs
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Sacramento, CA 94295-0001

Cliff L. Tillman, Jr.
Business Agent
AFSCME, Local 2620, AFL-CIO
555 Capitol Mall, Suite 1225
Sacramento, CA 95814

Re: Request for Review of Proposed or Executed Personal Services Contract for Pharmacist Services (Contract No. 08BS0033 (VHC-B) – Prescription Shoppe)
[SPB File No. 09-016(b)]

Dear Ms. Tatum-O'Bannon and Ms. Manwiller:

By letter dated January 30, 2009, the American Federation of State, County, and Municipal Employees Local 2620, AFL-CIO (AFSCME) asked, pursuant to Government Code section 19132 and Title 2, Cal. Code Regs., § 547.59 *et seq.*, the State Personnel Board (SPB) to review for compliance with Government Code section 19130(b), a contract entered into by the Department of Veterans Affairs (Department) for Pharmacist services at the Veterans Home of California, Barstow (VHC-B) (Contract No. 08BS0033 – Prescription Shoppe) (hereinafter "Contract"). The term of the Contract is from January 1, 2009 through June 30, 2011.

On February 5, 2009, the SPB notified the Department that AFSCME had requested that SPB review the Contract, and informed the Department that it had until February 25, 2009, to submit its response to the SPB. The Department thereafter requested, and received, a continuance until March 18, 2009, to file its response. The SPB received the Department's response on March 11, 2009. AFSCME thereafter had until March 23, 2009, to submit its reply to the Department's response. The reply was received by AFSCME on March 17, 2009, after which the matter was deemed submitted for review by the Executive Officer.

For those reasons set forth below, I find that Contract No. 08BS0033 is not justified under the provisions of Government Code section 19130(b)(8), but that the Contract is justified under the provisions of Section 19130(b)(10). As a result, the Contract is approved.

Legal Standard

In *Professional Engineers in California Government v. Department of Transportation*,¹ 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)(8)

Government Code section 19130(b)(8) authorizes a state agency to enter into a personal services contract when:

The contractor will provide equipment, materials, facilities, or support services that could not feasibly be provided by the state in the location where the services are to be performed.

Section 19130(b)(8) requires that the State demonstrate that it could not “feasibly” provide the services at the subject location – in other words, the State must show that it is not capable of providing the equipment or personnel to perform the contracted services at the subject location.² The Board has previously determined that application of the Section 19130(b)(8) exception is not applicable in situations where the State has employees in place who need upgraded equipment to replace obsolete tools and the State chooses to contract for the services in lieu of supplying the upgraded equipment.³ The Board did, however, find the exception applicable in those cases where substantial costs would have to be expended at existing worksites to establish the requisite facilities needed to perform the required services.⁴

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.

¹ (1997) 15 Cal.4th 543, 547.

² PSC No. 01-08, p. 5.

³ PSC No. 98-04, p. 23.

⁴ Id.

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.⁵

Analysis

Department Position:

VHC-B is located in the high desert of Southern California midway between Los Angeles and Las Vegas, and has an average daily census of 172 elderly and disabled residents in three levels of care: Domiciliary Care, Intermediate Care, and Skilled Nursing Care. In 2003, VHC-B lost its Skilled Nursing Facility (SNF) classification, but the classification was restored in 2008. Veterans Home of California-Chula Vista (VHC-CV) is located southeast of San Diego, approximately 185 miles from VHC-B, and has an average daily census of 331 residents. Both the Intermediate Care Facility (ICF) and the SNF provide licensed levels of care that require VHC-B and VHC-CV to have pharmaceutical services available to residents 24 hours per day, seven days per week.

Routine medication and prescription-related services for VHC-B and VHC-CV are provided by employees of those institutions. Because VHC-B does not have its own pharmacy, unlike VHC-CV, VHC-B's pharmaceutical services are provided by two VHC-B pharmacists⁶ working out of the VHC-CV pharmacy during that pharmacy's normal operating hours of 8:00 a.m. – 5:00 p.m., Monday through Friday. Prescription orders from VHC-B that are faxed to VHC-CV before 1:30 p.m. are filled and shipped to VHC-B by courier the next day. The Contract does not alter that existing arrangement.

It is neither practical nor efficient for VHC-CV to keep its pharmacy open and staffed around the clock or on weekends and holidays to address situations that may arise at either institution after normal hours of operation. Instead, after-hours pharmaceutical services that cannot be filled from emergency drug supplies are provided to VHC-CV pursuant to a contract with Sharp Medical Center, located adjacent to VHC-CV. It is not feasible for Sharp Medical Center to serve as backup for VHC-B due to the distance between VHC-B and the Medical Center. Moreover, it is even less feasible for VHC-B to offer after-hours and holiday emergency pharmaceutical services on-site, given that it does not have sufficient staff, space, materials, or equipment necessary to run a pharmacy during normal business hours, nor the need to do so given that its resident population is half that of VHC-CV's.

Instead, VHC-B executed the Contract with the Prescription Shoppe, located near VHC-B, and other local 24-hour pharmacists located in the Barstow area when the Prescription Shoppe is closed, to address the dispensing requirements of VHC-B when the VHC-CV pharmacy is

⁵ PSC No. 05-04, at p. 7.

⁶ These are two Pharmacist I positions charged to VHC-B's payroll.

closed. In short, the Contract is intended to provide legally required pharmaceutical services, including equipment, facilities and personnel not available at VHC-B, to support VHC-B when the VHC-CV pharmacy cannot do so. As such, the Contract is justified under the provisions of Government Code section 19130(8)(b).

AFSCME Position:

AFSCME set forth the following arguments in support of its position that the Contract is not justified under the provisions of Government Code section 19130(b):

- 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.
- Application of the Section 19130(b)(8) exception is not warranted in this case, as there are “prisons within the Department of Corrections and Rehabilitation that have facilities within the geographic areas that employs Pharmacist [sic] and would be able to provide the services as stated in [the Department’s] response to the SPB. This would simply require an interagency agreement.”

Analysis:

The Department failed to present sufficient information to establish that the Contract is justified under the provisions of Government Code section 19130(b)(8), as the Department failed to provide any explanation as to why it was not feasible for VHC-B to have an on-site pharmacy. Unlike the situation in PSC No. 98-04, the Department failed to set forth any evidence demonstrating that the State would incur unreasonable costs in establishing and operating a pharmacy at VHC-B. As such, the Department failed to demonstrate that it is not capable of providing the equipment or personnel to perform the contracted services at VHC-B. Therefore, I necessarily find that the Contract is not justified under the provisions of Section 19130(b)(8).

I do, however, find that the Department presented sufficient information to establish that the Contract is justified under the provisions of Section 19130(b)(10). The Department adequately demonstrated that it utilizes civil service pharmacist employees to provide its pharmaceutical services at VHC-B during normal working hours, and the Contract is only for the provision of such services on an unanticipated, occasional basis when an emergency arises that cannot wait

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for normal pharmacy hours to resume. Consequently, I find the Contract is justified under Section (b)(10) due to the occasional nature of the services rendered.

Conclusion

Although the Contract is not justified under the provisions of Government Code section 19130(b)(8) because the Department failed to establish that it is not feasible to provide pharmacist services at VHC-B, I find that the Contract is justified under the provisions of Section 19130(b)(10) due to the occasional nature of the needed services. As such, Contract No. 08BS0033 is approved.

This letter constitutes my decision to approve Contract No. 08BS0033. 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