

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by)	BOARD DECISION
)	
AFSCME, Local 2620)	
)	PSC No. 06-02
from the Executive Officer's June 28, 2006)	
Approval of Personal Services Contracts for)	
Psychologist Services.)	April 3, 2007
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)	

APPEARANCES: Andrew H. Baker, Attorney, Beeson, Tayer & Bodine, on behalf of AFSCME, Local 2620; Chrisman L. Swanberg, Senior Staff Counsel, on behalf of the Department of Corrections and Rehabilitation.

BEFORE: Sean Harrigan, President, Anne Sheehan, Vice President; Patricia Clarey and Maeley Tom, Members.

DECISION

This matter is before the State Personnel Board (SPB or Board) after the American Federation of State, County and Municipal Employees, Local 2620 (AFSCME), appealed from the Executive Officer's June 28, 2006, decision approving 15 personal services contracts (ICM03260, ICM03261, ICM03262, ICM03263, ICM03264, ICM03266, ICM03267, ICM03268, ICM03269, ICM03270, ICM03271, ICM03272, ICM03273, ICM03308, and RJD03052) (Contracts), for the use of psychologists to provide inmate psychological services at various Department of Corrections and Rehabilitation (Department) institutions. The matter was initially brought to the SPB after AFSCME requested that the SPB review the Contracts for compliance with the provisions of Government Code section 19130(b)(10).

In this decision, the Board finds that the Contracts are not justified under the provisions of Government Code sections 19130(b)(3) or (10), because the Department failed to present sufficient information to establish that: existing civil service classifications are inadequate to perform those services to be rendered under the Contracts; it has made reasonable, good faith efforts to hire civil service employees to perform those services to be rendered under the Contracts; the services are of a temporary, occasional nature, or that an emergency exists that justifies the Contracts; or that the Contracts are required as the result of a federal court order. As a result, the Contracts are disapproved.

BACKGROUND

The Department is tasked with providing medical care, including necessary psychological services, to those inmates incarcerated in state correctional facilities.

The Department promulgated 15 Agreements¹ for psychologist services with specified individuals and entities. Each of the Agreements describes the services to be performed, in pertinent part, as follows:

1. Contractor shall provide temporary/relief Psychologist(s) on an as-needed basis for the California Department of Corrections (CDC) for the purpose of providing medical specialty services to inmates at the institutions.
2. Contractor shall provide all necessary and appropriate temporary/relief Psychologist services of Psychologist to Institution inmate/patients within the confines of the prison grounds. Contracted services will be used to fill temporary vacancies, CDC employee absences and temporary workload increases.

¹ In addition to the 14 Agreements specified in the Union's request, the Department submitted a second Agreement with Foley Consultants, ICM03308.

Each of the Agreements specifies a term of April 1, 2004 through March 31, 2007. The Agreements list the following total costs: \$4,374,000.00 (Foley Consultants, RJD03052), \$4,374,000.00 (Foley Consultants, ICM03308), \$49,428,446.00 (Golden State Psychcare, ICM03269), \$56,735,460.00 (Registry of Physician Specialists, Inc., ICM03273), \$48,585,448.00 (Teddy Adelstein, Ph.D., ICM03260), \$45,875,686.00 (Medical Staffing Network, Inc., ICM03262)², \$44,370,608.00 (Professional Psych Providers LLP, ICM03264), \$53,426,768.00 (American Correctional Solutions, Inc., ICM03266), \$49,254,615.00 (National Locum Solutions, Inc., ICM03263), \$50,895,590.00 (National Medical Registry, Inc. (dba NMR HealthPros, Inc., ICM03268), \$30,829,500.00 (Associated Staffing Resources, Inc., ICM03271), \$3,672,000.00 (AMS-Access Medical Staffing, ICM03272), \$2,349,000.00 (Staff Care, Inc., ICM03270), \$52,825,500 (NorthStar Services, ICM03261), \$47,007,270.00 (Unadi Incorporated, ICM03267). The 15 Agreements provide for a total of \$501,703,891.00 in payments to the contractors.

The Department did not submit the proposed Contracts to the Board for review as cost-savings contracts subject to the provisions of Government Code section 19130, subdivision (a). Instead the Department promulgated the Contracts on the grounds that they were justified as the result of a federal court order in *Coleman v. Schwarzenegger* (USDC, Eastern District, California, C S-90-020 LKK), and/or because the Contracts were justified under one or more of the personal services contracting-out exceptions set forth in Government Code section 19130, subdivision (b).

² This Agreement is an amendment to another agreement that changes the name of the contractor from Infinity Quality Services Corporation to Medical Staffing Network, Inc.

PROCEDURAL HISTORY

By letter dated January 10, 2006, AFSCME asked the SPB to review for compliance with Government Code section 19130, subdivision (b), 14 personal services contracts promulgated by the Department for inmate psychological services at various Department institutions. By letter dated March 2, 2006, the SPB directed the Department to file with a response with the SPB and AFSCME concerning the Contracts.

By letter dated May 5, 2005, the SPB advised the Department that it had not received the information requested in its March 2, 2006 letter, and afforded the Department another opportunity to provide the requested information by May 15, 2006, and further requested that the Department advise it whether or not the Contracts were subject to any orders issued in the cases of *Plata v. Schwarzenegger* (USDC, Northern District, California, C01-1351 THE), and/or *Coleman v. Schwarzenegger* (USDC, Eastern District, California, C S-90-020 LKK).³

The Department subsequently provided its response, and AFSCME thereafter filed a reply, after which the matter was deemed submitted for review by the Executive Officer.

On June 28, 2006, the Executive Officer issued his decision approving all 15 Contracts on the grounds that the Contracts were justified as a result of the on-going *Coleman* litigation.

³ *Plata* concerns issues related to inmate's being provided inadequate medical care. *Coleman* concerns issues related to inmates being provided inadequate psychological services.

On June 30, 2006, AFSCME notified the SPB of its intent to appeal the Executive Officer's decision to the five-member Board. Briefing was complete on December 7, 2006.

ISSUE

The following issue is before the Board for review:

Are the Contracts justified under Government Code section 19130, subdivision (b)?

LEGAL PRINCIPLES

In *Professional Engineers in California Government v. Department of Transportation*,⁴ 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, subdivision (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

⁴ (1997) 15 Cal.4th 543, 547.

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.

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.

DISCUSSION

The Department contends that it wants to hire civil service mental health care workers to perform those duties contemplated under the Contracts, but it has experienced chronic difficulty filling its psychologist positions due, in part, to competitive pressures from private employers. The Department's efforts to increase civil service mental health care worker salaries have been unsuccessful, with the end result being significant staffing shortages at a number of institutions. The Department did not, however, provide any evidence demonstrating what efforts it has made to recruit civil service mental health care workers, and/or to obtain salary increases for those classifications in order to make them more competitive with the private sector.

The Department further asserts that a March 2, 2006, decision from the federal court in the *Coleman* case required the Department to immediately reduce staffing shortages to no more than ten percent at each institution, and to pay

competitive wages for all mental health care workers.⁵ The Department did not, however, submit a copy of the Order for the Board's review.

For its part, AFSME contends that the burden of proof is on the Department to prove that the Contracts are justified under one or more of the exceptions set forth in Government Code section 19130(b), but the Department has presented no evidence regarding its recruitment efforts (such as participation in recruitment fairs, newspaper advertisements, etc.), or its efforts to have mental health care worker salaries increased, except for its bare assertions that it has done so. Nor has the Department presented the actual order from the federal court that reportedly authorizes the contracting out. In the absence of any such evidence, AFSCME asserts that the Board cannot approve the contracts.

The Contracts Are Not Justified Under Government Code section 19130(b)(3)

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 department to establish either: (1) that there are no civil service job classifications to which it could appoint 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.

In the instant case, there is no dispute that there are existing civil service classifications to which employees can be appointed to perform those duties to be rendered under the Contracts. Therefore, in order to justify the Contracts under Section 19130(b)(3), the Department must present evidence demonstrating that,

⁵ During oral argument before the Board the Department asserted that significant salary increases for Department mental health care workers had been implemented during mid-December 2006. As a

despite making diligent, good faith efforts, to hire civil service Psychologists, it has been unable to do so. The Department, however, failed to present any such evidence. Instead, the Department has only made bare assertions, unsupported by any evidence, that it has made efforts to hire civil service employees.

As AFSCME correctly points out, the burden of proof is on the Department to present sufficient evidence to establish that the Contracts are justified. Here, the Department has submitted no evidence for the Board's review and consideration, such as the Department posting vacancy notices on its website or the Board's website, advertising in local newspapers, participating in job fairs, or placing advertisements in professional journals, demonstrating the Department's efforts to hire civil service employees. Given the lack of evidentiary support presented by the Department, we must necessarily conclude that the Department has failed to establish that the Contracts are justified under the provisions of Government Code section 19130(b)(3).

The Contracts Are Not Justified Under Government Code section 19130(b)(10)

In order to justify a personal services contract under Government Code § 19130(b)(10), a state agency 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.⁶ Thus, in *California State Employees Association*, the Board approved the contracting out of nursing services where the department established

result, the Department anticipates its future civil service recruiting efforts will be more successful.

⁶ *California State Employees Association* (2003) PSC No. 03-02 at p. 3.

an urgent need for those services and demonstrated a diligent, but unsuccessful, effort to obtain those services through the civil service system.

The Department has not shown that its need for inmate psychologist services is merely temporary or occasional. Rather, the evidence demonstrates that the Department's need for those services is predictable, permanent and constant.

Neither are the services in question "urgent" in nature, for purposes of Section 19130(b)(10). The Department has failed to submit evidence to establish that their urgent need for the services arose because they tried and failed to hire civil service employees to perform those services. Rather, the Department's need for the services is occasioned almost exclusively because the Department has not hired a sufficient number of psychologists to perform those services.

Although the provision of psychological services to inmates is an essential service that must be performed in an expeditious manner, it not the type of "urgent" service contemplated under Section (b)(10). Instead, the term "urgent" refers to situations that are unforeseen or unavoidable. Nor can the "urgency" arise as the result of the Department's own inaction, as otherwise a state agency could simply refuse to make any efforts to hire civil service employees to perform essential services, and thereafter claim an "urgent" need to contract out such services on the grounds that provision of the services is urgently needed. Such a result would eviscerate the civil service mandate and is contrary to the intent of Section (b)(10) that clearly limits the ability of state agencies to contract out work traditionally performed by the civil service. Here, the Department has failed to submit evidence

demonstrating that the Contracts are “urgent” within the meaning of Section 19130(b)(10).

The Contracts Are Not Justified as the Result of an Order from the Federal Court

The Department further asserts that the Contracts are justified as a result of the March 2, 2006, Order issued by the federal court in *Coleman*. The Department, however, did not submit a copy of the Order to the Board for review; thus, the Board has no basis for ascertaining whether the Contracts are justified by virtue of that Order alone. Consequently, the Board finds that the Department failed to establish that the Contracts are justified as a result of the federal court’s Order in *Coleman*.

CONCLUSION

The Board is well aware of the fact that the Department is required to provide on-going mental health care to inmates under its jurisdiction. The Board is also cognizant of the fact that the Department is subject to close scrutiny by the federal courts concerning the mental health care it provides to inmates. Nonetheless, under the law, the burden rests with the Department to prove that the Contracts are justified under one or more of the contracting-out exceptions set forth in Government Code section 19130(b). Here, the Department has failed to meet that burden.

The Department failed to present any evidence establishing that existing civil service classifications are inadequate to meet its psychologist services needs. Nor did the Department present any evidence in support of its assertion that it has been unable to hire sufficient civil service employees to perform those duties contemplated under the Contracts, despite its stated desire to do so. Thus, the Department failed to establish that the Contracts are permissible under Section

19130(b)(3). Similarly, because the services to be performed under the Contracts are predictable and recurring in nature, and because the “urgency” of having the services performed results from the Department failing to hire an adequate number of civil service employees to perform the Contract functions, the Department failed to prove that the Contracts are justified under Section 19130(b)(10). Finally, the Department failed to present evidence demonstrating that the Contracts are justified as the result of an Order issued by the *Coleman* court, as that Order was not presented to the Board for review. Consequently, the Department failed to establish that the Contracts are justified pursuant to the provisions of Government Code section 19130(b) or by federal court order.

ORDER

The Board hereby disapproves all 15 Contracts (Foley Consultants, RJD03052; Foley Consultants, ICM03308; Golden State Psychcare, ICM03269; Registry of Physician Specialists, Inc., ICM03273; Teddy Adelstein, Ph.D., ICM03260; Medical Staffing Network, Inc., ICM03262; Professional Psych Providers LLP, ICM03264; American Correctional Solutions, Inc., ICM03266; National Locum Solutions, Inc., ICM03263; National Medical Registry, Inc. (dba NMR HealthPros, Inc., ICM03268; Associated Staffing Resources, Inc., ICM03271; AMS-Access Medical Staffing, ICM03272; Staff Care, Inc., ICM03270; NorthStar Services, ICM03261; and Unadi Incorporated, ICM03267), on the grounds that the Contracts are not justified as under Government Code section 19130(b).

STATE PERSONNEL BOARD⁷

Sean Harrigan, President
Anne Sheehan, Vice President
Patricia Clarey, Member
Maeley Tom, Member

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I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on April 3, 2007.

Floyd Shimomura
Executive Officer
State Personnel Board

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⁷ Member Richard Costigan did not participate in this Decision.