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 December 30, 2009, decision dismissing AFSCME's challenge of a proposed or executed personal services contract for use of pharmacists.	**PSC No. 10-01** RESOLUTION April 6, 2010

WHEREAS, the State Personnel Board (Board) has considered carefully the findings of fact and Decision issued by the Executive Officer in SPB File No. 10-01(b) on December 30, 2009, dismissing the above-entitled matter, as well as the written and oral arguments presented by AFSCME and the State of California Prison health Care Services (CPHCS) during the Board's April 6, 2010, 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.

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The foregoing Resolution was made and adopted by the State Personnel Board in PSC No. 10-01 at its meeting on April 6, 2010, as reflected in the record of the meeting and Board minutes.

CALIFORNIA STATE PERSONNEL BOARD
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ARNOLD SCHWARZENEGGER, Governor

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December 30, 2009

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Re: Request for Contract Review Pursuant to Government Code Section 19130(b)
[SPB File No. 09-029(b)]

Dear Messrs. Swanberg and Tillman

The State Personnel Board (SPB) received a request on October 20, 2009, from the American Federation of State, County, and Municipal Employees, Local 2620 (AFSCME or Union) to review for compliance with Government Code section 19130, a proposed or executed personal services contract (Contract) for the use of pharmacists with Maxor National Pharmacy Corp. (Maxor), allegedly promulgated by the State of California Prison Health Care Services (CPHCS).[1]

On October 23, 2009, SPB notified CPHCS of AFSCME's request under Government Code section 19130, and informed CPHCS that it was required to file with SPB and serve upon AFSCME a response within 15 days upon receipt of the AFSCME's review request. SPB received CPHCS's response on November 10, 2009. AFSCME, thereafter, had until November 20, 2009, to submit its reply to CPHCS'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 the reasons set forth below, AFSCME's challenge under Government Code section 19130 is dismissed.

[1] AFSCME alleged that the California Department of Corrections and Rehabilitation (CDCR) entered into an agreement with Maxor. SPB was notified by Mr. Swineberg that any such contract, if entered into, would not be with CDCR but rather the State of California Prison Health Care Services. As such, the correct party to this challenge is not CDCR but CPHCS.

Legal Standard

In *Professional Engineers in California Government v. Department of Transportation*,[2] 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.

Positions of the Parties

AFSCME asserts that the CPHCS entered into a Contract with Maxor for the purpose of having contract pharmacists work at CDCR's facilities. AFSCME contends "there is nothing urgent, temporary, nor occasional about the use of these contracts or any contracts that preceded them." AFSCME alleges that "these contracts are being used to fill vacant positions that CDCR 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."

In support of its assertion that CPHCS entered into these agreements, AFSCME does not submit the agreement or agreements at issue, rather it submits a job advertisement posted by Maxor for the position of pharmacist. The job advertisement states in part that:

> Maxor is currently seeking qualified PHARMACISTS interested in getting involved in this one-in-a-lifetime opportunity to help establish exemplary standards in pharmaceutical care for [the California Department of Corrections and Rehabilitation].

The job advertisement further states:

> The Clinical Pharmacy Operations Specialist:
>
> - provides educational and consultation services in the field of pharmacology and drug therapy,
> - implements clinical therapeutic initiatives
> - implements disease management guidelines
> - performs formulary management activities and engages in other educational and clinical activities as necessary

[2] (1997) 15 Cal.4th 543, 547.

CPHCS responds that the matter is beyond SPB's jurisdiction because there is no contract to review[3]:

- AFSCME only attached a job advertisement; and
- It is by a private company to fill its own positions necessitated by its own contract with the Prison Healthcare Receivership Corporation to assist in setting up a comprehensive pharmacy system.

Analysis

CPHCS's argument that SPB lacks jurisdiction is not meritorious. Government Code section 19132 vests SPB with jurisdiction to review, upon request by an employee organization, whether an executed or proposed contract complies with the provisions Government Code section 19130, subdivision (b). Whether the employee organization submits a contract to SPB with its request is not determinative of SPB's jurisdiction. It is the request itself that brings this matter within SPB's jurisdiction.

Significantly, California Code of Regulations, title 2, section 547.62, requires the state agency to file with the Board and serve upon the employee organization a copy of the proposed or executed contract within 15 days of receiving a copy of the employee organization's request. Once AFSCME requested SPB review of the pharmacist contract and CPHCS was notified of the request, it was incumbent upon CPHCS to deny the existence of such a Contract or file the challenged Contract with SPB. CPHCS failed to do either. It is further noted that it appears from both the job advertisement and CPHCS's own response that such a Contract exists. The job advertisement offers applicants the once-in-a-lifetime opportunity to participate "in the reform of CDCR Pharmacy Services" implying collaboration between CDCR and Maxor. CPHCS also mentions the existence of a contract in its response: "to fill its own positions necessitated apparently by its own contract with the Prison Healthcare Receivership Corporation to assist in setting up a comprehensive pharmacy system."

While CPHCS failed to comply with its obligation to file the Contract with SPB, AFSCME did not meet its burden of demonstrating how the Contract fails to meet the conditions specified in Government Code section 19130, subdivision (b). CCR, title 2, section 547.61 provides, in part, that:

> The employee organization's request for review shall identify the contract to be reviewed and include the following:
>
> (1) specific and detailed factual information that demonstrates how the contract fails to meet the conditions specified in Government Code § 19130(b) . . .

Government Code section 19130, subdivision (b), provides that personal services contracting is permissible when:

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[3] CPHCS does not challenge SPB's jurisdiction over it.

(10) 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.

AFSCME argues "these contracts are being used to fill vacant positions that the Department of Corrections and Rehabilitation 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." AFSCME, however, fails to demonstrate how the job advertisement supports its argument. AFSCME fails to provide any evidence, such as a declaration, job description, job bulletin, etc., illustrating how contractors are performing "the same work, in the same settings, and under the same conditions as civil service employees." Therefore, AFSCME's challenge of the Contract is dismissed.

Conclusion

This letter constitutes the decision by the Executive Officer to dismiss AFSCME's challenge to the Contract. Any party has the right to appeal this decision to the five-member State Personnel Board under 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,

SUZANNE M. AMBROSE
Executive Officer