

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by)	BOARD DECISION
)	
CALIFORNIA ATTORNEYS,)	
ADMINISTRATIVE LAW JUDGES AND)	PSC No. 04-05
HEARING OFFICERS IN STATE)	
EMPLOYMENT)	
)	March 22, 2005
from the Executive Officer's November 17,)	
2004 Approval of a Contract for Special)	
Education Mediation Conferences and Due)	
Process Hearings between the California)	
Department of Education and McGeorge)	
School of Law)	

APPEARANCES: Steven B. Bassoff, Attorney, on behalf of California Attorneys, Administrative Law Judges and Hearing Officers in State Employment; Gregory J. Rousseve, Deputy General Counsel, on behalf of California Department of Education; Charity Kenyon, Attorney, on behalf of University of the Pacific, McGeorge School of Law.

BEFORE: William Elkins, President; Maeley Tom, Vice President; Sean Harrigan and Anne Sheehan, Members.

DECISION

This matter is before the State Personnel Board (SPB or Board) after the California Attorneys, Administrative Law Judges and Hearing Officers in State Employment (CASE) appealed from the Executive Officer's November 17, 2004 decision approving the contract (Contract) between the California Department of Education (CDE) and University of the Pacific, McGeorge School of Law (McGeorge) for special education mediation conferences and due process hearings. In this decision, the Board finds that the Contract is justified under Government Code section 19130, subdivision (b)(10) as an urgency agreement, while the contracted services are being

transitioned consistent with the civil service mandate implied in Article VII of the California Constitution.

BACKGROUND

Federal law guarantees “free appropriate public education” to all students with disabilities. To comply with federal law and obtain federal funding, states must provide certain procedural safeguards, including special education mediation conferences and due process hearings, for parents and students who wish to challenge decisions public schools may make with respect to the identification, evaluation, placement and delivery of free appropriate public education to students with disabilities.

California has over 700,000 special education students. The federal government provides over \$1 billion to the state to ensure that these students obtain a free appropriate public education. The state risks losing these federal funds if there is any interruption in the special education services mandated by federal law, including the availability of special education mediation conferences and due process hearings.

Federal law prohibits CDE from conducting the special education mediation conferences and due process hearings itself. From 1981 through 1988, OAH conducted the due process hearings, but not the mediation conferences, for CDE. Since 1989, CDE has contracted with McGeorge to conduct both the special education mediation conferences and due process hearings.

On June 25, 2002, CASE challenged an earlier contract that CDE had entered into with McGeorge, asserting that the contracted work could be performed adequately and competently by state civil service employees in the Office of Administrative Hearings (OAH). That contract’s term was from June 1, 2000 through May 31, 2003

and its total amount was \$23,277,916.00. At its meeting on March 9, 2004, the Board issued a decision in *California Department of Education and University of the Pacific, McGeorge School of Law* (2004) PSC No. 03-04 (PSC No. 03-04), which approved that earlier 3-year contract on the grounds that, at the time of contracting, OAH did not have sufficient expert staff and resources to perform the contracted services.¹

According to CDE, after SPB issued its decision approving that earlier 3-year contract, the Department of General Services (DGS) required CDE, before it could seek proposals from private contractors to perform the special education mediation conferences and due process hearings, to ask OAH to review whether it could provide those services. On May 24, 2004, OAH responded to CDE's inquiry, in relevant part, as follows:

...the character of the special education dispute resolution program is typical of other dispute resolution programs routinely handled by the Office of Administrative Hearings for over 100 other state agencies and over 800 local and county agencies. The hearing and mediation process, as well as the calendaring demands, you described are consistent with the work the Office of Administrative Hearings customarily performs. In short, the special education resolution program calls for the very type of quasi-adjudicatory forum for which the Office of Administrative hearings was created.

Unfortunately, for the 2004-05 fiscal year, the Office of Administrative Hearings simply does not have the administrative law judges, staff support or other resources necessary to appropriately handle the indicated volume of special education cases. Additionally, even if the resources were available, at this late date there is insufficient time to provide adequate training or transitioning prior to July 1, 2004.

Should the staffing and resources situation change, we would be most pleased to work with you and your staff in transitioning the administration

¹ The Board understands that, because the 3-year contract that was the subject matter of PSC No. 03-04 expired before the Board issued its final decision in that case, CDE entered into a 1-year contract with McGeorge for the 2003-2004 fiscal year. CASE did not ask the Board to review that 1-year contract for compliance with Government Code section 19130.

of the special education dispute resolution program to the Office of Administrative Hearings in the 2005-06 fiscal year.

CDE asserts that OAH's refusal to provide the needed services created an urgent need for the Contract at issue in this case. The Contract's term is from July 1, 2004 through June 30, 2005, and its total amount is \$9,929,575.00. CASE has challenged the Contract, asserting that the contracted services could be provided adequately and competently by civil service employees.

PROCEDURAL HISTORY

By letter dated June 25, 2004, pursuant to Government Code section 19132 and SPB Rule 547.59 et seq.,² CASE asked SPB to review the Contract for compliance with Government Code section 19130, subdivision (b). On July 30, 2004, pursuant to SPB Rule 547.68,³ McGeorge moved to intervene as a party in this matter. McGeorge's motion was granted on August 13, 2004.

On July 30, 2004, Protection and Advocacy, Inc. (PAI) moved to intervene as a party in this matter. CASE objected to that motion on the grounds that PAI was not a contractor and was, therefore, not permitted to intervene as a party under SPB Rule 547.68. On August 13, 2004, PAI's motion to intervene as a party was denied, but PAI was granted the opportunity to submit written comments as a member of the public.

CDE and McGeorge submitted responses to CASE's review request, and CASE submitted a reply to CDE's and McGeorge's responses.

² Cal. Code Regs., tit. 2, § 547.59 et seq.

³ California Code of Regulation, title 2, section 547.68, in relevant part, provides:

At any time after an employee organization requests that that board review a contract for compliance with Government Code §19130(a) or §19130(b), a contractor to the disputed contract may move to intervene as a party in the contract review process....

The Executive Officer issued his decision approving the Contract on November 17, 2004, finding, in relevant part:

For the current fiscal year, OAH refused to perform for CDE the special education mediations and due process hearings mandated under federal law for students with disabilities. While OAH, in the future, may be able to provide those services adequately and competently if OAH is fully funded, for this fiscal year, in order to ensure that parents of special needs students continued to obtain, without interruption, all the administrative process to which they are legally entitled and the state did not risk losing up to \$1 billion in federal finds, CDE had an urgent need for McGeorge's services that could not have been met by OAH through the civil service process.

CASE timely appealed to the Board from the Executive Officer's decision.

The Board has reviewed the record, including the written arguments of the parties and, at its regularly scheduled meeting on March 9, 2005, heard the oral arguments of the parties,⁴ and now issues the following decision.

ISSUE

The following issue is before the Board for review:

Is the Contract justified under Government Code section 19130, subdivision (b)(10)?⁵

⁴ The Board has also reviewed the written and heard the oral public comments of PAI.

⁵ In the written arguments filed with the Executive Officer, McGeorge asserted that SPB was bound by Education Code section 56504.5 to approve the Contract. Footnote 2 in the Executive Officer's November 17, 2004 decision stated that,

Because the Contract is authorized under Government Code section 19130(b)(10), there is no need to address McGeorge's assertion that the Contract is also authorized under Education Code section 56504.5. In *California Department of Education and University of the Pacific, McGeorge School of Law* (2004) PSC No. 03-04 at pp. 5-9, the Board made clear that it does not have jurisdiction to review a challenged contract for compliance with Education Code section 56504.5.

McGeorge did not appeal to the Board from the Executive Officer's determination on this issue. The Board, therefore, finds that this issue is not properly before the Board for review. Even if this matter could be considered to be before the Board for review, the Board adopts and repeats its determination set forth in PSC No. 03-04 at pp. 5-9. So long as CDE relies upon Government Code section 19130, subdivision (b)(10) as its authorization for contracting, it must prove that the Contract is consistent with Article VII of the California Constitution and justified under the judicially recognized exception to the civil service

DISCUSSION

In *Professional Engineers in California Government v. Department of Transportation*,⁶ the California Supreme Court recognized that, emanating from Article VII of the California Constitution, is an implied “civil service mandate,” which 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 that various court decisions have recognized. 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.

CDE and McGeorge assert that the Contract is justified under Government Code section 19130, subdivision (b)(10), which authorizes a state agency to enter into a personal services contract with a private contractor 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.

CDE and McGeorge assert that OAH did not inform CDE until May 24, 2004 that it could not perform the needed special education mediations and due process hearings for the 2004-2005 fiscal year. If CDE did not have in place a contract for special education mediations and due process hearings for that time period, it would have put in jeopardy California’s eligibility to receive over \$1 billion in federal funds. In addition, the

mandate set forth in subdivision (b)(10), notwithstanding any independent authorization it may have to contract under the Education Code.

⁶ (1997) 15 Cal.4th 543, 547.

state would have risked disrupting the educations of thousands of children with disabilities and the work of the schoolteachers and administrators who educate them.

CDE and McGeorge contend that this information shows that CDE had an urgent need for the contracted services that could not have been timely met through the civil service.

CASE counters that the only reason that OAH was unable to perform the contracted work for the 2004-2005 fiscal year was because it has not been given sufficient resources to do so. In support of its position, CASE cites to the finding in *Professional Engineers in California Government v. Department of Transportation* that a state cannot create an artificial need for contracting by refusing to hire sufficient civil service employees to perform the state's work, and then rely upon the workforce shortage it has created to justify the hiring of private contractors.⁷ According to CASE, unless the Board disapproves the Contract and the state redirects the funds to OAH, OAH will never have sufficient staff and resources to perform the special education mediations and due process hearings.

The Board does not wish to take any precipitous action that would impede the ability of special education students and their parents to obtain, without interruption, all the administrative process to which they are legally entitled. Neither does the Board want to subject the state to the risk of losing up to \$1 billion in federal finds. In order to ensure that such interruptions and risks do not occur, the Board is willing to allow the Contract to remain in effect on the grounds of urgency under Government Code section 19130, subdivision (b)(10).

The Board is, however, very sympathetic to CASE's assertion that, unless the state takes prompt, appropriate action consistent with Article VII and the state's civil service mandate to redirect the funds currently being paid to McGeorge, and to authorize the needed state staffing, resources and training to perform the special education mediations and due process hearings, CDE will remain on the never-ending merry-go-round of contracting outside the civil service.

During oral argument, McGeorge asserted that the current Contract is only a "transition" agreement in order to assure that the special education mediations and due process hearings will not be interrupted or delayed while CDE determines how it will proceed in the future. The parties stated further that CDE has issued a Request for Proposals (RFP) to solicit bidders from both inside and outside the state civil service for a three-year contract for the 2005 –2008 fiscal years.

The documentation from OAH submitted in this matter and in PSC No. 03-04⁸ shows that the mediation conferences and due process hearings currently being conducted by McGeorge under the Contract are the types of services that state workers historically and customarily have performed and can perform adequately and competently. Consistent with the requirements of Article VII and the state civil service mandate, the contracted work should, therefore, be transitioned to state workers. The RFP process currently underway does not appear to be designed to effectively result in such a transition.

⁷ 15 Cal. 4th at pp. 571-572. (The Court noted that “the trial court found Caltrans created an artificial 'need' for private contracting that resulted from its practice of maintaining an inadequate level of civil service staff, rather than from any legitimate lack of available or obtainable qualified personnel.”)

⁸ The Board takes official notice of its record in PSC No. 03-04.

In PSC No. 03-04, the Board allowed CDE's then contract with McGeorge to remain in effect because OAH did not have adequate resources and sufficient expert staffing at the time of contracting to perform the contracted services and the Board did not want to cause a disruption in the of delivery of essential administrative processes to parents of students with disabilities. The Board is allowing the Contract at issue in this case to remain in effect for the same reason. The Board, however, will not approve any further contracting unless it is clear that the state is diligently working to develop and implement a plan that would promptly transition the contracted work to state workers in accordance with Article VII and the state's civil service mandate.

CONCLUSION

In order to ensure that parents of students with disabilities continue to receive, without interruption, all the mediation and due process hearing services to which they are entitled under state and federal law, the Board will allow the Contract to remain in effect under Government Code section 19130, subdivision (b)(10) as an urgent transition agreement. The Board trusts and expects that the state will, without any further delay, take all necessary and appropriate action to transition the contracted work to state workers consistent with Article VII and its implied civil service mandate.

ORDER

The Board hereby sustains the Executive Officer's November 17, 2004 decision approving the Contract under Government Code section 19130, subdivision (b)(10).

STATE PERSONNEL BOARD⁹

William Elkins, President
Maeley Tom, Vice President
Sean Harrigan, Member
Anne Sheehan, Member

* * * * *

I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on March 22, 2005.

Floyd Shimomura
Executive Officer
State Personnel Board

[PSC 04-05-CDE-McG-CASE]

⁹ Member Ron Alvarado did not participate in this decision.