

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by)	BOARD DECISION
)	
Department of Mental Health)	
)	PSC No. 07-04
from the Executive Officer's July 18, 2007)	
Disapproval of two Personal Services)	
Contracts for Psychological Services.)	March 4, 2008
)	
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)	

APPEARANCES: Andrew H. Baker, Attorney, Beeson, Tayer & Bodine, on behalf of the American Federation of State, County, and Municipal Employees, Local 2620, AFL-CIO; Norman Black, Assistant Chief Counsel, on behalf of the Department of Mental Health.

BEFORE: Sean Harrigan, President; Richard Costigan, Vice-President; Anne Sheehan and Maeley Tom, Members.

DECISION

This matter is before the State Personnel Board (SPB or Board) after the Department of Mental Health (Department) appealed from the Executive Officer's July 18, 2007, decision in SPB File No. 07-006(b), disapproving Contract No. 05-75063-000 and Contract No. 06-76007-000 (hereinafter "Contracts") promulgated by the Department for Sexually Violent Predator (SVP) psychological evaluation services. The matter was initially brought to the SPB after the American Federation of State, County, and Municipal Employees, Local 2620, AFL-CIO (AFSCME), requested that the SPB review the Contracts for compliance with the provisions of Government Code section 19130(b).

In this decision, the Board finds that the Contracts are not justified under the provisions of Government Code section 19130(b)(3), because the Department failed

to establish that existing civil service classifications are inadequate to employ civil service employees to provide those services to be rendered under the Contracts, and because the Department failed to establish that it made reasonable, good faith efforts to hire civil service psychologists or psychiatrists prior to entering into the Contracts.

The Board also finds, however, that immediate revocation of the Contracts would result in a substantial risk of harm to the public safety and, as a result, the Board delays revocation of the Contracts for 90 days after the date of this Decision in order to afford the Department an opportunity to hire civil service employees to perform those services contemplated under the Contracts.

BACKGROUND

The Department is tasked with evaluating state inmates to determine whether the inmate should be designated as an SVP, and the Contracts are for the psychological evaluation of inmates who have been identified as possible SVPs. According to the Department, the evaluation process requires the inmate to first be evaluated by two practicing psychiatrists or psychologists to determine if the inmate has a diagnosed mental disorder and whether the inmate is likely to engage in sexually violent behavior if he or she does not receive appropriate treatment while in custody. If the examining professionals do not agree as to the appropriate diagnosis, the inmate is thereafter examined by two independent professionals.¹ If

¹ Because Welfare and Institutions Code § 6601 mandates that the two independent professionals cannot be state government employees, the Department maintains that the Contracts are necessarily permissible, at least insofar as they contemplate contracting for the services of the two independent professionals. AFSCME has not disputed the Department's contention in this regard. The Board finds, therefore, that the Contracts are permissible for purposes of the Department contracting for the services of independent professional evaluators under Section 6601.

the inmate is ultimately determined to be a SVP, the inmate remains in custody until he or she is found to no longer pose a danger to the health and safety of others. These evaluations must, however, be completed prior to the inmate's release date in order to prevent the inadvertent release of a possible SVP.

During the proceedings before the Executive Officer, the Department asserted that the Contracts were authorized because the nature of the contracted work was a response to an extreme emergency, and because the Department was unable to meet the urgent demands of the work through the civil service. More specifically, the Department asserted that the passage of Senate Bill 1128 in September 2006, and the passage of Proposition 83 (Jessica's Law) in November 2006, expanded the criteria by which individuals are designated as an SVP, thereby significantly increasing the number of SVP evaluations the Department was required to conduct. The significant increase in evaluations led to a near doubling of the number of SVP Panel evaluators since 2006.

The Department further asserted in the proceedings before the Executive Officer that there are no existing civil service positions with the required qualifications of licensed psychiatrist or psychologist to evaluate SVPs, and that it has been unable to hire civil service psychologists because the current salary of a state psychologist is far below what an expert in SVP training can make in private practice. As a result, the Department asserted that it has experienced a 19 percent staffing vacancy rate for psychologists, and a 42 percent staffing vacancy rate for psychiatrists. The Department further maintained that its efforts to hire psychiatrists and psychologists with the requisite expertise to evaluate and treat SVPs has been

futile and, “since SVP evaluations cannot wait while more time is spent advertising under the Civil Service process, [the Department] had to execute the contract as the only immediate solution to this crisis.”² The Department also asserted, however, that the Contracts were intended to be temporary, as they expire during 2008.

As a result of the foregoing, during the proceedings before the Executive Officer, the Department maintained that the Contracts were permitted pursuant to Government Code section 19130, subdivisions (b)(3), (6) and (10). The Department further asserted that the Contracts were authorized pursuant to Title 2, Cal. Code Regs., section 302.1.

During the hearing before the Board, however, the Department asserted that the Contracts were justified for the following reasons:

(1) The Department has attempted to fill vacant psychology positions for the SVP evaluation program for several years, but has never received an application from an incumbent Department psychologist. In addition, the Department has never been able to fill more than one position at a time, and has typically received no more than three applications at a time for any of the unspecified recruitments that it has conducted, with none of those applicants possessing the required qualifications and experience for the vacant positions. Recruitment activities for the vacant positions included the following:

- Advertising with the Association for Treatment of Sexual Abusers on unspecified date(s).

² The Department provided no information as to the recruitment efforts it had made to hire civil service psychiatrists and psychologists.

- Advertising by “traditional,” unspecified state service job announcements on unspecified date(s).

(2) The highly specialized qualifications needed to perform SVP evaluations are usually not available with entry-level psychologists, which has greatly increased the difficulty in recruiting and hiring civil services psychologists and psychiatrists to perform those duties contemplated under the Contracts. In addition, the extensive travel, possible need to relocate, and sometimes erratic and/or long hours required as part of the job has also made it difficult to recruit and hire civil service employees.

(3) During a series of meetings that commenced in 2006, a representative from the SPB participated in discussions with representatives from the Department, the Department of Finance (DOF), the Department of Developmental Disabilities (DDD), the Department of Public Health (DPH), the Department of Personnel Administration (DPA), the Department of Veterans Affairs (DVA), and the Health and Human Services Agency (HHSA), concerning the difficulties being experienced by the various departments with respect to hiring civil service psychologists and psychiatrists. The consensus reached during those meetings was that the Department of General Services (DGS) would approve contracts for psychologist and psychiatrist services as “emergency” contracts necessary to perform critical services, and that such contracts were justified pursuant to Government Code section 10340(b) (1). Because SPB staff were aware of that decision to authorize emergency contracts for psychologist and psychiatrist services, the SPB is being inconsistent in disapproving the instant contracts.

(4) Under the law, if an inmate scheduled for release is not evaluated within a certain period of time for purposes of determining whether he or she is to be classified as an SVP, the inmate must be released from incarceration.³ If the Contracts are cancelled, it is very likely that a number of SVPs will be released into the community, as the Department does not have adequate existing resources to evaluate those inmates scheduled for evaluation as an SVP. Such a result presents an unacceptable risk to the public health and safety.

Unlike the proceedings before the Executive Officer, during the proceedings before the Board, the Department did not assert that the Contracts were permissible under the provisions of Government Code section 19130, subdivisions (b)(6) or (10), nor did the Department assert that the Contracts were authorized under the provisions of Title 2, Cal. Code Regs., section 302.1. As a result, those assertions are now deemed waived for purposes of this Decision.

In addition, in an *amicus* brief submitted by the Santa Clara County District Attorney's Office, that Office asserts that a high level of expertise is needed for psychologists/psychiatrists to accurately evaluate SVPs, and it is not realistic to assume that "state doctors can simply incorporate SVP cases into their daily workload." Given the public safety concerns that will arise if potential SVPs are not properly evaluated prior to their release from incarceration, the Contracts should be approved in order to give the Department additional time to ascertain the availability of qualified civil service employees to perform the SVP evaluation function.

³ Although the Department did not specify what statute or regulation sets forth the time period in which an inmate must be evaluated for SVP purposes, Welfare and Institutions Code sections 6600-6609.3 govern the SVP evaluation process.

For its part, AFSCME contends that the Department failed to present sufficient evidence to establish that it had made reasonable recruitment efforts to hire civil service employees.⁴ AFSCME further asserts that, because during the proceedings before the Executive Officer, the Department failed to raise the issue of SPB staff purportedly concurring with the Department's decision to contract for psychologist and psychiatrist services on an emergency basis, the Department is now stopped from raising that argument before the Board. Finally, AFSCME contends that protection of the public safety is not one of the enumerated reasons under which a personal services contract may be justified under Government Code section 19130(b) and, as a result, that contention must also be dismissed.

PROCEDURAL HISTORY

By letter dated April 19, 2007, AFSCME asked the SPB to review for compliance with Government Code section 19130, subdivision (b), two personal services Contracts promulgated by the Department for SVP psychological evaluation services. By letter dated May 1, 2007, the SPB directed the Department to file with a response with the SPB and AFSCME concerning the Contracts. The Department thereafter filed its brief with the SPB on May 21, 2007. AFSCME declined to submit a reply to the Department's response, and the matter was deemed submitted for review by the Executive Officer.

⁴ AFSCME also objected to several declarations and other information submitted by the Department during the proceedings before the Board concerning the Department's recruitment efforts, on the grounds that the Department was barred from raising that information because it had failed to submit the information for consideration by the Executive Officer. As discussed *infra*, because the Board finds that, even taking into consideration the information to which AFSCME objects, the Contracts are not justified under Government Code section 19130(b)(3), the Board declines to reach the issue of whether the information in question was barred from consideration in these proceedings.

On July 18, 2007, the Executive Officer issued her decision disapproving the Contracts, finding that the Contracts were not justified under Government Code section 19130(b)(3), as the Department failed to establish that existing civil service classifications are inadequate to employ civil service employees to provide those services to be rendered under the Contract, and because the Department failed to present sufficient information that it made reasonable, good faith efforts to hire civil service hearing reporters. The Executive Officer further found that the Contracts did not constitute emergency contracts under Government Code section 19130(b) (6) because, although it was undisputed that the Department needed psychologists to evaluate inmates to determine if they should be classified as SVPs, the Department failed to establish that an “emergency” existed, as the Department knew well in advance that it would need to hire psychologists to evaluate potential SVPs. Thus, the case did not involve a true emergency that could not be planned for in advance. Finally, the Executive Officer found that the Contracts were not justified under Government Code section 19130(b) (10), as the services to be performed were not urgent, temporary or occasional in nature, but instead were predictable, permanent and constant.

The Department filed an appeal of the Executive Officer’s decision with the Board on August 16, 2007, and submitted its opening brief on September 7, 2007. AFSCME filed its response on September 21, 2007. The Department filed its reply on October 4, 2007. In addition, on November 19, 2007, the Santa Clara County

District Attorney's Office requested permission to participate as an *amicus curie* in PSC 07-04, and submitted a brief in support of the Department's position.⁵

Oral argument was conducted before the Board during its December 4, 2007, meeting, after which the matter was submitted for decision by the Board.

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*,⁶ 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.

⁵ The Board subsequently accepted the *amicus* brief submitted by the Santa Clara County District Attorney's Office, but denied that Office's request to participate in oral argument during the Board's December 4, 2007 meeting.

⁶ (1997) 15 Cal.4th 543, 547.

Government Code section 19130, subdivision (b) (3), authorizes a state agency to enter into a personal services contract when:

[t]he 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 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.⁷

DISCUSSION

(The Contracts are not Justified Under Section 19130(b) (3))

The Department asserts that the highly specialized qualifications needed to perform SVP evaluations are usually not available with entry-level psychologists, which has greatly increased the difficulty in recruiting and hiring civil services psychologists and psychiatrists to perform those duties contemplated under the Contracts. The Department has not, however, asserted that there are no existing civil service classifications to which it could appoint employees with the requisite expertise needed to perform the work contemplated under the Contracts. Consequently, in order to establish that the Contracts are justified under the provisions of Government Code section 19130(b)(3), the Department must prove

⁷ PSC No. 05-03, at p. 8.

that it has been unable to successfully hire suitable candidates for its vacant psychologist and psychiatrist positions.

Here, the Department asserts that it has attempted to fill vacant psychology positions for the SVP evaluation program for “several years,” but has never received an application from an incumbent Department psychologist. In addition, the Department contends that it has never been able to fill more than one position at a time, and has typically received no more than three applications at a time for any of the unspecified recruitments that it has conducted, with none of those applicants possessing the required qualifications and experience for the vacant positions. The Department’s recruitment efforts have consisted of advertising with the Association for Treatment of Sexual Abusers on unspecified date(s), and advertising by “traditional,” unspecified, state service job announcements on unspecified date(s).

The burden of proof is on the Department to present sufficient evidence to establish that the Contracts are justified. Stating that over the course of several years, the Department placed a recruitment advertisement in a trade publication on one, or possibly more, unspecified occasions, and that it also placed unspecified “traditional” state service job announcements in unspecified media on one or more unspecified occasions, simply does not constitute adequate proof that the Department made concerted civil service recruitment efforts prior to resorting to employing contractors to perform the type of work customarily performed by the state civil service.

While it may be, as the Department asserted during oral argument, that staff turnover within the Department resulted in the loss of verifiable information

concerning the Department's recruitment efforts, such a loss of institutional knowledge cannot be relied upon to shore up an otherwise wholly inadequate record concerning the Department's recruitment efforts. As a result of this lack of evidentiary support presented by the Department, the Board necessarily finds that the Department has failed to establish that the Contracts are justified under the provisions of Section 19130(b)(3).

(Implied Approval of the Contracts by SPB Staff)

The Board finds to be without merit the Department's apparent assertion that the SPB somehow acquiesced to the Department entering into the disputed Contracts because one or more SPB staff members were purportedly cognizant of the Department's intention to do so and did not object to the Department's proposed course of action. As an initial matter, because the Department failed to present that argument for consideration by the Executive Officer, it is determined that the Department waived its right to present that argument for consideration before the Board. More importantly, it is for the Board, not one of its employees, to determine whether any personal services contract complies with the requirements of Government Code section 19130. Consequently, the Department's argument is rejected.

(Public Safety Considerations)

This case does, however, present very troublesome public safety considerations. Although AFSCME is technically correct in that Government Code section 19130(b) does not contain a "public safety" exception for purposes of approving a personal services contract, the Board is also cognizant of the fact that

its decisions do not exist in a vacuum, and that significant real world consequences may result if the Contracts at issue here were to be immediately voided.

It is undisputed that the Department lacks the requisite staff to conduct SVP evaluations in a timely manner. It is also undisputed that if those SVP evaluations are not conducted in a timely manner, it is very possible that one or more inmates who might very well be designated as SVPs were they to be properly evaluated, will be released into the community with possible disastrous consequences should the inmate re-offend. Such a significant risk must be guarded against if at all possible.

Had the Department presented sufficient evidence to support its assertion that it has been unable to hire civil service employees to perform SVP evaluations, despite having made good faith efforts to do so, the Contracts would be justified under Government Code section 19130(b)(3). By failing to present such evidence, however, the Department has placed the Board in the untenable position of either immediately disapproving the Contracts, with no consideration to the real world consequences that might result from that action, or approving the Contracts on the basis of the wholly inadequate evidence submitted by the Department. Neither of those options is acceptable to the Board.

Given the foregoing, the Board approves the Contracts for 90 days from the date of this Decision in order to afford the Department an opportunity to recruit civil service employees to perform SVP evaluations. At the conclusion of this 90 days grace period, however, the Contracts are disapproved.

CONCLUSION

The Department failed to present sufficient evidence to establish that existing civil service classifications are inadequate to meet its SVP evaluator needs. Nor did the Department present sufficient evidence to establish that it has made reasonable, good faith efforts to hire civil service employees to perform those duties contemplated under the Contracts. Consequently, the Department failed to establish that the Contracts are permissible under the provisions of Government Code section 19130(b)(3).

The Board, however, recognizes that significant harm could occur if the Contracts are immediately disapproved and potential SVP inmates are not properly evaluated prior to being released back into the community. As a result, the Board finds that the appropriate result in this case is permit the Contracts to continue for 90 days after the date of this Decision in order to afford the Department an opportunity to hire civil service employees to perform its SVP evaluations, and to disapprove the Contracts at the expiration of that 90 days period.

ORDER

The Board hereby authorizes the Department of Mental Health to utilize the Contracts for 90 days from the date of this Decision in order to afford the Department an opportunity to hire civil service employees to perform those duties contemplated under the Contracts. This provisional approval shall expire 90 days after the date of this Decision, at which time the Contracts are disapproved.

STATE PERSONNEL BOARD⁸

Sean Harrigan, President
Richard Costigan, Vice President
Anne Sheehan, 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 March 4, 2008.

Suzanne M. Ambrose
Executive Officer
State Personnel Board

⁸ Member Patricia Clarey did not participate in this Decision.