

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**

from the Executive Officer's September 26,
2024, Approval of the Contract Between the
California Department of State Hospitals and
Vorwerk Forensic Psychology, Inc.

BOARD DECISION

PSC NO. 25-01

April 8, 2025

APPEARANCES: Sarah S. Kanbar, Esq., on behalf of the American Federation of State, County and Municipal Employees, Local 2620; Carlos A. Castro, Attorney, on behalf of the California Department of State Hospitals.

BEFORE: Shawnda Westly, President; Kathy Baldree, Vice President; Dr. Gail Willis, Kimiko Burton, and Ana Matosantos.

DECISION

The American Federation of State, County and Municipal Employees, Local 2620 (AFSCME) appealed from the State Personnel Board (SPB) Executive Officer's September 26, 2024, decision approving a contract for psychological services (hereinafter "the Contract") between the California Department of State Hospitals (DSH) and Vorwerk Forensic Psychology, Inc. (Vorwerk). The members of the State Personnel Board (Board) unanimously find that DSH established that the contract is constitutional under the implied civil service mandate of article VII of the California Constitution. The Board, therefore, denies AFSCME's appeal and approves the contract.

BACKGROUND

The Contract calls for Vorwerk to provide psychological services to criminal defendants deemed incompetent to stand trial (IST). DSH contends that the contract is necessary to allow them to meet court-mandated timelines related to providing services to

evaluate and/or restore a defendant's competency. AFSCME contends that the Contract unlawfully contracts for services that state employees can perform. The question of what standards should be applied to the evaluation of the Contract is at the heart of this matter.

Criminal defendants charged with felonies may be evaluated for competency to stand trial under Penal Code section 1369. The state is prohibited from trying or convicting a defendant that is found IST. Once a defendant is found IST, DSH is charged with determining whether there is a substantial probability that the defendant will attain competency in the foreseeable future. The IST defendant is placed on a waitlist for admission to a DSH facility. DSH, however, contends that it has insufficient resources for the growing number of defendants referred to it for competency services. One Appellate court held that, upon a finding of incompetence, DSH must begin to provide substantive services within 28 days. (*Stiavetti v. Clendenin* (2021) 65 Cal.App.5th 691, 737-738.) DSH, however, frequently misses this deadline, which can lead to sanctions and may infringe upon the defendant's due process rights.

To help remedy the issue, the Legislature created a process for reevaluating IST defendants that are on the waitlist for admission to DSH facilities to receive competency services. The process laid out in Welfare and Institutions Code (WIC) section 4335.2 calls for the evaluation of whether an IST defendant awaiting admission has regained competence, is unlikely to regain competence, or should be referred to a county or other facility for treatment or placement in a diversion program. If an IST defendant falls into one of these categories, they are removed from the IST waitlist. Removal from the waitlist makes it more likely that DSH will be able to comply with the mandated timeline for providing remaining-IST defendants substantive services.

The Contract with Vorwerk calls for it to, among other things, reevaluate IST defendants. In so doing, Vorwerk is to review records, interview IST defendants to

determine their competency to stand trial, submit any required reports, and testify if necessary. DSH initially executed the Contract on December 21, 2021, for a three-year term expiring on June 30, 2024. On April 23, 2024, the Contract was amended to add services through the 2025 fiscal year. The amendment added \$600,000.00 to the cost of the Contract. The Contract cites to WIC section 4335.2, which, according to DSH, “gives explicit authority to DSH to contract for IST re-evaluation services.”

PROCEDURAL HISTORY

On June 10, 2024, AFSCME requested, under Government Code¹ section 19132 and California Code of Regulations, title 2, section 547.64, that the Executive Officer review and disapprove the Contract because the services contracted for can and should be provided by civil service employees. AFSCME argued that the work to be performed under the Contract could be competently and efficiently performed by civil servants and that DSH should be compelled to hire an adequate number of psychological forensic evaluators to perform IST services. Specifically, AFSCME argued that the Contract does not comply with section 19130, subdivision (b)(5), nor article VII of the California Constitution and is therefore impermissible.

DSH provided its Response on July 16, 2024, asserting that the Contract is constitutional and exempt from review under section 19130 pursuant to the Budget Act of 2024. Nonetheless, DSH contended that section 19130, subdivisions (b)(3), (b)(5), and (b)(10) all provide applicable exceptions that support the Contract. DSH also contended that WIC section 4335.2, subdivision (b), explicitly authorized it to enter into the Contract.

On July 20, 2024, AFSCME submitted its Reply to the Executive Officer, again reiterating its position that DSH lacked statutory authority to enter into the Contract without

¹ All further statutory references are to the Government Code and are referred to as “section,” unless otherwise indicated.

compliance with section 19130. Further, assuming that the SPB applied section 19130, AFSCME contended that DSH failed to establish that any of the exceptions to the civil service mandate applied. In short, AFSCME contended that DSH failed to establish that despite making diligent, good faith efforts to hire sufficient civil servants to perform IST evaluations, it has been unable to do so.

On September 26, 2024, the Executive Officer issued her decision in SPB Case No. 24-0009(b), finding that the Contract was not subject to review under section 19130. Nonetheless, under section 18670, the SPB is called upon to enforce the observance of Article VII of the California Constitution. Thus, the Executive Officer reviewed the constitutionality of the Contract under Article VII's civil service mandate. She determined that DSH established that the services called for under the Contract cannot be adequately and competently performed by civil servants.

AFSCME filed a timely notice of intent to appeal the Executive Officer's decision. On December 2, 2024, AFSCME timely filed its opening brief wherein it contended that the Executive Officer erroneously found that the Contract is exempt from section 19130, and that if the Contract is exempt from section 19130 by virtue of a Budget Act, then the Budget Act is unconstitutional. Further, applying case law regarding the civil service mandate, the Contract must be found unconstitutional.

On December 27, 2024, DSH timely filed its Response to the appeal asserting that WIC section 4335.2 provides DSH with the authority to enter into the Contract. Further, the relevant Budget Acts exempt the Contract from review under section 19130. Under the civil service mandate, DSH argued that the Contract was constitutional because DSH established that civil servants alone cannot adequately and competently perform sufficient IST evaluations to meet DSH's constitutional mandates. This is despite DSH's significant efforts to advertise open positions, streamline its hiring processes, develop and expand

training programs, and increase compensation for civil servants that complete IST evaluations. Finally, DSH contended that the Contract satisfies section 19130, subdivisions (b)(3), (b)(5), and (b)(10) and would therefore be permissible even if it were not exempt from section 19130 review.

On January 10, 2025, AFSCME timely filed its Reply to DSH's Response asserting, among other things, the Executive Officer improperly determined that the Budget Act of 2023 exempts the Contract from review under section 19130. AFSCME called attention to the DSH's stated reasons for entering into the Contract on government forms, which did not reference any Budget Act. For the first time, AFSCME argued that DSH failed to produce sufficient evidence to justify the Contract, for example DSH did not establish how many psychologist positions are open, how many IST defendants are still on the waitlist to be treated, or what the IST waitlist times are.

The case was thereafter re-designated as PSC No. 25-01 and submitted for oral argument before the Board during its regularly scheduled meeting on February 10, 2025.

Because this case concerns an appeal from the Executive Officer's decision, the Executive Officer recused herself from any deliberation or discussion in this matter. The Legal Office was also recused as it assisted the Executive Officer in her decision-making process.

ISSUES

The following issues are before the Board for consideration:

- (1) What standards apply to the review of a contract for IST services?
- (2) Is DSH's contract for psychological services with Vorwerk constitutional under Article VII of the California Constitution?

DISCUSSION

The California Supreme Court has acknowledged that Article VII of the California

Constitution provides for an implied “civil service mandate” that requires work that has historically and customarily been adequately and competently performed by civil service employees to not be performed by private contractors. (*Professional Engineers in California Government v. Dept. of Transportation* (1997) 15 Cal.4th 543, 547.) This mandate “emanates from an implicit necessity for protecting the policy of the organic civil service mandate against dissolution and destruction.” (*California State Employees Ass'n v. Williams* (1970) 7 Cal.App.3d 390, 397.)

Typically, public service contracts are reviewed by the SPB under a statutory request by an employee organization. (Gov. Code, § 19132; Cal. Code Regs., tit. 2 §§ 547.61, 547.70.) Such review evaluates whether the contract is permissible under section 19130, which codifies 11 exceptions to the implied civil service mandate. Under section 19130, among other rationales, personal services contracts are permissible to achieve cost savings if certain stringent criteria are satisfied. Section 19130, subdivision (b) also provides ten, non-cost-savings situations where personal services contracts are permissible.

This matter, however, involves a contract that the Legislature explicitly exempted from review under section 19130. The budget acts in place at the time that the Contract was executed and amended (2021 and 2023 respectively) specifically exempt “[c]ontracts entered into or amended from funding included in [the budget] to address the [IST] waitlist . . . from . . .” section 19130.² AFSCME’s contention that the Legislature violated the California Constitution’s single subject rule is not properly before the Board. The California

² The Board rejects AFSCME’s contention that it should blind itself to the terms of the 2021 budget act due to the Executive Officer’s reliance on the identical terms of the 2023 budget act. Both acts exempt contracts *and amendments* based upon the source of the funding for the contract. AFSCME failed to establish that the amendment at issue in this matter is funded through the Budget Act of 2021. Further, there is no reason for the SPB to ignore the terms of the Budget Act of 2021. Assuming that AFSCME is correct that the Contract is subject to the Budget Act of 2021 based upon its initial execution date, there is no prejudice to applying its terms at this stage. The terms of both budget acts are the same, thus, the analysis is same. Under either Budget Act, the Contract and its amendment are exempt from review under section 19130.

Constitution is clear, administrative agencies cannot declare a statute unenforceable on the basis of it being unconstitutional unless an appellate court has determined that the statute is unconstitutional. (Cal. Const., art. III, § 3.5.) Thus, Appellant failed to establish that the SPB should review the Contract under section 19130.

The Executive Officer determined that the Legislature did not abrogate the SPB's duty to review the contract under section 18670. Section 18670 calls for the SPB to make investigations and hold hearings to enforce the observance of Article VII of the Constitution. As recognized by the courts, the civil service mandate emanates from Article VII of the Constitution. (*Professional Engineers, supra*, 15 Cal.4th at p. 548.) Moreover, no party contested the Executive Officer's determination that the Contract should be reviewed under section 18670 for its compliance with the implied civil service mandate. As such, it is appropriate for the SPB to review the Contract to ensure compliance with the civil service mandate.

The implied civil service mandate's restriction on contracting for services is not without exceptions. The California Supreme Court has held that a personal services contract does not violate the civil service mandate if the contracting department demonstrates that the work tasks could not "be adequately and competently performed by one selected in accordance with the mandate of the Constitution." (*Burum v. State Compensation Ins. Fund* (1947) 30 Cal.2d 575, 580 [quoting *State Compensation Ins. Fund v. Riley* (1937) 9 Cal.3d 126, 135].) As in *Burum*, there is no dispute that civil servants can perform the work that is the subject of the Contract in a competent manner. Thus, the question becomes whether the services called for under the Contract can be adequately performed civil servants as that phrase is used in decisional law related to the civil service mandate.

Over time, the justifications for entering into contracts which do not violate the civil

service mandate have expanded beyond *Burum* and *Riley*. For example, “[l]ater cases have affirmed the ‘nature of the services’ restriction declared in *Riley*, but have also indicated that the restriction is inapplicable if the state seeks to contract for private assistance to perform new functions not previously undertaken by the state” (*Professional Engineers, supra*, 15 Cal.4th at p. 549.) In upholding section 19130, subdivision (a), the court observed that allowing the state to consider cost savings in contracting is consistent with the two main purposes of article VII, namely, to promote efficiency and economy’ in state government, and to eliminate the ‘spoils system’ of political patronage. (*Ibid.*) Further, in finding statutes approving the use of private contracts for highway projects unconstitutional, the California Supreme Court held that the statutes were contrary to the civil service mandate because they authorized Caltrans to contract privately *without regard to whether available civil service staff can timely perform the services*. (*Id.* at p. 557 [italics added].)

Thus, to evaluate the Contract under the implied civil service mandate, the Board reviews both the need for the services contracted for and the ability of civil service staff to adequately perform the services.³

The Need for Reevaluation Services

Regarding whether available civil service staff can timely perform IST evaluations, the Legislature through its enactments implied that civil servants are not adequately providing services to IST defendants. WIC section 4335.2 establishes “a program for [DSH] to perform reevaluations primarily through telehealth evaluations for felony [IST] individuals

³ Before proceeding with such analysis, however, the Board notes that, in AFSCME’s opening brief to the Board in support of its appeal from the Executive Officer’s decision, AFSCME did not argue that the current state of the IST waitlist nor DSH’s failure to provide specific evidence of its current state should lead the SPB to overturn the Contract. AFSCME raised this issue for the first time in its January 10, 2025, Reply Brief.

in jail who have been waiting for admission to [a DSH facility]. The Legislature declared that the goal of the program is to, *inter alia*, reduce the growing [waitlist] of IST defendants, help address the significant impacts of the COVID-19 pandemic on the IST waitlist, and reduce the timeframe for a competency evaluation for IST defendants in jail. (Welf. & Inst. Code, § 4335.2, subds. (b)(2) – (b)(4).) Thus, at the time of WIC section 4335.2’s enactment in 2021, the Legislature impliedly declared that the IST waitlists were growing, the pandemic had negatively impacted the waitlist, and the timeframe for competency evaluation of IST defendants needed to be reduced.

“Legislative findings, while not binding on the courts, are given great weight and will be upheld unless they are found to be unreasonable and arbitrary.” (*California Housing Finance Agency v. Elliott* (1976) 17 Cal.3d 575, 583.) “The rule is well settled that the legislative determination that the facts exist which make the law necessary must not be set aside or disregarded by the courts, unless the legislative decision is clearly and palpably wrong and the error appears beyond reasonable doubt from facts or evidence which cannot be controverted.” (*Ex parte Miller* (1912) 162 Cal. 687, 696.) It is reasonable to give weight to the facts implied by the purposes expressed by the Legislature in establishing the IST reevaluation program.

Moreover, the Executive Officer cited to recent caselaw which recites a factual basis to support the need for the Contract:

For many years, [DSH] has faced a seemingly intractable problem of timely admitting criminal defendants . . . to its facilities once ordered to do so by our state courts. Among those the DSH serves are defendants found [IST]. Although the numbers have fluctuated, it is undisputed that there has been a massive increase in referrals to the state hospital system over the past decade and the capacity of the system to admit patients has failed to keep pace. As the record in this case reflects, that failing has had very real impacts on the IST defendants for whom the DSH is obligated to provide services.

(*In re Chunn* (2022) 86 Cal.App.5th 639, 644.)

DSH provided a September 30, 2021, letter that it sent to CalHR seeking approval to hire 19 Consulting Psychologists. In the letter, DSH states that the pre-pandemic IST waitlist was over 800 defendants but trending downward. As of August 23, 2021, the number of IST individuals pending placement into a DSH facility or program was 1,620. Based on the above, the SPB upholds the Executive Officer's finding that DSH has an ongoing IST waitlist backlog that requires extraordinary methods to address.

DSH's Staffing Efforts

DSH provided a declaration from a Staff Services Manager II with DSH's Recruitment Unit. She attested that DSH has a statewide shortage of mental health staff, particularly psychologists. She believes that the reasons for DSH's difficulty in recruiting sufficient psychologists is in part due to the offered salaries. From July 1, 2021, to June 30, 2024, DSH published 68 job postings for Psychologist-CF-Clinic, 56 for Consulting Psychologist, 48 for Senior Psychologist Specialist, 7 for Chief Psychologist, and 36 for Senior Psychologist Supervisor. DSH advertises its open positions on online platforms including LinkedIn, psychCareers, Facebook, I Hire Mental Health, JAMA, and Google. DSH also attends career fairs and conventions to support its hiring goals.

Additionally, in attempting to reduce the waitlist, DSH obtained permission to fill Consulting Psychologist positions to evaluate IST defendants. Once authorized, all Consulting Psychologist positions within the DSH Forensic Services Division, which is responsible for IST reevaluation services, were filled. DSH filled these positions with its own, salaried civil servants, who received a second civil service appointment and hourly pay. As this approach sunsetted, DSH incentivized its employees to continue to perform IST services after-hours by offering salaried employees additional hourly wages to take on IST evaluations. DSH only utilized contract psychologists, such as those provided by Vorwerk, to perform services after DSH's employees turned down the assignments.

The Executive Officer found that the evidence did not support AFSCME's argument that DSH could create more Senior Psychologist Specialist positions to perform IST evaluations, which would render the Contract unnecessary. AFSCME argued that over 90 percent of Senior Psychologist Specialist positions at DSH Patton are filled. The Executive Officer pointed out that only 74 percent of Psychologist positions at DSH Patton are filled and AFSCME provided no evidence to suggest that only Senior Psychologist Specialists are able to perform IST evaluations. Considering DSH's workforce as a whole, 76 percent of allocated Senior Psychologist Specialist positions are filled (91 out of 119) and 67 percent of all mental health professional positions are filled (252 out of 374). Thus, the problem is not an insufficient number of allowable positions. Instead, DSH has significant difficulty filling approved positions or attracting qualified applicants.

The evidence established that DSH has expended considerable effort to fill its civil service ranks, yet it has fallen short. DSH has made reasonable, good faith efforts to create civil service positions and hire into those positions to complete the necessary IST reevaluations under WIC section 4335.2. It even employed the atypical solutions of seeking approval for secondary positions to pay its own employees for extra work spent performing IST evaluations after hours and paying salaried employees for extra work on an hourly basis. Thus, civil service psychologists alone could not adequately perform all the work required to ensure that the IST waitlist is appropriately addressed.

The Adequacy of IST Evaluation by Civil Servants

The issue then becomes whether the IST waitlist backlog supports a finding that the Contract is for services that cannot be adequately performed by civil servants. AFSCME contends that civil service mandate cases do not support the proposition that an inability to hire enough employees justifies contracting for services. Rather, according to AFSCME, the sole measure of adequacy looks to whether the "nature of the services" being contracted

out can be performed by a public employee. Put another way, the civil service mandate focuses on the quality of the services, without regard to whether there are sufficient civil servants to perform the services being contracted out.

Although the initial cases establishing the civil service mandate focused on the nature of the services to be provided, without regard to the state's ability to hire enough civil servants to perform the services contracted for, as noted above, the justifications for executing contracts which do not violate the civil service mandate have expanded. For example, contracts have been upheld if the contract relates to a new state function or is shown to promote efficiency and economy in state government. Similarly, in finding statutes approving the use of private contracts for highway projects unconstitutional, the California Supreme Court held that the statutes were contrary to the civil service mandate because they authorized the Department of Transportation to contract privately *without regard to whether available civil service staff can timely perform the services*. (*Professional Engineers, supra*, 15 Cal.4th at p. 557 [emphasis added].) By implication then, whether there is sufficient civil service staff available to timely perform IST evaluations is relevant to the constitutionality of the Contract.

Finally, the Third District Court of Appeal under section 19130, upheld the constitutionality of two contracts which arranged for prisoners to be transferred out of state due to severe overcrowding in state prisons. (*California Correctional Peace Officers Assn. v. Schwarzenegger* (2009) 163 Cal.App.4th 802, 808-809.) Although section 19130, subdivision (b)(10), does not control the SPB's review of the Contract, the court's review in CCPOA provides useful analysis. Section 19130, subdivision (b)(10), authorizes contracting for services that are of such an urgent, temporary, or occasional nature that the delay incumbent in their implementation under the civil service would frustrate their very purpose. Because of the time it would take to build more prison facilities and staff them

with state civil servants, the court held that there existed an “‘urgent, temporary’ need for services that ‘the delay incumbent in their implementation under civil service would frustrate.’” (*CCPOA, supra*, 163 Cal.App.4th at p. 822.) The court rejected CCPOA’s argument that, despite subdivision (b)(10), the contracts violate the civil service mandate because the issue is the inability of civil service employees to adequately perform the *nature* of the services, not the availability of civil servants. (*Id.* at p. 823.) Therefore, even though the contracts called for private contractors to perform services that California correctional officers could perform, the exigency of prison overcrowding and the civil service’s inability to solve the emergency rendered the contracts constitutional.

AFSCME’s insistence that only the nature of the services called for in the Contract is relevant is not supported by the case law. The Executive Officer reasonably found that there is insufficient civil service staff to timely perform the services contracted for in the Contract. Because DSH: (1) does not have sufficient staff to fully meet the demand of the IST waitlist backlog; (2) continues to recruit psychologists to the civil service in an attempt to hire sufficient staff to address the backlog; and (3) there is an urgent need for private psychologists to provide IST services, the Contract does not violate the implied civil service mandate. As such, AFSCME’s appeal is denied.

The Board finds that DSH presented sufficient evidence that its employees cannot adequately and sufficiently perform IST evaluation services to abate the IST waitlist. Moreover, as noted above, AFSCME failed to contend on appeal to the Board that DSH’s failure to provide specific evidence regarding the current state of the IST waitlist should lead the SPB to overturn the Contract. For these reasons, the Executive Officer’s determination that the Contract complies with the implied civil service mandate is upheld.

CONCLUSION

The Board finds that the DSH submitted adequate information to show that the

contract entered into between the DSH and Vorwerk for IST evaluation services does not violate the implied civil service mandate. The Board, therefore, approves the contract.

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STATE PERSONNEL BOARD

Shawnda Westly, President
Kathy Baldree, Vice President
Dr. Gail Willis, Member
Kimiko Burton, Member
Ana Matosantos, Member

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I hereby certify that the State Personnel Board made and adopted the foregoing Decision at its meeting on April 10, 2025.



Scott A. Sommerdorf
Senior Staff Counsel
State Personnel Board