

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by)
)
CALIFORNIA ASSOCIATION OF)
PSYCHIATRIC TECHNICIANS)
and)
CALIFORNIA STATE)
EMPLOYEES ASSOCIATION)
)
)
From the Executive Officer's Approval of)
the Contract between the Department of)
Developmental Services and Quality)
Management Associates, Incorporated,)
succeeded by Center for Outcome)
Analysis, Inc.)
)

BOARD DECISION

PSC NO. 98-01

February 3-4, 1998

APPEARANCES: Loren McMaster, Attorney, on behalf of California Association of Psychiatric Technicians and California State Employees Association; Gregory Wagner, Ph.D., Senior Psychologist, on behalf of Department of Developmental Services.

BEFORE: Lorrie Ward, President; Floss Bos, Vice President; Ron Alvarado and Richard Carpenter, Members

DECISION

By letter dated June 12, 1997, the California Association of Psychiatric Technicians ("CAPT") and the California State Employees Association ("CSEA") requested that the State Personnel Board (the "Board") review Contract No. HD390158 (the "Contract") between the Department of Developmental Services ("DDS") and Quality Management Associates, Inc, succeeded by Center for Outcome Analysis, Inc., ("COA") to determine whether the Contract was justified by any of the exceptions listed in Government Code § 19130(b).

In accordance with Public Contract Code § 10337(c), the review of the Contract was delegated to the Executive Officer of the Board. As set forth in his letter dated September 9, 1997, the Executive Officer concluded that the Contract was justified under Government Code §19130(b)(5), since the Contract was entered into as a result of a “court imposed settlement specifically mandating that the department contract with an independent expert consultant.”

CAPT and CSEA appealed the Executive Officer’s decision to the Board.

In this decision, the Board concurs with the Executive Officer’s decision and approves the Contract.

BACKGROUND

In 1993, DDS, with the approval of the San Francisco County Superior Court, settled a class action lawsuit entitled Coffelt v. Department of Developmental Service (“Coffelt”). The settlement agreement (the “Settlement Agreement”) entered into by the parties and approved by the court requires, among other things, that the population of the state developmental centers be reduced by 2,000 residents by 1998. The reduction is being accomplished substantially by placing residents into community living arrangements. The Settlement Agreement provides for a monitoring process to assess the quality of the community living arrangements and the satisfaction of the residents who have been moved into these community settings as follows:

In order to ensure the objectivity of the quality assurance mechanism for class members, the Department will contract with an independent expert consultant chosen jointly by the Department, the regional center defendants as a group, and the plaintiffs as a group, to assist, at a minimum, in the development of the survey protocols and instrument, the analysis of the data collected, the staff training, the development and application of the quality assurance review process designed to test the validity of the survey system, and the preparation of an annual report

describing the results of the surveys. The consultant shall be responsible for testing the validity of the survey system, preparing the annual report and determining sample size. If not responsible for directly performing any of the remaining tasks described above, the consultant will be utilized by the Department in a consultant capacity to ensure the integrity of those activities.

DSS entered into the Contract with COA to comply with the above-quoted provision of the Settlement Agreement.

DISCUSSION

The Board agrees with DDS that the Contract is justified under Government Code § 19130(b)(5) (“Section 19130(b)(5)”).

Section 19130(b)(5) permits state agencies to enter into personal services contracts when:

The legislative, administrative, or legal goals and purposes cannot be accomplished through the utilization of persons selected pursuant to the regular civil service system. Contracts are permissible under this criterion to protect against a conflict of interest or to insure independent and unbiased findings in cases where there is a clear need for a different, outside perspective.

These contracts shall include, but not be limited to, obtaining expert witnesses in litigation. (Emphasis added.)

CAPT and CSEA contend that the Contract is not justified under Section 19130(b)(5) for the following reasons: (1) Section 19130(b)(5) does not apply because DDS does not have a conflict performing the services described in the Contract; (2) since the types of services described in the Contract are typical of the work civil service employees have performed in the past and are currently performing, DDS’s retention of a private contractor to perform these services violates Article VII of the California Constitution; and (3) DDS cannot evade its constitutional obligations to have state work

performed by state employees simply by entering into a court-approved settlement agreement. We address each of these contentions in order.

Section 19130(b)(5) Criteria

The Board disagrees with CAPT and CSEA's claim that, because DDS does not have a conflict performing the services described in the Contract, the Contract is not justified under Section 19130(b)(5). Section 19130(b)(5) applies not only when a state agency has a "conflict" performing the services described in a personal services contract, it also applies "to insure independent and unbiased findings in cases where there is a clear need for a different, outside perspective." DDS was required by the terms of the Settlement Agreement to "contract with an independent expert consultant" to "ensure the objectivity of the quality assurance mechanism for [the plaintiff] class members." In requiring that an independent consultant monitor DDS's compliance with its obligations under the Settlement Agreement, the Settlement Agreement creates a clear need for a different, outside perspective. COA's role under the Contract is to ensure that the quality assurance monitoring of DDS's performance of the Settlement Agreement is independent and unbiased.

Even if, as CAPT and CSEA contend, DDS is required in other circumstances to perform the types of services described in the Contract, the Settlement Agreement specifically calls for an independent consultant rather than DDS to perform the quality assurance reviews mandated by the Settlement Agreement. Because the Settlement Agreement was approved by the court pursuant to Federal Rule of Civil Procedure 23, it became a court order which is binding and enforceable upon all the parties to the Coffelt lawsuit. If DDS were to perform the Contract services itself instead of retaining an

independent consultant to perform them, it would violate a court order. The Board, therefore, finds that DDS's retention of COA as the "independent expert consultant" required by the court-approved Settlement Agreement is justified by Section 19130(b)(5).

The Civil Service Mandate

The Board rejects CAPT and CSEA's contention that DDS has violated Article VII of the California Constitution by retaining an independent consultant to perform services that civil service employees are currently performing.¹

In Professional Engineers in California Government v. Department of Transportation ("Professional Engineers") (1997) 15 Cal. 4th 543, 547, the California Supreme Court stated as follows:

We consider here important questions of law and policy arising under the state Constitution's civil service provision (Cal. Const., art. VII, § (article VII)) and its implied mandate limiting the state's authority to contract with private entities to perform services the state has historically or customarily performed. (See, e.g., State Compensation Insurance Fund v. Riley (1937) 9 Cal.2d 126, 134-136...(Riley)... As we explain, the civil service mandate forbids private contracts for work that the state itself can perform "adequately and competently." (Riley, supra, 9 Cal.2d at p. 135.)

Although the Court reaffirmed the state's civil service mandate in Professional Engineers, it recognized that, consistent with the California Constitution, state agencies may retain private contractors to perform services for the state where state employees cannot perform such services "adequately and competently." Id. at p. 567.

The exception to the civil service mandate set forth in Section 19130(b)(5) is consistent with the Court's holding in Professional Engineers. Section 19130(b)(5)

¹ DDS does not dispute that the types of services being performed by COA under the Contract are the types of work DDS civil service employees have historically performed.

allows state agencies to contract with private contractors when the “legal goals and purposes [of the contract] cannot be accomplished through the utilization of persons selected pursuant to the regular civil service system.” In order to meet the conditions of Section 19130(b)(5), it must be shown that either the state agency has a conflict performing the services or, as in this case, there is a clear need for a different or outside perspective to ensure independent and unbiased findings. The Settlement Agreement approved by the court expresses a clear mandate that an independent contractor perform the monitoring services required under the Settlement Agreement in order to ensure the objectivity of the findings for the plaintiff class members. Since the Settlement Agreement requires that the Contract services must be performed by an “independent” consultant, it follows that DDS employees cannot perform these services “adequately and competently.” The Board, therefore, finds that DDS has not violated Article VII of the California Constitution by retaining COA under the Contract.

The Impact of the Settlement Agreement

CAPT and CSEA contend that:

the fact that the contract was agreed upon in a settlement agreement to end litigation does not make legal what prior to such agreement was illegal. If such were the case, all a state agency would have to do to get around section 19130(b) would be to invite a prospective contractor to sue, and then agree upon the contract as part of the settlement agreement.

While the Board agrees that a settlement agreement, which requires a party to violate the law, even if approved by a court, would not be legal, nothing in the Settlement Agreement requires DDS to undertake any action that is contrary to the law. Section 19130(b)(5) specifically permits state agencies to enter into personal services

contracts with private contractors when, as here, the “legal goals and purposes cannot be accomplished through the utilization of persons selected pursuant to the regular civil service system.”

There was no evidence presented to the Board to suggest that DDS and COA acted collusively in the Coffelt litigation to artificially create a need for the Contract. It appears that COA was not a party to the Coffelt action but was, instead, chosen after the Settlement Agreement was executed to perform the monitoring services described in the Settlement Agreement in order to ensure an independent and unbiased result.

From the evidence presented to the Board, it appears that DDS entered into the Settlement Agreement in a legitimate effort to settle a lawsuit brought by parties other than COA. The Settlement Agreement requires that an independent consultant be retained to monitor, independently and in an unbiased fashion, compliance with the terms and conditions of the Settlement Agreement.

The Board finds nothing illegal or improper in DDS’s having entered into the Contract with COA to comply with the Settlement Agreement’s mandate that an independent consultant be retained.

CONCLUSION

For the foregoing reasons, the Board approves the Contract.

STATE PERSONNEL BOARD²

Lorrie Ward, President
Floss Bos, Vice President
Ron Alvarado, Member
Richard Carpenter, Member

* * * * *

I hereby certify that the State Personnel Board made and adopted the foregoing Decision at its meeting on February 3 – 4, 1998.

Walter Vaughn
Acting Executive Officer
State Personnel Board

[DDS.dec]

² Member Strock did not participate in this decision.