

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 May 4, 2009,)
Approval of Personal Services Contracts)
for Dietitian Services by the Department)
of Social Services)

PSC No. 09-07

RESOLUTION

August 11, 2009

WHEREAS, the State Personnel Board (Board) has considered carefully the findings of fact and Decision issued by the Executive Officer in SPB File No. 09-003(b) on May 4, 2009, approving the above-entitled matter, as well as the written and oral arguments presented by AFSCME and the California Department of Social Services (Department) during the Board's August 11, 2009, 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.
3. The Department is urged to communicate and join efforts with AFSCME in recruiting civil service employees to perform dietitian services.
4. Adoption of this Resolution shall be reflected in the record of the meeting and the Board's minutes.

* * * * *

The foregoing Resolution was made and adopted by the State Personnel Board in PSC No. 09-07 at its meeting on August 11, 2009, as reflected in the record of the meeting and Board minutes.



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May 4, 2009

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Pam Manwiller
Director of State Programs
AFSCME, Local 2620, AFL-CIO
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Re: Request for Review of Proposed or Executed Personal Services Contract for
Dietitian Services (Contract No. 07-3035 – JP Services)
[SPB File No. 09-003(b)]

Dear Mr. Burton and Ms. Manwiller:

By letter dated January 5, 2009, the American Federation of State, County, and Municipal Employees Local 2620, AFL-CIO (AFSCME) asked, pursuant to Gov. Code § 19132 and Title 2, Cal. Code Regs., § 547.59 *et seq.*, the State Personnel Board (SPB) to review for compliance with Gov. Code § 19130(b), a contract entered into by the Department of Social Services (Department) for dietitian services (Contract No. 07-3035 – JP Services) (hereinafter “Contract”). The term of the contract is from July 1, 2007 through June 30, 2009.

On January 12, 2009, the SPB notified the Department that AFSCME had requested that SPB review the Contracts, and informed the Department that it had until February 2, 2009, to submit its response to the SPB. The Department thereafter requested, and received, a continuance until April 14, 2009, to file its response. The SPB received the Department’s response on April 14, 2009. AFSCME thereafter had until April 24, 2009, to submit its reply to the Department’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 those reasons set forth below, I find that Contract No. 07-3035 is authorized under the provisions of Government Code section 19130(b)(3). Consequently, the Contract is approved.

Legal Standard

In *Professional Engineers in California Government v. Department of Transportation*,¹ 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.

Government Code section 19130(b)(3)

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

The 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 contracting 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.²

Government Code section 19130(b)(10)

Government Code section 19130(b)(10) authorizes a state agency to enter into a personal services contract 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.

In order to justify a personal services contract under section 19130(b)(10), the contracting department must provide sufficient information to show: (1) the urgent, temporary, or occasional

¹ (1997) 15 Cal.4th 543, 547.

² PSC No. 05-03, at p. 8.

nature of the services; and (2) the reasons why a delay in implementation under the civil service would frustrate the very purpose of those services.³

Position of the Parties

Department Position:

The Department asserts that the Contract is justified under the provisions of Government Code section 19130(b)(3) and (10) because the Contract services cannot be adequately performed by civil service employees, and because the necessary services are of an intermittent nature.

The Department regulates group homes, child care centers, residential facilities for the elderly, small family home services for the mentally disordered and developmentally disabled, adult rehabilitation facilities, foster family homes, and non-medical facilities. From time to time, the Department requires the use of a registered dietitian for purposes of identifying and correcting deficiencies, and in upgrading the quality of care provided in the aforementioned facilities.

Dietitians utilized by the Department are required to possess a valid license from the State. A dietitian is required to participate in complaint investigations and provide interpretations to evaluators' findings during facility evaluations. Dietitians also provide consultation related to the development of Department regulations, policies, and procedures. Additionally, dietitians are required to provide a report of findings and recommendations, and to provide expert testimony at administrative hearings and in various court proceedings. Dietitians also provide consultation services on an as-needed basis where there is a serious health or safety issue concerning the appropriateness of a client remaining in a community care facility.

The Department does not have any classification of employee related to the above-mentioned needs. Moreover, civil service employees cannot perform those duties required under the Contract, as they lack the necessary expert skill and knowledge.

Although the Department considered hiring civil service dietitians, such an appointment would not be cost-effective, as the dietitian would work on an intermittent, on-call, as needed basis. Nor could a half or full-time dietitian position be justified since, to date, just \$2,458.49 in Contract funds have been expended since July 1, 2007. As a result, the Contract is justified due to the intermittent need for the services.

AFSCME Position:

AFSCME did not file a reply disputing any information contained in the Department's response. Instead, AFSCME asserted the following in challenging the propriety of each Contract:

- The contracts were executed pursuant to Government Code section 19130(b)(10), but do not include specific and detailed factual information as justification for their use as

³ PSN No. 05-04, at p. 7.

required by Title 2, Cal. Code Regs., section 547.60; rather, they merely restate the language of Section 19130(b)(10) which permits personal services 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."

- There is nothing urgent, temporary, or occasional about the use of the contracts. Instead, the contracts are being used to fill vacant civil service positions that the Department 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 and many of these contractors have worked in this capacity for several years.

Analysis

A review of existing civil service classifications reveals that there are currently four specific Dietitian classifications: Clinical Dietitian; Clinical Dietitian (Safety); Clinical Dietitian, Correctional Facility; and Pre-Registered Clinical Dietitian. None of the above-listed classifications appear to contemplate the type of duties required under the Contract. Instead, the civil service Dietitian classifications generally require the performance of duties such as planning regular and special therapeutic diets for State facility residents and training facility staff in client dietary needs, whereas the Department utilizes dietitians to review facility records to determine if a facility's clients are receiving appropriate dietary care, and to assist the Department in formulating policies and regulations related to the level of dietary care provided by facilities. Therefore, the Department is correct that existing civil service classifications are inadequate to serve the Department's needs. Moreover, because only \$2,458.49 has been expended on Contract services since July 1, 2007, it does not appear that the Department has such a significant need for the services so as to warrant the Department seeking the creation of a new civil service classification that meets the Department's needs. As a result, I find that the Contract is justified under the provisions of section 19130(b)(3).

Conclusion

The Department presented sufficient information to demonstrate that existing civil service classifications are insufficient to meet the Department's dietitian needs, and that the Department does not possess such a need for dietitian services so as to justify the creation of a new civil service classification that would meet the Department's dietitian needs. Consequently, I find that the Contract is justified under the provisions of Government Code section 19130(b)(3).

Executive Officer Decision
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May 4, 2009
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This letter constitutes my decision to approve Contract No. 07-3035. Any party has the right to appeal this decision to the five-member State Personnel Board pursuant to 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,

/s/ SUZANNE M. AMBROSE

Suzanne M. Ambrose
Executive Officer