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**UNITED STATES DISTRICT COURT**  
**NORTHERN DISTRICT OF CALIFORNIA**

11 MARCIANO PLATA, et al.,

12 *Plaintiffs,*

13 v.

14 ARNOLD SCHWARZENEGGER, et al.,

15 *Defendants.*

Case No. C01-1351 TEH

**SUPPLEMENTAL DECLARATION OF  
JOHN HAGAR IN SUPPORT OF  
RECEIVER'S MASTER APPLICATION  
FOR ORDER WAIVING STATE  
CONTRACTING STATUTES,  
REGULATIONS AND PROCEDURES,  
ETC.**

1 I, John Hagar, declare as follows:

2 1. I am currently the Special Master in *Madrid v. Tilton* and have been engaged as Chief of  
3 Staff for Receiver Robert Sillen in the *Plata* matter. I make this supplemental declaration  
4 in support of the Receiver's "Master Application For an Order Waiving State Contracting  
5 Statutes, Regulations And Procedures, etc." ("Master Waiver Application"). The facts set  
6 forth herein are based upon my own personal knowledge or upon information and belief  
7 based upon my investigation into this matter.

8 2. In my capacity as Chief of Staff for the Receiver, I have general operational oversight of  
9 most of the ongoing activities of the receivership and regularly confer with the Receiver  
10 and other staff members regarding those activities to ensure that the Receiver's goals and  
11 directives are being implemented.

12 3. I have reviewed the "Response of State Personnel Board to Receiver's Master  
13 Application," and have discussed it with the Receiver. After considering the matter  
14 further, the Receiver believes that he should, in fact, establish policies which comport  
15 with California Government Code § 19130, as urged by the State Personnel Board  
16 ("SPB") in its response. Therefore, the Receiver will modify his Master Waiver  
17 Application and withdraw his request for a waiver of Government Code § 19130 and  
18 California Public Contracts Code § 10337 because he does not understand the law to  
19 require, or the SPB to request, pre-approval by the SPB of contracts he awards.

20 4. Under California law, State agencies are required to inform SPB about their plans to  
21 contract out work that is historically performed by State employees *only if* the agency  
22 uses the "cost saving contract" exception under Section 19130(a). In reality, the  
23 overwhelming majority of personal services contracts awarded by State agencies are  
24 justified under one or more of the 10 exceptions set forth in Section 19130(b) – and  
25 therefore the State agency does *not* have to report the contract to the SPB. At my request,  
26 one of the Receiver's staff members asked the Department of General Services ("DGS")  
27 to provide statistics concerning the justifications offered by State agencies for personal  
28 services contracts. We have been informed that within the last 12 months nearly 2500

1 personal services contracts have been awarded State-wide. According to DGS staff, at  
2 least 95% of those contracts have been awarded under Section 19130(b), *i.e.*, *without any*  
3 *notice* of any kind to the SPB or State employee organizations.

4 5. Similarly, as the SPB acknowledges in its Response to the Receiver's Motion, the  
5 Receiver likely could award future personal service contracts without notice to the SPB  
6 under Section 19130(b). As a result, the SPB's concerns about its "role in the process"  
7 are somewhat theoretical. Nonetheless, the Receiver will report each and every one of his  
8 personal services contracts to the Court in his Quarterly Reports. In practice, therefore,  
9 the Receiver will provide more notice of such contracts than is required of State agencies  
10 by California law, resulting in a level of transparency to his contract process which  
11 significantly exceeds California's statutory requirements.

12 6. In addition to the foregoing, the Receiver urges the Court, in evaluating SPB's Response,  
13 to consider who has addressed the real-life concerns of California's employee  
14 organizations, and who has not. The Court is aware that for more than a decade the  
15 California Department of Corrections and Rehabilitation ("CDCR") has in effect  
16 privatized its prison clinical staff by keeping State salaries unrealistically low and, at the  
17 same time, entering into registry contracts with physician, psychiatrist, psychologist, and  
18 registered nurse contractors at salaries considerably above that of State employees (even  
19 when including benefits). In addition, the short term nature of contract employees, and  
20 the problems that have arisen as a result, have been well documented in the *Madrid, Plata*  
21 and *Coleman* litigation. The combination of these factors has resulted in crippling  
22 clinical staffing shortages.

23 7. After years of effort, in 2003 the California State Employees Association ("CSEA")  
24 finally managed to bring this problem to the attention of the SPB. Nevertheless, the SPB  
25 hearing panel dodged the salary and structural staffing problems created by CDCR's  
26 policies and essentially gave a stamp of approval to CDCR's privatization practice. A  
27 true and correct copy of Board Decision PSC No. 03-02 is attached hereto as Exhibit 1.

28 8. In marked contrast, the Receiver has faced the staffing problem head on. As one of his

1 first priorities, the Receiver took decisive steps to stop the privatization of the CDCR's  
2 clinical workforce, first by raising salaries and improving clinical environments, and then  
3 by aggressively hiring new employees. Thus far, because of his actions, hundreds of  
4 additional full-time permanent, *i.e.*, tenured civil service, State nurses are now on duty in  
5 California's prisons.

6 9. Likewise, when the Receiver made the decision to bring in the Maxor Corporation to  
7 oversee the prison pharmacy system, steps were taken to include the appropriate  
8 pharmacist employee organization in this process, including having organization  
9 representatives meet with the Maxor team members who are on-site in California. In  
10 view of the Receiver's record, it is somewhat ironic that the SPB felt it necessary to raise  
11 its hypothetical concerns in response to the Receiver's Motion.

12 I declare under penalty of perjury under the laws of the State of California that the  
13 foregoing is true and correct.

14 Dated: May 25, 2007

/s/  
\_\_\_\_\_  
John Hagar

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19 I hereby attest that I have on file all holograph  
20 signatures for any signatures indicated by a  
21 "conformed" signature (/s/) within this efiled  
22 document.

23  5/25/07  
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Martin H. Dodd  
Attorneys for Receiver Robert Sillen

# EXHIBIT 1

**BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA**

In the Matter of the Appeal by

**CALIFORNIA STATE EMPLOYEES  
ASSOCIATION**

from the Executive Officer's January 15,  
2003 Approval of a Contract for nursing  
services between the California Department  
of Corrections and Best Rehabcare Services,  
Inc.

**BOARD DECISION**

**PSC NO. 03-02**

August 5, 2003

**APPEARANCES:** Harry Gibbons, Attorney, on behalf of the California State Employees Association; Keri L. Faseler, Staff Counsel, on behalf of the California Department of Corrections.

**BEFORE:** William Elkins, President; Sean Harrigan and Maeley Tom, Members.

**DECISION**

The California State Employees Association (CSEA) has appealed from the Executive Officer's January 15, 2003 decision approving a Contract (Contract) for nursing services between the California Department of Corrections (CDC) and Best Rehabcare, Inc. (Contractor). In this decision, the Board finds that CDC has shown that the Contract is authorized under Government Code § 19130(b)(10). The Board, therefore, sustains the Executive Officer's decision approving the Contract.

**EXHIBIT 1**

## **BACKGROUND**

Federal court decisions and orders in on-going federal litigation (Coleman v. Davis, Madrid v. Alameida, and Plata v. Davis) have determined that CDC has violated the constitutional rights of inmates by failing to provide adequate medical and mental health care. After its efforts to recruit sufficient civil service nurses failed, CDC entered into the Contract in order to obtain temporary/relief nursing services so that it could provide inmates with the level of medical and mental health services mandated in the on-going federal litigation.

CSEA asserts that the contracted services can be provided adequately and competently by individuals hired through the civil service, but that CDC has been unable to recruit sufficient civil service nursing staff because the salaries that the state has been offering are inadequate to attract qualified nurses.

## **PROCEDURAL HISTORY**

By letter dated August 30, 2002, pursuant to Government Code § 19132, CSEA asked SPB to review the Contract for compliance with Government Code § 19130(b). CDC submitted its response to CSEA's request on October 17, 2002. By letter dated November 6, 2002, CSEA submitted its reply to CDC's response.

The Executive Officer issued his decision approving the Contract on January 15, 2003.

On February 14, 2003, CSEA appealed to the Board from the Executive Officer's January 15, 2003 approval. CSEA filed its written argument dated April 21, 2003. CDC filed its response dated May 19, 2003. CSEA filed its reply dated May 27, 2003.

The Board has reviewed the record, including the written arguments of the parties, and has heard the oral arguments of the parties, and now issues the following decision.

### **ISSUE**

The following issue is before the Board for consideration:

Is the Contract authorized under Government Code § 19130(b)?

### **DISCUSSION**

CDC asserts that the Contract is justified under Government Code § 19130(b), subdivisions (5), (8) and (10).

Government Code § 19130(b)(10) authorizes a state department 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.

In order to justify a personal services contract under Government Code § 19130(b)(10), a state agency must provide sufficient information to show: (1) the urgent, temporary, or occasional 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.

According to CSEA, CDC has a permanent and ongoing need for nursing services that is so predictable that the state has been able to allocate the appropriate number of positions needed to perform the work, and that a workload that is permanent, ongoing, and predictable does not qualify as "temporary" or "occasional." The Board

agrees. CDC has a permanent, ongoing, and predictable need for nursing services that cannot qualify as "temporary" or "occasional."

Therefore, the sole issue is whether the contracted nursing services are so "urgent" that the delay in their implementation under the civil service would frustrate their very purpose. CSEA concedes that the federal courts in Coleman, Madrid and Plata have ordered CDC to provide health care services to its inmate population that CDC cannot currently meet utilizing only its existing civil service staff and that CDC has engaged in diligent recruitment efforts to retain more civil service nurses. CSEA asserts, however, that the "urgent" exception applies only when there is not enough time to hire civil servants and that the state has known for approximately seven years that it has a pressing need for nurses, more than enough time to complete the competitive hiring process. CSEA contends that the reason that allocated positions have remained vacant for all this time is that the salaries the state is offering to pay to civil service nurses, when compared to the salaries that the contract registry nurses receive, are inadequate. CSEA argues that it is not the delay in the civil service hiring process that is preventing the court-mandated nursing services from being performed in a timely manner, it is the state's unwillingness to spend available money on civil service salaries.

It is not clear from the information that has been presented to the Board whether the failure of the state to pay civil service nurses salaries that are comparable to the salaries paid to contract registry nurses is the sole determining factor that has caused CDC to be unable to attract sufficient civil service nurses. While CDC concedes that salary differentials may play some role, it asserts that it is not clear that, when the

benefits that the state offers are taken into consideration, the total compensation that civil service nurses receive is that much less than that of contract registry nurses. CDC also asserts that other factors may play very important roles in influencing nurses to work for a contract registry instead of the state, including a desire for very flexible part-time or intermittent work schedules and the opportunity to work in multiple and varied settings, rather than a single prison.

Even if the salary differentials may play a role in causing some nurses to choose to work for contract registries rather than for the state, CSEA has not presented, and we have not independently found, any case law or administrative ruling that has concluded that the state's failure to pay salaries that are as high as the salaries that the private sector may be willing to pay is a reason to deny contracting in an otherwise appropriate instance.

The federal court orders have imposed upon CDC an urgent need to provide nursing services to its inmate population that, despite its diligent recruitment efforts, it is currently unable to satisfy completely through the civil service hiring process. The Board, therefore, finds that the Contract is authorized under Government Code § 19130(b)(10). The Contract is approved for those nursing services that are urgently needed in order to comply with the federal courts' orders. The Board strongly encourages CDC to work diligently with CSEA to find a more permanent civil service solution to its nursing shortage by, among other things, reviewing whether it could institute a state registry, instead of a private contract registry, to fill its nursing needs.

Because the Board finds that the Contract is justified under Government

Code § 19130(b)(10), it does not need to review whether Government Code § 19130(b), subdivisions (5) and/or (8) also may apply.

**CONCLUSION**

The Board finds that CDC has submitted sufficient information to establish that the Contract is authorized under Government Code § 19130(b)(10). The Board, therefore, sustains the Executive Officer's decision approving the Contract.

**STATE PERSONNEL BOARD<sup>1</sup>**

William Elkins, President  
Sean Harrigan, Member  
Maeley Tom, Member

\* \* \* \* \*

I hereby certify that the State Personnel Board made and adopted the foregoing Decision at its meeting on August 5, 2003.

---

Walter Vaughn  
Executive Officer  
State Personnel Board

[PSC 03-02 dec]

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<sup>1</sup> Vice President Ron Alvarado did not participate in this decision.

**CORRECTED DECLARATION OF SERVICE**

I declare:

I am employed in the County of Sacramento, California. I am 18 years of age or older and not a party to the within entitled cause; my business address is 801 Capitol Mall, P. O. Box 944201, Sacramento, California 94244-2010.

On October 29, 2003, I mailed the attached

**BOARD DECISION  
PSC No. 03-02**

in said cause, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Sacramento, California, addressed as follows:

Harry J. Gibbons, Attorney  
California State Employees Association  
1108 "O" Street  
Sacramento, CA 95814

Keri L. Faseler, Staff Counsel  
Department of Corrections  
1515 S Street, 314S  
Sacramento, CA 95814

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed at Sacramento, California on October 29, 2003.

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ELLA B. COWDEN

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies as follows:

I am an employee of the law firm of Futterman & Dupree LLP, 160 Sansome Street, 17<sup>th</sup> Floor, San Francisco, CA 94104. I am over the age of 18 and not a party to the within action.

I am readily familiar with the business practice of Futterman & Dupree, LLP for the collection and processing of correspondence.

On May 25, 2007, I served a copy of the following document(s):

**SUPPLEMENTAL DECLARATION OF JOHN HAGAR IN SUPPORT OF RECEIVER'S MASTER APPLICATION FOR ORDER WAIVING STATE CONTRACTING STATUTES, REGULATIONS AND PROCEDURES, ETC.**

by placing true copies thereof enclosed in sealed envelopes, for collection and service pursuant to the ordinary business practice of this office in the manner and/or manners described below to each of the parties herein and addressed as follows:

- BY HAND DELIVERY: I caused such envelope(s) to be served by hand to the address(es) designated below.
- BY MAIL: I caused such envelope(s) to be deposited in the mail at my business address, addressed to the addressee(s) designated. I am readily familiar with Futterman & Dupree's practice for collection and processing of correspondence and pleadings for mailing. It is deposited with the United States Postal Service on that same day in the ordinary course of business.
- BY OVERNIGHT COURIER SERVICE: I caused such envelope(s) to be delivered via overnight courier service to the addressee(s) designated.
- BY FACSIMILE: I caused said document(s) to be transmitted to the telephone number(s) of the addressee(s) designated.

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9 Dated: May 25, 2007

  
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