

April 6, 2022

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Re: Request for Review of the Personal Service Contracts between the California Department of Fair Employment and Housing (“DFEH”) and Olivier Schrieber & Chao, LLP and DFEH and Outten & Golden, LLP  
SPB Case No.: 21-0005(b)

Dear Counsel:

The California Attorneys, Administrative Law Judges, and Hearing Officers in State Employment, State Bargaining Unit 2, (“CASE”), requested the Executive Officer for the State Personnel Board (SPB) to review and determine whether personal services contracts that were entered into between the California Department of Fair Employment and Housing (“DFEH”) and the law firms of Olivier Schreiber & Chao, LLP, and Outten & Golden, LLP are compliant with Title 2, California Code of Regulations (“CCR”), section 547.61 and Government Code<sup>1</sup> section 19132. DFEH submitted its response and CASE submitted its reply. After due consideration of the submissions and arguments, the Executive Officer finds the contracts are permissible under section 19130, subdivisions (b)(5) and (7). The following represents the Executive Officer’s decision.

### **FACTUAL AND PROCEDURAL BACKGROUND**

According to DFEH’s webpage, it is “the largest state civil rights agency in the country.” ([About DFEH | DFEH \(ca.gov\)](#).) DFEH is responsible for, among other things, receiving, investigating, conciliating, mediating, and prosecuting complaints alleging practices made unlawful under Government Code section 12940, et seq. (Gov. Code, § 12930, subd. (f)(1).) Its authority extends to bringing and prosecuting civil actions in state and federal courts. (Gov. Code, §§ 12930, subd. (h), and 12965.) DFEH uses its own civil service counsels to handle

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<sup>1</sup> All statutory references are to the Government Code unless stated otherwise.

DFEH trial-level litigation. Indeed, since DFEH obtained litigation authority in 2012, it has not utilized the Office of Attorney General (OAG) in any of its trial-level enforcement actions. (Declaration of Nelson Chan, DFEH’s Asst. Chief Counsel, ¶ 12.)

The contracts that are the subject of CASE’s request for review pertain to two separate lawsuits. The contract retaining the services of Olivier, Schreiber, & Chao, LLP, (“Olivier Law Firm”) pertain to the action entitled *Department of Fair Employment & Housing v. Riot Games, Inc., et al.*, (Case No. 18STCV03957), that was filed in the Los Angeles County Superior Court. The contract retaining the services of Outten & Golden, LLP, pertain to DFEH’s suit against Activision Blizzard, Inc., (Los Angeles Superior Court, Case No. 21STCV26571 and U.S. District Court, Central District of California, Case No. 2:21-CV-07682.)

**DFEH v. Riot Games, Inc., et al.,**

In 2020, DFEH intervened in a private class action originally brought by Melanie McCracken and Jessica Negron against Riot Games, Inc., alleging various unlawful employment practices. The matter, *Department of Fair Employment & Housing v. Riot Games, Inc., et al.*, (Case No. 18STCV03957), was filed in Los Angeles County Superior Court. During the litigation, Riot Games took an appeal of an adverse interlocutory discovery order. The DFEH customarily retains the OAG to represent its interest on appellate matters. The DFEH, however, believed the OAG could not represent DFEH’s interest because of a potential conflict of interest arising out of OAG’s representation and defense of the California Department of Corrections and Rehabilitation (“CDCR”) in a pending lawsuit filed by DFEH.<sup>2</sup> Accordingly, DFEH sought and received from the OAG on July 2, 2021, a limited delegation of authority for DFEH to either use its own attorneys or retain outside counsel in handling the appeal.

On July 8, 2021, DFEH notified CASE of its intent to retain the legal services of Olivier Schreiber & Chao, LLP, (“Olivier Law Firm”) to represent DFEH in the action against Riot Games. The notice states, in relevant part,

The DFEH Legal Division staff lack the expertise in state appellate procedure and appellate advocacy that we normally rely on the Attorney General’s office to provide. In addition, the subject matter of the appeal is in the highly specialized area of civil rights class litigation. The DFEH needs to retain appellate counsel, Olivier Schreiber & Chao, LLP, due to a conflict of interest with the Attorney General’s office. The consent of the Attorney General’s office is attached as Attachment 1 to this notice. The DFEH Legal Division staff lacks the expertise in state appellate procedure and appellate advocacy which it would normally rely on the Attorney General’s office to provide.

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<sup>2</sup> The lawsuit, *DFEH v. CDCR* (Case No. 20STCV46485) in Los Angeles County Superior Court, alleges CDCR’s leave policies violate anti-discrimination laws. The OAG also represents CDCR in other litigation against CDCR concerning the same issues.

The Agreement Summary (Form STD 215) for the retention of the Olivier Law Firm states that “Contractor shall provide legal representation for the Department of Fair [sic] and Housing in the matter of the *DFEH v. Riot Games Inc.*[,] Case No. 18STCV03957[,] in all stages and aspects of litigation up to and including trial if necessary.” (STD 215, dated 8/16/21.) The Summary further provides the contract is justified under section 19130, subdivision (b)(7).

**DFEH v. Activision Blizzard, Inc.**

In September 2021, the Equal Employment Opportunity Commission (“EEOC”) filed a Title VII complaint against Activision Blizzard, Inc., et al. in the United States District Court for the Central District of California, (Case No. 2:21-cv-07682). Simultaneous with the filing of its complaint, EEOC also submitted to the district court a Proposed Consent Decree to resolve the action against Activision.

DFEH had been working with the EEOC on its investigation into Activision’s employment practices well before the EEOC filed its complaint in the district court. DFEH was concerned about the terms and scope of the Proposed Consent Decree and sought to discuss its concerns with the EEOC. On October 4, 2021, DFEH held a meeting with the EEOC to discuss the Proposed Consent Decree. During the meeting, the EEOC informed DFEH for the first time that they had concerns regarding DFEH’s assigned counsels on the Activision matter being in violation of the Ethics in Government Act, 18 U.S.C. § 207, as those identified counsels were previously employed with the EEOC and had performed extensive work on the EEOC’s investigation into Activision’s unlawful employment practices. The EEOC contends those attorneys and other DFEH attorneys may be precluded from working on DFEH’s action against Activision. DFEH disagreed with the EEOC’s position regarding any ethical violation. According to DFEH, out of an abundance of caution, it elected to retain outside counsel so as to not jeopardize DFEH’s interest in the litigation against Activision.

On October 5, 2021, the day following the meeting with the EEOC, DFEH notified the OAG of the need to retain outside counsel. The notice stated, in part, “The DFEH needs to augment its in-house team with outside counsel with specialized knowledge and expertise in class action litigation, opposing reverse action settlement tactics, and state and federal procedure and anti-discrimination law.” (DFEH’s Letter to OAG dated October 5, 2021, p. 2.)

On October 18, 2021, DFEH notified CASE of its intent to contract out for legal representation in DFEH’s litigation against Activision. DFEH entered into contract with Outten & Golden, LLP, (“Outten Law Firm”) on October 28, 2021. The description of services to be provided as listed in the Agreement Summary (Form STD 215) states,

Contractor will provide legal representation and services including advising on potential strategies and options regarding two complex mission critical and/or first impression legal matters in trial court, which are subject to attorney work product and attorney client privileges, including strategies for resolution and potential court action. Case numbers are as follows: 21STCV 26571 and 2:21-CV-07682

DSH-JEM. Contractor will consult and advise DFEH attorneys, conduct research and advise on pleadings and memorandum.

DFEH further provided that the contract was justified under section 19130, subdivision (b)(5).

CASE met and conferred with DFEH regarding the propriety of the legal services contracts mentioned above. Unable to resolve their disagreement, CASE requested the SPB Executive Officer to review the contracts under section 19130, subdivision (b).

### **PARTIES' CONTENTION**

DFEH contends the challenged legal services contracts are permissible and necessary to guard against adverse consequences in the underlying litigated matters due to potential conflicts of interest. In the *DFEH v. Riot Games* matter, DFEH contends that a potential conflict arising from the OAG's representation of CDCR in unrelated lawsuits filed by DFEH precludes it from utilizing the OAG in the Riot Games appellate matter. DFEH also relies on this potential conflict as a basis for contracting out for legal services in the *DFEH v. Activision* matter. In addition, the EEOC's threatened disqualification of DFEH's attorneys from the Activision suit also served as an additional conflict justifying its retention of outside counsel. DFEH cites to section 19130, subdivisions (b)(5) and (7), as the basis for the contracts.

CASE asserts that any purported conflict arising out of OAG's representation and defense of CDCR in DFEH's lawsuits do not disqualify the entirety of OAG from representing DFEH. Moreover, CASE also questions the sincerity of DFEH's assertion of a conflict of interest in the *DFEH v. Activision* matter as the justification for retaining the services of the Outten Law Firm. CASE points out the retention of the Outten Law Firm does not cure the purported conflict of interest issue as the Outten Law Firm admittedly works closely with DFEH's assigned attorneys who are the subject of the EEOC's ethical complaint.

### **DISCUSSION**

The California Supreme Court recognized that Article VII of the California Constitution provides for an implied "civil service mandate." (*Professional Engineers in California Government v. Department 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.) In effect, the implied civil service mandate prohibits state agencies from contracting with private entities to perform work that is historically and customarily performed by and can be performed adequately and competently by the civil service workforce. (*Professional Engineers in California Government v. Department of Transportation, supra*, 15 Cal.4th at 547.)

The prohibition, however, is not without exceptions. The Legislature has set forth standards in section 19130 that allows for personal services contracts. Under section 19130, subdivision (a), personal services contracts are permissible to achieve cost savings under stringent criteria. Subdivision (b) provides several non-cost-savings situations where personal services contracts are permissible. The provisions at issue in this matter are subdivisions (b)(5) and (7) as the personal services contracts were purportedly necessitated by potential conflicts of interests affecting DFEH and OAG attorneys from representing DFEH's interest in the subject lawsuits.

Under section 19132, an employee organization such as CASE may ask the Board to review a personal services contract that a department contends is permitted under section 19130, subdivision (b). Pursuant to Public Contract Code section 10337, subdivision (c), the Board has delegated the review to the Executive Officer subject to an appeal to the Board. (*In the Matter of Dept. of Personnel Administration* (2000) PSC No. 00-01, p. 6.) The scope of the review of contracts under 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. (*In the Matter of California Attorneys, Administrative Law Judges, and Hearing Officers in State Employment* (2005) PSC 05-01, p. 4.)

To justify a personal services contract under section 19130, a department must provide specific and detailed factual information demonstrating that one or more of the statutory exceptions within the subdivisions of section 19130 apply. The agency seeking the personal services contract bears the burden of establishing applicability of the exception. (*State Compensation Ins. Fund v. Riley* (1937) 9 Cal.2d 126, 134-135.)

#### **Contract with the Olivier Law Firm – *DFEH v. Riot Games, Inc.***

DFEH contracted with the Olivier Law Firm to represent it in defense of Riot Games' appeal from an interlocutory discovery order. DFEH identified subdivision (b)(7) as the justification for the contract. Subdivision (b)(7) permits personal services contracts when

State agencies need private counsel because a conflict of interest on the part of the Attorney General's office prevents it from representing the agency without compromising its position. These contracts shall require the written consent of the Attorney General, pursuant to Section 11040.

The conflict stems from the OAG's representation of CDCR, a defendant in an unlawful discrimination lawsuit filed by DFEH. The OAG acknowledged and agreed "an adversity conflict exists" due to the two departments opposing one another in the CDCR matter. (Letter from Michael L. Newman, Sr. Asst. Attorney General, to Janette Wipper, DFEH's Chief Counsel, dated July 2, 2021.) The OAG further noted the conflict could be resolved, in time, through mutual agreement to an informed consent waiver. (*Ibid.*) However, due to the urgency of the situation and the paramount need for DFEH to mount an adequate defense in the Riot

Games action, the OAG consented to DFEH's request to retain outside counsel or handle the matter itself. (*Ibid.*)

In response to CASE's argument, DFEH contends the OAG may not simultaneously represent DFEH's interest while also representing another client, CDCR, in a matter adverse to DFEH. According to DFEH, it matters not that OAG's representation of CDCR is not related to DFEH's actions against Riot Games or Activision. Doing so would compromise OAG's duty of *loyalty* to its respective clients. (*Flatt v. Superior Court* (1994) 9 Cal.4<sup>th</sup> 275, 284, even if the dual representations "may have *nothing* in common, and there is *no* risk that confidences to which counsel is a party in the one case have any relation to the other matter, disqualification may nevertheless be *required*."") The rationale behind the harsh application of the disqualification is explained as follows:

A client who learns that his or her lawyer is also representing a litigation adversary, even in a wholly unrelated matter, cannot be expected to sustain the level of confidence and trust in counsel that is one of the foundations of the professional relationship. [*Flatt* at p. 285.] Thus, even though the simultaneous representations may have nothing in common, and there is no risk that confidences to which counsel is a party in the one case have any relation to the other matter, *per se* or automatic disqualification is required in all but a few instances. [*Flatt* at p. 284.]

*State Farm Mut. Auto. Ins. Co. v. Federal Ins. Co.* (1999) 72 Cal.App.4<sup>th</sup> 1422, 1431, underlined added.

CASE does not dispute the existence of a conflict stemming from OAG's representation of CDCR. CASE, however, contends the conflict here does not vicariously disqualify the entirety of OAG from representing DFEH's interest. CASE's argument has some purchase considering the courts have "generally declined to apply an automatic and inflexible rule of vicarious disqualification in the context of public law offices." (*In re Charlissee C.* (2008) 45 Cal.4<sup>th</sup> 145, 162.) The rationale behind this general policy is the very nature and purpose of a government law office.

Unlike their private sector counterparts, public sector lawyers do not have a financial interest in the matters on which they work. As a result, they may have less, if any, incentive to breach client confidences. [Citation.] Public sector lawyers also do not recruit clients or accept fees. As a result, they have no financial incentive to favor one client over another. [Citation.] [¶] ... [V]icarious disqualification in the public sector context imposes different burdens on the affected public entities, lawyers and clients.

(*Id.* at 163.)

CASE proposes OAG's representation of DFEH in these litigations remain possible considering the size and structure of the OAG. The assignment of the litigation to an office or unit that is uninvolved in the *DFEH v. CDCR* litigation to represent DFEH in other lawsuits as well as creating ethical walls would ensure DFEH's interest is protected. CASE's proposal follows the Supreme Court's observation in *In re Charlisse C., supra*, 45 Cal.4th 145.

“In light of these considerations, courts have more readily accepted the use of screening procedures or ethical walls as an alternative to vicarious disqualification in cases involving public law offices.” [Citation.] As the *Christian* court put it, “in the public sector, in light of the somewhat lessened potential for conflicts of interest and the high public price paid for disqualifying whole offices of government-funded attorneys, use of internal screening procedures or ‘ethical walls’ to avoid conflicts within government offices ... have been permitted. [Citations.]” *People v. Christian* (1996) 41 Cal.App.4th 986, 998.]

(*In re Charlisse C., supra*, 45 Cal.4th at 163.)

The suggested arrangements in *In re Charlisse C.* is particularly apt for matters involving an attorney's *successive* representation of clients with potentially adverse interests, and the primary value at stake is therefore client confidentiality, as was the situation in *In re Charlisse C.* However, in concurrent representation cases, the standards are more stringent as expressed in *Flatt v. Superior Court*, and therefore disqualification *may* be compelled.

It is not necessary for this decision to address whether the situation warrants disqualification of the entirety of the OAG. It is sufficient here that the OAG acknowledged the existence of a conflict and consented to DFEH handling the litigations itself or retaining outside counsel to do so. Given OAG's position and the urgency of DFEH's interest in defending the appeal filed by Riot Games, DFEH's retention of the Olivier Law Firm is permissible under section 19130, subdivision (b)(7).

If the OAG had opined it was capable and willing to competently and aggressively represent DFEH's interest with appropriate internal safeguards to ensure that DFEH's confidential information or litigation goals are not compromised, the analysis of whether a conflict exists as to justify contracting out under (b)(7) would have been more complicated. Such, however, is not the case.

### **Contract with the Outten Law Firm – *DFEH v. Activision, Inc.***

DFEH readily admits its attorneys routinely handle trial-level litigation that it brings to enforce provisions of the Fair Employment and Housing Act. In the *Activision* litigation, DFEH's counsels were representing DFEH's interest in the action until the EEOC threatened to disqualify DFEH's attorneys from the case. DFEH promptly sought the OAG's permission to engage the services of a law firm skilled in handling class action matters.

DFEH relies, in part, on section 19130, subdivision (b)(5), as justification for engaging the services of the Outten Law Firm. This subdivision permits contracting for services outside the civil service when it is necessary to protect against a conflict of interest.

(b)(5) 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 ensure 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.

The EEOC's assertion of an ethical violation by DFEH and its attorneys presented a real threat to DFEH's interest in pursuing its enforcement action against Activision in both federal and state court.<sup>3</sup> While DFEH did not believe there was any ethical violation in former EEOC attorneys now employed with DFEH handling the Activision matter, it viewed a reasonable risk to its continued prosecution of the case if the EEOC and Activision's threat of disqualifying DFEH from the action comes to fruition. Moreover, the OAG had already indicated the existence of a conflict due to the OAG's representation of CDCR and therefore OAG was not in a position to represent DFEH's interest in the Activision lawsuit.

Under these circumstances, DFEH's engagement of the Outten Law Firm was justified to protect against a conflict claim that may have prevented or significantly hampered DFEH's interest in its action against Activision. Absent the threat of disqualification, DFEH would have continued litigating the matter itself. The engagement of the Outten Law Firm occurred quickly after the EEOC's threat and is limited to the matters that were the subject of the conflict threat.

## CONCLUSION

The Board takes seriously its obligation to guard against the encroachment of the civil service mandate requiring civil service work to be performed by civil servants. However, in litigation, unforeseen or unanticipated circumstances may occur, giving rise to claims of conflict of interest. In this case, the conflict was not created by DFEH, but rather by the OAG's decision to defend CDCR in lawsuits where DFEH is the plaintiff. Moreover, the conflict was also created by the EEOC's threat of disqualification, which could have effectively eliminated DFEH's vested interest in enforcing the state laws prohibiting unlawful employment practices. There is no indication that DFEH makes a practice of engaging outside firms to handle its direct

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<sup>3</sup> Activision filed a motion in *DFEH v. Activision* to stay the case in order to pursue limited discovery into the alleged ethics violation by DFEH's counsel and to determine whether a motion to disqualify should be filed. Activision counsel relied on the EEOC's response to DFEH's motion to intervene in the *EEOC v. Activision* federal action, wherein the EEOC asked the federal court to disqualify DFEH from the federal action. (Defendants Activision Blizzard, et al.'s *Ex Parte* Application to Stay the Case for the Purpose of Limited Discovery in Alleged Ethics Violations by Counsel for Plaintiff and a Potential Motion to Disqualify, dated October 19, 2021, Los Angeles County Superior Court, Case No. 21STCV26571.)



CASE v. DFEH  
SPB File No. 21-0005(b)  
April 6, 2022  
Page 9 of 9

litigation or its appellate work. This work is routinely performed by DFEH's own civil service attorneys or the attorneys at the OAG.

Based on the parties' submissions, DFEH has met its burden of showing that the contracts with the respective outside law firms are permissible under subdivisions (b)(5) and (7). CASE has a right to appeal this decision to the five-member State Personnel Board under California Code of Regulations, title 2, section 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,

*Suzanne M. Ambrose*  
SUZANNE M. AMBROSE  
Executive Officer