STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA CORRECTIONAL PEACE OFFICERS ASSOCIATION, Charging Party, v. STATE OF CALIFORNIA (OFFICE OF THE INSPECTOR GENERAL), Respondent.	Case No. SA-CE-2074-S PERB Decision No. 2660-S August 15, 2019

Appearances: Daniel Lindsay, Chief Counsel and Jennifer Ragan, Staff Counsel, for California Correctional Peace Officers Association; David Villalba, Labor Relations Counsel, Department of Human Resources, for the State of California, Office of the Inspector General.

Before Banks, Shiners, and Paulson, Members.

DECISION

PAULSON, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions by State of California (Office of the Inspector General) (OIG) to the proposed decision of an administrative law judge (ALJ). The ALJ found that OIG violated the Ralph C. Dills Act (Dills Act)[1] when it denied certain Department of Corrections and Rehabilitation (CDCR) employees their right to representation by their exclusive representative, California Correctional Peace Officers Association (CCPOA), during interviews OIG conducted pursuant to a Senate Rules Committee-authorized review of safety practices at High Desert State Prison (HDSP).

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[1] The Dills Act is codified at Government Code section 3512 et seq. Unless otherwise indicated, all statutory references are to the Government Code.

OIG excepts to various conclusions of law in the proposed decision, specifically: (1) that it was acting as the employer of the correctional officers (COs) for purposes of the Dills Act; (2) that the COs had a reasonable fear of discipline stemming from the interviews; (3) that the interviews were marked by highly unusual circumstances; and (4) that OIG's report to the Legislature constituted interference with the officers' right to representation under the Dills Act and with CCPOA's right to represent its members under the Dills Act. CCPOA did not file exceptions and urges the Board to adopt the proposed decision.

We have reviewed the entire record in this matter, including OIG's exceptions, CCPOA's response thereto, supplemental briefing from both parties, and considered the parties' arguments in light of applicable law. Based on that review, we affirm all parts of the proposed decision, except the ALJ's finding that the OIG's statements in the 2015 Special Review interfered with employee rights.

PROCEDURAL BACKGROUND

CCPOA represents bargaining unit 6, a unit of correctional officers. On April 25, 2016, CCPOA filed an unfair practice charge against OIG for allegedly interfering with its members' right to representation and CCPOA's right to represent its members during interviews OIG held in October and November 2015. CCPOA also alleged retaliation and interference based on the content of OIG's 2015 Special Review of HDSP (Special Review), published in December 2015. On September 8, 2016, the Office of the General Counsel issued a complaint alleging that OIG violated the Dills Act, section 3519, subdivisions (a) and (b), by denying three COs their right to be represented by CCPOA during the interviews and concomitantly denying CCPOA its right to represent its members.

On October 17, 2016, OIG answered the complaint by denying any violations of the Dills Act and asserting multiple affirmative defenses. After a failed informal settlement conference, the ALJ set the case for a formal hearing for the week of February 13, 2017. On January 19, 2017, OIG filed a motion to dismiss or alternatively stay the complaint. In its motion, OIG argued that PERB should dismiss the complaint because OIG was not acting as an employer for purposes of the Dills Act section 3519 when it interviewed COs pursuant to its review of HDSP. In the alternative, OIG argued, PERB should stay the proceeding pending resolution of the related arbitration and state court proceedings involving the same issues of law and fact. CCPOA filed its opposition to the motion on February 3, 2017. On February 7, 2017, the ALJ denied the motion in its entirety.

The case proceeded to formal hearing on April 24, 25, and 26, 2017. The matter was considered submitted for decision after the parties filed their closing briefs on June 21, 2017. On May 14, 2018, OIG notified the ALJ that the Court of Appeal had issued its decision in the related state court litigation, *Blue v. Office of the Inspector General* (2018) 23 Cal.App.5th 138 (*Blue*), and argued that the findings of the Court of Appeal in this matter were conclusive and binding as to the issues before PERB. CCPOA subsequently petitioned for review. The Supreme Court denied the petition on August 22, 2018, rendering the *Blue* decision final.

FACTUAL BACKGROUND

OIG

In 1994, the Legislature enacted Penal Code section 6125 et seq., establishing OIG as an office within the Youth and Adult Correctional Agency. (Stats. 1994, ch. 766, § 1.) At its inception, OIG had the responsibility to review, investigate, and audit the policies, procedures, and practices of several correctional departments and boards, including CDCR, upon a request

of the Secretary of the Youth and Adult Correctional Agency or a Member of the Legislature. The Inspector General also had the authority to require an employee to participate in a confidential interview and to refer matters involving criminal conduct to the proper law enforcement authorities. In 1998, the Legislature converted OIG into an independent office to ensure it would not be a subdivision of any other governmental entity, while keeping OIG's duties largely the same. (Stats. 1998, ch. 969, § 2.) In 2009, the Legislature tasked OIG with "contemporaneous oversight of internal affairs investigations and the disciplinary process" at CDCR. (Stats. 2009, ch. 35, § 14.)

Shortly thereafter, in 2011, the Legislature narrowed the scope of the Inspector General's duties, removing his/her responsibility to investigate and audit the policies, procedures, and practices of CDCR and other departments. Instead, "[w]hen requested by the Governor, the Senate Committee on Rules, or the Speaker of the Assembly, the Inspector General shall *review* [CDCR] policies, practices, and procedures[.]"[2] (Pen. Code, § 6126, subd. (b), emphasis added.) In 2013, the Legislature amended the Penal Code to provide that OIG would have staff "physically colocated with the Department of Corrections and Rehabilitation's Office of Internal Affairs" to "facilitate oversight" of the Office of Internal Affairs. (*Id*. at § 6133, subd. (a).)

At all times relevant to this charge, Robert Barton (Barton) was the Inspector General. Barton described OIG as "an independent agency charged with being a watchdog for the citizens of California."

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[2] OIG retains authority to conduct investigations in limited circumstances: (1) reports of mishandling of incidents of sexual abuse (Pen. Code, § 2641, subd. (e)); and (2) retaliation complaints. (*Id*. at § 6129.)

OIG's 2015 Special Review of HDSP

On June 23, 2015, Senator Kevin de Leon, Chair of the Senate Rules Committee, wrote to Barton requesting an investigation and written report of practices at HDSP with respect to: (1) excessive use of force against inmates; (2) internal reviews of incidents involving the excessive use of force against inmates; and (3) protection of inmates from assault and harm by others. The letter cited specific precipitating events for the request, all relating to a "concern about whether some members of HDSP staff are engaged in a pattern or practice of using inappropriate and excessive force against inmates and whether there is adequate protection of inmates from harm at the prison." Believing that his office did not possess the required investigative authority, Barton immediately informed the Senate Rules Committee that he could not comply with the request. In particular, Barton drew a distinction between the requested "investigation" and his office's authority to conduct a "review." Barton informed the committee that he would be willing to conduct a review of the listed issues on a general basis only, as his staff was no longer authorized to investigate any specific allegations of misconduct.

Following this exchange, on June 25, 2015, Senator de Leon sent Barton a second letter requesting that OIG "review the practices at [HDSP]" with respect to the same subjects outlined in the June 23 letter. The committee additionally requested that OIG "consult with, and recommend appropriate actions to, the Office of Internal Affairs within the Department of Corrections and Rehabilitation regarding [OIG's] review[.]"

CDCR was not involved at any stage of the planning or preparation of OIG's Special Review. Barton decided that the review team would not interview COs who were then working at HDSP because he was concerned that they would not be as forthcoming given what

he deemed a "code of silence" among the staff. He also wanted to avoid the risk of interviewing COs who themselves could have been potential participants in the alleged misconduct. According to Barton, the purpose of these interviews was purely informational, i.e., not to gather evidence in support of initiating or recommending disciplinary actions, and he gave specific orders to his staff to this effect.

Chief Deputy Inspector General Roy Wesley (Wesley) oversaw the review of HDSP. Wesley specifically excluded from the review team any Special Assistant Inspectors General (SAIGs), attorneys whose function is to monitor the disciplinary side of the Office of Internal Affairs. Instead, he assigned Deputy Inspector Generals (DIGs) who were former investigators and auditors to serve on the team. Once assembled, the team developed interview questions and established criteria for selecting which COs to interview, without consultation or input from CDCR. The team chose to interview COs who had been at HDSP during the relevant time period, but who had left HDSP within the last year. Wesley, like Barton, testified that the DIGs who were assigned to conduct the interviews were not authorized to recommend any disciplinary action or to investigate specific instances of misconduct. Both Barton and Wesley emphasized that the content of the interviews was confidential.

<u>The Interviews</u>

In October and November 2015, DIGs Harman Sufi (Sufi) and Michael Maddox (Maddox) interviewed the selected COs at their worksites before or while they were on duty. In each case, the DIG arranged with the local warden, watch commander, or public information officer the use of a private room and the attendance of the CO at a pre-arranged time. OIG's

interview questions were broadly phrased.[3] For example, after some preliminary questions about the COs' work experience, the DIGs asked the COs to describe the relationship between inmates and staff at a particular yard and then to compare that relationship to other yards at HDSP. The DIGs also asked the CO about "inmate politics" and whether sex offenders were treated differently by staff in either yard; whether and how the COs would know if a particular inmate was a sex offender; whether the COs had heard staff calling inmates certain names to identify them as child molesters; and whether inmates usually know if a particular inmate is a sex offender. Other questions included inquiries as to any training or directives the COs had been given for dealing with "DDP" [*sic*] and "mental health" types of inmates;[4] whether COs discuss an inmate's commitment offense amongst themselves; and whether inmates at HDSP were treated differently based on their race, or if the COs had heard staff "using racist comments." The DIGs inquired whether HDSP should be doing anything differently, or whether there was anything HDSP could change to prevent complaints. Maddox and Sufi informed all the COs they interviewed that the interviews were not investigatory in nature, that nothing they said would be referred for investigation, and that the interviews would not lead to disciplinary action.

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[3] Based upon OIG's assertion that all the HDSP interviews were confidential, it did not provide or disclose a list of questions it created as part of the HDSP review. However, during an October 13, 2015 interview of a CO identified as BR, BR was permitted to audio record the interview and to have a CCPOA representative present. CCPOA produced an unofficial transcript of this interview, and Maddox agreed that the questions were similar to those he asked of other COs as part of the HDSP review. Neither party called BR to testify at the formal hearing.

[4] According to OIG's Report of the Special Review (Special Review Report), HDSP has been designated a "Disability Placement Program" (DPP) since 1997. This means that inmates with verified disabilities can be housed at HDSP, with the expectation that these inmates will be provided access to programs and services, in accordance with the Americans with Disability Act and the court's ruling in *Armstrong v. Davis* (9th Cir. 2003) 318 F.3d 965.

CCPOA Chapter President Robert Davis

Robert Davis (Davis) is a correctional sergeant at California State Prison, Lancaster and CCPOA Lancaster Chapter President. Davis represented two COs at interviews including the interview of BR on or about October 13, 2015. Davis had not received advance notice from OIG that BR was being interviewed and learned of it from a chief job steward who informed him that the interview was underway. Davis reported to the watch office where he was met by BR. Acting under the assumption that the interview was with the Office of Internal Affairs, Davis asked BR for the "scope letter" describing the subject matter of the interview he assumed BR had received. Davis explained that a scope letter is typically given to an employee before an interview stating the scope of the interview, time and location of the interview, whether the employee is considered the subject of an investigation or merely a witness, and whether the interview is administrative or criminal in nature. BR informed him that he had not been given a scope letter.

Once the interview began, Sufi introduced himself and informed Davis and BR that representation was unnecessary because he intended to ask only general questions about HDSP and the interview was voluntary. Nevertheless, after speaking with his supervisor, Senior Deputy Inspector General Anna Galvan (Galvan), Sufi approved BR's request for representation.[5] Thus, Sufi allowed Davis to stay and attend the interview. Additionally, Sufi recorded the interview and did not intervene when Davis began to make an audio recording of the interview on his cell phone.

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[5] Sufi testified that OIG decided sometime after these interviews to forbid the presence of union representatives. Wesley testified that he directed the interviewing DIGs not to permit representation after learning that Sufi allowed Davis to participate in two interviews.

Sufi also interviewed CO Mark Rosales (Rosales) that day. Again, Sufi allowed Davis to attend the interview as Rosales' representative. Davis recalls that he intervened during the interview to clarify some of the questions. Davis did not record the Rosales interview because his phone ran out of memory after recording BR's interview. At some later time, Davis learned that Sufi had interviewed an additional CO, identified only as Officer "Brown."

CO Steve Oschner

On October 30, 2015, Maddox interviewed CO Steve Oschner (Oschner) at Salt Creek Conservation Camp. Prior to the interview, Oschner contacted CCPOA to seek representation. CCPOA dispatched attorneys Phillip Murray (Murray) and Justin Delacruz (Delacruz) to accompany Oschner to the interview, which was held in a lieutenant's office. Maddox asked Oschner before the start of the interview whether he would voluntarily submit to questioning. When Oschner declined, Maddox served him with a subpoena[6] but informed him that he did not consider Oschner to be a subject, only a witness. Maddox then advised Oschner that he would not be permitted to have a representative present for the interview.

Murray and Delacruz left the office and Maddox proceeded with the interview. Only Oschner and Maddox were present. Maddox's questions were general and he did not ask for names of witnesses or individuals who might have engaged in misconduct. Oschner testified that he was nevertheless concerned about the potential for discipline because he did not have

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[6] OIG may "[i]ssue subpoenas for the attendance of witnesses and the production of papers, books, accounts, or documents in any medium, or for the making of oral or written sworn statements, in any interview conducted pursuant to duties authorized by this chapter." (Pen. Code, § 6127.3 subd. (a)(3).) Maddox testified that OIG prepared subpoenas after Bryan Blue, a CO at Ironwood State Prison, refused to be interviewed without representation in mid-October 2015. Initially, Maddox permitted Blue to decline the interview. However, after Maddox reported this to his superiors at OIG, Wesley immediately contacted the warden at the prison, who then ordered Blue to participate in the interview without representation. In turn, Maddox, who by that time had left the prison, was directed by Wesley to return to the prison and conduct Blue's interview.

any advance knowledge of the subject of the interview, and he believed that the implications of what he said could "come back to get you later on." In particular, he found Maddox's questions about use of force worrisome because his duty as a sworn officer and CDCR employee is to report any use of force that he witnesses. Maddox recorded the interview, but refused Oschner's request for a copy. Oschner also requested, but Maddox denied, permission to make a recording of the interview.

CO James McCloughan

On November 2, 2015, Maddox interviewed CO James McCloughan (McCloughan) at Washington Ridge Fire Camp. After receiving notice that OIG wanted to interview him, McCloughan contacted CCPOA to arrange for a representative to be present. CPPOA retained attorney Douglas Foley (Foley) to attend the interview with McCloughan. McCloughan and Foley arrived together at the interview location, a Cal Fire office on site, at which point Maddox informed Foley that he would not be permitted to participate in the interview. Following this exchange, McCloughan asked Maddox if the interview was voluntary. Maddox confirmed that it was, and McCloughan declined to participate. Maddox then presented McCloughan with a subpoena compelling his participation, but informed him that he was not considered a subject. As with Oschner, however, OIG did not give McCloughan prior notice of the subject matter of the interview. Maddox made an audio recording of the interview, yet refused McCloughan's request to do the same. Only Maddox and McCloughan were present for the interview.

McCloughan testified that Foley's absence from the interview made him nervous. In his words, "The Inspector General's Office doesn't come and interview you to give you a commendation. They're there to interview allegations of wrongdoing." And, while

acknowledging Maddox's assurances that the interview would be confidential, McCloughan still expressed concern that Maddox could be under an obligation to report criminal conduct if such information was disclosed to him during an interview.

CO Arthur Tovar

Early on the morning of October 29, 2015, a watch sergeant called CO Arthur Tovar (Tovar) and ordered him to report to the employee relations officer's (ERO's) office later that day. Tovar subsequently arranged for CCPOA Chapter President Casey Granfield (Granfield) to accompany him to the interview. When Tovar reported to the ERO's office, Maddox was already there. Maddox, Tovar, and Granfield spoke briefly. Maddox stated that the interview was voluntary but produced, upon Tovar's request, a subpoena compelling Tovar's presence. Granfield asked to accompany Tovar into the interview, and Maddox replied that he could not. Maddox made an audio recording of the interview, but did not allow Tovar to make his own recording.[7] During the interview, Maddox did not ask for names of witnesses or individuals who may have engaged in misconduct, nor did he ask about specific dates and times. Nonetheless, Tovar was concerned about being interviewed without Granfield because it was his first such interview in his twenty-plus year career as a COand OIG had not informed him of the subject matter beforehand. Tovar further testified that he did not fully understand the difference between OIG and CDCR, and was not sure whether OIG was his employer. Only Maddox and Tovar were present for the interview.

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[7] At the start of the interview, Tovar read into Maddox's record the CCPOA Rights Advisement Card. The card instructs members as to their legal rights and provides them with a statement to be read if they are denied their right to a representative.

The Special Review Report

In December 2015, OIG published a written report of its findings entitled "2015 Special Review: High Desert State Prison." As stated in the report, the review was "intended to determine whether there is a culture among the custody staff at HDSP that contradicts the CDCR's paramount objective of ensuring the safety of both inmates and staff in the prison system." The report summarized OIG's findings on various topics relating to HDSP, including its entrenched culture, sex offenders and their classifications, sensitive needs yards, inmate appeals and staff complaints, use of force incidents, inmates and parolees with disabilities, and internal affairs investigations. OIG made recommendations to CDCR on each of these subjects.

The section detailing HDSP's entrenched culture includes a subsection about CCPOA and its role in OIG's review. OIG's characterizations of CCPOA suggest a tense relationship between OIG and CCPOA, based on passages such as the following: "[D]uring the course of the OIG's Senate-authorized review, OIG staff faced significant opposition from [CCPOA] which attempted to impede OIG's informational, non-disciplinary interviews aimed at uncovering the veracity of allegations that the integrity of the correctional profession and the advancement of public safety at HDSP have been compromised." OIG reproduced an e-mail that CCPOA sent to its membership on October 15, 2015. The e-mail advised members that OIG was in the process of interviewing COs who work or worked at HDSP, and instructed members that if OIG contacted them for an interview, they were to immediately request a representative, avoid giving a voluntary statement, and refrain from having a conversation with the agent. OIG stated that this instruction "was not only an inaccurate statement of its members' legal rights, but it also encouraged its members to commit acts qualifying as

misdemeanor offenses under the law." Other statements suggest OIG and CCPOA have a history of fraught relations:

> "On November 23, 2015, CCPOA's State President sent a letter to the Governor and each member of the California State Legislature disparaging the OIG with various unfounded accusations of impropriety in all facets of its operations . . . the letter is the latest strong-arm tactic CCPOA has elected to deploy in an effort to obstruct the OIG's Senate-authorized review and attempt to discredit the OIG in advance of the release of this report."

The report described OIG's interview process, including how DIGs informed the COs prior to the start of the interviews that OIG was not conducting an investigation, that the COs being interviewed were not the subject of an investigation, and that OIG would not use any statements provided during the interviews to initiate an investigation into the interviewees. OIG stated that it did not allow COs to have a representative during the interviews "to prevent compromising the integrity of its review." The rest of the subsection contains additional allegations of CCPOA's attempted interference with OIG's review.

DISCUSSION

Standard of Review

Although the Board's review of a proposed decision is de novo, to the extent that a proposed decision adequately addresses issues raised by certain exceptions, the Board need not further analyze those exceptions. (*City of San Ramon* (2018) PERB Decision No. 2571-M, p. 5.) The Board also need not address alleged errors that would not impact the outcome. (*Ibid.*) With these principles in mind, we focus our attention on OIG's exceptions that call into question its duties under the Dills Act.

OIG and the Dills Act

The ALJ found that OIG is the "state" for purposes of section 3519 because it was "acting as the employer" when it interviewed Oschner, McCloughan, and Tovar. (Dills Act, § 3519.) OIG argues that the ALJ's finding was in error.[8] We reject OIG's exception for several reasons.

The Dills Act declares as its purpose the improvement of employer-employee relations through recognition of "the right of state employees to join organizations of their own choosing and be represented by those organizations in their employment relations *with the state*." (*Id*. at § 3512, italics added.) However, the Act does not expressly define "state" and indeed it uses three different terms to refer to state management entities: "state employer," "employer," and "state." (*Id*. at §§ 3513, subd. (j) and 3519.) Although by appearances similar, these terms address separate subjects and are not synonymous. (*State of California* (*Department of Forestry & Fire Protection, State Personnel Board)* (2014) PERB Decision No. 2317a-S, p. 7 *(Department of Forestry)*.) For instance, section 3513, subdivision (j) limits its definition of "state employer" or "employer" to the context of bargaining or meeting and

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[8] OIG marshals a number of arguments to support this exception, including that the ALJ committed reversible error by misleading the parties as to the applicable legal standard. A few days prior to the hearing, the ALJ sent an e-mail to the parties sharing information she thought "may be instructive to both parties." She stated: "In the interest of ensuring the best use of everyone's time next week, please take note of the standard applied by the FLSA [sic] in these cases: *National Aeronautics and Space Administration v. Federal Labor Relations Authority* [citation omitted] and *National Treasury Employees Union v. Federal Labor Relations Authority* [citation omitted]." The ALJ also told the parties during the hearing, "I've given both parties fairly direct information regarding the case law that I think is relevant and the information that I want from you." OIG argues that it relied on the ALJ's statements to its detriment and that in doing so, it was irreparably prejudiced.

We find no merit to OIG's exception. The ALJ made no statements as to relevant California authority, nor did she make any conclusive statements as to the authority she would ultimately apply. At most, she offered the parties guidance as to what she considered relevant federal authority and implied the parties should address these authorities in their briefing.

conferring in good faith. (Dills Act, § 3513, subd. (j).) Here, the parties agree that OIG was not the state employer or employer as defined in section 3513. (*Ibid.*)

In contrast, section 3515.5 confers broad rights on employee organizations to represent their members in employment relations with *the state*, not just the Governor or his or her designee. (*Cumero v. Public Employment Relations Bd.* (1989) 49 Cal.3d 575, 597 (*Cumero*).) Additionally, section 3519 makes it unlawful for the "state" to "interfere with, restrain, or coerce employees because of their exercise of rights guaranteed" to them under the Act and to "[d]eny to employee organizations rights guaranteed to them" under the Act. (Dills Act, § 3519, subds. (a) and (b).) Although the Act does not define the term "state" in this context, the Board has noted that "state" as used in section 3519 is broader than "state employer" in section 3513, subdivision (j). (*State of California (State Personnel Board)* (2006) PERB Decision No. 1864-S, pp. 21-22 (*SPB*); *Department of Forestry*, *supra*, PERB Decision No. 2317a-S, p. 7.)

We begin by ascertaining the definition of "state" in section 3519. The fundamental task in statutory construction is ascertaining the intent of the Legislature so as to effectuate the purpose of the law. (*Day v. City of Fontana* (2001) 25 Cal.4th 268, 272.) We first examine the statutory language, giving words their usual and ordinary meaning. (*Ibid.*) If the terms of the statute are unambiguous, we assume the Legislature meant what it said; the plain meaning of the language controls and there is nothing to interpret or construe. (*Estate of Griswold* (2001) 25 Cal.4th 904, 911; *Katz v. Los Gatos-Saratoga Joint Union High School District* (2004) 117 Cal.App.4th 47, 61.) "The words of the statute must be construed in context, keeping in mind the statutory purpose, and statutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible." (*Dyna-Med, Inc. v. Fair*

Employment & Housing Com. (1987) 43 Cal.3d 1379, 1387.) If the statutory terms are ambiguous, then we may resort to extrinsic sources, including the purpose of the statute and the legislative history. (*Day v. City of Fontana*, *supra*, 25 Cal.4th at p. 272.)

In *SPB*, the Board examined the prohibition against interference in section 3519 subdivisions (a) and (b) applying these rules of statutory construction. That case concerned SPB's adoption of a policy to disapprove settlement agreements in disciplinary actions that were the product of collectively bargained procedures. (*SPB*, *supra*, PERB Decision No. 1864-S, p. 20.) The Board, in considering whether it could exercise jurisdiction over SPB as a state agency as opposed to as an employer, focused on the plain language of the statute: "'Section 3519 indeed makes it illegal for the 'state,' not the 'employer,' to violate the protected rights of state employees and their exclusive representatives. . . . the correct inquiry may be to determine whether, as the 'state,' SPB's conduct violated the Dills Act.'" (*Id*. at pp. 22-23.) On this basis, the Board concluded that SPB's status as a "state employer" was irrelevant for purposes of determining whether it unlawfully interfered with protected rights; as a state agency, SPB was subject to section 3519 subdivisions (a) and (b). (*Id*. at p. 23; accord *Department of Forestry*, *supra*, PERB Decision No. 2317a-S, p. 7.) [9]

In keeping with our decision in *SPB* and the Supreme Court's recognition of the context-dependent definition of "the state" announced in *Cumero*, we find that a broad view of section 3519 is consistent with the plain language of the statute. Unlike section 3513, subdivision (j),

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[9] The concurrence and dissent incorrectly claims that *SPB* is inconsistent with *Department of Forestry*, *supra*, PERB Decision No. 2317a-S, and was impliedly overruled. In fact, *Department of Forestry* expressly approved of the Dills Act's distinction between section 3513 subdivision (j)'s definition of the "state employer" for purposes of determining whether the employer engaged in bad faith bargaining under section 3519 subdivision (c), and "state" for purposes of determining whether the employer engaged in unlawful interference under section 3519 subdivision (a) and (b).

section 3519 refers only to the "state" without either qualifying or defining the term. We therefore interpret "state" as meaning exactly what it says—the state itself. (See *Department of Forestry*, *supra*, PERB Decision No. 2317a-S, p. 8, fn. 6.) This reading of the section is harmonious with the rest of the statute, namely section 3513, subdivision (c), which excludes OIG employees from the definition of "state employee." The Legislature's express exclusion of OIG employees, without a corresponding exclusion for OIG from section 3519, indicates that the broader term "state" subjects OIG to the Dills Act.

A state agency, including OIG, is subject to liability under section 3519 subdivisions (a) and (b) if it is the appointing authority or when it acts as an employer. (*Cal Fire Local 2881 v. Public Employment Relations Bd.* (2018) 20 Cal.App.5th 813, 819 [state entity must be acting as employer to violate Dills Act section 3519]; *Department of Forestry*, *supra*, PERB Decision No. 2317a-S, p. 8 [agency must be acting as the employer or appointing authority to be subject to Dills Act].) This decision does not mean, as the concurrence and dissent suggests, that every state agency is subject to section 3519 liability at all times in any interaction with a state employee or employee organization.[10] Instead, this decision follows our precedent by limiting the liability of a non-appointing authority to instances when an agency is acting as an employer. (*SPB, supra,* PERB Decision No. 1864-S, pp. 21-22; *Department of Forestry*, *supra*, PERB Decision No. 2317a-S, p. 8.)

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[10] The concurrence and dissent also suggests that this decision conflicts with *California State Employees Association (Gonzalez-Coke, et al.)* (2000) PERB Decision No. 1411-S (*Gonzalez-Coke*) and *Department of Forestry*, *supra*, PERB Decision No. 2317a-S. It does not. In *Gonzalez-Coke*, at pp. 17-18, the Board noted that PERB itself is not the "state" for the purposes of section 3519 subdivision (d) when it adjudicates a case. In *Department of Forestry* at p. 9, the Board found that when a non-appointing authority makes a broadly applicable quasi-legislative decision—in that case adopting regulations for disciplinary hearing procedures—it is also not the "state employer" for the purposes of determining a bargaining obligation under the Dills Act. Here, OIG was not performing a quasi-judicial or quasi-legislative act and no one contends it had a duty to bargain.

Here, OIG acted as the employer when it interviewed the COs. The Legislature empowered OIG to review CDCR policies, practices, and procedures. (Pen. Code, § 6126, subd. (b).) In this case, OIG was specifically tasked with reviewing, and writing a report, about HDSP's practices including: (1) excessive use of force against inmates; (2) internal reviews of incidents involving the excessive use of force against inmates; and (3) protection of inmates from assault and harm by others. The report was meant to address, in part, "concern about whether some members of HDSP staff are engaged in a pattern or practice of using inappropriate and excessive force against inmates[.]" The request for the OIG's report was prompted by several incidents in 2014 and 2015 where the actions of custodial staff were alleged to contribute to violence against inmates. Thus a key part of OIG's task was to review the conduct of a group of CDCR employees.

An investigation or review of an employee's conduct at work—or a group of employees' conduct at work—is the act of an employer. So too is an interview of an employee in the furtherance of such an investigation or review. The state may not evade responsibility for providing representation rights to an employee by outsourcing a review or investigation to a different arm of the state.

Here, the Legislature specifically assigned to OIG, and not CDCR, the task of conducting a review of employee conduct at HDSP. By conducting this review, and interviewing COs as part of this review, OIG was acting as an employer.

OIG's enabling statute subjects the Inspector General to the Public Safety Officers Procedural Bill of Rights (POBR)[11] "as if the Inspector General were the employer" when "it

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[11] Government Code section 3300 et seq. is also known as the POBR. POBR catalogs the rights and protections due peace officers by their public employers. (*California Correctional Peace Officers Assn. v. State of California* (2000) 82 Cal.App.4th 294, 304.)

appears that the facts of the case could lead to punitive action." (*Id.*, at § 6126.5.) Penal Code section 6126.5, subdivision (d) provides:

> The Inspector General may require any employee of [CDCR] to be interviewed on a confidential basis. . . . It is not the purpose of these communications to address disciplinary action or grievance procedures that may routinely occur. If it appears that the facts of the case could lead to punitive action, the Inspector General shall be subject to Sections 3303, 3307, 3307.5, 3308, 3309, and subdivisions (a) to (d), inclusive, of Section 3309.5 of the Government Code as if the Inspector General were the employer, except that the Inspector General shall not be subject to the provisions of any memorandum of understanding or other agreement entered into between the employing entity and the employee or the employee's representative that is in conflict with, or adds to the requirements of, Sections 3303, 3307, 3307.5, 3308, 3309, and subdivisions (a) to (d), inclusive, of Section 3309.5 of the Government Code.

The statute's inclusion of a triggering mechanism for POBR makes clear that the Legislature contemplated instances where OIG would have to respect, among other things, a public safety officer's right to a representative when he or she is faced with an interrogation focusing on matters likely to result in punitive action (Gov. Code, § 3303, subd. (i).) This language indicates that, in the limited setting of conducting interviews during a review, the Legislature gave OIG the authority to act as an employer of CDCR employees, thereby triggering the POBR. By acting as the employer within the context of the particular interviews, OIG became subject to the prohibition against interference with protected rights found in section 3519. (*SPB*, *supra*, PERB Decision No. 1864-S, pp. 21-22; *Department of Forestry*, *supra*, PERB Decision No. 2317a-S, p. 8.)

The unique circumstances of this case also support a finding that OIG was acting as the employer when it interviewed the COs. The subject-matter of the interviews—the COs' observations during their work at HDSP—were work-related. Although OIG did not conduct the

interviews at the request of CDCR, CDCR management cooperated with and supported the interviews. OIG coordinated with local prison management to have the COs made available for the interviews, and directed COs to report at a specified time and place for the interviews. OIG held the interviews at the COs' job sites, before or during the COs' on-duty time. Moreover, some OIG agents, namely DIG Sufi and his supervisor Galvan, apparently recognized the validity of the COs' requests for representation and permitted CCPOA representatives to participate in and record the interviews. Overall, the facts presented by this case firmly support our conclusion that OIG had a duty not to interfere with the protected rights of these employees or their exclusive representative.

We are not the first labor relations agency to reach the conclusion that an Office of the Inspector General must provide an employee with representation during a work-related interview. Several federal cases have examined analogous issues to those raised in this case.[12] In *U.S. Department of Justice v. Federal Labor Relations Authority* (D.C. Cir. 2001) 266 F.3d 1228 (*Department of Justice*), the D.C. Circuit upheld the conclusion of the Federal Labor Relations Authority (FLRA) that a federal prison employee had a right to union representation during an investigation conducted by the Department of Justice's Office of the Inspector General (DOJ-OIG). During a criminal investigation into whether the prison employee had smuggled drugs into a facility, the DOJ-OIG had denied the prison employee's request for union representation. (*Id.* at p. 1229). The FLRA includes a provision requiring an agency to provide an employee with representation during an examination of the employee in connection with an investigation if: (1) a "representative of the agency" conducts the examination; and (2)

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[12] In interpreting representational rights under the Dills Act, we are guided, but not bound, by precedent interpreting federal collective bargaining statutes. (*Capistrano Unified School District* (2015) PERB Decision No. 2440, pp. 28-29 (*Capistrano*).)

the employee reasonably believes the examination may result in disciplinary action. (5 U.S.C. § 7114(a)(2)(B)). This provision grants federal employees representational rights comparable to *Weingarten*[13] rights afforded private sector employees. The FLRA, interpreting this provision, held that the DOJ-OIG'sagents "were representatives" of the employer during the investigation and were therefore required to provide the prison employee representation rights. (*Department of Justice*, *supra*, 266.F.3d at p. 1230.) On appeal, the employer argued that OIG was conducting a criminal investigation, not an administrative investigation, and therefore the employee did not have representation rights. (*Id.* at p. 1231.) The D.C. Circuit affirmed the FLRA's decision, observing that the "the difference between administrative and criminal investigations in this respect is one of investigative strategy, not one of law. In either case, both OIG and agency management can benefit by mutual cooperation[.]" (*Ibid.*)

Department of Justice relied on *National Aeronautics and Space Admin. v. Federal Labor Relations Authority* (1999) 527 U.S. 229 (*NASA*). In *NASA*, the U.S. Supreme Court upheld the FLRA's conclusion that a NASA employee was entitled to representation rights during an investigatory interview conducted by the NASA's Office of Inspector General (NASA-OIG). The Court concluded the employer unlawfully narrowed the NASA employee's representational rights when the NASA-OIG refused to allow a union representative to participate in the interview. (*Id*. at p. 246.) The Court was not persuaded by NASA's argument that a "representative" of the agency referred only to the entity that had a collective bargaining relationship with the employee's union. (*Id*. at p. 234.) The Court noted that the overlap between management activities and the NASA-OIG's duties would often generate

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[13] In *NLRB v. J. Weingarten, Inc.* (1975) 420 U.S. 251 (*Weingarten*), the Supreme Court upheld an employee's right to have a union representative present at an investigative interview which he or she reasonably believed could lead to discipline.

cooperation between agency managers and the NASA-OIG. (*Id*. at p. 242.) The Court also observed that the "interest in fair treatment for employees under investigation is equally strong whether they are being questioned by employees in NASA's OIG or by other representatives of the agency." (*Id*. at pp. 244-245.) The Court held that the NASA-OIG was "acting as a representative" of NASA during employee investigations, and therefore was required to provide representational rights to employees during the investigations. (*Id*. at p. 246.)

The concurrence and dissent urge us to adopt a test taken from *National Treasury Employees Union v. Federal Labor Relations Authority* (D.C. Cir. 2014) 754 F.3d 1031 (*NTEU*) to determine whether a state agency other than the appointing authority is acting as an employer.[14] In *NTEU*, the D.C. Circuit affirmed the FLRA's application of a "function and control" test to determine if the Office of Personnel Management (OPM) was required to provide representation rights to Internal Revenue Service (IRS) employees during suitability investigations. (*Id*. at p. 1047.) The FLRA applied the "function and control" test it had previously used regarding contractors. (*Id*. at p. 1043.) Under that test an individual who is not an agency employee may nonetheless act as a "representative" of the agency if she or he: (1) performs an agency function; and (2) is subject to agency control. (*Id.* at p. 1042.) The FLRA found, and the D.C. Circuit affirmed, that OPM was not a "representative" of the IRS and therefore not required to provide representational rights to IRS employees.

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[14] The dissent dismisses the significance of *NASA* and *Department of Justice* because the Offices of Inspector General in those cases existed within the appointing agency, or under the umbrella of the same agency head. The concurrence asserts that those cases are distinguishable because OIG is a separate entity that is bureaucratically distinct from CDCR. But this point simply elevates form over substance: OIG is not some plenipotentiary with powers to review the actions of any state employee or agency, rather its only purpose is to gather information about CDCR and its employees. Thus, OIG has a parallel function as the Offices of Inspector General examined in *NASA* and *Department of Justice*, and the State's choice to form OIG as a separate entity from CDCR is immaterial.

The *NTEU* decision and the test articulated by that decision, however are not as applicable to the facts of this case as the U.S. Supreme Court's decision in *NASA*. *NASA* spoke directly on the issue of whether the NASA-OIG was required to provide representational rights to employees during an interview. (*NASA*, *supra*, 527 U.S. 229.) Although the NASA-OIG was obviously created and empowered by different statutes than the California OIG, both share common characteristics. The purpose of the NASA-OIG is to conduct and supervise audits and investigations of a handful of specified programs and operations, including NASA. (*NASA, supra*, 527 U.S. at p. 238 citing 5 U.S.C. App. § 2 at p. 1381.) Similarly, a key purpose of the California OIG is to review, investigate, and audit the policies, procedures, and practices of several correctional departments and boards, including CDCR. (Pen. Code, § 6126, subd. (b).) In contrast, the agency in question in *NTEU* was OPM, an agency without a mission solely focused on investigating or reviewing the IRS. The precedent set forth by *NASA* is therefore more applicable to this case.[15]

In *NASA*, *supra,* 527 U.S. 229, the question before the Court was whether the NASA-OIG was acting as a "representative of the agency" when it performed an investigatory interview of a NASA employee. The Court answered in the affirmative. Here, a similar question is before the Board, whether OIG was acting as the employer when it interviewed COs in order to review the conduct of a group of CDCR employees. This question must also be answered in the affirmative.

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[15] Further, as we noted in *Capistrano*, *supra*, PERB Decision No. 2440, pp. 28-29, "[b]y choosing to follow federal authority on a particular issue, PERB is not automatically bound by subsequent developments in federal law on that point . . . the determinative issue is . . . whether federal [decisions] are consistent with the language and purposes of the PERB-administered statutes."

Accordingly, for the foregoing reasons, we conclude that OIG was bound by section 3519 when it conducted interviews of COs pursuant to Penal Code section 6126.5 as part of its Special Review.

Right to Representation

We next consider whether the nature of OIG's interviews triggered the COs' right to representation and, if so, whether OIG violated those rights. The ALJ answered both these questions in the affirmative. OIG excepts to these conclusions.

Under California law, the representational rights of state employees and employee organizations are grounded in both statutory and decisional law. Section 3515 guarantees state employees "the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations." (Dills Act, § 3515.) Section 3515.5 guarantees employee organizations an independent right to "represent their members in their employment relations with the state." (*Id*., § 3515.5; *Capistrano*, *supra*, PERB Decision No. 2440, pp. 13-14.) An investigatory or disciplinary interview falls within the broad definition of "all matters of employer-employee relations" and section 3515 therefore grants state employees representational rights that are at least as broad as those afforded private sector employees under *Weingarten* and other federal authorities interpreting section 7 of the National Labor Relations Act. (Dills Act, § 3515; *Capistrano*, *supra*, PERB Decision No. 2440, p. 11; *Social Workers' Union, Local 535 v. Alameda County Welfare Dept.* (1974) 11 Cal.3d 382, 384.) In fact, both PERB and California courts recognize that, in several respects, the language of our public sector bargaining laws is "considerably broader" than the federal law on which *Weingarten* rests. (*Capistrano*, *supra*,

PERB Decision No. 2440, p. 13.) In those such circumstances, "PERB must follow the intent of the Legislature to effectuate the purpose of the statute." (*Id*. at p. 16.)

To prove a violation of the right to representation in an investigatory or disciplinary interview, the charging party must establish that: (1) the employee or representative invoked the right to representation on behalf of the employee; (2) for an investigatory meeting; (3) which the employee reasonably believed might result in disciplinary action; and (4) the employer denied the request. (*Ibid*; *State of California (Board of Equalization)* (2012) PERB Decision No. 2237-S, p. 6.) Because California law affords employee organizations a statutory right to represent employees in their employment relations, the same elements can be used to demonstrate that an employer violated both an employee's right to be represented and the union's right to represent the employee. (*Capistrano*, *supra*, PERB Decision No. 2440, p. 14; *Rio Hondo Community College District* (1982) PERB Decision No. 260, pp. 18-19.)

1. The COs Had a Right to Representation at the Interviews

   a. The Interviews Were Investigatory

OIG contends that any belief that COs had that the interviews in question were investigatory and could result in punitive action was inherently unreasonable. In support, OIG cites Maddox's advisement to the COs that he was not conducting an investigation and that he would not refer anything the COs disclosed for investigation. OIG further urges us to consider that it interviewed the COs only as witnesses, rather than subjects, and did not ask any specific questions about dates or names of individuals involved in misconduct. We are not persuaded by OIG's arguments. Regardless of how an employer characterizes an interview, if it serves to elicit incriminating or merely negative evidence with the potential to impact the employment

relationship, then it is investigatory for purposes of the Dills Act. (*Capistrano*, *supra*, PERB Decision No. 2440, p. 20.) Context is the guiding question. (*Id*. at pp. 21-23.)

For this reason, we cannot square the objectively investigatory aspects of OIG's interviews of Oschner, McCloughan, and Tovar with OIG's characterizations of the interviews as merely "informational" in nature. The record supports the following facts, which are largely undisputed. OIG coordinated with local prison management to have the COs made available for the interviews, usually through issuance of direct orders for the COs to report at a specified time and place. OIG went so far as to ask local wardens to direct COs to attend and participate in the interviews. It held the interviews at the COs' job sites, in office spaces that it arranged for with management, rather than at a neutral or offsite location. OIG gave the COs little to no advance notice of the interviews or their subject matter, and while the DIGs told the COs the interviews were voluntary, the subpoenas clearly indicated otherwise. Nor did the COs have time to object to the subpoenas since the DIGs proceeded with the interviews on the spot. Contrary to OIG's assertion, not all of the COs interviewed understood the different functions of CDCR and OIG, or even that OIG was distinct from CDCR. Given OIG and CCPOA's acrimonious history, as evidenced by some of OIG's statements from the Special Review Report, the COs had particular reason to be vigilant when confronted with a DIG with only a minimum of notice and no background information whatsoever. In this context, the COs could have reasonably feared that they or their colleagues faced punitive action as a result of the interviews, particularly because the interviews covered topics which exposed COs to potential for discipline for failure to report their own or others' misconduct. We find a reasonable basis for such a belief notwithstanding the DIGs' caveats that the interviews were part of a review as opposed to an investigation and therefore would not serve as the basis for any discipline.

OIG's proffered countervailing facts do little to assist its argument. Foremost, OIG argues, it is independent of CDCR and therefore lacks authority to compel CDCR to open investigations into misconduct, and vice versa. OIG additionally avers that the purpose of the interviews was strictly informational and confidential, and that it would not use any of the information it obtained to pursue or recommend disciplinary action against the interviewees. However, a CO who has been summoned to appear at an interview onsite, for which he or she had no foreknowledge, by an authority that has long been at odds with CCPOA, could have reasonably believed in the possibility of discipline, regardless of the DIGs' assurances to the contrary. As the Board has found, such partial or ambiguous reassurances are insufficient to dispense with an employee's otherwise effective request for representation at an investigatory interview. (*Capistrano*, *supra*, PERB Decision No. 2440, p. 34.)

We find that the interviews were investigatory in nature, and therefore triggered the COs' right to representation.

b. The Interviews Presented Highly Unusual Circumstances

In California, a public employee is entitled to representational rights not only when an employee reasonably fears discipline, but also in other "highly unusual" circumstances that are not necessarily disciplinary. (*Capistrano*, *supra*, PERB Decision No. 2440, p. 13; *Redwoods Community College Dist. v. Public Employment Relations Bd.* (1984) 159 Cal.App.3d 617, 625 (*Redwoods*).) OIG disputes the ALJ's finding that the interviews were marked by "highly unusual circumstances." We find the weight of the record supports the ALJ's analysis.

In *Redwoods*, an employee received a routine performance evaluation from her immediate supervisor that she considered less than favorable. She took the issue up with a district-level executive who suggested that the employee attempt to resolve the matter with her

supervisor. The employee then requested an independent review of her performance evaluation, and the executive assigned a dean to conduct the review. After the dean accepted the assignment, but prior to the review, the employee withdrew the request because she and her supervisor had mutually agreed to another performance evaluation. In spite of the withdrawal, the dean pressed forward with the review and scheduled a meeting with the employee, at which a district personnel technician and union representative were also present. At the outset of the meeting the dean stated that its purpose was for information gathering, with "no aspect or overtones for discipline," and told the employee's representative to refrain from entering into the conversation. Following the meeting, the union filed an unfair practice charge against the district based upon the dean's refusal to allow the representative to speak during the meeting.

The Board concluded that the importance of the meeting, the employee's perception that the interview was akin to a grievance procedure or appeal, and the formal nature of the meeting, collectively, supported the conclusion that the employee had a right to be represented and the union had an analogous right to represent her at the interview. (*Redwoods*, *supra*, 159 Cal.App.3d at p. 622.) The Court of Appeal affirmed. It held that an employee's right to representation in employee-employer interviews is normally limited to those meetings which carry the potential for disciplinary action. (*Id.* at pp. 624-625.) Acknowledging, however, that "the precedents do not compel a conclusion that the discipline element is invariably essential to the right of representation," the court stated that under California law "representation should be granted, absent the discipline element, only in highly unusual circumstances." (*Id*. at p. 625.) Under the circumstances of that case—an investigatory and relatively formal interview, an intimidating atmosphere, and a manager that was hostile to the union representative who was

present[16]—the employee was entitled to representation which she did not receive, and her union was denied its right to represent her. (*Ibid*.)

The circumstances in the instant case similarly present highly unusual circumstances. As the ALJ observed, Oschner, McCloughan, and Tovar all declined to participate voluntarily in the interviews, leading OIG to compel their participation by serving each of them with a subpoena. OIG convened the meetings at COs' jobsites, but in management or other private offices away from the employees' ordinary worksite. Although OIG investigators are not in the same chain of command as COs, OIG's role in the interviews lent them an aura of formality which predictably aroused the COs' anxieties and suspicions. As Tovar testified, formal interviews are a rare occurrence at CDCR. At the time OIG interviewed Tovar, he had been a correctional officer for over 20 years without ever having participated in a formal interview, and even then he did not fully recognize the difference between OIG and CDCR. For his part, McCloughan understood OIG's function as investigating allegations of wrongdoing—even if his belief was unfounded given OIG's limited statutory mandate, it informed his perspective that OIG's involvement in an interview could portend a finding of misconduct.

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[16] In its exceptions, OIG cites "the factors necessary to establish a finding of highly unusual circumstances," per *Redwoods*, as the following: (1) the meeting is investigatory and formal; (2) a high-ranking official of the employer is present; (3) there exists an atmosphere of intimidation; and (4) the employee is subsequently disciplined based on the meeting. OIG mischaracterizes the Court of Appeals' analysis of highly unusual circumstances as far more formulaic and unbending than we interpret it to be. While OIG is correct that the degree of formality surrounding the interview is, in itself, insufficient to establish highly unusual circumstances (*Redwoods*, *supra*, 159 Cal.App.3d at p. 625), the court did not hold that all or most of the factors must be present to trigger the exception. (*Ibid*.) In fact, the court did not even define a set of factors. It merely described aspects of the interview that the employee could have reasonably perceived as highly unusual.

We have no reason to disturb the ALJ's finding that, under the circumstances, it was reasonable for the COs to assume that no good could come from being singled out by OIG for a private, compulsory interview that, by all outward indications, was a formal investigation, regardless of OIG's intention. In particular, the interviews were characterized by little to no advance notice of their occurrence, no forewarning of the subject matter, and inadequate advisement as to how OIG would use the content of the interviews, all against the background of a historically tense relationship between CCPOA and OIG—to the COs, the interviews were indistinguishable from a formal investigation. Again, given these circumstances, at least one DIG (Sufi) and his supervisor chose to permit CCPOA to represent its members during these interviews, and to record the interviews.

Thus, even assuming the COs' fear of disciplinary action in connection with the interviews was not reasonable, we conclude that they were nonetheless entitled to representation under the *Redwoods* standard. Because of CCPOA's concomitant right to represent the COs' during the interviews, OIG's conduct also violated section 3515.5. (*Rio Hondo Community College District*, *supra*, PERB Decision No. 260, pp. 18-19.)

<u>Res Judicata</u>

OIG argues that the doctrine of res judicata precludes the Board from adjudicating the issue of whether the COs had a reasonable fear of discipline associated with the interviews, based upon *Blue*, *supra*, 23 Cal.App.5th 138. We disagree.

Res judicata gives conclusive effect to a former judgment in subsequent litigation involving the same controversy where the following elements are met: (1) a claim or issue raised in the present action is identical to a claim or issue litigated in a prior proceeding; (2) the prior proceeding resulted in a final judgment on the merits; and (3) the party against whom the

doctrine is being asserted was a party or in privity with a party to the prior proceeding. (*Boeken v. Philip Morris USA, Inc.* (2010) 48 Cal.4th 788, 813; *State of California (Department of Corrections)* (1995) PERB Decision No. 1104-S, adopting proposed decision at pp. 11-12.) Furthermore, Court of Appeal decisions are binding precedent on PERB. (*State of California (Department of Personnel Administration)* (2008) PERB Decision No. 1978-S, p. 9.)

In *Blue*, the related state court action, the CCPOA alleged that OIG and the Inspector General violated Penal Code section 6126.5 and POBR by refusing COs' requests for representation during the Special Review interviews. (*Blue*, *supra*, 23 Cal.App.5th at p. 147.) OIG in turn filed an anti-SLAPP[17] motion, asserting that CCPOA's causes of action arose from OIG's protected activity under Civil Code section 425.16, subdivisions (e)(2) and (e)(4).[18] (*Ibid*.) The trial court denied the anti-SLAPP motion, concluding that while OIG carried its threshold burden of demonstrating the causes of action were tied to protected activity, CCPOA

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[17] SLAPP is an acronym for a strategic lawsuit against public participation. (See Code Civ. Proc., §§ 425.16-425.18.) The SLAPP statute creates a right to a special motion to strike for "[a] cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue[.]" (*Id.*at § 425.16, subd. (b)(1).)

[18] Civil Code section 425.16, subdivision (e) provides:

> "As used in this section, 'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue' includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law, (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest."

established a probability of prevailing on the merits. (*Id*. at p. 142.) On OIG's appeal, the Court of Appeal considered two questions: first, whether the interviews triggered a right to representation under POBR (*id*. at p. 159); and second, whether the interviews triggered a right to representation under *Weingarten*. (*Id*. at pp. 160-161.) The court answered both in the negative. As to the latter question, the court found that none of the COs were under investigation for any suspected misconduct, and no reasonable person in the COs' position could have believed that he or she was under investigation. (*Id*. at p. 161.) Thus, none of the COs had a reasonable basis to believe their interviews could lead to punitive action. (*Ibid*.) The court concluded that the trial court should have granted OIG's anti-SLAPP motion.

We hold that *Blue* does not bar us from deciding whether the COs had reason to fear disciplinary action as a result of the Special Review interviews. To begin with, the *Blue* Court of Appeal analyzed the COs' right to representation only under *Weingarten*; it did not analyze their rights under the Dills Act and the more expansive highly unusual circumstances test articulated in *Redwoods*. Accordingly, even if res judicata did apply, PERB would still be empowered to determine whether the COs were entitled to a representative under the *Redwoods* test. Moreover, as we explained above, where California law provides for broader or additional rights not found in federal law, PERB is required to follow the Legislature's intent to effectuate the purpose of the statute. (*Capistrano*, *supra*, PERB Decision No. 2440, p. 16.)

In any instance, we are not collaterally estopped from deciding whether the COs were entitled to representation under *Weingarten* because *Blue* was decided on OIG's anti-SLAPP motion, meaning the parties did not fully litigate the issue. In anti-SLAPP motions, the factual record is inherently limited because the filing of a notice of motion immediately suspends all discovery in the action, absent a court order. (Code Civ. Proc., § 425.16, subd. (g).)

Accordingly, CCPOA could not have fully litigated the *Weingarten* issue to the extent it did before PERB. The ALJ heard testimony from various CCPOA and OIG witnesses and examined documentary evidence. As the trier of fact, the ALJ found that the COs had a right to representation under the Dills Act, and we determine that the record supports her findings. *Blue* does not preclude us from deciding this issue.[19]

<u>OIG's Statements in the Special Review</u>

OIG excepts to the ALJ's finding that statements in its Special Review Report constituted interference with the COs' rights to representation and CCPOA's right to represent its members. OIG asserts that its statements are protected under the United States and California Constitutions as free speech. It also argues that the California Constitution protects the public's right to access information concerning the operation of public institutions. On the same grounds, it argues that the ALJ's remedy is overbroad and without support in PERB precedent.

The Board has held that an employer's expression of any views, argument, or opinion generally does not constitute or serve as evidence of an unfair labor practice if such expression contains no threat of reprisal or force or promise of benefit. (*Rio Hondo Community College District* (1980) PERB Decision No. 128, pp. 19-20.) This protection extends to an employer's interpretation of the law provided that it is not such a misrepresentation of the law so as to constitute an illegal threat. (*Modesto City Schools* (1983) PERB Decision No. 291, pp. 51-52.)

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[19] Further, section 3514.5 of the Dills Act states that the "initial determination as to whether the charges of unfair practices are justified, and, if so, what remedy is necessary to effectuate the purposes of this chapter, shall be a matter within the exclusive jurisdiction of the board." The California Supreme Court has interpreted this rule to mean that PERB has "exclusive jurisdiction over activities arguably protected or prohibited by" the Act. (*City of San Jose v. Operating Engineers Local Union No. 3* (2010) 49 Cal.4th 597, 604.) Therefore, application of the doctrine of res judicata in this instance would be incongruous with the Legislature's express intent to commit the questions posed in this unfair practice charge to PERB's initial and exclusive jurisdiction.

We find that OIG's statements in its Special Review Report amounted to protected speech. While OIG's statement that CCPOA's actions could qualify "as misdemeanor offenses under the law" might be construed as threatening because of the reference to criminal prosecution, that alone is not tantamount to a threat. We instead regard OIG's statement as its reasonable interpretation of the law, specifically Penal Code section 6126.5, subdivision (c), which states: "Any officer or person who fails or refuses to permit access, examination, or reproduction, as required by this section, is guilty of a misdemeanor." (Pen. Code, § 6126.5, subd. (c).) OIG's statements were neither exaggerations nor unfounded assertions. It did not make any statements that suggest a threat of criminal prosecution. Even if OIG's interpretation of the statute was technically incorrect—which we need not decide here—its statements did not constitute misrepresentations of the law. Therefore, we do not find that OIG's statements interfered with the COs' and CCPOA's protected rights. Accordingly, we reverse the ALJ's determination that the OIG's statements in the 2015 Special Review violated the Dills Act.

REMEDY

In accordance with our discussion *ante*, we adopt in part and modify in part the remedies in the ALJ's proposed order to better effectuate the purposes of the Dills Act.

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, it is found that the Office of the Inspector General (OIG) violated the Dills Act (Act), Government Code section 3519, subsections (a) and (b) when it denied certain Department of Corrections and Rehabilitation (CDCR) employees their right to representation by their exclusive representative, California Correctional Peace Officers Association (CCPOA), during

interviews OIG conducted pursuant to a Senate Rules Committee-authorized review of safety practices at High Desert State Prison.

Pursuant to section 3514.5, subsection (c), of the Government Code, it hereby is ORDERED that OIG and its representatives shall:

A. CEASE AND DESIST FROM:

1. Interfering with the right of CDCR employees to be represented during investigatory interviews held by the OIG pursuant to Penal Code section 6125 et seq., where an employee reasonably fears discipline or where the interview presents highly unusual circumstances.

2. Interfering with the right of bargaining unit employees to be represented by the employee organization of their choosing.

3. Interfering with the right of CCPOA to represent bargaining unit employees.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE ACT:

1. Provide CDCR employees with their right to representation during investigatory interviews held by the Office of the Inspector General pursuant to Penal Code section 6125 et seq., where an employee reasonably fears discipline or where the interview presents highly unusual circumstances.

2. Within ten (10) workdays following the date this decision is no longer subject to appeal, post at all work locations where notices to CDCR employees in the bargaining units represented by CCPOA are customarily posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of OIG, indicating that it will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30)

consecutive workdays. In addition, OIG shall provide: (1) evidence of an electronic posting by e-mail, intranet, website, or other electronic means; or (2) a statement that OIG does not regularly communicate with CDCR bargaining unit 6 members by e-mail, intranet, website, or other electronic means. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material.

3. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of the Public Employment Relations Board, or the General Counsel's designee. OIG shall provide reports, in writing, as directed by the General Counsel or his designee. All reports regarding compliance with this Order shall be concurrently served on CCPOA.

Member Banks joined in this Decision.

Member Shiners' concurrence and dissent begins on p. 37

SHINERS, Member, concurring and dissenting: I concur in the dismissal of the allegation that certain statements in the December 2015 Special Review of High Desert State Prison Report by the State of California (Office of the Inspector General) (OIG) interfered with employee and employee organization rights in violation of the Ralph C. Dills Act (Dills Act). I respectfully dissent, however, from the majority's conclusion that OIG violated the Dills Act when it refused to allow a representative of the California Correctional Peace Officers Association (CCPOA) to be present during OIG's interviews of three correctional officers (COs)[20] as part of the review. As explained below, I would find that PERB lacks jurisdiction over CCPOA's unfair practice charge because OIG was not acting as an employer when it conducted the review, and therefore its conduct was not subject to the Dills Act. Alternatively, I would find on the facts of this case that the COs were not entitled to CCPOA representation during the interviews. Accordingly, I would dismiss the complaint and underlying unfair practice charge in their entirety.

1. Acting as an Employer under Dills Act Section 3519

Dills Act section 3519 makes it "unlawful for the state" to "interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter," and to "[d]eny to employee organizations rights guaranteed to them by this chapter." (§ 3519, subds. (a), (b).) While the Dills Act does not define "the state" for purposes of section 3519, applicable case law holds that section 3519 applies when a state agency is acting: (1) as the appointing authority of its own employees,[21] or (2) as an employer with regard to another agency's employees. (*Cal Fire Local 2881 v. PERB* (2018) 20 Cal.App.5th 813, 819 (*Cal*

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[20] Steve Oschner, James McCloughan, and Arthur Tovar.

[21] "'Appointing authority' or 'appointing power' means a person or group having authority to make appointments to positions in the state civil service." (Gov. Code, § 18524.)

Fire); *State of California (Department of Forestry & Fire Protection, State Personnel Board)* (2014) PERB Decision No. 2317a-S, pp. 8-9 (*Department of Forestry*); *California State Employees Association (Gonzalez-Coke, et al.)* (2000) PERB Decision No. 1411-S, pp. 17-18 (*Gonzalez-Coke*).)[22] This rule appropriately recognizes the dual roles state agencies play as regulators and employers. (*Department of Forestry*, *supra*, PERB Decision No. 2317a-S, p. 9.)

Here, OIG is not the appointing authority of the three COs at issue. The California Department of Corrections and Rehabilitation (CDCR) is the appointing authority of state correctional officers, including Oschner, McCloughan, and Tovar. OIG is not part of CDCR, but rather an independent agency that cannot "be a subdivision of any other governmental entity."[23] (Pen. Code, § 6125.) Moreover, OIG "may require any employee of [CDCR] to be interviewed on a confidential basis," and such interviews are not subject "to the provisions of any memorandum of understanding or other agreement entered into between the employing entity and the employee or the employee's representative." (Pen. Code, § 6126.5, subd. (d).) If OIG were the appointing authority of state correctional officers, the Legislature would not have needed to refer to "employees of [CDCR]" or "the employing entity" in Penal Code

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[22] The majority's reliance on *State of California (State Personnel Board)* (2006) PERB Decision No. 1864-S (*SPB*) in support of this rule is misplaced. In *SPB*, a two-member plurality concluded that "SPB, as a State agency, is subject to the Dills Act section 3519," and found it irrelevant whether SPB was acting as an employer in that case. (*Id*. at p. 23.) Member Shek, concurring in the dismissal of the complaint but rejecting the plurality's legal reasoning, relied on *Gonzalez-Coke* as a basis for dismissal, concluding that PERB lacked jurisdiction over the charge because SPB had not acted as the employer or appointing authority of the employees involved. (*Id.* at pp. 31-34, 36.) Because the *SPB* concurrence, not the plurality, relied on the rule later adopted by the Board in *Department of Forestry*, and affirmed by the court in *Cal Fire*, the majority's citation to *SPB* in support of that rule is inappropriate. Moreover, because *SPB* is inconsistent with *Department of Forestry* and *Cal Fire*, it should be overruled.

[23] Before it became an independent agency on January 1, 1999, OIG was part of the Youth and Adult Correctional Agency, which included the Department of Corrections. (Stats. 1998, ch. 969.)

section 6126.5, subdivision (d). The inclusion of such language indicates OIG is not the appointing authority of CDCR employees, including Oschner, McCloughan, and Tovar.

OIG's statutory independence from CDCR makes the federal cases cited by the majority distinguishable. Under the Federal Service Labor-Management Relations Statute, a covered federal employee has the right to the presence of a union representative in "any examination . . . [conducted] by a representative of the [employing] agency in connection with an investigation."[24] (5 U.S.C. § 7114, subd. (a)(2)(B).) In *National Aeronautics and Space Administration v. Federal Labor Relations Authority* (1999) 527 U.S. 229 (*NASA*), NASA argued that agents of its Office of Inspector General were not "representative[s] of the agency" under 5 U.S.C. § 7114, subdivision (a)(2)(B) when interviewing NASA employees. The Court rejected that argument, relying in part on the Inspector General Act (IGA), 5 U.S.C.App. section 1 et seq. (*NASA* at pp. 237-243.) Under the IGA, each Inspector General "shall report to and be under the general supervision of" the head of the agency housing the particular Office of Inspector General. (*Id*. at p. 239, citing 5 U.S.C.App. § 3(a).) Furthermore, "an OIG's investigative office, as contemplated by the IGA, is performed with regard to, and on behalf of, the particular agency in which it is stationed." (*NASA* at p. 340.) Thus, "[a]s far as the IGA is concerned, NASA-OIG's investigators are employed by, act on behalf of, and operate for the benefit of NASA." (*Id*. at p. 241.) On these facts, the Court concluded that NASA-OIG agents acted as NASA representatives when interviewing NASA employees. (*Id*. at p. 243.)

Likewise, in *U.S. Department of Justice v. Federal Labor Relations Authority* (D.C. Cir. 2001) 266 F.3d 1228 (*Department of Justice*), the court concluded that agents of the

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[24] The Federal Service Labor-Management Relations Statute is codified at 5 U.S.C. § 7101, et seq.

Department of Justice's Office of Inspector General were acting as "representative[s] of the agency" when they interviewed a Department employee as part of a criminal investigation. (*Id*. at pp. 1229-1230.) As the court observed, the OIG agents were under the same agency head as the interviewed employee. (*Id*. at p. 1230.)

In contrast, under California law, OIG is an independent agency that does not fall under the same agency head as employees of CDCR. As a result, *NASA* and *Department of Justice* provide no guidance in this case.

Because OIG is not the appointing authority of COs Oschner, McCloughan, and Tovar, the question to be answered is whether OIG acted as the COs' employer when it interviewed them as part of its review. Federal authority provides useful guidance on this point.

The Federal Labor Relations Authority (FLRA) has "concluded that an individual who is not an agency employee may nonetheless act as a 'representative' of the agency if he (1) performs an agency function and (2) is subject to agency control." (*National Treasury Employees Union v. Federal Labor Relations Auth.* (D.C. Cir. 2014) 754 F.3d 1031, 1042 (*NTEU*).) The purpose of this inquiry is to prevent an agency from evading its employees' representational rights by outsourcing personnel investigations to another agency. (*Id*. at p. 1045.)

In *NTEU*, the court upheld an FLRA decision holding that investigators from the Office of Personnel Management (OPM) were not acting as representatives of the Internal Revenue Service (IRS) when conducting suitability investigations of IRS employees. (*NTEU*, *supra*, 754 F.3d at p. 1047.) The court concluded the investigators were not performing an agency function because OPM, not the IRS, has statutory authority to conduct suitability investigations. (*Id*. at p. 1046.) It also found the IRS did not have control over the OPM

investigators because the IRS had no authority to tell the investigators how to conduct their interviews. (*Ibid.*) Notably, the court endorsed the FLRA's reasoning that, "'[b]ecause this matter involves investigators who are not employed by the Agency,' the 'most relevant' precedent is the [FLRA's] outside contractor cases, not *NASA*." (*Id*. at pp. 1043-1044.)

In my view, the FLRA's "function and control" test, as articulated in *NTEU*, provides an appropriate standard for determining when a state agency other than the appointing authority is acting as the employer of the employees at issue. Applying the "function and control" test to the facts before us, I disagree that OIG was acting as an employer of the interviewed COs.

While an investigation or review of an employee's conduct at work may well be the act of an employer in general, the majority overstates OIG's role in this case. A public agency, of its own volition, may investigate its employee's conduct or assign that task to an outside investigator after defining the purpose and scope of the investigation. In such circumstances the employer or its agents are acting as an employer. But here OIG did not investigate the COs at CDCR's behest. Rather, it conducted a review of CDCR practices at the direction of the Senate Rules Committee pursuant to Penal Code section 6126, subdivision (b). CDCR has no similar statutory authority to conduct such a review. Thus, when OIG conducts a review pursuant to Penal Code section 6126, it is not performing a function of CDCR.[25] (*NTEU*, *supra*, 754 F.3d at p. 1046.)

Nor is there evidence CDCR had control over OIG's review. OIG intentionally did not allow CDCR personnel to be involved at any stage of the planning or preparation of the

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[25] OIG may investigate CDCR employees in only two circumstances: (1) alleged mishandling of incidents of sexual abuse (Pen. Code, § 2641, subd. (e)), and (2) alleged retaliation by CDCR management (*Id*., § 6129, subd. (b)(1)).

review. CDCR employees did not prepare interview questions, attend any of the interviews, or review COs' answers. Nor did CDCR staff have any input as to how OIG's investigators conducted their interviews. Further, OIG implemented internal safeguards to ensure that OIG staff engaged in oversight of CDCR's internal employee discipline processes were not involved in the review.[26] Thus, CDCR did not have the necessary control over the OIG review to support a conclusion that OIG was acting as an employer of the interviewed COs.[27] (*NTEU*, *supra*, 754 F.3d at p. 1046.)

Instead of applying the well-established "function and control" test—which directly addresses the majority's animating concern of evasion of representational rights through outsourcing of personnel investigations—the majority instead concludes in cursory fashion:

> An investigation or review of an employee's conduct at work—or a group of employees' conduct at work—is the act of an employer. So too is an interview of an employee in the furtherance of such an investigation or review.

The majority's conclusion limits the holdings in *Cal Fire*, *Department of Forestry*, and *Gonzalez-Coke* to situations where an agency is acting in a quasi-judicial or quasi-legislative

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[26] OIG is "responsible for contemporaneous oversight of internal affairs investigations and the disciplinary process" of CDCR. (Pen. Code, § 6126, subd. (a).)

[27] This conclusion is consistent with that reached by Arbitrator Norman Brand in arbitration proceedings between CCPOA and CDCR over the OIG's interviews of McCloughan, Tovar, and a third CO, Bryan Blue. According to the arbitration award in evidence in this case, the issue before the arbitrator was whether CDCR was actively involved in OIG's investigation such that CDCR could be held liable for OIG's alleged violations of union access and representation provisions in the collective bargaining agreement, which mirror those in the Dills Act. After reviewing the record before him (which appears to have been substantially similar to the record in this case) in light of the decision in *California Correctional Peace Officers Association v. State of California* (2000) 82 Cal.App.4th 294, Arbitrator Brand concluded that "CDCR's cooperation with the OIG's special review of High Desert State Prison was *de minimis*" and thus "CDCR had no active involvement in the OIG investigation."

capacity, thereby making a state agency an employer for purposes of section 3519 any time it interviews another agency's employee.[28] But nothing in those decisions indicates that an agency necessarily acts as an employer when it interviews another agency's employee.

In fact, Penal Code section 6126.5, subdivision (d), explicitly contemplates situations where OIG does not act as an employer when it interviews CDCR employees. That subdivision states, in relevant part:

> If it appears that the facts of the case could lead to punitive action, the Inspector General shall be subject to Sections 3303, 3307, 3307.5, 3308, 3309, and subdivisions (a) to (d), inclusive, of Section 3309.5 of the Government Code *as if the Inspector General were the employer*.[29]

(Pen. Code, § 6126.5, subd. (d), italics added.) Thus, when the statutory condition is met, OIG is treated as the employer and must grant the interviewee POBR rights. Subdivision (d)'s explicit definition of when OIG acts as the employer of CDCR employees necessarily means that in all other situations OIG does not act as CDCR employees' employer. (See *Santa Clara County Superior Court* (2014) PERB Decision No. 2394-C, pp. 19-20 [applying the maxim of *expressio unius est exclusio alterius* (the expression of one thing is the exclusion of another) to conclude that a statute's repeated references to meeting and conferring over the impact of court closures indicated that the Legislature did not intend to impose a meet and confer obligation over a decision to close the court].) The majority opinion, however, renders the statutory distinction meaningless, as representational rights no longer will turn on "the facts of the case"

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[28] More broadly, by summarily concluding that "OIG acted as the employer when it interviewed the COs," the majority apparently would find that a state agency is acting as an employer any time it interacts with a state employee or employee organization unless that interaction can be described as a quasi-judicial or quasi-legislative act. (Maj. Opn. p. 18)

[29] The listed Government Code sections are part of the Public Safety Officers Procedural Bill of Rights Act (POBR).

but solely on the fact that the employee is being interviewed at all.[30] (See *Santa Clara Valley Water District* (2013) PERB Decision No. 2349-M, p. 16 [when interpreting a statute, PERB must give "meaning to every word of the statute, if possible, [to] avoid a construction that makes any word surplusage"].) I thus decline to join my colleagues in rewriting Penal Code section 6126.5, subdivision (d) to treat OIG as the employer of CDCR employees in all circumstances "in the face of strong evidence of a contrary legislative intent." (*Regents of the University of California v. PERB* (1985) 168 Cal.App.3d 937, 944-945.)

In sum, CCPOA has failed to prove OIG was acting as an employer of CDCR employees when it conducted its review, and specifically when it interviewed COs Oschner, McCloughan, and Tovar as part of its review. Therefore, when it engaged in the conduct alleged in the complaint, OIG was not acting as "the state" for purposes of section 3519. Consequently, PERB lacks jurisdiction over the allegations in the charge and complaint, and I would dismiss both on that ground.

2. Reasonable Fear of Discipline

The majority concludes that COs Oschner, McCloughan, and Tovar reasonably feared that their interviews by OIG could lead to discipline, and therefore were entitled to union representation in the interviews. I disagree.

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[30] Although Penal Code section 6126.5, subdivision (d) speaks only to POBR rights, PERB and courts have recognized that the representational rights under POBR parallel those under California's public sector labor relations statutes. (See *Contra Costa Community College District* (2019) PERB Decision No. 2652, pp. 28-30 [following POBR cases to hold that an exclusive representative is not entitled to obtain a formal written complaint prior to representing an employee in an investigatory interview]; *Cranston v. City of Richmond* (1985) 40 Cal.3d 755, 774 [noting parallel rights under POBR and the Meyers-Milias-Brown Act (Government Code section 3500 et seq.) to representation during investigatory interviews]; *Upland Police Officers Assn. v. City of Upland* (2003) 111 Cal.App.4th 1294, 1308 [same].)

Dills Act section 3515 guarantees state employees "the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations." Section 3515.5 guarantees employee organizations an independent right to "represent their members in their employment relations with the state." These sections provide state employees with the right to have a union representative present during an investigatory interview by their employer. (*Capistrano Unified School District* (2015) PERB Decision No. 2440, p. 11 (*Capistrano*); see *NLRB v. J. Weingarten, Inc.* (1975) 420 U.S. 251, 256 (*Weingarten*) [finding a similar right under the National Labor Relations Act].) But that right only arises if the employee reasonably believes the interview may result in disciplinary action. (*Capistrano* at p. 16.)

The majority finds COs Oschner, McCloughan, and Tovar reasonably believed their interviews by OIG could lead to discipline because they were interviewed on their employers' premises, were served with subpoenas to attend immediately before the interview,[31] and were not informed of the subject of the interview beforehand.[32] The majority then disposes of the countervailing facts in summary fashion based on the COs' subjective beliefs about the possible result of the interviews.

Whether an employee has a reasonable fear of discipline arising from a meeting with management is determined by an objective standard considering the entire factual context in which the meeting takes place. (*Capistrano*, *supra*, PERB Decision No. 2440, pp. 37-39; *Mammoth Unified School District* (1983) PERB Decision No. 371, adopting proposed decision

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[31] Notably, had OIG been acting as the COs' employer, it could have ordered them to participate in the interviews, thus obviating the need to issue them subpoenas.

[32] The majority also relies on a purported "acrimonious history" between CCPOA and OIG, but none of the three interviewed COs testified to any knowledge or belief of such a history that could have colored their perception of the interviews.

at p. 32; *Southwestern Bell Telephone Co.* (2002) 338 NLRB 552.) One factor to be considered is the employer's assurance that no discipline will result from the meeting. (*Capistrano* at p. 38.) Another factor is whether the meeting could elicit information that might negatively impact the employee's employment. (*State of California (Board of Equalization)* (2012) PERB Decision No. 2237-S, p. 7.)

Here, OIG investigator Michael Maddox (Maddox)—the only investigator alleged to have denied CCPOA representation to COs during the review—unambiguously informed COs Oschner, McCloughan, and Tovar at the outset of their interviews that he was not conducting an investigation, their responses would not subject them to discipline,[33] no information obtained in the interview would be used to pursue or recommend an investigation of them, and any such information would be kept confidential. The COs also were informed, verbally and in writing (in the subpoenas), that they were being interviewed as witnesses, not as subjects.[34] During the interviews, Maddox asked only general questions and intentionally did not ask the COs about specific incidents or individuals.

As OIG points out, the appellate court in *Blue v. Office of Inspector General* (2018) 23 Cal.App.5th 138 (*Blue*), held on these very same facts that a reasonable person in the same

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[33] The majority notes that management's "partial or ambiguous reassurances" that discipline is not intended to result from a meeting are insufficient to preclude the meeting from being investigatory. While I agree with this general principle, it is difficult to conceive of a more unequivocal assurance than the one Maddox gave to COs Oschner, McCloughan, and Tovar.

[34] PERB has declined to find an objectively reasonable belief that discipline may result from a meeting where the employee is not the subject of an investigation. (E.g., *City of Modesto* (2009) PERB Decision No. 2022-M, adopting proposed decision at pp. 12-13 [no reasonable belief where employee was complainant, not subject]; *State of California (Department of California Highway Patrol)* (1997) PERB Decision No. 1210-S, adopting proposed decision at pp. 21-22 [no reasonable belief where employee was interviewed as a witness].)

position as COs Oschner, McCloughan, and Tovar could not have an objectively reasonable belief that the OIG interviews could lead to discipline because OIG made it abundantly clear the COs were not under investigation themselves and were not being questioned as part of an ongoing investigation by CDCR. (*Id.* at pp. 159-161.) Although I agree with my colleagues that we cannot give the court's decision preclusive effect because of the procedural posture of that case,[35] I nonetheless find the court's reasoning persuasive.

Obviously, the purpose of the OIG's interviews was to elicit information about the general atmosphere and culture at High Desert State Prison. But the interviews were not intended to elicit information that could be used against any of the COs for disciplinary purposes, and none of the information obtained was used for such purposes. Although the COs understandably felt they were caught off guard by the interviews, I cannot find on these facts that they had an objectively reasonable fear of discipline arising out of the interviews. I thus would find the interviews were not investigatory interviews triggering union representation rights.

3. Highly Unusual Circumstances

Finally, the majority concludes that even if COs Oschner, McCloughan, and Tovar did not have a reasonable fear that discipline could result from the interviews, they were entitled to CCPOA representation because the interviews were conducted under "highly unusual circumstances." An employee is entitled to union representation in "employer-initiated investigations and interviews, absent the discipline element, only in highly unusual circumstances." (*Sonoma County Superior Court* (2015) PERB Decision No. 2409-C, p. 13

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[35] The case was decided on an anti-SLAPP motion with evidence provided by declaration. (*Blue*, *supra*, 23 Cal.App.5th at pp. 145, 149.)

(*Sonoma County Superior Court*);[36] *Redwoods Community College District* (1983) PERB Decision No. 293, p. 8 (*Redwoods*).) In *Redwoods*, the Board found the following circumstances triggered a right to union representation: the employee was required to attend a meeting that she no longer sought over her performance evaluation; the meeting was formal; a dean presided over the meeting; and the dean was hostile toward the employee. (*Redwoods* at p. 8.) Here, although COs Oschner, McCloughan, and Tovar were required to attend the interviews and the interviews were of a formal nature, no member of CDCR management (or any CDCR employee, for that matter) attended the interviews, and the record clearly demonstrates that Maddox was not hostile toward the COs during the interviews or that he had any animosity toward them prior to the interviews.

Again, the majority relies on the subjective beliefs of the COs and the purported "historical animosity" between CCPOA and OIG to find "highly unusual circumstances" here. As discussed above, the COs' subjective beliefs are irrelevant to whether they were entitled to union representation. In most cases, an employee who is called into a meeting or interview will be uneasy and desire union representation, but that cannot be the standard for finding a right to representation. (See *Capistrano*, *supra*, PERB Decision No. 2440, p. 37, quoting *Weingarten*, *supra*, 420 U.S. at p. 257, fn. 5 ["'any rule that requires a probe of an employee's subjective motivations' must be rejected as 'an endless and unreliable inquiry'"].) As for management's hostility, we have found that relevant only when the manager presiding over the meeting was hostile to the employee. (*Capistrano*, *supra*, PERB Decision No. 2440, pp. 37-79 & fn. 17; *Redwoods*, *supra*, PERB Decision No. 293, p. 8.) Expanding the consideration of hostility, as the majority does, to encompass relations between the exclusive representative and

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[36] I express no opinion on whether *Sonoma County Superior Court* was correctly decided, but apply it here as extant Board law.

the agency conducting the interview opens the door to union representation in every meeting with management during a time of labor tension between the union and the employer.[37] Those are not "highly unusual circumstances" that would justify a right to union representation in the absence of an objectively reasonable fear of discipline.

Ultimately, for purposes of this case, it does not matter whether the interviews were investigatory or non-disciplinary in nature. As the Board explained in *Sonoma County Superior Court*, *supra*, PERB Decision No. 2409-C, the underpinning of the right to union representation in meetings with management is the fact that the meeting may result in some change to the employees' terms and conditions of employment. (*Id*. at pp. 13-14, 20.) Here, OIG had no ability to directly change the working conditions of COs Oschner, McCloughan, and Tovar, through discipline or otherwise. Further, Maddox unambiguously assured the COs that no information from their interviews would be used to recommend an investigation of them by their employer, CDCR, and, in fact, OIG kept that information confidential from CDCR. Thus, because the meetings had no potential to initiate a change in the COs' terms and conditions of employment, they were not entitled to union representation during the interviews.

4. <u>Conclusion</u>

The majority's finding of a violation in this case is based on an unwarranted narrowing of the holdings in *Cal Fire*, *Department of Forestry*, and *Gonzalez-Coke* to apply only when a state agency is acting in a quasi-judicial or quasi-legislative capacity, not when it is interviewing state employees. But the statute giving OIG authority to interview CDCR employees explicitly provides that OIG acts as the employer of CDCR employees only under

[37] The only evidence in the record implying the possibility of tension between OIG and CCPOA is the December 2015 Special Review Report. Though the Report indicates there was friction between OIG and CCPOA during the review, it does not establish the "historically tense relationship" between the agency and the exclusive representative found by the majority.

certain circumstances, and thus OIG does not act as an employer in all other circumstances. The majority's myopic reading of our decisional law is contrary to this statutory scheme. Additionally, while the majority is concerned about state agencies evading employees' representational rights by outsourcing personnel investigations to other agencies, my colleagues refuse to adopt the FLRA's "function and control" test, which specifically addresses that concern.

The majority also misses the mark by finding a right to representation here based on little more than the interviewed employees' subjective beliefs and purported animosity between CCPOA and OIG. Neither of these criteria is an appropriate one to consider when determining whether the right to union representation attaches to a particular meeting. Indeed, if these were the touchstones of the representation right, it would exist in virtually all meetings between employees and management.

In sum, OIG was not acting as an employer when it interviewed COs Oschner, McCloughan, and Tovar as part of its review of policies and practices at High Desert State Prison, and thus its conduct was not subject to Dills Act section 3519. Alternatively, the facts before us show the three COs did not have a reasonably objective belief that the interviews could lead to discipline, nor are there any "highly unusual circumstances" here that would justify finding a right to representation. For these reasons, I would dismiss the complaint and underlying unfair practice charge in their entirety.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD
An Agency of the State of California

After a hearing in Unfair Practice Case No. SA-CE-2074-S, *California Correctional Peace Officers Association v. State of California (Office of the Inspector General)*, in which all parties had the right to participate, it has been found that the State of California (Office of the Inspector General) (OIG) violated the Dills Act, Government Code section 3512 et seq, by denying California Department of Corrections and Rehabilitation (CDCR) employees their right to representation at interviews held pursuant to Penal Code section 6125 et seq.

As a result of this conduct, we have been ordered to post this Notice and we will:

A. CEASE AND DESIST FROM:

1. Interfering with the right of CDCR employees to be represented during investigatory interviews held by the OIG pursuant to Penal Code section 6125 et seq., where an employee reasonably fears discipline or where the interview presents highly unusual circumstances.

2. Interfering with the right of bargaining unit employees to be represented by the employee organization of their choosing.

3. Interfering with the right of California Correctional Peace Officers Association to represent bargaining unit employees.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE MMBA:

1. Provide CDCR employees with their right to representation during investigatory interviews held by the OIG pursuant to Penal Code section 6125 et seq., where an employee reasonably fears discipline or where the interview presents highly unusual circumstances.

Dated: ______________________

STATE OF CALIFORNIA (OFFICE OF THE INSPECTOR GENERAL)

By: _________________________________
Authorized Agent

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR AT LEAST THIRTY (30) CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE REDUCED IN SIZE, DEFACED, ALTERED OR COVERED WITH ANY OTHER MATERIAL