*** * * JUDICIAL APPEAL PENDING * * ***

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

KEVIN M. HEALY, Charging Party, v. STATE OF CALIFORNIA (CORRECTIONAL HEALTH CARE SERVICES), Respondent.	Case No. SF-CE-290-S PERB Decision No. 2760-S April 12, 2021

Appearances: Kevin M. Healy, on his own behalf; California Department of Human Resources by Jennifer M. Pearson, Assistant Chief Counsel, and Marvin H. Stroud, Labor Relations Counsel, for State of California (Correctional Health Care Services).

Non-Party Informational Briefs: Alvin Gittisriboongul, Chief Counsel, and Dorothy Backsai Egel, Senior Attorney, for California State Personnel Board; Theresa C. Witherspoon, Assistant Chief Counsel, for Service Employees International Union, Local 1000; Weinberg, Roger & Rosenfeld by David Rosenfeld and Anne I. Yen, Attorneys, for International Union of Operating Engineers Locals 3, 39, and 501, and Union of American Physicians and Dentists; Messing Adam & Jasmine by Gary M. Messing and Lina Balciunas Cockrell, Attorneys, for Cal Fire Local 2881; Suzanne L. Jimenez, Managing Counsel, for California Correctional Peace Officers Association.

Before Banks, Chair; Shiners and Krantz, Members.

DECISION

KRANTZ, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions by the State of California (California Correctional Health Care Services) (CCHCS) and Kevin M. Healy to the attached proposed decision of an administrative law judge (ALJ). The complaint in this matter alleged that

CCHCS violated the Ralph C. Dills Act (Dills Act)[1] by refusing to promote Healy in retaliation for his activities as a shop steward for Service Employees International Union (SEIU) Local 1000. More specifically, the complaint alleged that CCHCS discriminated or retaliated against Healy when it denied him promotion into the Health Care Compliance Analyst (HCCA) position at California State Prison, San Quentin (San Quentin).[2]

After an evidentiary hearing, the ALJ ruled in Healy's favor. As part of the proposed remedy, the ALJ ordered CCHCS to offer Healy the next available SSA/AGPA position at San Quentin and to make Healy whole for the time in which he was denied such a promotion. CCHCS excepted to the ALJ's liability findings and associated remedy. Healy filed limited cross-exceptions, asking the Board to adjust one factual finding and one aspect of the remedy. The California State Personnel Board (SPB) requested leave to submit an informational brief about the ALJ's proposed remedy. We granted the request and at the same time provided employee organizations representing state employees the opportunity to submit informational briefs about the remedy.

We have reviewed the proposed decision, the entire record, briefs submitted by the parties and interested non-parties, and relevant legal authority. We conclude that

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[1] The Dills Act is codified at Government Code section 3512 et seq. All statutory references are to the Government Code, unless otherwise specified.

[2] CCHCS posted the vacant HCCA position as falling within the Associate Governmental Program Analyst (AGPA) classification or, alternatively, the Staff Services Analyst (SSA) classification. Healy claims that, but for unlawful discrimination, he would have been the successful applicant and thereby become a permanent AGPA.

the record supports the ALJ's factual findings and that the proposed decision's legal conclusions are consistent with applicable law. Accordingly, we adopt the proposed decision as the decision of the Board itself, subject to and as supplemented by the following discussion. We adjust the ALJ's remedial order to effectuate the Dills Act in a more tailored manner.

BACKGROUND

Most relevant facts are set out in the attached proposed decision. We briefly summarize and supplement these findings to provide context for our discussion of the parties' exceptions.[3]

CCHCS provides medical, dental, and mental health services to inmates at institutions within the California Department of Corrections and Rehabilitation. At all times relevant to this case, CCHCS employed Healy as an Office Technician (OT) at San Quentin. In 2014 and 2016, Healy completed several out of class (OOC) assignments in an AGPA position. Separately, he was paid as an SSA for four months while he performed a special project. Positions in the SSA and AGPA classifications receive higher pay than those in the OT classification. Healy has served as an SEIU shop steward since at least 2016.

I. The Hiring Process for Civil Service Positions at San Quentin

Article VII of the California Constitution provides that permanent appointment and promotion in the civil service "shall be made under a general system based on merit ascertained by competitive examination." (*Id.*, art. VII, § 1, subd. (b).) The State

[3] With only minor exceptions, neither party has excepted to the ALJ's factual findings. Nonetheless, after thoroughly reviewing the record, we have made several factual findings that the ALJ did not make.

Civil Service Act implements the merit principle.[4] (§§ 18500-19799.) The Civil Service Act generally requires appointing powers to fill vacant positions "by appointment" and generally requires appointments to "be made from employment lists." (§§ 18524, 19050.) An "employment list" includes an "eligible list," meaning "a list of persons who have been examined in an open competitive examination and are eligible for certification for a specific class." (§§ 18532, 18537.) Eligible lists are "established as a result of free competitive examinations open to persons who lawfully may be appointed to any position within the class for which these examinations are held and who meet the minimum qualifications requisite to the performance of the duties of that position as prescribed by the specifications for the class or by [state personnel] board rule." (§ 18900, subd. (a).) The names of those who have attained passing marks in the examination "shall be placed on the [eligible or promotional] list in the order of final earned ratings." (§ 18937.)

A hiring department must screen applications to determine which candidates meet minimum qualification requirements and are eligible for appointment. After determining which candidates to interview, the department must develop job-related interview questions and scoring criteria, as well as determine who will serve on an interview panel. After the interviews, the panel ranks the candidates. The Civil Service Act's "rule of three ranks" requires certification of a list to the appointing power with the names of those eligible employees who place in the top three ranks of scores and

[4] The merit principle embodies "the concept under which public employees are recruited, selected, and advanced under conditions of political neutrality, equal opportunity, and competition on the basis of merit and competence." (*Pacific Legal Foundation v. Brown* (1981) 29 Cal.3d 168, 184, fn. 7, internal quotations omitted (*Pacific Legal Foundation*).)

who are willing to accept appointment under the conditions of employment specified. (§ 19057.1; Cal. Code Regs., tit. 2, § 254.) The appointing power must select a candidate from the three highest ranking candidates but need not select the one with the highest score. (Cal. Code Regs., tit. 2, § 254.) The rule of three ranks is designed to assure that one of the better candidates, if not the best, will be chosen. (*Kidd v. State of California* (1998) 62 Cal.App.4th 386, 404 (*Kidd*).)

At all relevant times, Human Resources (HR) Analysts Janet Somosierra-Francisco and Maria Moore oversaw the civil service process for hiring medical personnel at San Quentin.[5] Moore and Francisco reported to Staff Services Manager Isaac Obando.

At San Quentin, an interview panel typically recommends the top three candidates for reference checks, because one or more candidates could turn down the position. The interview panel members perform the reference checks and after doing so the panel then recommends to the hiring authority the panel's top candidate. If the top interview scores are close, the panel looks to recommend for hiring the candidate who would be the best fit, which may not be the highest ranked candidate.

If one or two of the top candidates decline a position, the standard practice at San Quentin has been to recommend for hiring the other candidate(s) in the top three. Typically, the hiring authority follows the panel's recommendation.[6] Most importantly,

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[5] In accord with the proposed decision, we refer to Somosierra-Francisco as "Francisco."

[6] While Obando noted that the hiring authority need not follow the panel's recommendation, this testimony focused more on the hiring authority's general powers than on the usual practice at San Quentin.

in this instance the HCCA hiring authority, San Quentin's then-Chief Executive Officer Stephen Harris, indicated he would have picked Healy if the panel had recommended that he do so.

II. San Quentin's HCCA Vacancy

The HCCA, also known as the Americans with Disabilities Act (ADA) Coordinator, serves as an internal watchdog focusing on compliance with inmates' disability rights. Among other duties, the HCCA conducts audits to determine whether medical personnel are effectively communicating with their patients (EC audits). The HCCA also provides patients with required durable medical equipment and investigates patient complaints that their ADA needs are not being met. Carla Thompson-McKinney supervised the HCCA position during the relevant period.[7]

San Quentin's incumbent HCCA departed in early August 2017.[8] CCHCS posted both the permanent position and an OOC opportunity to perform the HCCA work during the selection process for a permanent replacement. To fill an OOC position, the hiring authority must select from qualified civil service candidates but may appoint any eligible candidate without completing further steps in the civil service hiring process, such as holding competitive interviews.

The job announcement for the permanent HCCA position listed it as falling within the AGPA classification but indicated that appointment at the SSA level would be considered in the alternative. Employees were eligible to apply if they were on the

[7] In accord with the proposed decision, we refer to Thompson-McKinney as "McKinney."

[8] All future dates refer to 2017, except where otherwise indicated.

SSA eligibility list or the AGPA eligibility list, provided they had at least 12 months' experience in such classifications. Healy was on the AGPA eligibility list and had the requisite 12 months experience. He applied for both the OOC and the permanent HCCA position.

A. CCHCS Places Healy in the OOC HCCA Position Just as His Shop Steward Duties Increase.

Harris offered Healy the OOC position after the other applicant declined. Harris thought Healy would do a "fine job" in the position. Healy received an e-mail notifying him of his selection and indicating that his OOC assignment would continue "for 120 days, or until the position has been filled." Healy began serving as the HCCA on August 8, working out of class in the AGPA classification.

Just as Healy began his new OOC HCCA role, Healy's shop steward duties required him to represent an employee, Nicole Smith, who was directly complaining about McKinney, who was now Healy's supervisor in the HCCA position. Smith claimed that on July 31, McKinney came to Smith's office to retrieve a file, and the interaction turned physical, with McKinney doing a "chicken head, bob and weave," and almost "chest bump[ing]" Smith. Smith asserted that she tried to leave her own office to escape the situation, and McKinney blocked her egress. This incident occurred three days after Smith complained to San Quentin Chief Support Executive Chad Hickerson regarding pressure McKinney exerted on her to breach operating procedure.[9]

[9] The issues in dispute in this case do not require us to determine whether Smith's allegations against McKinney were well founded. Rather, the import of these allegations is that they drew Healy into representing Smith in a union complaint

Smith sought Healy's help addressing McKinney's alleged bullying. Healy wrote an e-mail for Smith to send regarding McKinney's allegedly hostile management style. On August 9, Smith sent the e-mail to Harris and Hickerson, and she copied Healy. The e-mail asked Hickerson his plans to deal with McKinney and stated that Smith would escalate the matter to Harris "if we don't have some solid progress with a specific path forward on this by close of business on Monday," August 14.[10] As a result of Smith's complaint, Harris spoke with McKinney about the July 31 incident. Healy also followed up with a further e-mail to Harris regarding additional union complaints against McKinney.[11]

On August 14, several days into Healy's OOC assignment, McKinney entered Healy's office, interrupting a conversation between Healy and Smith. McKinney grabbed papers out of Healy's hands and told him that he needed to stop performing his union duties and focus solely on his HCCA duties, because that job was the only one he should be worried about. Don Fox, the supervisor to whom Healy regularly reported, overheard McKinney telling Healy that the OOC job was "serious," and that

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against McKinney, which we find was one motivating factor behind McKinney's retaliatory conduct.

[10] Hickerson had previously spoken to McKinney about union complaints against her, including one dating back to November 2016. In that instance, Hickerson required McKinney to allow two employees time off to vote, requests which she had earlier denied.

[11] McKinney testified that she did not have "a problem with" Harris speaking to her about the incident with Smith. However, we infer from the totality of the evidence it is more likely than not that McKinney was upset there was another union complaint against her, which had caused Harris to meet with her.

Healy would not have the time to do union work and the OOC work. Harris soon learned from Smith that McKinney had grabbed papers out of Healy's hands.

Shortly after McKinney left Healy's work area, Healy e-mailed McKinney and San Quentin Labor Relations Analyst Barbara Brown, notifying them that he would need union leave time to represent a Pharmacy Technician in an internal affairs investigation the next day. Healy also indicated that while he would be able to complete both his union steward duties and his HCCA work, "this will require a degree of trust and flexibility all the way around." Healy wrote, in part:

> "*I am hoping that LRA Brown can echo* how critically important it is for our ongoing success at San Quentin for Union Stewards to be able to do their jobs AND be Union Stewards. Not only is it contractually required, but it makes good working sense. The conta [sic] (i.e. to imply or say that one can't keep a job/promotion if he/she is a [sic] working as a steward) is actually a *Dills Act* violation. The bottom line is we can do both jobs and we should do both jobs."

(Emphasis in original.)

McKinney responded shortly thereafter:

> "Thank you for the information. As stated in our previous conversations, I do not have a problem with you conducting your union steward duties. However, your duties as the OOC ADA Analyst takes priority."

McKinney and Brown spoke later that day. McKinney wanted to talk to Brown "about how to deal with [Healy]." According to Brown, they discussed Healy's "duties as an SEIU job steward." Meanwhile, Harris approved Healy's request for union leave.

B. Shortly Before Healy Interviews for The Permanent HCCA Position, McKinney States That Healy "Is Not Getting the Job" Because "His Job is with the Union."

On August 17, Francisco notified Healy that he would be interviewed for the permanent HCCA position the next day. McKinney was a member of the hiring panel constituted for this purpose. The other panel members were Obando, Chief Medical Executive Dr. Elena Tootell, and Health Program Manager Tonia Woodson. Obando and his staff had determined that Healy was eligible to be hired based on a list developed after an open competitive exam. The panel interviewed four applicants, including Healy, on August 18.

In the hours leading up to Healy's August 18 interview, McKinney had a conversation with Francisco. Francisco testified that McKinney said Healy "is not getting the job. His job is with the Union. He doesn't have the focus to be an ADA Coordinator." Francisco asked McKinney: "What if he is the best candidate for the position?" McKinney responded, "if I have anything to do with it, that won't happen." According to Francisco, McKinney did not want Healy in any position she supervised because of his "Union affiliation and because [he was] missing deadlines."

In her testimony, McKinney admitted telling Francisco, in advance of the interview, that Healy would not get the job. McKinney testified that she did not recall commenting on Healy's union duties and instead meant that she would deny Healy the job because he did not seem to be interested in or preparing himself for it.

To the extent McKinney's testimony about the August 18 conversation conflicted with Francisco's testimony, we credit Francisco for the following reasons.[12] First, two additional witnesses to the conversation confirmed that McKinney mentioned Healy's union-related role or duties. One witness, Moore, testified that McKinney was picking up interview packets and Healy was brought up as one of the candidates whom the panel would be interviewing that day. Moore testified on both direct and cross-examination that McKinney said "there's no way [Healy's] going to get the job" because of the work he was doing with SEIU. More particularly, Moore said that McKinney expressed that the competing demands of his union stewardship would result in time away from the HCCA work and cause him to lose focus on that work. Smith, the other witness, confirmed that McKinney made it "absolutely astoundingly clear" that Healy "would never get the job under [McKinney's] watch" because of the time Healy would presumably devote to his union duties.

Second, Francisco's testimony is consistent with the position McKinney expressed on August 14: that Healy would not have enough time to perform both his union steward duties and his HCCA duties. Third, Francisco had no reason to lie about what she heard. Indeed, that she testified against the interests of her employer weighs in favor of crediting her testimony. (*Alliance Environmental Science and*

[12] Finding that even the pre-interview statements to which McKinney admits were sufficient to show unlawful motive, the ALJ did not resolve whether McKinney or Francisco was more accurate in describing the conversation. While the ALJ was correct that Healy would prevail in either instance, we nonetheless supplement the ALJ's findings based on the overall record, including but not limited to the testimony of other percipient witnesses to the conversation, as well as the ALJ's observation that McKinney was evasive in her testimony, as discussed *post*.

Technology High School, et al. (2020) PERB Decision No. 2717, p. 22, fn. 15 (judicial appeal pending).)

On the other hand, McKinney had every reason to say she could not recall her statement tying Healy's promotion prospects to his union activities.[13] McKinney also asserted that her memory from this period was not strong. And we join the ALJ in noting that McKinney became evasive when pressed for examples of statements or behavior upon which she based her belief that Healy was not interested in the job or preparing himself for it. In fact, McKinney acknowledged Healy received some training for the position, and that he was actively seeking additional training during the brief period between the start of his OOC assignment and the August 18 interview. These facts directly conflict with McKinney's assertions that Healy seemed disinterested in, or was not preparing himself for, the job.[14]

The weight of the evidence supports finding that McKinney said Healy would not get the HCCA position because of his union activities. But even had McKinney mentioned only Healy's allegedly missed deadlines as the basis for her pre-interview statement that Healy would not get the permanent job, the record supports the ALJ's finding that McKinney's insistence that Healy missed a deadline during his short OOC

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[13] The witness's "bias, interest or motive" is relevant in determining the credibility of testimony. (*State of California (Department of Corrections and Rehabilitation)* (2012) PERB Decision No. 2285-S, p. 10, fn. 15, citing Evid. Code, § 780.)

[14] The "existence or nonexistence of facts testified to" also is a relevant factor in determining the credibility of witness testimony. (*State of California (Department of Corrections and Rehabilitation)*, *supra*, PERB Decision No. 2285-S, p. 10, fn. 15, citing Evid. Code, § 780.)

assignment was pretextual. The afternoon of August 14, following their back-and-forth that morning about Healy's union activities, McKinney sent Healy an e-mail message inquiring whether he had begun the August EC audit. These audits are due by the fifth of each month, but the August audit had not been completed before Healy assumed the OOC assignment on August 8. Healy responded that he would need additional time to complete the audit as his training had been insufficient to perform the task. Healy also reassured McKinney that the deadline had been extended: "We are not behind on the deadlines; this was confirmed with HQ yesterday." McKinney acknowledged in her testimony that when Healy assumed the OOC HCCA assignment, his predecessor had failed to complete the August audit by the initial August 5 deadline. McKinney could not recall if she had ever informed Healy that the August audit still needed to be performed. Nor could she recall if the August 5 deadline had been extended. In any event, she admitted that she later told Tootell that Healy "missed a deadline" in August.[15] This story was unwarranted and a pretext for denying Healy the HCCA position.

The record does not reflect whether Obando or Woodson ever heard the false story about Healy missing a deadline during his OOC assignment. However, the nature of the interview panel consultation process, combined with McKinney's admitted agenda to deny Healy the position and the fact that she shared the story with Tootell, suggests it is more likely than not that McKinney or Tootell shared at least the gist of the allegation when the panel discussed Healy.

[15] In her testimony, McKinney could not recall what deadline Healy purportedly missed, but she did recall reporting a missed deadline to Tootell.

Prior to the panel convening on August 18, McKinney had also informed Tootell that she would have a difficult time supervising Healy. This statement from McKinney to Tootell, together with McKinney's false allegation that Healy missed a deadline, contributed to bias that Tootell harbored against Healy from the moment he began working in the OOC position. Indeed, several days after Healy began in the OOC position, Tootell e-mailed Harris she was "resigning" because he had placed Healy in the temporary position. In response, Harris falsely told Tootell that Healy did not meet the minimum qualifications for the permanent position, decided to bring Healy's OOC assignment to a premature close, and appointed both Tootell and McKinney—neither of whom was neutral regarding Healy—to the hiring panel. Based on these concessions from Harris, Tootell rescinded her resignation, which, in context, appears to have been much closer to a threat than a completed act. Also as part of this combination of decisions, CCHCS expedited the interview process by scheduling the interviews for August 18, which was the following week.

Tootell testified that she entered the interview process without having made up her mind about Healy, and she opined it would have been improper if McKinney had pre-determined that Healy could not be selected. However, Tootell's resignation threat and associated e-mail comments to Harris the week prior to the interviews showed that her testimony on this point was not truthful, as she had an extremely strong position prior to the interview. Indeed, she expressed her opposition to Healy in no uncertain terms in an e-mail to Harris: "promoting Mr. Healy into the position (whether permanent or OOC) would be unacceptable."

Tootell also testified that Healy was not a good worker based on Healy allegedly missing a deadline while helping Tootell with a July 2017 project involving ophthalmology patients. Before describing that claim, we note that in evaluating Healy's work ethic and work product, the most reliable evaluator was Fox, who supervised Healy and thus relied on extensive personal knowledge in rating Healy's work very highly. We accord more weight to Fox's assessments than to those of McKinney and Tootell because of their biases, the fact that several critical parts of their testimony did not hold up when compared to other facts, and the fact that Fox had far more opportunities to observe Healy's work performance.

During the July 2017 ophthalmology project, Tootell asked Healy to review patient charts and identify specified documents for submission to a third-party insurance billing group. Although Tootell e-mailed Healy on July 26 to check on his progress, she did not at any time provide Healy with a deadline for completing the project, making it highly misleading for her to join McKinney in claiming that Healy missed deadlines. Moreover, upon receiving the documents, Tootell told Healy that although he had produced records she did not need or ask for, he had been "very thorough," and he had made her life a lot easier. Tootell never told Fox that Healy had performed poorly. Rather, she told Fox that Healy provided more information than asked for, which Fox interpreted as a *positive* comment. Ultimately, the record contains various characterizations of Healy's performance on the project. Drawing reasonable inferences from the overall weight of the evidence, and crediting Fox's assertions that Healy was hard working, diligent, and focused, and that the project

was more difficult than a typical OT assignment, the weight of the evidence does not reflect poorly on Healy's performance on this brief project.

Tootell also espoused a decidedly jaded perspective on SEIU's role in the workplace, and she did so in a manner that raised further questions regarding her contention that his work on that brief project was a strike against him in the HCCA hiring process. Specifically, Tootell testified about an August 30 conversation she had with Jaime Molina, a clinic nurse and SEIU's president. In recounting her conversation with Molina, Tootell testified that she viewed Healy as one of several employees who had been improperly using SEIU to complain about McKinney and thereby deflect attention away from their own poor performance. Tootell mentioned Healy's work on the ophthalmology project as an example of employees allegedly using SEIU to avoid accountability, even though there was no union involvement in any aspect of that brief project.

C. The Panelists Rank Healy Third, and He Continues His Protected Activity.

At the conclusion of the August 18 interviews, the panelists scored each applicant's answers, and these scores determined the applicants' relative rankings. The top-ranked applicant scored 88%, while the second candidate scored 65%. Healy scored 60% and was ranked third.[16] Following the interview, each panelist rated Healy as a "competitive" candidate, indicating that he demonstrated the level of knowledge and understanding required by the position.

[16] Obando and Woodson each acknowledged that Healy's total interview score contained minor mathematical errors. Correcting for these errors, Healy scored 60%, rather than 59%, on the interview.

The panelists determined that the top three scoring applicants, including Healy, scored high enough in the interview to move to the next phase of the process, the reference check. This unanimous determination is also reflected on the interview ranking sheet, which shows the top three scoring applicants as "recommended."

As discussed further *post,* on August 25, Francisco notified Healy that his OOC assignment would end that day. On August 28, once McKinney was no longer his supervisor, Healy and other union stewards wrote Harris to protest actions taken by McKinney in her role as a manager. The "letter of no confidence" sought removal of McKinney from her management position, which was still probationary at the time, and threatened "vigorous" actions to protect bargaining unit employees from her. Harris shared the August 28 "letter of no confidence" with Tootell a day or two later.

In an August 29 e-mail, Healy alerted Obando to McKinney's pre-interview statements that Healy would not get the position. Although the e-mail is not in evidence, Obando testified that Healy's e-mail was his first notice of McKinney's pre-interview statements. Obando responded that Healy should take the matter up with the merit board, but he performed no independent investigation nor followed up in any other way.

Healy also wrote to Tootell on September 2, complaining about McKinney's supervision of him during his OOC assignment and rebutting McKinney's claims that he had missed deadlines during that brief period.

D. The Other Two Top Candidates Drop Out, but the Panel Does Not Check Healy's References or Recommend Him to Harris.

Meanwhile, Tootell checked the first-ranked candidate's references and based on the panel's recommendation, Harris offered the position to that candidate. The first-ranked candidate accepted the offer on August 28 but rescinded her acceptance on or about September 11. Francisco suggested that Tootell check the references of an alternate candidate, and Tootell requested the references for the second-ranked candidate. That candidate did not fill the position either, though the record does not explain why.

After the first two candidates did not work out, Healy was the highest remaining candidate, and under San Quentin's usual practice the panel would normally have moved on to him. Indeed, while we find it more likely than not that pretextual arguments about Healy and/or other forms of discrimination for his protected activity caused him to receive lower interview scores from one or more panelists, even the scores he did receive were close to the second-ranked candidate, and all four panelists rated him as competitive and recommended. Yet no one ever started a reference check for Healy, and CCHCS instead started the recruitment process anew.[17]

[17] When asked to explain why nobody checked Healy's references, Tootell claimed that the panel decided it would only hire the first two candidates. But Tootell could not say when the panel made this alleged decision, positing that it was either after the interviews or after the first-ranked candidate declined the offer. In any event, no other panel member supported Tootell's testimony that the panel decided not to check Healy's references. Moreover, such a decision would conflict with the panel's unanimous agreement that Healy passed the oral interview and that his application should proceed to the next step of the process. We thus do not credit Tootell's

Francisco notified Healy by letter dated September 29 that he had not been selected for the permanent HCCA position and that another applicant had been selected. In fact, however, CCHCS took no further steps to fill the position before reposting it in November.[18]

Harris testified that he did not offer the permanent position to Healy simply because the hiring panel did not tender his name to Harris for appointment. Harris affirmatively asserted that he would have had "no problem" with Healy serving in the permanent position.

In March 2018, Healy asked Obando about the status of his August 29 complaint regarding McKinney's pre-interview statements. Francisco and Moore similarly raised concerns about McKinney's pre-interview statements with Obando and Obando's supervisor. Both Francisco and Moore believed that McKinney should have recused herself from the interview panel because she had already made statements that one of the applicants was not going to get the job. Obando agreed and indicated that, had he known about McKinney's statements prior to the interview, he would have excluded her from the panel.

Although Obando found out about McKinney having prejudged the matter while the position was still open and there was time to attempt to rectify the unfairness, Obando took no steps to hire Healy, or even to reinterview Healy or check his references. Instead of taking one of these actions, CCHCS filled the position effective

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testimony as to how or why CCHCS decided to abandon the reference check process and instead repost the position.

[18] Healy, having been passed over the first time, did not re-apply.

May 1, 2018, at which point no one had filled the HCCA position for nearly nine months.

Meanwhile, on April 30, 2018, the California Department of Human Resources filed a four-page position statement responding on behalf of CCHCS to the instant unfair practice charge. In that position statement, CCHCS provided only the following reason for having decided to reject Healy: "While charging party was denied the permanent position as ADA Coordinator, that denial stemmed from charging party's unsatisfactory performance in the approved OOC assignment for the position, including missing deadlines on work projects, and not due to any protected activity."

DISCUSSION

Although the Board reviews exceptions to a proposed decision 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.*) To the extent an ALJ assesses credibility based upon observing a witness in the act of testifying, we defer to such assessments unless the record warrants overturning them. (*Los Angeles Unified School District* (2014) PERB Decision No. 2390, p. 12.)

To establish a prima facie case of retaliation, the charging party has the burden to prove, by a preponderance of the evidence, that: (1) one or more employees engaged in activity protected by a labor relations statute that PERB enforces; (2) the respondent had knowledge of such protected activity; (3) the respondent took adverse action against one or more of the employees; and (4) the respondent took the adverse

action “because of” the protected activity, which PERB interprets to mean that the protected activity was a substantial or motivating cause of the adverse action. (*City and County of San Francisco* (2020) PERB Decision No. 2712-M, p. 15.) If the charging party meets its burden to establish each of these factors, certain fact patterns nonetheless allow a respondent the opportunity to prove, by a preponderance of the evidence, that it would have taken the exact same action even absent protected activity. (*Ibid*.) This affirmative defense is most typically available when, even though the charging party has established that protected activity was a substantial or motivating cause of the adverse action, the evidence also reveals a non-discriminatory motivation for the same decision. (*Id*. at pp. 15-16.) In such “mixed motive” or “dual motive” cases, the question becomes whether the adverse action would not have occurred “but for” the protected activity. (*Id*. at p. 16.)

In this case, no dispute remains regarding the first three elements of Healy’s prima facie case, as CCHCS did not file exceptions to the ALJ’s findings that Healy engaged in protected activity, the hiring authority and at least several of the interview panelists knew of that activity, and CCHCS took adverse action against Healy when it refused to promote him into the permanent HCCA position. As discussed below, CCHCS also does not explicitly challenge the fourth element (commonly referred to as the “nexus” factor). The primary liability issue before us relates to CCHCS’s affirmative defense, though that issue naturally overlaps with the fourth element of Healy’s prima facie case. We have independently reviewed the record and find that it adequately supports the proposed decision. We supplement the ALJ’s analysis to address

CCHCS's five exceptions and to adjust the remedial order to effectuate the Dills Act in a more tailored manner.

I. CCHCS's Exception Regarding an Alleged Adverse Inference

CCHCS contends that the ALJ improperly drew an adverse inference against it for having provided only interview scores for the candidates, while redacting and refusing to provide the panel's written comments. CCHCS further argues that any such adverse inference would be improper because CCHCS acted pursuant to a protective order that the ALJ approved.[19]

We find no evidence that the ALJ drew an adverse inference against CCHCS. CCHCS's exception references the portion of the proposed decision analyzing CCHCS's claim that it had a non-discriminatory reason for not hiring Healy, and that it acted based on that non-discriminatory reason. This portion of the decision—which does not mention the protective order—merely noted that the redacted score sheets do not provide evidence of the panelists' rationales for either Healy's or the other applicants' assigned scores, and therefore shed little light on the non-discriminatory factors CCHCS sought to establish. Like the ALJ, we consider below all the various rationales CCHCS put forward for its decision, but we do not draw any inference from the fact that CCHCS sought to maintain confidentiality of certain materials and to provide evidence in a different manner, mainly through witness testimony from interview panel members.

[19] Neither party excepted to this protective order, so we do not consider its propriety.

II. CCHCS's Exception Regarding the OOC Assignment

CCHCS excepts to the ALJ's finding that Healy's union duties motivated Harris to end the OOC HCCA assignment prematurely.[20] The record amply supports this finding.

When CCHCS uses an OOC assignment while filling a vacancy, the OOC assignment typically lasts until the permanent position is filled—as management indicated it planned to do here—unless the temporary employee is not performing satisfactorily. Yet, Healy was not informed that his performance was problematic, and indeed, Hickerson reported to Harris that Healy was meeting the expectations of an OOC serving in the position. Nor does the record as a whole contradict Hickerson's assessment by suggesting that Healy failed to perform well in the OOC position.

On August 14, Harris approved Healy's union leave request to represent a Pharmacy Technician in an internal affairs investigation. Harris then informed San Quentin's HR staff that he was ending Healy's OOC assignment immediately. Harris testified that when he learned Healy would need to take some union leave time, he was concerned that Healy's representational duties would interfere with his completion of the OOC HCCA duties. Obando convinced Harris to "hold off a bit longer," but Harris subsequently ended Healy's OOC assignment just days later, on August 25. At that point, Healy had served for just over two weeks in the OOC position, an assignment scheduled to last for 120 days or until the permanent position was filled. Harris provided Healy with no reason for ending the assignment.

[20] The premature cessation of Healy's OOC assignment is not alleged as an independent adverse action but is nonetheless relevant as evidence of unlawful intent.

Harris's concern that he did not share with Healy—that Healy's representational duties would interfere with performing the HCCA duties—is an unlawful rationale; indeed, CCHCS cannot and does not dispute that the Dills Act protects Healy's work as a union steward. Moreover, the record does not reflect that Healy neglected his OOC duties, and Harris reported in an internal management e-mail that Hickerson found Healy was meeting expectations in that position. Harris's alleged concern that Healy might neglect his duties is further undercut by the fact that CCHCS was able to operate with the position completely vacant from late August 2017 to early May 2018.

In its exception, CCHCS argues that "far from retaliating against Healy for union duties, Harris was actually trying to assist Healy in performing the union duties, as demonstrated by the ALJ's finding that '[o]n August 14 and 15, 2017, Healy took union leave time to represent a Pharmacy Technician at an [internal affairs] investigation.'" It would not aid CCHCS to establish that Harris wanted Healy to assist the Pharmacy Technician and moved to end Healy's OOC HCCA assignment because he felt it was incompatible with Healy's union duties. Harris's purported position—that he had no problem with Healy performing union duties, provided his assignment was not the HCCA position—reflects unlawful animus toward Healy's protected activity as a union steward. Indeed, forcing an employee to give up a temporary promotive position—and thereby lessen his chances to fill the position permanently—demonstrates an inclination to levy a heavy price on those exercising protected rights. (Cf. *State of California (California Correctional Health Care Services)* (2019) PERB Decision No. 2637-S, pp. 15-16 [resistance to requests for union-related leave evidence of CCHCS's animus].)

While Harris was temporarily dissuaded from ending Healy's OOC assignment and therefore briefly delayed doing so, CCHCS does not except to the finding that Harris' decision to end Healy's OOC assignment on August 25 evidenced intent to discriminate. And even if CCHCS properly excepted to that finding, we agree with the ALJ's conclusion, as we infer that Harris' reason for wanting to cut short the OOC position on August 14 remained the same when he eventually did so on August 25.[21]

The record also does not support a conclusion that Harris ended the OOC on August 25 simply because he thought a candidate would likely fill the position soon. Such an argument is inconsistent with both Harris' admitted concern about union activity and the original plan, stated in writing, to have Healy continue in the OOC "for 120 days, or until the position has been filled." It is also inconsistent with the decision not to reinstate Healy to the OOC for any of the nine months prior to May 1, 2018, when the position was filled. Prematurely removing Healy from the OOC HCCA position assignment and leaving the position vacant for nine months runs counter to established practice and thus serves as substantial evidence of unlawful motive.

[21] According to Francisco, even though Harris briefly backed off terminating Healy's assignment between August 14 and August 25, Harris indicated that he wanted the OOC assignment to be ended as soon as possible, and to that end he directed Francisco to schedule interviews for the permanent position immediately. The interviews were held by the end of that same week, August 18. As soon as the panel asked Harris to appoint the first-ranked candidate, Harris terminated Healy's OOC assignment, without waiting to see whether the permanent position was filled or when it would be filled. Even though the selected candidate declined the permanent position, and the position remained unfilled for nine months, the OOC position was not reinstated and instead McKinney performed the job duties in the interim.

Moreover, as discussed *ante*, such a conclusion ignores that Tootell, after conferring with McKinney, heavily pressured Harris to keep Healy out of the OOC and permanent HCCA positions, even resigning, or threatening to resign, if he did not do so. Responding to that pressure, Harris appointed McKinney and Tootell to the interview panel for the permanent position, directed that the panel should conduct interviews the next week, and ended Healy's OOC assignment. Whether Harris was more motivated by Healy's continuing commitment to his union steward role or McKinney's and Tootell's bias-tainted aversion to having Healy fill the HCCA position temporarily and/or permanently, in either instance Healy's premature removal from the OOC assignment supports the ALJ's finding of nexus between Healy's protected activities and CCHCS's failure to offer Healy the permanent position.

III. CCHCS's Exception Regarding its Affirmative Defense

CCHCS does not explicitly except to the ALJ's findings that "the panel's decision[-]making process was tainted by the unlawful animus of a few of its members" (Proposed Decision, p. 48), nor that its "treatment of [Healy] as an applicant for promotion evidences a desire to seek out and, if necessary, manufacture reasons to reject Healy's application for promotion, rather than to consider his application on the basis of merit alone." (Proposed Decision, p. 44). Even construing the exceptions broadly to cover these issues, the record fully supports the ALJ's finding that the promotion process was suffused with discrimination.

As discussed above, because Healy has established that unlawful animus substantially motivated his employer's decision not to promote him, the burden shifts to CCHCS to establish that it would have refused to promote Healy even if he had not

engaged in protected activity. (*City and County of San Francisco*, *supra*, PERB Decision No. 2712-M, p. 27; *San Diego Unified School District* (2019) PERB Decision No. 2634, pp. 15-16.) This determination can involve weighing the evidence supporting the employer's justification against the evidence of the employer's unlawful motive to determine what would more likely than not have occurred in the absence of protected activity. (*San Diego Unified School District* (2019) PERB Decision No. 2666, p. 7.) In doing so, we keep in mind that even when an employer has a managerial, statutory, or contractual right to take an employment action, its decision to act cannot be based on an unlawful motive, intent, or purpose. (*City of San Diego* (2020) PERB Decision No. 2747-M, p. 29; *County of Santa Clara* (2019) PERB Decision No. 2629-M, p. 13; *County of Lassen* (2018) PERB Decision No. 2612-M, p. 6; *Berkeley Unified School District* (2003) PERB Decision No. 1538, pp. 4-5.)

Over time, CCHCS has shifted its rationale for rejecting Healy. CCHCS's initial position statement to PERB stated that it rejected Healy because of his work in the OOC role, including missing deadlines. As discussed above, even though Hickerson found Healy was meeting expectations in the OOC position, McKinney falsely accused Healy of missing a single deadline as part of her stated plan to deny Healy the position because she felt his true job was with SEIU and he could not both be a steward and be the HCCA, as well as based on her likely covert hostility over Healy and SEIU representing employees who had complaints against her. As part of our further analysis, *post*, we explain that McKinney's initial allegation that Healy missed a single deadline in his brief OOC assignment soon morphed into a broader false allegation that he missed multiple deadlines during that assignment.

At the hearing, Obando gave an equally unsupportable explanation, which was that the disparity between the top ranked candidate's score and the second and third ranked candidates' scores justified re-posting the job announcement once the top-ranked candidate declined the position. The ALJ was correct to reject this explanation, as it does not comport with what happened. The panel readily moved on from the first-ranked candidate to the second-ranked candidate, halting its usual progression only after the second-ranked candidate did not work out.

CCHCS now argues that the prime factors that disqualified Healy for the position were his temperament, performance during the interview, work ethic, and work product. While the ALJ adequately addressed these issues, we supplement the ALJ's analysis as follows.

To begin, the ALJ found the record only showed Healy being argumentative, or having conflicts with others, while performing union duties; the ALJ found no substance to allegations of Healy creating workplace conflicts that did not implicate his union duties. Stewards, in fulfilling a union's statutory duty to represent all bargaining unit employees, are often called on "to resolve divergent and often conflicting interests," and in that role "may resort occasionally during representational meetings to intemperate speech or less than civil conduct." (*State of California (Department of Corrections & Rehabilitation)* (2012) PERB Decision No. 2282-S, p. 7.) Because stewards' representational duties often bring them into conflict with management, precedent affords them "significant latitude in their representational speech and conduct." (*Ibid.*; see also *Mount San Jacinto Community College District* (2018) PERB Decision No. 2605, p. 7 [individual employee's criticism of management or working

conditions is protected activity when its purpose is to advance other employees' interests or when it is a logical extension of group activity].)

CCHCS does not identify specific facts the ALJ overlooked tending to show workplace conflicts unrelated to Healy's union duties. Rather, CCHCS repeats vague and unsubstantiated claims Tootell e-mailed to Harris: that Healy had a recent conflict with "someone in medical records" and "multiple conflicts with other staff." CCHCS did not provide sufficient evidentiary support for these claims. Indeed, while Tootell's e-mail referenced "three thick binders of material on the many associated issues surrounding Mr. Healy," CCHCS did not seek to introduce such evidence at the formal hearing.[22] (See Proposed Decision, p. 39, fn. 50.)

Tootell's opinion about Healy's temperament was likely based at least in part on conflicts arising from the inherently conflictual job of representing employees in complaints against management. Indeed, CCHCS does not dispute the ALJ's finding that Tootell, like McKinney, Harris, and other decision-makers, was aware of Healy's frequent and public representational activities on behalf of himself and others. From the record, it appears that Healy's union affiliation and activities were so open and notorious that they almost became synonymous with him.

Moreover, as detailed *ante*, Tootell made pretextual allegations that Healy missed deadlines during the ophthalmology project and again during his OOC

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[22] CCHCS thus puts forward a contention that lacks foundation and relies on hearsay. While the technical rules of evidence do not apply in a PERB formal hearing, hearsay cannot form the sole basis for a material factual finding. (*County of Santa Clara* (2019) PERB Decision No. 2670-M, p. 21, fn. 23 [a factual finding cannot be based solely on uncorroborated hearsay that does not satisfy one of the statutory exceptions].)

assignment. Indeed, while we found above that McKinney spread the false allegation that Healy missed a single deadline during his OOC assignment, this falsehood only grew from there. Tootell expanded on it when she told Molina that Healy had missed "many deadlines" during his brief OOC assignment and that CCHCS would therefore be in trouble. After Molina told Healy that Tootell had said this, Healy e-mailed Tootell and rebutted the allegation that he had missed deadlines during that time. Nonetheless, the expanded falsehood did not fade away. In CCHCS's initial position statement to PERB, it stated under penalty of perjury that it denied Healy the promotion because of his work during the OOC assignment, including missing "deadlines."

Thus, viewed as a whole, the record contains sufficient direct and circumstantial evidence that McKinney's and Tootell's references to Healy's alleged poor work performance were pretextual.

As for Healy's interview, the panelists testified regarding ways in which Healy could have improved his interview answers. We agree with the ALJ that, without information about the actual questions asked and Healy's answers (much less information about other applicants' answers for comparison), these generalized critiques were not particularly probative.

Tootell was the panelist whose testimony was most critical of Healy's interview, as she accused him of dishonesty. But when asked for specific dishonest answers to questions, Tootell stuck with a very general explanation that did not involve any dishonesty. Rather, she asserted that whereas Healy "kept dropping names of both Harris and [Tootell] and other people about what work [he] had done," she knew his

work and had also "heard from multiple other people" about his work product, so when he "drop[ped] those names," it reminded her of "a lot of consternation on the part of [his] supervisors." This non-specific and hearsay-laden summary, apparently referencing unspecified facts that CCHCS did not attempt to introduce into the record, did not establish a dishonesty allegation and has limited persuasive value. (See *Palo Verde Unified School District* (2013) PERB Decision No. 2337, p. 22 [uncorroborated hearsay testimony about complaints of employee's alleged inappropriate workplace behavior was insufficient to establish employer's affirmative defense].) Tootell then claimed that she believed others also questioned Healy's honesty. But when asked the basis for that belief, Tootell admitted she had not heard others say he was dishonest. Other critiques were even more vague.[23]

Moreover, even though Healy more likely than not experienced one or more depressed interview scores as a result of misinformation about his having missed deadlines, his scores still approached those of the second-ranked candidate and therefore undercut the claim that he performed poorly at the interview. Notwithstanding the criticism, all panelists rated Healy "competitive" and all panelists recommended that he move to the next stage.

Beyond the above factors, other circumstantial evidence confirms the direct evidence of anti-union animus and prevents CCHCS from meeting its burden to show

[23] McKinney's testimony, echoed by Woodson, was that Healy's answers were "good" but "very long" and yet "not specific enough to the questions." Tootell called Healy's answers "verbose," and added her impression that Healy "complete[ly] misunderstood the questions and also misunderstood all of the impression of his work previously done."

that it would have rejected Healy for the HCCA position even absent his protected activity. For instance, when CCHCS notified Healy that he had not been chosen, it represented that another applicant had been chosen and did not tell him the position would be reposted. This false representation adds to the irregularities that support the direct evidence of discrimination.[24] Similarly, as discussed above, Tootell heightened the suspicious circumstances when she, alone among the four panelists, claimed that the entire panel jointly decided not to check Healy's references. Thus, even setting aside the likelihood that one or more panelists were unable to fairly score Healy, we agree with the ALJ's finding that animus nonetheless infected the decision not to move forward with Healy's candidacy after the first two candidates did not work out, and CCHCS did not meet its burden to show that it would have rejected Healy in the absence of his protected union activities.

The substantial direct and circumstantial evidence of discrimination and the employer's shifting, pretextual rationales for rejecting Healy distinguish this case from those in which employers have established an affirmative defense. For instance, in *City of Alhambra* (2011) PERB Decision No. 2161-M, the Board found credible evidence to support the employer's position that it would have rejected an employee on probation for reasons other than the employee's complaint at a work meeting that he was being worked too hard, and that it acted because of those non-discriminatory reasons. (*Id.* at pp. 19-20.)

[24] In yet another irregularity, on August 12 Harris e-mailed Tootell and falsely stated that Healy did not meet the minimum qualifications for the permanent HCCA position. This misstatement further supplements the considerable evidence showing animus against Healy, as the record reflects no dispute that Healy was on the AGPA eligibility list and met the minimum qualifications for the HCCA position.

This case is also wholly dissimilar from *State of California (Department of General Services)* (1994) PERB Decision No. 1063-S. There, the Board affirmed the ALJ's finding that there was no evidence the employer's decision to deny a lateral transfer was based on the applicant's protected activities. (*Id.*, adopting proposed decision at pp. 27-28.) Even had charging party proved a nexus between the applicant's protected activity and the adverse action, the employer demonstrated that it would have taken the same action despite the applicant's protected activity because the successful applicant better met the employer's stated needs, as he had more technical competence and a stronger background in electrical work than the unsuccessful applicant. (*Id.*, adopting proposed decision at p. 30.) The ALJ added that the employer could have legitimately rejected the unsuccessful applicant "based solely upon his lack of inter-personal skills and his erratic and abusive behavior," even if "the offensive behavior may have, on occasion, occurred in pursuit of legitimate and possibly protected issues." (*Ibid.*) Here, in contrast, the evidence of discrimination for protected activity outweighed the evidence supporting alleged alternative, non-discriminatory rationales.

Temperament, work product, work ethic, and performance at an interview are factors that would, on a different record, readily support an employer's affirmative defense. CCHCS simply has not made such a case. (Cf. *City of Santa Monica* (2020) PERB Decision No. 2635a-M, pp. 34-35 & 58 (judicial appeal pending) [preponderance of the evidence showed that employer's interview panel promoted a candidate other than the charging party because it selected the candidate who, unlike charging party, gave a phenomenal interview in which she spoke in an engaging

manner and detailed her experience performing extremely relevant duties at past jobs, and who had the past results and experience the interview panel sought].)

We also emphasize that no employer is automatically bound to offer a position to a third-ranked candidate if the first two drop out. To the contrary, provided its decision results from legitimate factors rather than discrimination against activity the Dills Act protects, PERB would readily dismiss any challenge to such a decision. Here, however, that is not what a preponderance of the evidence shows. Harris, the hiring authority, admitted that he would have hired Healy if the panel had submitted his name for appointment, but the record requires us to find that Healy's protected activity caused the panel to refrain from doing so. We agree with the ALJ's conclusion that Healy would have been appointed as a permanent AGPA in the HCCA position but for his protected activities.

IV. CCHCS's Exception Regarding the ALJ's Proposed Remedy

The Legislature has vested PERB with broad powers to remedy unfair practices or other violations of the Dills Act and to take any action the Board deems necessary to effectuate the Act's purposes. (Dills Act, § 3514.5, subd. (c); *Pacific Legal Foundation*, *supra*, 29 Cal.3d at p. 198; *Mt. San Antonio Community College Dist. v. Public Employment Relations Bd.* (1989) 210 Cal.App.3d 178, 189-190; *City of Palo Alto* (2019) PERB Decision No. 2664-M, p. 2 (*Palo Alto*); *City of San Diego* (2015) PERB Decision No. 2464-M, p. 42*,* affirmed *sub nom. Boling v. Public Employment Relations Bd.* (2018) 5 Cal.5th 898, 920.) An appropriate remedy must fully compensate affected employees for harms caused by an unfair practice. (*Palo Alto*, *supra*, PERB Decision No. 2664-M, p. 3; *City of Pasadena* (2014) PERB Order

No. Ad-406-M, p. 13.) The Board therefore crafts make-whole remedies, including "back pay, front pay or other forms of compensation," as necessary "to make injured parties and/or affected employees whole." (*Sonoma County Superior Court* (2017) PERB Decision No. 2532-C, p. 40; cf. *Local Joint Executive Bd. of Las Vegas v. NLRB* (9th Cir. 2018) 883 F.3d 1129, 1139-1140 [NLRB abused its discretion by ordering make-whole remedy that failed to compensate the affected employees].) In addition to these restorative and compensatory functions, a Board-ordered remedy should also serve as a deterrent to future misconduct, so long as the order is not a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act. (*Palo Alto*, *supra*, PERB Decision No. 2664-M, p. 3; *City of San Diego*, *supra*, PERB Decision No. 2464-M, pp. 40-42; *City of Pasadena*, *supra*, PERB Order No. Ad-406-M, pp. 12-13.)

The ALJ's proposed order directs CCHCS to (1) offer Healy the next available SSA/AGPA position at San Quentin, and (2) provide Healy back pay and front pay as necessary to reimburse him for all losses he has incurred and will incur from the time he was denied the HCCA position on September 29, 2017, until the time he is placed in the next available SSA/AGPA position at San Quentin. CCHCS and SPB argue that the merit principle set forth in the California Constitution and the Civil Service Act bars PERB from awarding Healy the next available AGPA position without a competitive interview process.[25] In contrast, SPB offers no objection to an order requiring back

[25] The California Constitution at Article VII, section 1, subdivision (a) provides that "every officer and employee of the State" is in the state civil service system, unless otherwise exempted. Section 1, subdivision (b) states that civil service employees are appointed and promoted "based on merit," which is to be "ascertained by competitive examination." Section 2 provides for SPB to administer the state civil

pay, front pay, and/or placing Healy in the San Quentin HCCA position that he was denied, instead conceding that those remedies do not violate the merit principle.

We review the substantial precedent in this area in Part A below, and we then proceed to discuss the appropriate remedy for this matter in Part B below.

A. PERB's Authority to Remedy Discrimination Against State Employees

Precedent establishes that, notwithstanding SPB's jurisdiction to enforce civil service laws, prescribe classifications, and review disciplinary actions against state civil service employees, PERB is authorized to provide a full remedy if such employees experience discrimination for engaging in activity the Dills Act protects. First, in *Pacific Legal Foundation*, *supra*, 29 Cal.3d 168, the California Supreme Court rejected a facial challenge to Dills Act provisions allowing PERB to investigate and devise remedies for unfair practices. (*Id*. at p. 197, fn. 19.) The Court explained that PERB's authority over unfair practices did not infringe on SPB's jurisdiction to review disciplinary actions because SPB and PERB were created to serve "different, but not inconsistent, public purposes." (*Id*. at p. 197.) The central point underpinning the Court's reasoning is critical to the instant case as well: if the State, in the course of making a personnel decision, discriminates against protected activity in violation of the Dills Act, it transgresses the merit principle as well. (*Id.* at p. 198.) Thus, the Court declined "to construe article VII, section 3, subdivision (a) in a manner that would

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service system. Section 3, subdivision (a) describes the SPB's duties: "The [SPB] shall enforce the civil service statutes and, by majority vote of all its members, shall prescribe probationary periods and classifications, adopt other rules authorized by statutes, and review disciplinary actions." As noted above, to implement article VII, the Legislature enacted the State Civil Service Act, Government Code sections 18500-19799.

deprive all state civil service employees of the important safeguards afforded by [PERB and other] specialized agencies." (*Id.* at p. 199.) In reaching this conclusion, the Court noted that when the Legislature enacted the Dills Act, it explicitly tailored the law so as not "to contravene the spirit or intent of the merit principle." (Dills Act, § 3512.)

Four years after *Pacific Legal Foundation*, the Court held that two other state agencies charged with remedying employment discrimination similarly complement SPB's role rather than infringing on it. (*State Personnel Bd. v. Fair Employment and Housing Com.* (1985) 39 Cal.3d 422 (*Fair Employment and Housing*).) There, three unsuccessful state civil service applicants claimed that they had been rejected because of physical disability discrimination in violation of the Fair Employment and Housing Act (FEHA, Gov. Code, §§ 12900-12996). At the request of SPB, a trial court enjoined both the Department of Fair Employment and Housing and the Fair Employment and Housing Commission (FEHC) from enforcing FEHA in matters involving the state civil service, concluding that doing so conflicted with SPB's exclusive jurisdiction over state civil service employment. (*Fair Employment and Housing*, *supra*, 39 Cal.3d at p. 427.) The Court disagreed, holding that the merit principle governing state civil service was reinforced, rather than hindered, by enforcing FEHA, which "guarantees that nonmerit factors such as race, sex, [and] physical handicap" would play no role in appointing state civil service employees. (*Id*. at p. 439.) The Court also noted that the trial court had ruled before the Court, in *Pacific Legal Foundation*, "rejected the 'exclusive jurisdiction' interpretation of article VII." (*Id.* at p. 428.) Following that precedent, the Court explained, required it once

again “to reject [SPB’s] assertion of exclusive jurisdiction over civil service discrimination complaints.” (*Ibid*.)

Most importantly, in both *Pacific Legal Foundation* and *Fair Employment and Housing*, the Court specifically considered and rejected the idea that PERB remedies might conflict with SPB’s authority to administer the state civil service remedies. In *Pacific Legal Foundation*, the Court rejected the argument that granting PERB jurisdiction to “devise remedies for unfair practices” is “irreconcilably in conflict with [SPB’s] jurisdiction to ‘review disciplinary actions’ under [article VII].” (*Pacific Legal Foundation*, *supra*, 29 Cal.3d at p. 196.) The Court found this argument “fails on several grounds.” (*Ibid.*) First, the Court considered fact patterns such as those at issue here—in cases that do not involve discipline—to pose virtually no risk of conflicting SPB and PERB decisions. (*Id.* at p. 197 [“[E]ven in the case of employer reprisals against an employee for protected activity, PERB’s unfair practice jurisdiction would clearly pose no conflict with [SPB’s] jurisdiction if the reprisal took a form that did not constitute a ‘disciplinary action’ reviewable by [SPB]”].)

Furthermore, the Court advised that “in those areas in which the [agencies’] jurisdiction . . . overlap, familiar rules of construction” require “harmoniz[ing] the disparate procedures” rather than invalidating one or the other. (*Pacific Legal Foundation*, *supra*, 29 Cal.3d at p. 197.) The Court found harmonizing the agencies’ procedures should pose little problem even in the central area of overlap (disciplinary cases), because, as noted above, remedying discrimination against protected activity strengthens the merit principle. (*Id.* at pp. 198-199 [nothing in the Constitution precluded the Legislature from establishing specialized “watchdog” agencies to

remedy discrimination, as such discrimination is not a legitimate basis for determining merit].) Therefore, the Court found it would be an overreach to reserve only to SPB all authority to remedy unlawful actions against a civil service employee. (*Id.* at p. 199.)

The Court continued this line of reasoning in *Fair Employment and Housing*, *supra*, 39 Cal.3d 422, finding that FEHC had full authority to order reinstatement, hiring, promotion, and back pay in order to make whole state civil service employees and applicants who have experienced discrimination. (*Id.* at p. 429.) While SPB urged the Court not to allow both FEHC and SPB to assess and remedy discrimination, the Court held that neither agency supplants the other, and the Court noted that FEHC plays a valuable role because of its particularized expertise in discrimination on the basis of race, religion, sex, age, and other factors. (*Id.* at pp. 431-432.) The Court reaffirmed *Pacific Legal Foundation* and its holding that the Constitution allows the Legislature to create "specialized watchdog" agencies such as PERB and FEHC (*id.* at pp. 438-439), explaining that it is not difficult to harmonize the agencies' powers because they serve complementary purposes (*id.* at p. 438). The Court reiterated that it believed the main source of overlap would be in cases involving discipline and that even in such cases SPB's jurisdiction does not dislodge the Legislature from creating specialized agencies with complementary roles, such as PERB and FEHC. (*Id.* at p. 439.)

Fair Employment and Housing involved hiring and competitive examinations rather than discipline. Accordingly, as in the instant case, SPB claimed exclusive authority over "examinations and appointments in the civil service" based on article VII of the Constitution. (*Id.* at p. 440.) The Court emphatically rejected this argument,

finding that "the principle of selection by competitive examination" is found in article VII, section 1, subdivision (b), but "*that section creates no powers in [SPB]*. Rather, [the SPB's] constitutional powers derive from section 3, subdivision (a) of that article, which *includes no mention of examinations*." (*Ibid.*, emphasis supplied.) Moreover, the Court rejected SPB's argument that "its power over examinations is inextricably intertwined with its constitutional mandate in section 3 to 'prescribe classifications,'" noting that the argument "fails in the face of our reasoning in *Pacific Legal Foundation*." (*Ibid.*)

CCHCS and SPB rely on inapposite cases in which the California Supreme Court found that parties to a collective bargaining agreement cannot bargain for provisions that alter SPB's authority and the merit principle. First, in *California State Personnel Bd. v. California State Employees Assn., Local 1000, SEIU, AFL-CIO* (2005) 36 Cal.4th 758 (*California State Employees Association*), the Court invalidated collectively bargained post-and-bid programs that allowed promotion of state employees from a list of eligible candidates based entirely on seniority rather than merit. The Court noted that *Pacific Legal Foundation* permits the Legislature a free hand to fashion new laws relating to personnel administration (*id.* at p. 767), but the Court held that a collective bargaining agreement may not substitute a new definition of merit (*id.* at p. 772).

Following *California State Employees Association*, the Court found that a collectively bargained grievance/arbitration procedure conflicted with SPB's authority because it allowed disciplined state employees to bypass review before the SPB in favor of pursuing a private grievance and arbitration procedure. (*State Personnel Bd.*

v. Department of Personnel Admin. (2005) 37 Cal.4th 512, 526-527 (*Department of Personnel Administration*).) The Court explicitly distinguished *Pacific Legal Foundation* and *Fair Employment and Housing* because those decisions, like the instant case, involved expert statutory agencies (PERB and FEHC, respectively) carrying out "a specialized function that supplemented rather than supplanted the central adjudicative function of the [SPB]." (*Id.* at p. 524.) Because discrimination is not a legitimate basis for determining merit, PERB and FEHC advance the merit principle by remedying discrimination. (*Id.* at p. 525.) The Court therefore left no doubt that its four-decade-old rule remains in place and PERB is authorized to remedy Dills Act discrimination.

PERB precedent is consistent with the foregoing jurisprudence, in that it demonstrates the Board orders its standard remedies to the extent needed to make whole a state employee who has proven discrimination or retaliation. In *State of California (Department of Corrections)* (2001) PERB Decision No. 1435-S (*Department of Corrections*), for instance, PERB found that the State retaliated against a union steward for engaging in protected activities when it investigated him, reprimanded him, and rescinded his promotion to chief engineer, a civil service position which he had accepted but not yet assumed. (*Id.*, adopting proposed decision at pp. 26-48.) By the time of the Board's decision, the State had long since filled the chief engineer position, posing a remedial challenge like the one presented here, where CCHCS has filled the HCCA position. The Board concluded that it would not effectuate the purpose of the Dills Act to have the discriminatee displace the ultimately successful applicant. (*Id.*, adopting proposed decision at pp. 48-49.) To effectuate the purposes of the Dills Act and make whole the discriminatee, the Board directed the

State to reimburse him for all losses until he was placed in a comparable position "acceptable to him," which the Board found to be the next available chief engineer position. (*Id.*, adopting proposed decision at pp. 49-50.)

CCHCS cites *Lemoore Union High School District* (1982) PERB Decision No. 271 (*Lemoore*), in which the Board found that an employer's unlawful discrimination denied an employee a fair opportunity to compete for a vice principal position, but the record did not demonstrate that she would, more likely than not, have received the promotion absent discrimination. (*Id.* at p. 3.) Since the only proven adverse action was denying a fair opportunity rather than denying a promotion, the Board directed the employer to reconstitute the interview panel and redo the vice principal search before the next school year, make the process fair by denying the candidate chosen the first time any advantage from having performed in the position, and otherwise expunge all discriminatory aspects of the process. (*Id.* at pp. 4-5.)

The Board's remedy in *Lemoore* put the candidate chosen the first time at risk of displacement. Such a remedy may best effectuate the purposes of the law we enforce in select cases, such as where the promotional opportunity at issue was unique (meaning there will likely be no alternative spot to place the discriminatee for quite some time), and the record is insufficient to demonstrate whether, absent discrimination, the discriminatee would have earned the promotion. In more recent PERB decisions where either of these elements has been missing, the Board has disfavored removing an innocent incumbent chosen over a discriminatee. (*Department of Corrections*, *supra*, PERB Decision No. 1435-S, pp. 49-50; *State of California (Department of Parks and Recreation)* (1983) PERB Decision No. 328-S, pp. 18-19,

overruled in part on other grounds by *County of Santa Clara* (2017) PERB Decision No. 2539-M (*Department of Parks and Recreation*) [where State denied promotional opportunity in park ranger training program due to union steward's protected activities, Board declined to remove incumbent employee awarded the opportunity and instead directed State to offer steward next available comparable opportunity].)

B. Fashioning a Fair and Effective Remedy in the Present Circumstances

As the above authorities explain, reversing a discriminatory refusal to promote does not run afoul of the merit principle; rather, it is discrimination that frustrates the merit principle. These authorities also illustrate, however, that PERB has considerable discretion in crafting a remedy to fit the circumstances of each case.[26]

In fashioning a remedy to fit this case, we keep in mind that CCHCS evaluated Healy at multiple stages. First, San Quentin's Human Relations analysts determined Healy was list-eligible for appointment to a position in the AGPA classification.

[26] We fear the majority and concurring opinions herein largely talk past one another on the extent of the Board's discretion. Both the majority and concurring opinions note that the Dills Act shall not be "construed to contravene the spirit or intent of the merit principle. . . . provided by Article VII of the California Constitution or by laws or rules enacted pursuant thereto." (Dills Act, § 3512.) In harmonizing the Dills Act with the merit principle, we do not write on a blank slate. Rather, as discussed above, our state's highest court has explained that discrimination for protected activity harms the merit principle, and remedying discrimination therefore strengthens the principle. Since our concurring colleague fully joins the remedy we order in today's opinion, it seems that as a practical matter our disagreement centers on whether PERB violated article VII of the Constitution two decades ago, in *Department of Corrections*, *supra*, PERB Decision No. 1435-S, by awarding a discriminatee the next available chief engineer position. While the concurring opinion suggests the remedy in that decision was constitutionally infirm, we continue to regard it as a sound exercise of the Board's discretion.

Second, Human Relations screened Healy's application and determined that he met the position's minimum qualification: 12 months' experience working in the SSA or AGPA classification. Then, Human Relations scheduled Healy for an interview, along with three other top applicants. Next, notwithstanding panelists' false and pretextual allegations regarding Healy, the panel nonetheless placed him in the "first rank" (top three), deemed him "competitive"—meaning he demonstrated the required level of knowledge and understanding—and recommended him to advance with the other two first rank candidates for a reference check. While discrimination prevented CCHCS from checking Healy's references, the record further shows that: Fox rated Healy highly and therefore would have given him a strong reference had the panel followed its norms and contacted him; Harris would have selected Healy for the job if the panel had forwarded his name; Harris thought Healy would do a fine job in the HCCA position; and Hickerson confirmed that Healy did in fact meet expectations during his brief stint in the OOC before CCHCS cut the assignment short.

The above facts distinguish this case from *Kidd*, *supra*, 62 Cal.App.4th 386. In that case, an affirmative action program allowed certain female and minority applicants to be considered for state positions even though they did not place among the top three ranks, thereby violating the merit principle by relying on non-merit factors (race and sex) in the appointment process. (*Id.* at pp. 401-402.) Healy's ranking among the top three applicants also makes this case very different from *Alexander v. State Personnel Bd.* (2000) 80 Cal.App.4th 526. There, a demonstration project

required an examination, but did not grade it, and in fact dispensed with ranking applicants altogether, which again violated the merit principle. (*Id.* at p. 543.)[27]

Had Healy not been denied the HCCA position because of discrimination, he would have been classified as an AGPA by no later than September 29, 2017 (the date CCHCS notified him that he was not selected). The instant facts therefore call for a stronger remedy than in *Lemoore*, *supra*, PERB Decision No. 271, where we merely ordered the employer to redo its hiring process. We have little trouble determining that a fair and effective make-whole remedy must direct CCHCS to reclassify Healy into the AGPA classification retroactive to September 29, 2017, with back pay.[28]

The primary question concerns whether CCHCS must automatically place Healy in the next AGPA position that becomes vacant. Commenting on *Department of Corrections*, *supra*, PERB Decision No. 1435-S, SPB finds it likely that the case did not feature any challenge to PERB's authority to direct the State to appoint the discriminatee to the next available chief engineer position. If such a challenge had been brought, it would have lacked merit based on the foregoing appellate precedent. However, we also note SPB's suggestion that two factors distinguish this case from

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[27] Similarly, *Hastings v. Department of Corrections* (2003) 110 Cal.App.4th 963 is distinguishable because there an employee sought, as an accommodation, reassignment to a different civil service classification without complying with the examination process.

[28] While the ALJ focused her proposed remedy on Healy obtaining either an SSA or AGPA position, we find that absent discrimination, CCHCS would have hired Healy as an AGPA, not as an SSA. We tailor our remedy to this finding. Moreover, rather than ordering the reclassification to take effect immediately, we will give the parties a 45-day period in which they may attempt to reach an alternate agreement to make Healy whole for CCHCS's discriminatory conduct.

Department of Corrections. First, in that case the State had offered the discriminatee a chief engineer position before rescinding the offer for a pretextual reason. We do not find this to be a material distinction. When the State offers an employee a promotion before rescinding the offer for a pretextual reason, the critical point is that the employee deserved the promotion under the merit principal. While that scenario may be distinct from one involving an *unqualified* applicant who is also discriminated against, it is not materially distinct from the instant case, where we have found Healy would have been promoted absent discrimination and the alleged faults in Healy's qualifications—much like the alleged wrongdoing by the chief engineer in *Department of Corrections*—was pretextual.

Second, SPB distinguishes *Department of Corrections*, *supra*, PERB Decision No. 1435-S by noting that the AGPA classification is broader than the chief engineer class, making it arguably less clear that Healy should be placed in the next available AGPA position. While this point does not present a constitutional or statutory bar preventing us from affirming the ALJ's proposed order, it does impact how we exercise our discretion and convinces us to refrain from directing CCHCS to place Healy in the next AGPA position that happens to become vacant.

As noted above, SPB raises no objection to back pay and front pay until the HCCA position next becomes vacant and CCHCS places Healy in it. Indeed, combining back pay with front pay is typically warranted where there is no vacancy into which an employee can immediately be placed. (See *Horsford v. Bd. of Trustees of Cal. State Univ.* (2005) 132 Cal.App.4th 359, 388 ["Front pay usually reflects a temporary situation that will be remedied by other relief ordered in the judgment. If, for

example, the court orders reinstatement of a fired employee or promotion to a job the employee was denied as a result of discrimination, front pay might be awarded to make up a wage differential if there were no vacancy into which the employee could immediately be reinstated or promoted."]; accord *Department of Corrections*, *supra*, PERB Decision No. 1435-S, p. 50 [directing State to offer discriminatee the next available chief engineer position and to reimburse him for "losses, monetary and otherwise," plus interest at seven percent per annum].)

Having considered all competing factors, we will direct CCHCS to reclassify Healy retroactively to the AGPA classification, assign him appropriate duties[29] at San Quentin until the San Quentin HCCA position next becomes vacant, and place Healy in the HCCA position if he is still an active State employee at that time. We thus accomplish both the back pay and front pay through retroactive reclassification, without specifying what AGPA position or duties CCHCS must provide Healy, other than that they be appropriate AGPA duties that Healy can reasonably learn to perform.

We fashion the remedy in this manner primarily because the AGPA classification comprises a diverse swath of both administrative and programmatic roles. By declining to place Healy automatically in the next available AGPA position—which could be far afield from his skill set given that the classification is so broad and ubiquitous in state employment—we avoid the risk of placing him in a job he cannot

[29] Appropriate duties are those within the general ambit of the AGPA classification that CCHCS reasonably believes Healy can perform or learn to perform through typical on-the-job training.

reasonably be expected to learn or perform. This approach ultimately aids both parties in finding a workable path forward.[30]

Even though the HCCA position may be a relatively unique opportunity and may also be unlikely to become vacant soon, we decline to require CCHCS to remove the current incumbent HCCA to make room for Healy. Rather, we reaffirm that in the normal course it does not effectuate the purposes of the Dills Act to displace an incumbent chosen for a promotion over a discriminatee.

Providing only front pay without reclassification is another option we have considered and rejected. Such a remedy generally does not provide full make-whole relief given its negative impact on a discriminatee's prospects for further career advancement. Moreover, a long-running front pay award can place severe compliance strains on all parties and on PERB, whereas retroactive reclassification should lead to few, if any, future compliance disputes, as prospective compensation (including wage increases and pensionable income calculations) will flow from the regular payroll process rather than through a complex, ongoing compliance process.

For the foregoing reasons, we partially grant CCHCS's exception and modify the proposed remedial order as described above.[31]

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[30] SEIU Local 1000 submitted a non-party informational brief suggesting that we require CCHCS to place Healy in the next vacant position for which he meets minimum qualifications. This might be an apt approach in cases that involve promotional classifications less broad than that at issue here, and/or based on other evidence indicating that minimum qualification requirements would likely prevent discriminatees from ending up in positions that do not fit their abilities. The remedy we have selected is directed toward better attaining SEIU's presumed purpose.

[31] We also grant Healy's two exceptions. First, in footnote 16, *ante*, we adjusted a factual finding in the proposed decision. Second, we order interest on all amounts

V. CCHCS's Exception Regarding the ALJ's Alleged Finding that CCHCS Violated the Merit Principle

CCHCS argues it was inappropriate for the ALJ to mention that the selection process in this case violated the merit principle because it involved discrimination based on protected activity. Unlike CCHCS, we do not read the proposed decision as rendering a legal conclusion that CCHCS violated article VII of the state constitution. In any event, to the extent that the proposed decision could potentially be read in that manner, we amend it to clarify that we have not attempted to ascertain whether CCHCS violated the constitution or the Civil Service Act.

PERB and SPB "are not in competition with each other." (*Pacific Legal Foundation*, *supra*, 29 Cal.3d at p. 197.) As noted above, discriminatory personnel decisions violating the Dills Act "transgress the merit principle as well," and "the Legislature evidently thought it important to assign the task of investigating potential violations of [the Dills Act] to an agency which possesses and can further develop specialized expertise in the labor relations field." (*Id.* at p. 198.) Accordingly, when we find that a civil service decision was based on discrimination violating the Dills Act, our findings are consistent with the merit principle, which requires that entitlement to civil service positions must turn on lawful criteria. (*Id*. at pp. 196-200.)

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owed. It is not clear from the proposed decision why the ALJ did not award interest. While CCHCS has opposed Healy's cross-exception seeking an interest award, we find no cause to depart from our well-established precedent regarding back pay interest. (*Sonoma County Superior Court*, *supra*, PERB Decision No. 2532-C, p. 42 ["Back pay, front pay and/or other monetary awards, plus interest, are an ordinary part of Board-ordered remedies where necessary to compensate injured parties or affected employees for out-of-pocket losses caused, in whole or in part, by an unfair practice"]; *Department of Corrections*, *supra*, PERB Decision No. 1435-S, at p. 49; *Regents of the University of California* (1997) PERB Decision No. 1188-H, pp. 33-35.)

We do not view the proposed decision as reflecting an ALJ bent on superseding SPB's role. Rather, the passages CCHCS points out demonstrate the opposite proposition. The proposed decision reflects the ALJ's awareness that the Dills Act "does not at all attempt to nullify the constitutional principle that employment should be based upon merit; indeed, the statute reaffirms that precept." (Proposed Decision, p. 49, citing *Pacific Legal Foundation*, *supra*, 29 Cal.3d at p. 202.) Thus, far from referencing the merit principle to make a finding as to an alleged violation of California's civil service scheme, we read the proposed decision as noting that the ALJ's discrimination findings were consistent with the Dills Act's explicit recognition of the spirit and intent of the merit principle. (Dills Act, § 3512.) In any event, we so hold, thereby clarifying any ambiguity the proposed decision arguably contained.

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, it is found that State of California (Correctional Health Care Services), violated the Dills Act, Government Code section 3519, subdivision (a), by refusing to promote Kevin M. Healy to the Health Care Compliance Analyst position at San Quentin because he engaged in activity that is protected by the Dills Act, Government Code section 3515.

Pursuant to section 3514.5, subdivision (c) of the Government Code, it hereby is ORDERED that the State of California (Correctional Health Care Services) and its representatives shall:

A. CEASE AND DESIST FROM:

Retaliating against Healy for engaging in protected conduct.

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

1. No later than 45 days after this decision is no longer subject to appeal, reclassify Healy into the AGPA classification retroactively to September 29, 2017 and provide him with pay and benefits associated with that reclassification, both retroactively to that date and prospectively. Interest at a rate of 7 percent per annum shall accrue on the backpay portion of this award.

2. Beginning no later than 45 days after this decision is no longer subject to appeal and on an ongoing basis thereafter, assign Healy appropriate duties at San Quentin until the San Quentin Health Care Compliance Analyst position next becomes vacant, and at that point place Healy in the position, if he remains an active State of California employee at that time.

3. Within 10 workdays after this decision is no longer subject to appeal, post copies of the Notice attached hereto as an Appendix at all work locations where notices to San Quentin employees are customarily posted. The Notice must be signed by an authorized agent of the State of California (Correctional Health Care Services), indicating that it will comply with the terms of this Order. Such posting shall be maintained for a period of 30 consecutive workdays. The Notice shall also be posted by electronic message, intranet, internet site, and other electronic means customarily used by the State of California (Correctional Health Care Services), to communicate with San Quentin employees. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced, or covered with any other material.[32]

[32] In light of the ongoing COVID-19 pandemic, Respondent shall notify PERB's Office of the General Counsel (OGC) in writing if, due to an extraordinary

4. The parties are permitted, by mutual agreement, to jointly request that the General Counsel of the Public Employment Relations Board (PERB) alter the timeframes in this Order to facilitate settlement discussions, or to jointly request that the General Counsel otherwise adjust the Order, provided that no such changes violate rights or duties provided under the Dills Act.

5. Written notification of the actions taken to comply with this Order shall be made to the General Counsel. Respondent shall provide reports, in writing, as directed by the General Counsel or his/her designee. All reports regarding compliance with this Order shall be concurrently served on Kevin M. Healy.

Chair Banks joined in this Decision.

Member Shiners' concurrence begins on p. 53.

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circumstance such as an emergency declaration or shelter-in-place order, a majority of employees at one or more work locations are not physically reporting to their work location as of the time the physical posting would otherwise commence. If Respondent so notifies OGC, or if Charging Party requests in writing that OGC alter or extend the posting period, require additional notice methods, or otherwise adjust the manner in which employees receive notice, OGC shall investigate and solicit input from all parties. OGC shall provide amended instructions to the extent appropriate to ensure adequate publication of the Notice, such as directing Respondent to commence posting within 10 workdays after a majority of employees have resumed physically reporting on a regular basis; directing Respondent to mail the Notice to all employees who are not regularly reporting to any work location due to the extraordinary circumstance, including those who are on a short term or indefinite furlough, are on layoff subject to recall, or are working from home; or directing Respondent to mail the Notice to those employees with whom it does not customarily communicate through electronic means.

SHINERS, Member, concurring: I agree with the findings, conclusions, and order in the majority opinion. I write separately to explain why the portion of the administrative law judge's (ALJ) proposed order requiring the State of California (Correctional Health Care Services) (CCHCS) to offer Kevin M. Healy the next available Associate Governmental Program Analyst (AGPA) position at California State Prison, San Quentin—without conducting the civil service selection process for that position—violated the constitutional merit principle and thus exceeded PERB's remedial authority.

"PERB has broad authority under the Dills Act to remedy unfair practices." (*State of California (Department of Corrections and Rehabilitation)* (2012) PERB Decision No. 2282-S, p. 18; see Dills Act, Gov. Code, § 3514.5, subds. (a), (c).) But PERB's remedies "may not encroach upon statutes and policies unrelated to the Act and, therefore, outside of PERB's competence to administer." (*Boling v. Public Employment Relations Bd.* (2019) 33 Cal.App.5th 376, 388.) Of particular importance in this case, the Dills Act explicitly says that "[n]othing in this chapter shall be construed to contravene the spirit or intent of the merit principle in state employment . . . provided by Article VII of the California Constitution or by laws or rules enacted pursuant thereto." (Dills Act, § 3512.)

The California Constitution mandates that all appointments and promotions to permanent positions in the state civil service be "based on merit ascertained by competitive examination." (Cal. Const., art. VII, § 1, subd. (b).) Under this constitutional merit principle, state employees must be "recruited, selected, and advanced under conditions of political neutrality, equal opportunity, and competition on

the basis of merit and competence." (*Pacific Legal Foundation v. Brown* (1981) 29 Cal.3d 168, 183-184 and fn. 7, internal quotations and citation omitted (*Pacific Legal Foundation*).) And because the merit principle is enshrined in the state constitution, neither the Legislature nor any other branch or agency of state government may act inconsistently with it. (*California State Personnel Bd. v. California State Employees Assn., Local 1000, SEIU, AFL-CIO* (2005) 36 Cal.4th 758, 771 (*California State Employees Association*).)

The civil service appointment process has three phases. In the first phase, a competitive examination is administered to produce a certified list of eligible candidates. In the second phase, the appointing authority reviews the eligible candidates and selects the one best suited to the position.[33] In the third phase, the selected candidate serves a probationary period so the appointing authority may evaluate the candidate for permanent appointment to the position. (*California State Employees Association*, *supra*, 36 Cal.4th at p. 767.)

In *California State Employees Association*, the California Supreme Court held that the constitutional merit principle applies to the second or selection phase of the civil service appointment process. (36 Cal.4th at p. 772.) In that case, the Legislature approved a memorandum of understanding (MOU) with a state employee union that required an open position to be filled by the eligible candidate with the most seniority, "regardless of the nature of the positions in which the seniority was earned, the

[33] "'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.)

specific duties and responsibilities of the position to be filled, or the relative qualifications of the competing eligible [candidates]." (*Id.* at p. 768.) The Court found that, while seniority "may be an appropriate factor in evaluating merit and efficiency," the merit principle does not permit the Legislature to deprive an appointing authority "of the ability to interview eligible candidates and base their hiring decisions on a broader range of criteria bearing on fitness and efficiency." (*Id.* at pp. 771-772.) In so finding, the Court noted that "the competitive examinations that result in eligible lists typically test and rank only the general fitness and minimum qualifications required for an entire class of positions" but "do not test for all the specific knowledge, skills, abilities, and other personal characteristics and attributes that might reflect an eligible candidate's superior fitness for a particular position within a class." (*Id.* at p. 772.)

California State Employees Association establishes that the merit principle prohibits the Legislature and state agencies from requiring an appointing authority to select a particular candidate for a civil service position without allowing the appointing authority to conduct the selection process. (36 Cal.4th at p. 772.) The merit principle thus bars PERB from ordering CCHCS to offer Healy the next available AGPA position at San Quentin without a selection process.

Despite modifying the ALJ's proposed order to instead require that Healy be retroactively reclassified as an AGPA, the majority asserts the ALJ's order was within PERB's remedial authority. As the Court recognized in *Pacific Legal Foundation*, a personnel decision that discriminates in violation of the Dills Act also violates the merit principle. (29 Cal.3d at p. 198.) But this does not mean that ordering an appointing authority to offer a position to a discriminatee who has not gone through the selection

process for that position necessarily poses no conflict with the merit principle. And the authorities upon which the majority relies fail to establish that no such conflict exists.

First, the majority relies heavily on *Pacific Legal Foundation* and *State Personnel Bd. v. Fair Employment and Housing Com.* (1985) 39 Cal.3d 422 (*Fair Employment and Housing*), in which the California Supreme Court ruled that the State Personnel Board (SPB) does not have exclusive jurisdiction over discrimination claims brought by state civil service employees but rather has concurrent jurisdiction with specialized state agencies that adjudicate and remedy particular types of discrimination. (*Pacific Legal Foundation*, *supra*, 29 Cal.3d at pp. 196-199; *Fair Employment and Housing*, *supra*, 39 Cal.3d at pp. 438-439.) But neither CCHCS nor SPB argues that PERB lacks jurisdiction over this case; they contend instead that the merit principle limits PERB's remedial authority in this case. Because neither *Pacific Legal Foundation* nor *Fair Employment and Housing* speaks to the interplay between PERB's remedial authority under the Dills Act and the merit principle as it governs appointments and promotions, these decisions provide no guidance on that issue.

Second, the majority contends *California State Employees Association* merely prohibits collective bargaining agreements from altering the merit principle, and does not limit the remedies available to specialized state agencies such as PERB. But the Legislature's adoption of an MOU with a state employee union is a legislative act. (*Stoetzl v. Department of Human Resources* (2019) 7 Cal.5th 718, 740.) If the Legislature cannot legislate in contravention of the constitutional merit principle, it necessarily follows that when the Legislature delegates remedial authority to an agency such as PERB, the agency likewise cannot act contrary to the merit principle.

(*California State Employees Association*, *supra*, 36 Cal.4th at p. 771; *Kidd v. State of California* (1998) 62 Cal.App.4th 386, 401-402.) Indeed, the Legislature has explicitly forbidden PERB from exercising its authority under the Dills Act in a way that "contravene[s] the spirit or intent of the merit principle in state employment." (Dills Act, § 3512.) Under *California State Employees Association*, ordering an appointing authority to offer a discriminatee the next available position in a classification without going through the civil service selection process for that position does just that.

Finally, the majority relies on *State of California (Department of Corrections)* (2001) PERB Decision No. 1435-S (*Department of Corrections*), in which the Board summarily affirmed an ALJ's proposed order requiring the department to offer the discriminatee "the next available chief engineer position in northern California." (*Id.* at p. 3 & adopting proposed decision at p. 50.) The Board's decision does not indicate that the department or SPB objected to the ALJ's proposed order on the ground that it violated the merit principle, or that the Board even considered that issue. *Department of Corrections* therefore does not establish that PERB can order an appointing authority to offer a position to a discriminatee who has not gone through the selection process for that position. (See *County of Orange* (2019) PERB Decision No. 2657-M, p. 15 ["It is axiomatic that cases are not authority for propositions not considered"].) But to the extent *Department of Corrections* stands for that proposition, it should be overruled as contrary to the constitutional merit principle.

In my view, an order requiring CCHCS to retroactively reclassify Healy as an AGPA does not run afoul of the merit principle because reclassification does not implicate the examination or selection phases of the civil service appointment process.

Such an order also provides Healy a fair and effective remedy under the circumstances while allaying the concerns expressed in CCHCS's and SPB's briefs. I accordingly join in the order.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

KEVIN M. HEALY, Charging Party, v. STATE OF CALIFORNIA, (CORRECTIONAL HEALTH CARE SERVICES) Respondent.	UNFAIR PRACTICE CASE NO. SF-CE-290-S PROPOSED DECISION (August 26, 2020)

Appearances: Kevin M. Healy, in propria persona; Marvin H. Stroud, Attorney, for State of California (Correctional Health Care Services).

Before Alicia Clement, Administrative Law Judge

INTRODUCTION

In the above-referenced unfair practice charge, Kevin M. Healy (Healy or Charging Party) asserts a single allegation of retaliation against by the State of California (California Correctional Health Care Services)[1] (Respondent or CCHCS). In brief, Charging Party asserts that CCHCS managers refused to promote him to a vacant position as the Health Care Compliance Analyst (HCCA)[2] in retaliation for his activities as a steward for Service Employees International Union (SEIU) Local 1000.[3]

[1] CCHCS operates within the California State Prison system to provide medical, dental and mental health services to California's inmate population at all institutions within the California Department of Corrections and Rehabilitation.

[2] This position is also referred to as the "ADA Coordinator" position.

[3] SEIU Local 1000 is the exclusive representative of bargaining units 1, 3, 4, 15, 17, and 20.

PROCEDURAL HISTORY

Charging Party filed the above-referenced Unfair Practice Charge on March 29, 2018. On May 2, 2018, Respondent filed a Position Statement in response to the charge. On September 26, 2018, Charging Party filed a response to Respondent's May 2, 2018 Position Statement. On November 20, 2018, Respondent filed an "objection" to Charging Party's response. On January 17, 2019, Charging Party withdrew allegations asserting violations of the union's rights, and PERB's Office of the General Counsel (OGC) issued a Complaint asserting that Respondent violated section 3519, subdivision (a), of the Dills Act. On February 13, 2019, Respondent filed a timely Answer to the Complaint, denying any violation of the statute and asserting a number of affirmative defenses. An informal settlement conference was held on March 5, 2019, but the matter was not settled. The matter was transferred to the Division of Administrative Law for Formal Hearing.

On May 9, 2019, the undersigned held a Pre-Hearing Conference to discuss, among other things, a number of subpoenas duces tecum (SDTs) that were deemed procedurally defective for failure to comply with PERB Regulation 32150(a). At that time, Respondent filed a formal Motion to Revoke Subpoenas Issued to Dina Durano, Dr. Eureka Daye, and Isaac Obando. On May 16, 2019, Charging Party filed his Opposition to the Motion to Revoke the subpoenas for Durano, Dr. Daye and Obando. On May 21, 2019, Respondent filed a Reply Brief in Support of Motion to Revoke Subpoenas Issued to Dina Durano, Dr. Eureka Daye and Isaac Obando. On May 29, 2019, Respondent filed a Motion in Limine to Shorten Time to File Response, with accompanying Memorandum of Points and Authorities. On June 3, 2019, Respondent

filed a Motion to Revoke or Amend Subpoena Issued to Carla McKinney with Supporting Declaration of Marvin H. Stroud.

A Formal Hearing was held on June 3, 4, 14, and 18, 2019, during which time period, Durano, Dr. Daye, Obando, McKinney, and others, were produced as witnesses. Upon the conclusion of the hearing, the parties submitted closing briefs. This matter was fully briefed and submitted for my determination on September 4, 2019.

FINDINGS OF FACT

Charging Party's Work History

At all times relevant to this case, Charging Party was employed as an Office Technician (OT) by CCHCS at California State Prison (CSP), San Quentin (hereinafter, "San Quentin"). Charging Party had also completed several out of class (OOC) stints as a Staff Services Analyst/Associate Governmental Program Analyst (SSA/AGPA). Charging Party presented documentation demonstrating that in 2014, he worked 40 days in an OOC assignment as an AGPA.[4] In 2016, Charging Party worked 280 days in an OOC AGPA position.[5]

The American Correctional Association (ACA) Accreditation Project:

Don Fox was a Correctional Health Care Services Administrator II (CHSA II) at San Quentin from 2013 until 2018. During some of that period, he supervised Healy directly. Fox recalled that Healy had worked to prepare for an audit by the ACA. The work required Healy to review the facility's compliance records for completion and to

[4] See Exhibit 41.

[5] See Exhibit 40.

report his findings. After these duties were completed, Healy filed a grievance seeking, among other things, pay as an OOC AGPA for the time spent on the project. As a result of the grievance, Healy was awarded pay as an SSA for approximately four months to compensate him for his work on the project.[6] This was in addition to the two OOC assignments described above.

The Ophthalmology Project

In the Spring of 2017, the management team was having difficulty finding work for Healy. In order to keep him busy, Chief Medical Executive (CME), Dr. Elena Tootell, assigned Healy a discreet task within a larger project aimed at addressing some medical malpractice cases by inmates against a particular ophthalmologist. Descriptions of the project vary greatly.

According to Dr. Tootell, the project was fairly straightforward. She needed a series of documents from approximately 17 patients' charts to be submitted to a third-party insurance billing group. Dr. Tootell described these documents as including the "optometry note," the "ophthalmology note," and "any follow-up ophthalmology notes from UCSF." Dr. Tootell anticipated that her directive would entail Healy pulling 4-5 documents from each of the identified patients' medical files, scanning those documents, and emailing them to her. According to Dr. Tootell, this should not have required Healy to engage in any analytical work regarding the patients' records. An email dated July 11, 2017 from Dr. Tootell to Healy lists the names of 17 patients and asks for the following documents from each patient's file:[7]

[6] See Exhibit 42.

[7] See Exhibit 43.

1. Consult note from [doctor] evaluated the patient and decided to do cataract surgery
2. Cataract surgery from Dr. …
3. f/u note from Dr. …
4. optometry or other note that identified that a problem occurred- an RFS[8] was likely written that day for UCSF
5. the ophthalmology notes from UCSF, and any new surgeries from UCSF.

Dr. Tootell's email does not state when she needed the information.

After a discussion with San Quentin's then-Chief Executive Officer, Stephen Harris, Healy asked Dr. Tootell in a July 14 e-mail whether additional patients should be included in the project. Dr. Tootell's response was only, "He [Harris] hasn't talked to me about this so I can't respond."[9] On July 26, 2017, Dr. Tootell emailed Healy again to check on his progress, as the third-party insurance billing group was "anxiously awaiting the medical information." No deadline was given in this email, either.

In response to her directions, Healy presented Dr. Tootell with multiple pages of documents which she estimated between 50-200 pages for each patient. When Healy presented her with his findings, she informed him verbally that he had produced records that she did not need or ask for. At the hearing, she made clear that she intended this as a negative. Conversely, she also recalled telling Healy at the time that he was "very thorough," and that he had made her life a lot easier. When Healy confronted her with these seemingly conflicting messages, she testified that she only complimented his work in order to "move on with her day."

[8] "RFS" is a referral for service.

[9] See Exhibit 44.

Fox recalled that Dr. Tootell had assigned Healy to work on the ophthalmology project while Healy was reporting to Fox. According to Fox, the assignment was more than a typical OT assignment, as it required what he referred to as, "data mining." At one point, Dr. Tootell stated to Fox that Healy was giving her more information than she had asked for, but he understood the comment to have been positive. Admittedly, Fox never discussed the scope of the project with Dr. Tootell, so he acknowledges that he doesn't know if Healy produced what she asked for, but on the other hand, Dr. Tootell never told him that Healy had performed poorly on the project.

Fox expressed dismay at the hearing when he was presented with a copy of Dr. Tootell's August 13 email to Harris in which she describes Healy's "argumentative and frequent conflicts with others" and his "insufficient" work ethic. In contrast to Dr. Tootell's description of Healy, Fox found him to be "hard working, diligent," and "focused." When Fox left San Quentin and transferred to CSP Centinela in November 2018, he and Healy reviewed Healy's personnel file together. There was nothing negative in Healy's file at that time.

Organizing the Durable Medical Equipment (DME):

Tara Kessecker, a Licensed Vocational Nurse (LVN) testified about her experience working with Healy in the Department of DME. The timeframe of this collaboration was not clear but may have been as early as the year 2013. DME was described as a small department, with one or two individuals working in close quarters. Individuals in this department needed a fair degree of medical knowledge and needed to be comfortable with medical terminology. For example, if a patient was

fitted with a colostomy, the department of DME needed to ensure that the patient had all the necessary equipment supplied to them on a regular basis.

Working together, Kessecker and Healy established systems for dispersing DME throughout the facility by shifting the responsibility from the DME department staff who had previously delivered the materials, to the nursing staff who were tasked with the responsibility to retrieve the DME. Some of the changes that were implemented were met with resistance from the medical staff, though Kessecker recalls that Healy was able to work with medical staff to ensure compliance with procedures and documentation. Kessecker describes working with Healy in positive terms and recalls Healy as someone who enjoyed hard work. She also describes him as extremely detail-oriented in his work.

Charging Party's Protected Activity

Representation of Nicole Smith:

On Monday, July 31, 2017, Contract Analyst Nicole Smith sent an email message to Healy describing an interaction she had just had with McKinney. In brief, Smith and McKinney had a disagreement over Smith's interpretation of a policy that she believed McKinney was violating and/or directing her to violate. During the encounter in Smith's office, McKinney spoke to her in a condescending tone while standing too close to her and possibly while blocking Smith's exit. Smith believed that McKinney's conduct was "[b]eyond inappropriate behavior for a manager."[10] Healy's same-day response was that he believed the behavior was inappropriate and, although he was in training "this week," he would help Smith by setting up a

[10] See Exhibit 22.

supervisory meeting when he returned from training. In the meantime, Smith pursued an informal resolution with San Quentin's Chief Support Executive, Chad Hickerson.[11]

On August 24, 2017, Healy contacted Harris to initiate an informal pre-grievance meeting regarding the July 31 encounter between Smith and McKinney.

Representation of a Pharmacy Technician:

Sometime over the weekend of August 12-13, 2017, a Pharmacy Technician[12] at San Quentin notified Healy that she was being investigated by the Office of Internal Affairs (IA). She had been directed to attend an IA interview on Tuesday, August 15, 2017, at 12:30 p.m., and contacted Healy to represent her at that meeting. Healy then notified Harris, who was his supervisor at the time, of his need to take a few hours of union leave in order to represent the Pharmacy Technician during her IA investigation.

On Monday morning, Healy notified McKinney that he would be representing an employee in an IA investigation, including that he would need time to investigate the matter. In a follow-up email, Healy "introduces" McKinney to Labor Relations Analyst Barbara Brown and explains that it is critical that he be permitted leave time from his regular duties in order to represent union members, and that he will be able to complete both his job duties and his union steward duties, "but this will require a

[11] See Exhibit 23.

[12] This individual testified at the hearing and has been identified in the record by her full name. Because the circumstances of the investigation and her identity are not relevant to this unfair practice charge, I have omitted her name from this Proposed Decision. See Transcript Volume II, beginning at page 49, and exhibits 27 and 28.

degree of trust and flexibility all the way around."[13] McKinney's response states, in relevant part,

> "Thank you for the information. As stated in our previous conversations, I do not have a problem with you conducting your union steward duties. However, your duties as the OOC ADA Analyst takes priority."

On or about August 14, Smith witnessed an encounter between Healy and McKinney at Healy's cubicle. According to Smith, McKinney approached Healy and told him that his union duties were interfering with his OOC HCCA duties, and that the HCCA position would require more of his attention than his prior position, requiring him to refrain from union duties while in the OOC. Although this was not corroborated through Smith's testimony or her declaration, this encounter was likely the conversation described above where Healy notified McKinney of his need to represent a Pharmacy Technician at an IA investigatory interview. Healy later met with the Pharmacy Technician during work hours on Monday, August 14, and attended the IA meeting with her during work hours on Tuesday, August 15.

Complaints About McKinney:

On August 28, 2017, Healy and four other union stewards signed a letter addressed to Harris listing a number of concerns about McKinney's management style.[14] The letter sought removal of McKinney from her management position, which was still probationary at the time. The letter states, in part:

> "The HCCA position was vacated by the experienced incumbent reportedly only because of Ms. McKinney; she

[13] See Exhibit 18.

[14] See Exhibit 20.

> would have stayed if Ms. McKinney were no longer her supervisor. An out of class candidate refused to work under her and declined an opportunity."

The letter goes on to threaten "vigorous" actions against McKinney, including individual grievances, unfair labor practice charges and charges with the State Personnel Board, unless McKinney is "placed in an appropriate position that no longer hurts our represented members." Harris showed the letter to Dr. Tootell and asked her for advice.

A few days after the August 28, 2017 letter was sent to Harris, Dr. Tootell spoke to Jaime Molina about it. At the time, Molina was Dr. Tootell's clinic nurse, and also the Union President. There are three different accounts of this conversation. The first account of the conversation is taken from a declaration that Dr. Tootell made on October 5, 2018.[15] The second account of the conversation is taken from a declaration of Jaime Molina on June 17, 2019. Molina did not testify at the hearing, however, and his declaration must be treated as hearsay.[16] The third account of the conversation is from Dr. Tootell's testimony.

Consistent throughout these three accounts is that the August 28 letter signed by Healy and three other union stewards was the catalyst for the conversation between Dr. Tootell and Molina, and that Healy was mentioned by name.

In her testimonial account of the conversation, Dr. Tootell states that the conversation was about "union business," though she could no longer recall what was said with any particularity. Dr. Tootell also recalled that she "had been quite frustrated

[15] See Exhibit 12.

[16] See Exhibit 60.

by the work that [Healy] had done on the [ophthalmology project]." Dr. Tootell believed that Healy was one of several employees who had been using the union to complain about McKinney in an effort to deflect attention away from his/their own poor performance.

On September 2, 2017, Healy sent a lengthy email message to Dr. Tootell detailing his experience in the OOC HCCA position. In what amounts to several pages of printed text, Healy details a number of complaints about McKinney in her role as his supervisor/trainer, while refuting several presumed allegations by McKinney criticizing his performance in the OOC HCCA position. Dr. Tootell's response is, "Thank you for letting me know."[17]

The Skelly Hearing

Sometime in August 2017, a Registered Nurse, "DL,"[18] received an Adverse Action for which the penalty was a 5% reduction in pay for a period of six months. Healy represented DL at a Skelly hearing on August 31, where CEO Harris served as the Skelly Officer.

On September 9, 2017, Healy sent an email message to Dr. Tootell in her capacity as acting CEO, seeking a withdrawal of DL's Adverse Action.[19] Dr. Tootell responded on September 13 that Harris would be back the next day, deferring the

[17] See Exhibit 37.

[18] This individual is identified in the record but did not testify. I have omitted use of their full name both because it is not material to the issue at hand and to preserve, to the extent possible, their privacy with regard to what is clearly a personnel matter.

[19] See Exhibit 67.

decision to Harris. On September 14, 2017, DL received notice from Harris that the Adverse Action was being revoked.[20]

Dr. Tootell recalled DL as a poor employee with "significant problems, patient care problems." She did not recall the particular incident that gave rise to this Adverse Action but stated that she wouldn't have involved herself in the matter, as Adverse Actions are private personnel matters.

Representation of PS[21]

In September 2018, Healy raised a concern to Dr. Tootell about her treatment of PS. Specifically, Dr. Tootell included a second Probationary Report in PS's personnel file that was issued after the close of PS's probationary period. On September 14, 2018, Healy threatened to file a grievance on behalf of PS unless Dr. Tootell removed the September 10 Probation Report from PS's personnel file.

The Health Care Compliance Analyst Position

A Duty Statement for the OOC HCCA states, in part, that the incumbent in the position "will independently perform the analytical work in support of evaluating, monitoring, and maintaining institution compliance with various federal court mandates, federal and state regulations, and department policies and procedures."[22] Some of the regulations and mandates listed in the duty statement include the

[20] See Exhibit 74.

[21] This individual was identified in the record but did not testify. I have omitted use of their full name both because it is not material to the issue at hand and to preserve, to the extent possible, their privacy with regard to what is clearly a personnel matter.

[22] See Exhibit 9.

Disability Placement Program, the Armstrong Remedial Plan, the Developmental Disability Program, the Clark Remedial Plan, and the Americans with Disabilities Act, among others.[23] Additional tasks include reviewing and evaluating external audit reports, preparing Corrective Action Plans to address any identified deficiencies, and reporting allegations of staff non-compliance. Essentially, the position is an internal watchdog with a subject-matter focus on compliance with inmates' disability rights.

In the summer of 2017, Dina Durano was the HCCA at San Quentin. Durano describes her day-to-day duties in the HCCA position as ensuring that "Effective Communication" is addressed by medical personnel any time they interact with an inmate. "Effective Communication," or "EC," is used by both parties as a term of art. EC must be practiced by medical staff when they interact with inmates to ensure that the inmate and the clinician understand each other. This is especially important when patients have hearing aids, speech impediments, or cognitive delays. The HCCA then conducts audits by reviewing the clinician's notes and/or interviewing the clinician to determine what steps the clinician took to ensure that effective communication took place between the clinician and the patient. Compliance issues on the custody side of operations usually arise in two ways—either staff inform the HCCA that certain equipment needed by the inmate is unavailable, or the inmate files a complaint asserting that custody is not complying with their ADA needs. Examples of complaints include that the inmate should have been issued a cane or wheelchair or assigned to

[23] Both parties make repeated reference to the "*Armstrong*" litigation. I presume this to be a reference to *Armstrong v. Wilson* (9th Cir. 1997) 124 F.3d 1019, in which the Ninth Circuit held that the Americans with Disabilities Act and the Rehabilitation Act were applicable to prisoners and parolees in the California state correctional system.

a bottom bunk in a cell. The HCCA would then work with custody to ensure compliance. At times this may mean physically inspecting the inmate's housing location.

According to the Organizational Chart, the HCCA reports directly to the CEO. Despite the notation on the organizational chart that indicates that the HCCA reports directly to the CEO, Harris testified that he would never have been the trainer and supervisor of the HCCA position because his work was too high level, and he just didn't have the knowledge base to train someone on their day-to-day tasks. In practice, McKinney was assigned to perform the day-to-day supervision of the HCCA position. Durano described several conflicts that she had with McKinney while McKinney was her supervisor. Ultimately, Durano left the HCCA position in August 2017, in order to take the Community Partnership position, which she described as a better fit for her background and experience. Durano did not attribute her departure entirely to McKinney's supervision, but cites conflicts with McKinney as a factor in her decision to leave the HCCA position.

Among other duties, it was the HCCA's job to ensure that inmates received the DME they needed, and it was the job of the department of DME to supply the materials. Kessecker described her work in the department of DME as having frequent contact with the HCCA. For a period of time, the HCCA was Julie Beebe, with Durano filling the position after Beebe took a medical leave of absence. Kessecker worked closely with Beebe, Durano, and Healy, and when asked, stated that she believed Healy had the appropriate skill- and mind-set for the HCCA job.

The Out of Class Assignment August 8 – 25, 2017

On July 6, 2017, Hickerson, posted an OOC opportunity for the HCCA position. According to the announcement, the position was to begin on August 7, and the OOC assignment would last indefinitely until a permanent candidate was hired.[24] The HCCA position was classified as an SSA/AGPA. The minimum qualifications for the position included eligibility for the SSA/AGPA classification and 12 months of experience at San Quentin. Healy submitted a letter expressing his interest in the OOC position as well as detailing his relevant experience.[25]

Human Resources Analysts Janet Somosierra-Francisco and Maria Moore oversee the Civil Service process for hiring medical personnel at San Quentin. Although Francisco and Moore have an office located in the Plata Building on San Quentin's grounds, they report to Staff Services Manager I, Isaac Obando, whose office is located in Elk Grove, California. Francisco, Moore and Obando described the Civil Service hiring process in very broad terms.[26]

The procedure for filling OOC vacancies differs from the procedures for hiring a permanent civil service position. When an OOC is offered, the hiring authority for that position must select from qualified civil service candidates but may simply appoint the eligible candidate of their choice and competitive interviews are not required.

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[24] See Exhibit 2.

[25] See Exhibit 11.

[26] California's Civil Service System is governed by the State Civil Service Act, found at California Government Code, section 18500-19799.

Harris served as CEO at San Quentin for a two-year term, ending on September 7, 2018. In 2017, Harris was the hiring authority for the HCCA position,[27] meaning that it was his decision alone to choose from the eligible candidates one person to fill the OOC HCCA position. Both Obando and Harris recalled that there were two candidates for the OOC HCCA position – Healy and Rodeline Habana.[28] Initially, the position was offered to Habana, but Habana declined.[29] After Habana declined, the position was offered to Healy.

On August 7, 2017, Moore sent Healy an email message notifying him that he had been selected as the OOC HCCA, and that he would start that position the next day, on August 8, and that the OOC position would continue "for 120 days, or until the position has been filled."[30] In early August 2017, Harris attended the annual National Institute of Corrections (NIC) conference in San Diego. As a result, he was away from his office from August 7 through August 11, 2017.

As the CME at San Quentin, Dr. Tootell is just below the CEO on the organizational chart, and it was common practice for Dr. Tootell to take on the role of

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[27] Harris was medically unable to appear for in-person testimony, and his testimony was taken telephonically. Additionally, Harris stated that his memory of the events in question had been compromised as a result of his recent medical treatments. To the extent that I was able to form an impression of Harris, I found him open and forthcoming. Nevertheless, I view his testimony with some skepticism, given his own characterization of his faulty memory and admitted inability to recall certain key events.

[28] This individual was only identified by name.

[29] Habana did not testify.

[30] See Exhibit A.

Acting CEO when Harris was away from his office. Dr. Tootell was distressed upon learning that Harris had selected Healy for the OOC HCCA position. As Dr. Tootell described it, her job is to oversee the medical care and medical providers, and to coordinate with other healthcare departments and the institutional staff, areas of responsibility that overlap with the HCCA's areas of compliance oversight. Dr. Tootell was strongly opposed to putting Healy in the OOC HCCA position and believed that she had made her sentiments clear to Harris before he selected Healy for the OOC position. Harris's failure to take Dr. Tootell's concerns into consideration marked the culmination of a number of serious communication issues between Harris and Dr. Tootell.

In response to Harris's decision to place Healy in the OOC HCCA position, Dr. Tootell tendered her resignation. News of Dr. Tootell's resignation spread quickly. Regional Healthcare Executive and Director of Women's Health, Dr. Eureka Daye intervened in the matter. Dr. Daye spoke with several individuals, including Dr. Tootell, Harris and Health Program Manager III for Dental / Chief Compliance Officer for Quality Management, Tonia Woodson. Harris recalls that he received a phone call from Dr. Daye sometime during the week he was at the NIC conference. At the time, Dr. Daye was concerned that placing Healy in the HCCA position would cause Dr. Tootell to leave San Quentin, and she urged Harris not to hire Healy into the permanent position. Harris and Dr. Daye further discussed Dr. Tootell's resignation in a series of email exchanges on August 10, 12, and 13.[31] On August 12, 2017, Harris

[31] See Exhibits 63, 64, and 53, respectively.

explains, he and Dr. Tootell have worked through a number of her concerns. Harris's email states, in relevant part:

> "Finally[,] the OOC ADA position. I am told by Chad [Hickerson] that Mr. Healy is meeting our OCC [sic] expectations. As for the permanent ADA position, Mr. Healy does not meet the minimum experience required for the position. I have advised Elena [Tootell] as well. We are forming an interview panel to include our CME. And the ADA position will report to me. Let me also add that Mr. Healy was offered the ADA position only after conferring multiple times with Isaac Obana [sic] at HQ. Mr. Healy was one of two qualified candidates. He was offered the OCC [sic] position after Ms[.] Habana declined."

Meanwhile, Healy began serving as the OOC HCCA on August 8. According to Durano, the HCCA job duties can be learned in a single day by one who is "medically inclined." Durano provided between 90 minutes and six hours of training to Healy early in his tenure on the job.[32] She testified that this should have been sufficient instruction for him to learn what he needed in order to perform the job successfully. Durano had never received any training for the position and had taught herself the job by studying the audit files. In contrast to her description of the job duties as fairly straight-forward, Healy had difficulty learning all the responsibilities of the job, and he presented a number of email communications between he and McKinney in which he repeatedly sought to have Durano or McKinney provide additional training.

On Monday afternoon, August 14, 2017, McKinney sent Healy an email message inquiring whether he had begun the "EC audit." Apparently, Durano had not

[32] There was some discrepancy in this area. Durano at one point states that she provided approximately 6 hours of training, and Healy appears to argue that of the time Durano spent giving him training, only 90 minutes of it was valuable training.

completed the August audit prior to her departure from the HCCA position.[33] Audits are due on the fifth of every month, but extensions may be granted under some circumstances. Notably, Healy began serving in the HCCA position on August 8, a point at which the August deadline would already have passed. Healy responded that he would need additional time to complete the audit, as Durano's prior training of him was insufficient, and he believed that Durano had purposely performed the work poorly, in an attempt to sabotage the process and "get back at" Hickerson. McKinney responded immediately that she would schedule time on Thursday to "go over the EC [a]udit" with Healy.[34] This exchange occurred on Monday, the first of two days in which Healy took union release time to represent a Pharmacy Technician in an IA investigation.

Because McKinney had been supervising the HCCA as well as performing the work intermittently while CCHCS was searching for a permanent candidate, she was familiar with the nature of the work performed by the HCCA. McKinney acknowledged that, when Healy assumed the OOC HCCA position, the August audit had not been completed by his predecessor. Nevertheless, she explained that an employee in an OOC position is expected to step into the position without any training and assume all the duties of the position immediately. If the former HCCA had not completed the work, it would have fallen on Healy to do so. When pressed as to whether she had ever informed Healy that the August audit had not been completed or if an extension had been granted, McKinney could not recall if she had done so. McKinney did recall

[33] See Exhibit 30.

[34] See Exhibit 30.

informing Dr. Tootell that Healy had missed a deadline in August. Notably, in the email exchange between Healy and McKinney on August 14, Healy disputes McKinney's characterization that they had missed a deadline, and states, "We are not behind on the deadlines; this was confirmed with HQ yesterday."[35]

Also on August 14, 2017, Moore sent an email to her supervisor, Isaac Obando, notifying him that Harris would be ending Healy's OOC assignment, and "[t]his will definitely be escalated to the NR Manager."[36] Moore notified Francisco by email of Harris's request to cancel the OOC assignment. Not long after Moore alerted Francisco to these concerns, Harris asked Francisco to "hold off a bit longer." Harris later explained that when he learned that Healy would need to take some union leave time to address the issue with the Pharmacy Technician, he was concerned that Healy's representational duties would interfere with his completion of the OOC HCCA duties. In light of this concern, Harris considered suspending the OOC assignment for a brief period. Obando was aware of Harris's tentative decision on August 14 to end the OOC assignment and argued against it. As Obando explained, the whole reason for the OOC was to have someone performing the work while they sought a permanent replacement. Meanwhile, Healy continued to perform the HCCA work during this period, apparently unaware of Harris's concerns.

By 5 p.m. on Monday, August 14, Dr. Tootell had rescinded her resignation. In an email to Dr. Daye, Dr. Tootell states that she had a conversation with Harris and that they had "come up with a plan for the future." The extent to which Dr. Daye was

[35] See Exhibit 30.

[36] See Exhibit A. "NR" is a reference to the Northern Regional Manager.

involved in either Dr. Tootell's decision to stay at San Quentin or Harris' decision not to hire Healy in the permanent position is unclear. Dr. Daye was clearly annoyed that she had been implicated in this matter. She had only vague recollections of the particular events and denies taking an active interest in them—describing herself more as a passive recipient of information. Although Dr. Daye met Healy in person for the first time at the hearing, she recalled dealings with him several times in email and on the phone to resolve concerns and grievances that he raised.[37]

On August 25, 2017, Francisco sent Healy a memorandum informing him that his OOC assignment would end, effective at the close of business that day. At that point, Healy had completed 18 days of the OOC assignment. The memo does not state a reason for ending the assignment.[38] When Moore learned that the OOC for the HCCA position was being ended after only 18 days, she brought the matter to Obando's attention because there were "red flags" all over it. Obando did not share Francisco's concerns about irregularities. According to Obando, Healy's OOC was ended on August 25, only after they had selected a candidate for the permanent position, and for that reason alone.

The Permanent HCCA Position

On August 17, Francisco notified Healy that he would be interviewed for the permanent HCCA position at 11:30 a.m. the next day, August 18.[39] Hiring for a permanent civil service position involves a process that includes creating an interview

[37] See Exhibit 47.

[38] See Exhibit 9.

[39] See Exhibit 8.

panel and interviewing individuals from a list of eligible candidates. Panelists are given a written set of guidelines explaining the interview process, which they are asked to sign.[40] These guidelines state that all of the interview questions and any notes taken by the panelists are considered confidential. Panelists are admonished not to discuss the interview questions outside of the interview room. Candidates are then ranked on their performance at the interview. Based on their rank, an applicant may be "recommended" for the next phase, which is to check their references. Obando stated that it is typical to complete reference checks on the top two to three candidates. When reference checks are completed, the interview panel then recommends one or more candidates for hire, often in order of rank. The ultimate hiring decision belongs to the hiring authority and should be based on what is best for the department and the organization, but the hiring authority's discretion is confined to a choice from among those candidates recommended by the panel.

Obando was personally involved in the recruitment, interviewing, and hiring for the permanent HCCA position at San Quentin. Obando took a special interest in this position because it was both critical to operations at San Quentin as well as being a coveted position. He knew there would be fierce competition over the HCCA position, and that the selection process would be scrutinized. The hiring panel for the position included Obando, McKinney, Dr. Tootell and Woodson. Obando testified that all of the rules and guidelines outlined in Exhibit G were observed at the August 18 interviews.

In the hours leading up to the August 18 interview, McKinney and Francisco had a conversation about the HCCA interviews that was overheard by several

[40] See Exhibit G.

witnesses. There is no dispute that the conversation occurred, but there are disputes over many of the contextual details of the conversation, including location and timing. The salient points, which are largely undisputed, are that McKinney and Francisco were in the Plata Building, either in or near the HR Office; the conversation occurred within the 24 hour period prior to Healy's interview; at the time of her statements, McKinney knew that she would sit on the interview panel; and McKinney stated that Healy would not get the job.

Francisco recalled that McKinney came to the reception window for the HR Office to drop off some paperwork. The conversation included the topics of the OOC HCCA and the scheduled interviews for the permanent position. According to Francisco, McKinney stated: "…Kevin is not getting the job. His job is with the Union. He doesn't have the focus to be an ADA Coordinator." When Francisco asked, "what if he is the best candidate for the position?" McKinney apparently responded, "if I have anything to do with it, that won't happen." Francisco also recalled that Moore and Nicole Smith, who worked in or near the HR Office at San Quentin, overheard McKinney's comments.

Moore's recollection of the conversation was less vivid than Francisco's, but similar as to essentials. Moore recalls that McKinney came to the reception window and was chatting with the personnel analysts. When Healy's name came up, McKinney stated, "there's no way he's going to get the job." At the time, Moore understood the comment to be a reference to Healy's union activities because she knew him to be an active union steward.

Smith recalled overhearing McKinney's conversation with Francisco. According to Smith, McKinney stated that Healy would never get the job under her (McKinney's) watch. Smith also signed a declaration that corroborates Francisco's recollection of the events.[41]

For her part, McKinney recalls having the conversation with Francisco inside the HR Office, rather than at the reception window,[42] but cannot recall what errand had brought her to the HR Office. McKinney recalls stating at one point that Healy would not get the job. According to McKinney, she stated that Healy would not get the job because he did not seem to be interested in the job and had not been preparing himself for the job. She did not recall making any comments explicitly about Healy's union duties. When pressed for examples of statements or behavior upon which she based her belief that Healy wasn't interested in the job or wasn't preparing for the job, she becomes evasive. Conversely, she acknowledges that Healy received some training for the position, and that he was actively seeking additional training during the brief period between the start of his OOC and the August 18 interviews, which directly conflicts with her assertions that Healy seemed disinterested in the job and/or was not preparing himself for the job.

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[41] See Exhibit 26.

[42] This fine detail was the subject of much debate, in large part because it could expose one or more of the participants of failing to observe a strict rule prohibiting non-HR personnel from entering the HR office where confidential documents are stored. Each party accuses the other of embellishing their respective accounts in order to shield themselves from wrongdoing, while claiming that the other party was in violation of the rule. I decline the invitation to weigh in on this matter, because the points of agreement over this incident are far more compelling than the areas of disagreement.

Francisco testified that she alerted Obando and his direct supervisor to the fact of McKinney's pre-interview statements during a meeting in March 2018, approximately six months after the interview. Moore also recalls raising these concerns to Obando in conjunction with Francisco, but with less particularity. Both Francisco and Moore believed that McKinney should have recused herself from the interview panel because she had already made statements that one of the applicants was not going to get the job. Obando agreed that McKinney's statements, even uncorrelated to union activity, demonstrate that she did not have an open mind. Admittedly, if he had known about McKinney's statements prior to the interview, he would have excluded her from the interview panel. McKinney maintains that she went into the interview with an open mind, notwithstanding her statements to the contrary.

Four applicants were interviewed for the permanent HCCA position in August 2017. Only applicants who met the minimum qualifications for the position were granted interviews. All four applicants were asked the same nine questions. Panelists take notes of the applicants' answers to these questions on a document provided for that purpose. At the conclusion of all the interviews, panelists discuss the applicants' answers together and assign a score for each applicant's answer to each interview question. These numerical scores are added and then divided by the total number of points possible to determine a percentage. These percentages determine the applicant's rank in their respective applicant pool. After an applicant's rank is determined, all the documents containing the interview questions along with the panelists notes and scores are collected and retained by the Human Resources analysts as confidential documents. Only the score sheets from Healy's interview

were produced at the hearing. These score sheets were heavily redacted so that only Healy's name, the date, the panelist's name and the numerical scores for each question were visible.

According to Obando, the top three candidates are always considered for hire, and it is common practice (though not required) to complete reference checks on the top three. In Francisco's experience, an offer is typically made to the top-ranked candidate. If that candidate declines, the panel makes an offer to the next ranked candidate on the list. Admittedly, it is not a requirement that offers be made in order of rank, or even that offers be made at all.

All four of the panelists testified about Healy's performance at the August 18 interview. Of the four panelists, Obando gave Healy the highest marks. McKinney recalled that Healy's answers were "good" but "very long," sentiments that were echoed by Woodson. No testimony was taken regarding how other applicants performed during the August 18 interviews, except to reveal their final scores.[43]

In this case, the top-ranked applicant scored 88%, while the second candidate scored 65%. Healy scored 59% and was ranked third. All three of these applicants were "recommended" for reference checks, the next phase of the hiring process. Reference checks were completed on the first-ranked candidate.

The first-ranked candidate was offered the position and accepted sometime before August 25. Unfortunately, this candidate never actually began the work of the

[43] See Exhibit 50. To the extent that this is relevant, it is only to negate the Respondent's use of Healy's comparative performance in the interview as a defense to its failure to promote him. PERB's task is not to determine which candidate was best for the job, but in determining whether Respondent retaliated against Charging Party, PERB may weigh the Respondent's proffered justification for its decision.

HCCA and chose instead to remain at her prior assignment. In an email dated September 5, 2017, Dr. Tootell asked Francisco to send her the references for "candidate #2."[44] It is unclear if Dr. Tootell ever completed the reference checks on the second-ranked candidate. Dr. Tootell stated that she never completed Healy's reference checks.

Healy was notified by a letter dated September 29, 2017, that he had not been selected for the permanent HCCA position, and that another applicant had been selected.[45] The second-ranked candidate never assumed the position, however, and Obando could not recall why the second-ranked candidate did not fill the position. When asked why he had not hired Healy for the permanent HCCA position, Harris responded that he did not hire Healy because the panel did not recommend him for hire, and he had no reason not to support the panel's recommendation. Instead of hiring Healy, CCHCS re-advertised the position.[46]

The Second Round of HCCA Interviews

At length, only after more interviews, Madeline Tenney was hired as the HCCA in May 2018.[47] By that time, the HCCA position had been vacant for approximately 9 months, during which time, McKinney continued to perform the functions of the job. The OOC was not reinstated during the interim.

[44] See Exhibit 57.

[45] See Exhibit 7.

[46] See Exhibit H.

[47] See Exhibit I.

Charging Party presented documents and elicited testimony regarding the second round of interviews for the HCCA position. Presumably, his purpose in presenting this evidence was to establish that Respondent deviated from its policy during the second round of interviews. I explicitly decline to make findings as to whether the second round of interviews was conducted according to applicable rules and policies. Because Healy did not apply for the position a second time, his asserted injury is confined to the original decision not to hire him, and whether a second pool of applicants that did not include Healy was treated fairly, is not relevant to the issue before me.

To the extent that any of the facts regarding the second round of interviews are relevant, they are relevant for two purposes. First, the listing of the vacancy for a second round of interviews establishes conclusively that none of the initial applicants from the August 18 interviews was hired. Second, it is relevant that the position remained vacant between late August 2017 and May 2018, during which time the OOC HCCA was not reinstated.

ISSUE

Whether CCHCS's decision not to hire Healy for the permanent HCCA position was unlawfully motivated by Healy's protected conduct.

POSITIONS OF THE PARTIES

Charging Party:

Healy argues that key figures in the decision not to hire him were motivated specifically by a desire to retaliate against him for his protected conduct. He presents both direct and circumstantial evidence of anti-union animus among the CCHCS

management team at San Quentin, including two of the four panelists that scored his interview. On this basis, Healy contends that the hiring process was hopelessly tainted, despite Isaac Obando's inclusion on the hiring panel. He argues that CCHCS's justifications for removing him from the OOC position and for refusing to hire him for the permanent position were demonstrably untrue and pretextual.

Respondent:

Respondent relies heavily on its compliance with the Civil Service rules as evidence that the decision not to hire Healy was lawful and unbiased. It argues that Charging Party failed to establish the prima facie elements of his case because he failed to prove that *all* the members of his interview panel knew of his protected activity and/or that the panel's scores of Healy's interview performance were motivated by anti-union animus. Respondent addresses Charging Party's requested remedy of back pay and an appointment to an AGPA classification, asserting that such a remedy would violate the merit principle in the California Constitution and be void as outside of PERB's authority.

DISCUSSION

I. Discrimination

The Dills Act prohibits the State from imposing reprisals on employees because of their exercise of rights guaranteed by the Dills Act. (See Gov. Code, section 3519, subdivision (a).) The prima facie elements of a retaliation claim under section 3519, subdivision (a) require a charging party to establish: (1) the employee exercised rights protected by the Act; (2) the employer had knowledge of the exercise of those rights; (3) the employer took adverse action against the employee; and (4) the employer took

action because of the exercise of those rights. (*Novato Unified School District* (1982) PERB Decision No. 210, (*Novato*).)

Once the Charging Party proves the elements of a prima facie case, the burden shifts to the Respondent to establish both that it had an alternative non-discriminatory reason for the adverse act and that its justification was in fact the cause of the adverse action. (*Palo Verde Unified School District* (2013) PERB Decision No. 2337.)

A. Healy's Exercise of Rights

It is unnecessary to discuss this issue at length. It is clear, and Respondent does not seriously dispute, that Healy was an active union steward throughout the relevant period. Nevertheless, I explicitly find that Healy engaged in protected conduct on the following occasions.

On August 14 and 15, 2017, Healy took union leave time to represent a Pharmacy Technician at an IA investigation.

On August 24, 2017, Healy represented Nicole Smith at an informal pre-grievance meeting regarding an incident between Smith and McKinney.

On August 28, 2017, Healy signed a letter in his capacity as a union steward to protest actions taken by McKinney in her role as a manager.

On August 31, 2017, Healy represented DL at a Skelly Hearing before Harris, and on September 9 and 13, he sought a dismissal of DL's Adverse Action from then Acting CEO Dr. Tootell.

B. CCHCS's Knowledge

It is Charging Party's burden to show that the employer had knowledge of the employee's protected conduct, and that the adverse act was motivated by that

protected activity. (*Novato*, *supra*, PERB Decision No. 210, citing *N.L.R.B. v. South Shore Hosp.* (1st Cir. 1978) 571 F.2d 677.) Employer knowledge is established when at least one of the employer's agents responsible for taking the adverse action against the employee was aware of the protected conduct. (*State of California* (California Correctional Health Care Services) (2019) PERB Decision No. 2637-S; *Hartnell Community College District* (2018) PERB Decision No. 2567; *Jurupa Unified School District* (2015) PERB Decision No. 2450; *City & County of San Francisco* (2011) PERB Decision No.2207-M, adopting the General Counsel's dismissal letter, p.5.) Such knowledge "…need not be based on direct personal observation, but can be inferred from the facts and circumstances involved." (*N.L.R.B. v. South Shore Hosp.*, *supra*, 571 F.2d 677, 683.)

According to Respondent, there were several agents responsible for the decision not to hire Healy. The interview panel made recommendations to the hiring authority, but the responsibility for the final decision rests with the hiring authority alone.

1. <u>The Hiring Authority</u>

Harris, the hiring authority, was aware of Healy's protected activity. As Harris himself stated, his wavering attempt in early August to discontinue the OOC HCCA was motivated by a concern that Healy would not be able to complete the HCCA job duties if he was also taking union leave time. Thus, to the extent that the decision not to hire Healy rested solely or even partly, on Harris's discretion, employer knowledge of Healy's protected conduct is established.

2. The Interview Panel

The interview panel consisted of four individuals: McKinney, Dr. Tootell, Woodson and Obando. It is not contested, and McKinney admits, that she was aware of Healy's protected conduct before the interview in early August. In addition to the direct evidence of McKinney's knowledge, there is circumstantial evidence upon which I conclude that Dr. Tootell knew prior to the August 18 interview that Healy engaged in protected activity. For example, Dr. Tootell stated that she had worked with Healy for "many years," such that she was able to become familiar with the quality of his work. Dr. Tootell even supervised Healy intermittently, primarily as a result of her serving as acting CEO from time to time. Healy's union representation seems to have been widely known by other supervisors, including Fox, Hickerson and Harris. Because Dr. Tootell had known Healy for many years, was familiar with the quality of his work, and had supervised him intermittently, it is reasonable to conclude that she, like his other supervisors, was aware of his frequent and public representational activities on behalf of himself and others, prior to August 18.

Even assuming Dr. Tootell was not specifically aware of Healy's protected conduct prior to his August 18 interview, she became aware of this fact shortly after his interview. By her own admission, Dr. Tootell discussed Healy during a conversation she initiated with Union President Molina on August 30, to discuss "union business," and a "letter of no confidence." That letter contained Healy's signature and title as union steward. Moreover, it is clear from her description of that August 30 conversation with Molina, that Dr. Tootell believed Healy used the union as a method either to protect himself or to protest management, or both. Since using the union for

the protection of oneself and ones coworkers and/or to protest management is the sine qua non of protected activity under the statute, we should take her at her word and deem her fully cognizant of his protected activity no later than her conversation with Molina on or about August 30.

There is no direct evidence that Woodson or Obando knew, or had reason to know, of Healy's protected conduct. As noted above, Respondent argues that the decision not to recommend Healy could not have been made in retaliation for his protected conduct, because some members of the hiring panel were unaware of his union activities when it recommended against his promotion. Because Respondent raises this as a defense, I address this in section II.A., below. For purposes of establishing the element of employer knowledge, however, it is sufficient that at least one of the agents responsible for the adverse act was aware of the protected conduct. I find that three of the five agents—Harris, McKinney and Dr. Tootell—knew of Healy's protected conduct before taking the adverse action in this case.

C. The Adverse Act

There can be little doubt that the decision by CCHCS management not to promote Healy from an Office Technician to the permanent HCCA position, regardless of the motivation, was an adverse act. As noted by Obando, the HCCA position was sought-after and desirable, and it was important to the institution's operations. The HCCA position was classified as either a Staff Services Analyst or Associate Governmental Program Analyst, both positions that receive higher pay than an Office

Technician.[48] Thus, the failure to promote an individual from an OT to an SSA/AGPA represents a loss of pay and professional advancement, and the failure to promote Healy to the HCCA represents a loss of prestige. Accordingly, the failure to promote Healy to the HCCA position was objectively adverse to his employment.

The only adverse act listed in the Complaint is the failure to promote Healy to the vacant HCCA position on or about October 10, 2017.[49] The interview occurred more than six months prior to the date the charge was filed, and I am therefore prohibited by statute from considering the interview scores evidence of a separate retaliatory act. Nevertheless, both parties argue at hearing and in their closing briefs, that the interview scores were an important factor in the decision not to recommend Healy for the HCCA position. To the extent that I consider this argument, I do so only for the purpose of contextualizing the Respondent's ultimate decision not to promote Healy.

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[48] I note that the Civil Service pay bands posted on the CalHR website, last updated on February 19, 2020 show that an Office Technician earns between several hundred and several thousand dollars less per month than a Staff Services Analyst and/or an Associate Governmental Programs Analyst. (See www.CalHR.ca.gov/pay.)

[49] The evidence presented at the hearing tends to establish that CCHCS denied Healy's promotion on September 29, but failed to notify him of that fact at any time before October 6, the date the notice was mailed to him. No facts were presented establishing that any operative event occurred on October 10, 2017. Nevertheless, Respondent does not assert that the allegation in the charge is untimely, and did not present any evidence to refute the Charging Party's assertion that he learned of the employer's September 29 decision sometime after October 6, 2017. All of these dates are within six months of March 29, 2018. Thus, the lack of clarity on this issue is troubling, but ultimately immaterial. There is no doubt that Healy was denied the promotion, and that the promotion was denied within six months of the date the charge was filed.

According to Respondent, because the majority of the interview panel learned of Healy's protected conduct after it had scored his interview, his summative score could not have been motivated by anti-union animus. Because the purpose of the *Novato* test is to prove motive for taking the adverse action, Respondent's argument is relevant only if the decision not to promote Healy was based on his interview score.

Healy's interview score rendered him eligible for hire. Sometime after scoring his interview, the employer, through its agents Harris, McKinney, Dr. Tootell, Woodson, and Obando, decided not to hire him despite his eligibility. Even assuming his interview scores were completely free of unlawful animus (a finding I do not make), there was a separate decision by the employer not to recommend Healy for the position. Thus, while Healy's interview scores were an important factor in the employer's decision not to promote Healy, they were not the only factor.

As noted by several of CCHCS's human resources professionals, other factors include more amorphous considerations like, who was the best "fit" for the position? Ultimately, after taking these other factors into consideration, Healy was not promoted. Accordingly, the nexus factors are explored in this case to determine, to the extent possible, the employer's motive for not recommending Healy for promotion to the vacant HCCA position. Respondent's motive for Healy's interview scores is relevant but not determinative to a finding of retaliatory failure to promote.

D. Nexus

Because retaliatory conduct is inherently volitional in nature, where it is alleged that the employer has acted in reprisal against employees for participation in protected activity, evidence of unlawful motive is the specific nexus required to establish a prima

facie case. (*Novato*, *supra*, PERB Decision No. 210.) The Charging Party has the initial burden of demonstrating a causal connection or "nexus" between the adverse action and the protected conduct. (*Ibid*.)

Direct proof of motivation is rarely possible. Therefore, the Board will consider the record as a whole and may infer an employer's motive from circumstantial evidence. To that end, the Board has identified the following factors as being the most common means of establishing a discriminatory motive, intent, or purpose: (1) timing of the employee's adverse action in close temporal proximity to the employee's protected conduct; (2) the employer's disparate treatment of the employee; (3) the employer's departure from established procedures and standards when dealing with the employee; (4) the employer's inconsistent or contradictory justification for its actions; (5) the employer's cursory investigation of the employee's misconduct; (6) the employer's failure to offer the employee justification at the time it took action or the employer offering exaggerated, vague or ambiguous reasons; and (7) employer animosity towards union activists. This list is not exhaustive, however, and in addition to this list of common signs of discriminatory motive, the Board will consider any other facts that might demonstrate the employer's unlawful motive. (*Novato*, *supra*, PERB Decision No. 210.)

Recent PERB decisions have emphasized the continued relevance of the Board's *Novato* discrimination standard, particularly that an unlawful motive is the specific nexus that must be shown to establish a prima facie case. (See *State of California (*California Correctional Health Care Services*)*, *supra*, PERB Decision No. 2637-S, citing *Cabrillo Community College District* (2015) PERB Decision No. 2453.)

For example, the Board consistently recognizes that the timing of an employer's adverse action in relation to an employee's protected conduct is a factor in determining the employer's motive, but temporal proximity alone is insufficient to demonstrate that the employer's action was motivated by the employee's conduct. Typically, a Charging Party must establish temporal proximity and at least one additional factor that would link the employer's decision to the employee's conduct. (*Moreland Elementary School District* (1982) PERB Decision No. 227.)

1. Temporal Proximity

As noted above, Healy engaged in multiple protected acts during the month of August 2017, approximately one month before the employer's September 29, 2017, decision not to promote him. The proximity in time between the protected activity and the adverse act goes to the strength of the inference of unlawful motive to be drawn. (*Moreland Elementary School District*, *supra*, PERB Decision No. 227.) Thus, while the relatively close proximity of Healy's protected conduct to the adverse act is not determinative of the employer's motive, it gives rise to a strong inference in this case that Respondent refused to promote Healy in response to his union activity.

2. Employer Animosity Toward Union Activity

Employer statements that disparage protected activity or the collective bargaining process itself, by suggesting that unionization will result in loss of pay or benefits, or that use of the representative's grievance procedure is futile, have been found to discourage participation in protected activity and thereby interfere with the rights of employees and/or employee organizations. (*City of Oakland* (2014) PERB Decision No. 2387-M; *County of Riverside* (2010) PERB Decision No. 2119-M.)

Employer statements of this nature may also be evidence of unlawful motive, as they give rise to a logical inference that the employer might target union supporters for adverse action. (*California Virtual Academies* (2018) PERB Decision No. 2584.)

a. Overt Union Hostility

McKinney expressed open hostility toward Healy's union-related activities, both verbally and in writing. She confirmed these statements and sentiments in her testimony at PERB. At the hearing, McKinney seemed unaware of the objectionable nature of her August 14 statement to Healy that she had "no problem" with him performing union duties, so long as he understood that his work duties came first. The statement is objectionable on its face. But putting the statement in context makes it clear that this was not simply a lawful expression of opinion, but a coercive use of the employer's economic power to dissuade an employee from engaging in protected activity.

Healy, a known union activist, had just begun a high profile and controversial OOC placement when he was called upon as a union steward to represent an employee at a prearranged IA investigation that was scheduled during work hours. Healy then sought and was granted leave from his supervisor to represent the employee for several hours over the course of two days. McKinney's statement on the first of those two days to the effect that Healy should prioritize his work duties over his representational duties was clearly intended to discourage him from exercising his Dills Act right to take union leave time. Given McKinney's later statement to Moore and Francisco that Healy would never get the permanent HCCA position because he did not want the position badly enough, and her unsubstantiated claim that Healy

missed a deadline in the short period of his OOC assignment, McKinney's earlier statement to Healy takes on an even more ominous tone. Accordingly, I find that McKinney's statement to Healy on August 8 gives rise to an inference of unlawful animus and establishes a nexus between his protected conduct and the failure to promote.

b. Covert Union Hostility

Dr. Tootell expressed coded hostility toward Healy's union-related activities, both at the time of the events in question and in her testimony before PERB. As noted above, Dr. Tootell described Healy as argumentative, and as having frequent conflicts with others. The only evidence in the record of Healy being argumentative or having conflicts with others involve his union duties. If Dr. Tootell or CCHCS had evidence of Healy creating workplace conflicts that did not implicate his union duties, they should have produced those facts at the hearing.[50] Under the circumstances, I find that Dr. Tootell's characterization of Healy's protected activity as creating workplace conflicts establishes a nexus between his protected conduct and the failure to promote.

3. Unsubstantiated Claims of Poor Work Performance

In *Kidde, Inc*. (1989) 294 NLRB 840, the NLRB held that it is evidence of a discriminatory motive when an employer observes misconduct without redirecting the employee or disciplining the employee, all the while building a case against that employee. Dr. Tootell relied heavily on her experience working with Healy on the

[50] In her August 13, 2017 email to Harris, Dr. Tootell references "three thick binders of material on the many associated issues surrounding Mr. Healy…". These materials were not presented at the hearing, and there is no further description of their contents. See Exhibit 53.

ophthalmology project as evidence that he did not possess the necessary skills to perform well as the HCCA.

Facts and evidence adduced at hearing demonstrate that Dr. Tootell gave Healy the ophthalmology assignment with no deadline, was dismissive when Healy reached out to her with questions about the scope of the assignment, then complained to coworkers that Healy was not performing the assignment adequately while praising Healy's performance to his face. As this is the only concrete example Dr. Tootell gives of Healy's "insufficient" work ethic, it is highly suspect. Although Dr. Tootell testified that she provided Healy with additional feedback and redirection, her testimony on this point was vague and not corroborated by any written communication to that effect. Analogizing to *Kidde, Inc.*, *supra*, 294 NLRB 840, Dr. Tootell's assignment of the ophthalmology project to Healy without adequate direction or instruction all while building the case that Healy was a poor employee, is evidence of discrimination.

Similarly, McKinney informed Tootell that, while Healy was the OOC HCCA, Healy had missed his August deadline for the EC audit. Even assuming a deadline had been missed, there is no evidence that McKinney informed Healy of her concerns about his work performance. Rather, the record includes an email inquiry from McKinney about the status of the project, Healy's response with concerns about the project, and McKinney's promise of additional support. Conspicuously absent from the record is any evidence that McKinney informed Healy at any time that he was failing to meet expectations. McKinney then repeated her concerns at the hearing that Healy had failed to perform the job duties in a timely manner, despite being unable to

produce any objective evidence that such alleged failures occurred and/or that Healy had been informed of the expectation at any point prior to the deadline. Accordingly, McKinney's conclusions about Healy's work performance suffer from the same logical fallacies in Dr. Tootell's conclusions and should also be understood as pretextual.

4. CCHCS's Departure From Established Procedures

a. Reference checks

Even where an employer has a managerial, statutory, or contractual right to take an employment action, its decision to act cannot be based on an unlawful motive. (County of Santa Clara (2019) PERB Decision No. 2629-M; County of Lassen (2018) PERB Decision No. 2612; Berkeley Unified School District (2003) PERB Decision No. 1538.) Thus, even a statutory grant of discretion must be exercised in a non-discriminatory manner.

Charging Party asserts that Respondent deviated from its established procedures when it refused to complete post-interview reference checks on Healy. Respondent agrees that, while it has established a general practice of completing reference checks on the top three applicants, that practice is subject to some discretion, and the panel acted within a normal range of discretion when it chose not to conduct reference checks on Healy.

In this case, Woodson and Dr. Tootell completed reference checks for the first-ranked candidate, and apparently began to do so for the second-ranked candidate. And while Dr. Tootell stated definitively that Healy's references were not checked, she did not give a justification for her failure to do so. Standing alone the Respondent's failure to complete reference checks for Healy might not give rise to an inference of

unlawful animus. However, it is troubling that Respondent cites its exercise of discretion as a defense to an adverse employment decision, but has failed to provide the basis for exercising its discretion not to complete reference checks on one or more applicants.

b. Prejudgment

Charging Party also points out that the hiring panel included a panelist (McKinney) who stated publicly that she had predetermined the outcome of the interviews, and that Healy would not get the job. Respondent admits that these statements were made, and that the statements were sufficient to warrant removing her from the panel, yet argues that other safeguards ensured that Healy was fairly scored on his interview answers. This argument is another manifestation of Respondent's unwarranted focus on Healy's interview scores to the exclusion of the panel's consideration of other factors. Even taking Obando at his word that Healy was given fair marks on his interview, the interview scores were only one factor in the overall decision. There are myriad other ways that McKinney might have influenced the panel's decision without overtly distorting his interview scores. Regardless of whose responsibility it was to remove McKinney from the interview panel, her participation after publicly declaring her prejudgment of one candidate's fitness, even if it had no effect on the interview scores, marked a departure from CCHCS rules and procedures.

5. CCHCS's Premature Revocation of the OOC

According to Moore and Francisco, it is unusual to end an OOC assignment before the position is permanently filled, unless the OOC applicant fails to perform the

job. Yet Healy was removed from the position after only a few weeks, with no permanent replacement and no objective showing that Healy was not performing the job successfully. Even taking as true Obando's explanation that the OOC position was ended only after the permanent position had been offered to the first-ranked candidate, this circumstance was outside of the norm. Whether Respondent's deviation from its standard procedures in this case was the result of a benign miscommunication or due to retaliatory intent is subject to some debate.

Both Dr. Tootell and Harris stated that Healy did not meet the minimum qualifications for the HCCA, contradicting Obando's statement that only qualified applicants were interviewed. On the official form requesting that interviews be scheduled for the HCCA position, the minimum qualifications for the position are listed as 12 months of experience working in the classification of SSA/AGPA.[51] At the time Healy began the OOC assignment, he had completed 280 days as an AGPA, and another four months as an SSA, leaving him just shy of the one-year minimum required work experience as an SSA/AGPA. Keeping Healy in the OOC for an extended period would insure that he had attained the minimum experience in the position. There was an initial attempt by Harris to curtail Healy's tenure as OOC HCCA, and Obando stepped in to prevent Harris from acting on that impulse, arguing that the whole purpose for the OOC was to have someone performing the work while a permanent replacement was sought. Just a few days later, the position was ended with no permanent replacement, and without any apparent attempt to renew the OOC once it was prematurely cancelled. Respondent never addresses the apparent

[51] See Exhibit 49.

inconsistency between its stated purpose in creating the OOC HCCA and the fact that it left the HCCA vacant for a nine-month period, rather than permit Healy to fill the OOC position. Notably, this reversal occurred during a short period of time with no apparent change in circumstances between the time the OOC HCCA was first created and its premature termination 18 days later. At best, prematurely removing Healy from the OOC was a departure from institutional best practices. At worst, it was a deliberate attempt to prevent Healy from gaining the minimum experience required for the permanent position.

When all the above-described indicia of unlawful intent are viewed in their totality, Respondent's treatment of Charging Party as an applicant for promotion evidences a desire to seek out and, if necessary, manufacture reasons to reject Healy's application for promotion, rather than to consider his application on the basis of merit alone. Accordingly, I find that Charging Party has established, by a preponderance of the evidence, that CCHCS's decision not to promote Healy to the permanent HCCA position was, at least in part, unlawfully motivated by anti-union animus. Accordingly, the burden shifts now to the employer to establish that it would have refused to promote Healy even if he had not engaged in protected activity.

II. Defenses

Once a party pleads a general theory of a defense, PERB employs a flexible approach to determining whether the evidence presented at hearing supports the parties' claims. (*City of Santa Monica* (2020) PERB Decision No. 2635a-M.) Respondent argues that Healy failed to establish the prima facie elements of his case because he failed to establish that all the members of the interview panel were aware

of his protected activity. Respondent does not explicitly raise an affirmative "but for" defense. Nevertheless, I address both theories below.

A. Subordinate Bias Liability

Liability may attach to a decision by a supervisor who unwittingly relies upon biased information presented by his or her subordinates. (*Santa Clara Valley Water District* (2013) PERB Decision No. 2349-M.) Under the so-called "subordinate bias liability" theory, the unlawful motive of a supervisor or other lower-level official may be imputed to the decisionmaker responsible for authorizing an adverse action against the Charging Party when: (1) the lower-level official's recommendation, evaluation, or report was motivated by the employee's protected conduct; (2) the lower level official intended for his or her conduct to result in an adverse action; and (3) the lower level official's conduct was a motivating factor or proximate cause of the decision to take adverse action against the employee. Even where the decision maker's actions are entirely free of animus, the employer will nonetheless be held liable when the decision was influenced by the unlawful animus of the lower-level official. (*Santa Clara Valley Water District*, *supra*, PERB Decision No. 2349-M.)

Subordinate bias liability is typically raised by a charging party in order to establish the employer's liability in its prima facie case where a lower-level manager or supervisor influences a higher-level manager to take the adverse action. Respondent argues here that the animus of one agent of the employer (McKinney) should not be imputed to another agent of the employer (the interview panel), citing *Sacramento City Unified School District* (1985) PERB Decision No. 492.

In *Sacramento City Unified School District*, *supra*, PERB Decision No. 492, an employee alleged that he was given a failing score on a promotional exam in retaliation for filing grievances. There, the district's Director of Maintenance was found to have expressed anti-union sentiments to and about an employee after the employee filed several grievances. When the employee applied for a promotion, a panel of three supervisors, all subordinates of the director, ranked the employee sixteenth out of thirty-seven applicants based on his oral interview. Only the top five candidates were deemed eligible for the position.

Applying the *Novato* discrimination standard, the ALJ in *Sacramento City Unified School District*, *supra*, PERB Decision No. 492, found no reason to impute the director's anti-union animus to the interview panel. The ALJ found that the employee had engaged in protected conduct, the director knew of it, and the director harbored anti-union animus because of it. However, a missing key element from the employee's case was any proof that the interview panelists had knowledge of the employee's protected conduct. Thus, their scores of the employee's interview could not have been influenced by conduct of which they were unaware. The ALJ also found that the director did not influence the outcome of the interview scores or the panelists' impressions of the applicants.

This case is easily distinguishable from *Sacramento City Unified School District*, *supra*, PERB Decision No. 492, because McKinney was on the interview panel. No attribution from McKinney to other agents is necessary to find that at least one of the agents responsible for the adverse action knew of Healy's protected conduct. The

question really posed by Respondent's argument is, to what extent did the anti-union animus of some members of the panel infect the decisionmaking of the panel at large?

Both McKinney and Dr. Tootell were aware of Healy's protected conduct and both McKinney and Dr. Tootell had made statements denigrating Healy's protected conduct. But there is also circumstantial evidence to infer that Woodson was aware of Dr. Tootell's predisposition against Healy. Charging Party elicited testimony regarding a phone conversation between Dr. Tootell and Woodson in early August. At the time, Harris had just appointed Healy to the OOC HCCA position, and Dr. Tootell was contemplating her resignation because of Harris's decision. Even assuming the conversation between Woodson and Dr. Tootell focused on Dr. Tootell's frustration with Harris's decision-making process rather than his specific choice of Healy for the OOC HCCA, it does not stretch credulity to conclude that Dr. Tootell emphasized to Woodson how important the choice of HCCA was to her. The decision was so important, in fact, that Dr. Tootell was contemplating quitting rather than working with Harris's choice of HCCA. It is easy to conclude that, knowing how important this position was to Dr. Tootell, Woodson would support Dr. Tootell's choice of applicant to avoid a similar conflict. Indeed, the same can be said of Harris's rationale for supporting the panel's ultimate decision despite believing that Healy was qualified and capable.

As noted above, Respondent has refused to divulge any information about the civil service interview questions and the post-interview deliberations by the panelists with regard to the applicants' answers to those questions. Because of this, there is no testimony from the panelists that can resolve the question of whether and to what

degree, anti-union animus infiltrated the panel's decisionmaking. Instead, the employer, through Obando, states, trust me—there was no unlawful motive. PERB may reject an employer's self-serving declarations of lawful intent where they are contradicted by the totality of persuasive circumstantial evidence. (*Palo Verde Unified School District*, *supra*, PERB Decision No. 2337.) Given the multiple reliable indicia of unlawful animus in this case, I cannot credit Obando's vague and generalized declarations of lawful intent, no matter how sincere his belief in their veracity. Accordingly, I find that the panel's decisionmaking process was tainted by the unlawful animus of a few of its members, and the fact that Obando and possibly Woodson, were ignorant of the anti-union animus of the other members of the panel does not defeat a finding that the employer knew of Charging Party's protected conduct prior to taking the adverse action.

B. The "But For" Defense

When a charging party establishes each of the above-described *Novato* factors, certain fact patterns allow a respondent the opportunity to prove, by a preponderance of the evidence, that it would have taken the same action even absent protected activity. This affirmative defense is most typically available when, even though the charging party has established that protected activity was a substantial or motivating cause of the adverse action, the evidence also reveals a non-discriminatory motivation for the same decision. In such "mixed motive" or "dual motive" cases, the question becomes whether the adverse action would not have occurred "but for" the protected activity. (*City & County of San Francisco* (2020) PERB Decision No. 2712-M, citing *N.L.R.B. v. Transportation Management Corp.* (1983) 462 U.S. 393, 395-402;

McPherson v. Public Employment Relations Bd. (1987) 189 Cal.App.3d 293, 304; *Martori Brothers Distributors v. Agricultural Labor Relations Bd*. (1981) 29 Cal.3d 721, 729-730; *San Diego Unified School District* (2019) PERB Decision No. 2634, pp. 12-13; *Omnitrans* (2010) PERB Decision No. 2121-M, pp. 9-10; *Los Angeles County Superior Cour*t (2008) PERB Decision No. 1979-C, p. 22; *Palo Verde Unified School District* (1988) PERB Decision No. 689, pp. 7-8; *Novato*, *supra*, PERB Decision No. 210, pp. 5-6; *Wright Line, a Div. of Wright Line, Inc.* (1980) 251 NLRB 1083, 1086-1089.)

As a practical matter, for CCHCS to prevail, it must prove that it had an alternative non-discriminatory reason for refusing to hire Healy as the permanent HCCA and that it acted because of the alternative non-discriminatory reason. (*Anaheim Union High School District* (2015) PERB Decision No. 2434.) When analyzing the employer's affirmative defense in a retaliation case, PERB weighs the employer's justifications for the adverse action against the evidence of the employer's retaliatory motive. The question is whether the employer's justification was honestly invoked and was in fact the cause of the adverse action. (*Ibid*.)

1. Compliance with the Civil Service Rules

Article VII, Section 1, subdivision (b) of the California Constitution states that selection to the civil service shall be based on merit and that merit is to be ascertained by competitive examination. The Dills Act "does not at all attempt to nullify the constitutional principle that employment should be based upon merit; indeed, the statute reaffirms that precept." (*Pacific Legal Foundation v. Brown* (1981) 29 Cal.3d 168, 202.) As further explained by the Supreme Court, the process for permanent civil

service appointments occurs in three phases. The first phase of the process involves the administration of a competitive examination. The second phase is when the appointing power reviews the candidates on the eligible list and selects the candidate it finds best suited to the position it seeks to fill. The third phase requires the appointing power to evaluate the selected candidate throughout a probationary period to determine whether permanent appointment or promotion to the position is warranted. (*California State Personnel Bd. v. California State Employees' Assn., Local 1000, SEIU, AFL-CIO* (2005) 36 Cal.4th 758, ("*SPB v. CSEA*").) Only the first two phases are relevant here.

The ultimate decision not to hire Healy was made by Harris, the hiring authority, upon the panel's recommendation. Harris's exercise of authority represents the so-called second phase of the civil service hiring process. In *SPB v. CSEA*, the Court emphasized that the merit principle of "[A]rticle VII requires that appointment and promotion decisions, not just preappointment eligibility determinations and other screening measures, be based on merit." (*SPB v. CSEA*, *supra*, 36 Cal.4th at 770.) Echoing the sentiments in *SPB v. CSEA*, PERB has held that even when an employer has a managerial, statutory, or contractual right to take an employment action, its decision to act cannot be based on an unlawful motive, intent, or purpose. (*County of Santa Clara*, *supra*, PERB Decision No. 2629-M, p. 13.) Thus, if the second phase of the process, the hiring authority's exercise of discretion, was tainted by discriminatory intent, the decision violates the merit principle. Respondent's strict compliance with the first phase of civil service appointment is admirable, but it is no defense for the employer's failure to adhere to the merit principles in the second or third phase of

hiring. CCHCS must therefore establish that there was a non-discriminatory reason for not recommending Healy, and that the non-discriminatory reason was the actual reason Healy was not hired.

Notably, Respondent was unwilling to divulge several key details regarding the hiring process, citing broadly California's Civil Service Merit rules regarding confidentiality. Respondent provided copies of heavily redacted score sheets for Healy's interview, showing none of the substantive considerations that went into place for the panel's ultimate conclusion, other than the numerical scores given to each question. In doing so, Respondent withholds from PERB's consideration the panel's actual rationale for choosing not to recommend Healy for promotion. Instead, Respondent provides a plausible explanation for not recommending Healy, as proffered by Obando.

According to Obando, the disparity in scores between the first-ranked candidate and the other two could justify a decision by the employer not to consider the second and third candidates at all. But this explanation doesn't actually describe what happened in this case. By its own admission, the employer did consider the second candidate in this case, despite a disparity of twenty-three percentage points between them. Thus, in making this assertion, it is clear that Obando is providing only one possible explanation why the panel might choose not to check references on all three candidates, and not the actual reason why the panel chose not to complete reference checks on Healy.

In considering a Respondent's affirmative defense, PERB's inquiry is whether the justification was honestly invoked and whether the employer's proof establishes

that its justification was in fact the cause of the employer's action. (*Palo Verde Unified School District*, *supra*, PERB Decision No. 2337.) Respondent's burden is not limited by the extent of its statutory or common law duty to employees but is measured by the extent and persuasiveness of the prima facie case, which a successful affirmative defense must either meet or exceed. (*Ibid.*)

Respondent's proffered justification fails to persuade because the facts presented at hearing suggest that the panel was moving forward with a recommendation of the second-ranked candidate after the first-ranked candidate withdrew from consideration. The two remaining candidates scored within six percentage points of each other. Of these two, it is undisputed that the second-ranked candidate had never performed the job, while Healy had already demonstrated proficiency in the job. Viewed this way, the allegedly vast disparity in scores shrinks considerably.

Further doubt is cast on Respondent's proffered justification because it is clear that the second-ranked candidate never assumed the position. Thus, the choice, to the extent there was one, was between Healy and a vacancy. Respondent clearly preferred to leave this critical position vacant rather than hire Healy, who had been successfully performing the job, and who was deemed qualified for the permanent position. Given the multiple indicia of Respondent's discriminatory intent, I cannot credit its proffered non-discriminatory explanation for the failure to recommend Healy for the permanent HCCA position over the weight of evidence to the contrary. The preponderance of the evidence in this case weighs in favor of the Charging Party and a finding that the adverse action was motivated by unlawful anti-union animus.

Based on the discussion above, I find that Respondent failed and refused to recommend Healy for promotion to the HCCA position for reasons that include his history of engaging in protected activities. This conduct violates Government Code, section 3519, subdivision (a).

REMEDY

A properly designed remedial order seeks a restoration of the situation as nearly as possible to that which would have obtained but for the unfair labor practice. (*Modesto City Schools* (1983) PERB Decision No. 291.) To that end, PERB has been granted broad remedial powers, even under the Dills Act, where such powers might impact upon civil service positions. Dills Act section 3514.5, subdivision (c) states:

> The board shall have the power to issue a decision and order directing an offending party to cease and desist from the unfair practice and to take such affirmative action, including, but not limited to, the reinstatement of employees with or without backpay, as will effectuate the policies of this chapter.

Charging Party seeks backpay and appointment into the "first" available AGPA position. Respondent argues that PERB cannot award the remedy requested because to do so would run afoul of the merit principle in article VII of the California Constitution. Respondent argues that PERB has no authority to award such a remedy, citing to several cases "that reflect how stringently the merit principle is applied." For example, *Hastings v. Department of Corrections* (2003) 110 Cal.App.4th 963 (*Hastings*), stands for the principle that an employee is not entitled as an accommodation to reassignment to a position in a different civil service classification without complying with the competitive examination process of the civil service laws. *Noce v. Department of Finance* (1941) 45 Cal.App.2d 5 (*Noce*), is cited for the rule

that an employee may not be automatically transferred from one classification to another without an exam, where the classes have different training, qualifications and duties. *Kidd v. State* (1998) 62 Cal.App.4th 386, is cited for the rule that no other branch or agency of government may manipulate the merit principle to serve ends inconsistent with Article VII of the California Constitution. Finally, Respondent argues that a remedy ordering CCHCS to appoint Healy to a vacant position would be akin to PERB "assuming the managerial responsibility" of making personnel decisions on Respondent's behalf, citing *Georgia Power Company and Bobby Lewallen* (2004) 341 NLRB 576.

PERB's jurisdiction is not generally in conflict with the merit principles in the California Constitution. (*Pacific Legal Foundation v. Brown*, *supra*, 29 Cal.3d 168.) The purpose of the civil service system is to ensure that appointments and promotions are made solely on the basis of merit. (*Id*. at pp. 183-184.) One purpose of the Dills Act is to ensure that employment decisions are not made on the basis of an employee's participation in, or abstention from, the activities of an employee organization. (Gov. Code, §3512, et seq.)

My order below, instructing CCHCS to offer Healy the next available SSA/AGPA position at San Quentin does not run afoul of the merit principles in Article VII of the California Constitution. First, it is undisputed that Healy sought and was denied a promotion to a position for which he was qualified. Because Healy had complied with the civil service rules regarding promotion to the position from which he was discriminatorily denied, requiring CCHCS to offer Healy a promotion to a position for which he was deemed qualified does not violate the principles in *Hastings* or *Noce*.

Second, as noted above, PERB's purpose of preventing the State from using union dis/affiliation as a substitute for merit in hiring decisions is not in conflict with California's merit principles, and in fact serves those principles. Indeed, "disciplinary actions taken in violation of [the Dills Act] would transgress the merit principle as well…." (*Pacific Legal Foundation v. Brown*, *supra*, 29 Cal.3d 168, 198.) Thus, the order does not run afoul of the principle stated in *Kidd v. State*, *supra*, 62 Cal.App.4th 386.

The concerns raised in *Georgia Power Company and Bobby Lewallen*, *supra*, 341 NLRB 576 are not present here. There, the employee was denied a promotion that would have elevated the employee to a management position. It was this intrusion into the employer's decision-making ranks that gave the NLRB pause. Under those circumstances, the NLRB determined that the employee should be permitted to compete for the position without discrimination, but that it should not exercise its authority to appoint the employee to the employer's management team. Here, ordering the employer to appoint Healy from a non-supervisory Office Technician to a non-supervisory SSA/AGPA, does not raise any similar concerns of "assuming the employer's managerial authority," because in doing so, PERB would not be ordering Healy to join the decision-making ranks of Respondent's inner circle.

In *State of California (Department of Corrections)* (2001) PERB Decision No. 1435-S, after finding that the State had denied a promotion to a union steward in retaliation for his protected activity, the ALJ ordered back pay and appointment to a promotional position, as desired. The ALJ found that "[i]t would not effectuate the purpose of the Act to invalidate the promotion of the person who currently fills the

[promotional position sought] and place [the union steward] in that position," however. Instead of displacing the incumbent in the specific position that the union steward was denied, the ALJ determined that "[i]t would effectuate the purpose of the Act to … order that [the union steward] be offered the next available [promotional] position in northern California," which represented a geographic region deemed "acceptable" to the union steward. (*State of California (Department of Corrections)*, *supra*, PERB Decision No. 1435-S, pp. 48-49.) This, the ALJ found, would restore the union steward to the desired position he would be in but for the unlawful conduct, *to the extent possible*. (*Id*. at p. 49.) A similar remedy was ordered in *Kidd v. State*, *supra*, 62 Cal.App.4th 386, where the incumbent in the position from which the charging party was discriminatorily denied, was not a party and did not cause the employer's unlawful employment practice. The circumstances of this case weigh in favor of a similar remedial order.

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, it is found that STATE OF CALIFORNIA, (CORRECTIONAL HEALTH CARE SERVICES), violated the Dills Act, Government Code section 3519, subdivision (a), by refusing to promote Kevin M. Healy to the Health Care Compliance Analyst position at San Quentin because he engaged in activity that is protected by the Dills Act, Government Code, section 3515.

Pursuant to section 3514.5, subdivision (c) of the Government Code, it hereby is ORDERED that the STATE OF CALIFORNIA, (CORRECTIONAL HEALTH CARE SERVICES), its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

1. Retaliating against employees for engaging in protected conduct.

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

1. Offer Kevin M. Healy the next available SSA/AGPA position at San Quentin.

2. Reimburse Kevin M. Healy for the difference between the salary earned as an Office Technician and the salary he would have earned as the Health Care Coordinator Analyst from September 29, 2017, the date Healy was denied the position, until such time as Respondent has complied with paragraph B.1., above, of this Proposed Order.

3. Within 10 workdays of the service of a final decision in this matter, post copies of the Notice attached hereto as an Appendix at all work locations where notices to employees represented by SEIU Local 1000 in bargaining units 1, 3, 4, 15, 17, and 20, are customarily posted. The Notice must be signed by an authorized agent of the STATE OF CALIFORNIA, (CORRECTIONAL HEALTH CARE SERVICES), indicating that it will comply with the terms of this Order. Such posting shall be maintained for a period of 30 consecutive workdays. The Notice shall also be posted by electronic message, intranet, internet site, and other electronic means customarily used by the STATE OF CALIFORNIA, (CORRECTIONAL HEALTH CARE SERVICES), to communicate with employees represented by SEIU Local 1000 in bargaining units 1, 3, 4, 15, 17, and 20. Reasonable steps shall be taken to ensure

that the Notice is not reduced in size, altered, defaced or covered with any other material.

4. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of the Public Employment Relations Board (PERB or Board), or the General Counsel's designee. Respondent shall provide reports, in writing, as directed by the General Counsel or his/her designee. All reports regarding compliance with this Order shall be concurrently served on KEVIN M. HEALY.

RIGHT TO APPEAL

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Public Employment Relations Board (PERB or Board) itself within 20 days of service of this Decision. The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
Telephone: (916) 322-8231
Facsimile: (916) 327-9425
E-File: PERBe-file.Appeals@perb.ca.gov

In accordance with PERB regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (Cal. Code Regs., tit. 8, § 32300.)

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered "filed" when received by

facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet which meets the requirements of California Code of Regulations, title 8, section 32135, subdivision (d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, § 32135, subds. (b), (c), and (d); see also Cal. Code Regs., tit. 8, §§ 32090 and 32130.)

Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, §§ 32300, 32305, 32140, and 32135, subd. (c).)

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. SF-CE-290-S, *Kevin M. Healy v. State of California*, in which all parties had the right to participate, it has been found that the State of California (Correctional Health Care Services) violated the Ralph C. Dills Act (Dills Act), Government Code section 3512 et seq. by refusing to promote Kevin M. Healy to the Health Care Compliance Analyst position at San Quentin because he engaged in activity that is protected by the Dills Act, Government Code, section 3515.

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

A. CEASE AND DESIST FROM:

1. Retaliating against employees for engaging in protected conduct.

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

1. Offer Kevin M. Healy the next available SSA/AGPA position at San Quentin.

2. Reimburse Kevin M. Healy for the difference between the salary earned as an Office Technician and the salary he would have earned as the Health Care Coordinator Analyst from September 29, 2017, the date Healy was denied the position, until such time as Respondent has complied with paragraph B.1., above, of this Proposed Order.

Dated: _____ State of California

By: _____
Authorized Agent

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