STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 1000, Charging Party, v. STATE OF CALIFORNIA (DEPARTMENT OF SOCIAL SERVICES), Respondent.	Case No. SA-CE-2073-S PERB Decision No. 2624-S February 5, 2019

Appearances: Daniel Luna, Staff Attorney, for Service Employees International Union Local 1000; State of California (Department of Human Resources) by Camille K. Binon, Labor Relations Counsel, for State of California (Department of Social Services).

Before Banks, Shiners, and Krantz, Members.

DECISION

SHINERS, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions by Charging Party Service Employees International Union, Local 1000 (SEIU) to the attached proposed decision of an administrative law judge (ALJ). The complaint in this case alleged that the State of California (Department of Social Services) (Department) violated the Ralph C. Dills Act (Dills Act)[1] by demoting Carey Wilson (Wilson) because of her participation in protected activity. Following an evidentiary hearing, the ALJ dismissed the complaint, concluding that the demotion was based upon Wilson's repeated policy violations and not her service as a union officer or her use of union leave. SEIU now asks that we reverse the ALJ's dismissal of the complaint.

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

Based on our review of the proposed decision, the entire record, and relevant legal authority in light of the parties' submissions, we conclude that the ALJ's factual findings are supported by the record and her conclusions of law are well-reasoned and consistent with applicable law. We therefore adopt the proposed decision as the decision of the Board itself, as supplemented by the following discussion of SEIU's exceptions.

BACKGROUND

The full procedural history and factual findings can be found in the attached proposed decision. We summarize the pertinent findings here to give context to our discussion of SEIU's exceptions.[2]

Prior to her demotion, Wilson was a Disability Evaluation Analyst (DEA). DEAs evaluate a claimant's qualification for disability benefits based on a medical and vocational assessment. Among the computer programs DEAs use to adjudicate and manage cases are MIDAS and eCAT. MIDAS organizes caseloads, tracks cases, and creates "tickles," which are date prompts for completing the next action in a case. Every open case must have a tickle to schedule the next action to avoid the case getting "lost." The eCAT program is used to summarize evidence, note actions taken or reasons for delays, and record medical and vocational determinations.

The Department periodically issues policies to its staff regarding claims processing. Between April 2012 and August 2014, the Department circulated four different policy memoranda to staff with subjects that included maintaining the integrity of electronic folder data, workload management, and workflow expectations. Each of these memoranda discussed the

[2] We also correct a few inadvertent errors and omissions in the proposed decision. Thus, where the findings described here conflict with those in the proposed decision, the proposed decision's findings are superseded.

Department's policy that all cases must have a tickle and reminded employees that they could be disciplined for clearing a tickle without taking appropriate or meaningful action on a case.[3] It is undisputed that Wilson received these memoranda.

Beginning in 2007, Wilson held several official positions within SEIU, including job steward and District Labor Council President. Over the years, her involvement with SEIU often required her to take union leave. Wilson's union leave began to increase in 2012. Initially, she took intermittent leave during that year before taking a full-time leave from November 2012 to March 2013. Her leave was intermittent after returning to work in March 2013, until she took another full-time leave from August 2014 to November 2014. In 2015, Wilson, through SEIU, made a total of 22 union leave requests, two of which the Department denied. Her union leave through most of 2015 was intermittent. Wilson took another full-time leave from December 2015 to April 2016.

Unit Manager Jon Howard (Howard) was Wilson's supervisor from December 2013 to August 2015. Prior to becoming Wilson's supervisor, Howard served as a DEA, attended the six-month DEA training class together with Wilson, and was an SEIU member. In July 2014, Wilson received an Individual Development Plan (IDP). While the IDP noted that Wilson maintained a 92.4% accuracy rate, it also referred to areas of improvement needed and identified "major issues" as tickles being cleared before action was taken, entries referencing actions made before the actions were taken, and completion of actions without entering information in MIDAS. The IDP listed specific case examples of tickles cleared without appropriate or meaningful action taken, medical records not reviewed, and entries for actions not completed.

[3] A DEA could clear a tickle in one of two ways: either by marking it as "P'd", denoting the tickle was completed, or by marking it as "Q'd", denoting the action tied to the tickle was not performed.

In August 2014, Howard counseled Wilson about her work performance issues, including her high number of pending cases and improper clearing of tickles without appropriate action being taken. Nevertheless, Wilson continued to clear tickles inappropriately, leading the Department to issue her a Notice of Adverse Action (NOAA) in November 2014. The NOAA included 12 case examples of alleged policy violations, 11 of which involved clearing tickles without taking meaningful action, leading to delays in cases ranging from 18 to 65 days. The NOAA reduced her salary by five percent for four months. Wilson and SEIU filed an appeal with the State Personnel Board (SPB), which resulted in an agreement between the parties to reduce the discipline to a five percent salary reduction for two months.

Following imposition of the reduction in pay, Howard continued to monitor Wilson's caseload and send her e-mails regarding specific case issues or actions needed. In or about March 2015, Howard observed a continuing pattern of Wilson improperly clearing tickles, and Howard discussed the issue with his supervisors. In May 2015, he began to audit her cases. Meanwhile, at Howard's behest, on May 5, 2015, Wilson attended a "tune up" training session regarding medical records processing. That same month, Howard and his supervisors decided to pursue a further NOAA against Wilson. Prior to drafting a second NOAA, Howard and his supervisors considered putting Wilson on a case management plan even though she had already been placed on an IDP, but ultimately chose not to do so as they believed there was a straightforward means for Wilson to avoid her most common policy violations: she needed to stop clearing tickles inappropriately.

Howard completed the first draft of the second NOAA in July 2015. The Department's legal division reviewed the draft and returned it to Howard in August 2015, asking for additional information. Howard sent a second draft to the legal division in September, followed by a third

and final draft that was reviewed and returned to Howard in late October. The legal division directed Howard to update the case activity information summarized in the NOAA each time a draft was returned. The issues identified in the NOAA were largely the same as the issues underlying Wilson's November 2014 reduction in pay.

On October 9, 2015, Wilson requested union leave to attend a special council meeting to be held on October 28 and 29. The Department denied her request on October 12, forcing her to use vacation leave to take the time off. On October 29, Howard and his supervisors signed a formal request for Department management to issue the NOAA. On November 6, the Department of Human Resources reversed the denial of Wilson's union leave for October 28 and 29, and restored her vacation leave for those dates.

The Department served Wilson with the second NOAA on December 31, 2015. The NOAA demoted Wilson from a DEA to a Program Technician II, and summarized the 13 most egregious examples of her policy violations, including clearing tickles without taking meaningful action, making untimely requests for records and belatedly reviewing records, and failing to timely schedule consultative exams and to take action following receipt of consultative assessments. These violations resulted in delays of two to six months for claimants awaiting their disability determinations. Wilson and SEIU appealed the demotion to the SPB. The SPB upheld Wilson's demotion despite clearing her of certain alleged violations, including dishonesty for clearing tickles without entering substantive information into the electronic case management system.

At the formal hearing in this matter, SEIU presented evidence regarding three other DEAs from the Department who had received NOAAs. Each of these three NOAAs discussed untimely actions, lack of knowledge of program requirements, failure to recognize issues and

apply policy/program criteria, and inability to work independently, all of which resulted in significant delays in making disability determinations. Only one of the DEAs was charged with improperly clearing tickles. All three of the other DEAs were given at least one case management plan prior to their adverse actions. Two of these DEAs were demoted, while the third received a one-year suspension.

DISCUSSION

The Dills Act prohibits the state from imposing reprisals on employees because of their exercise of rights guaranteed by the Act, including the right to form, join, and participate in the activities of employee organizations of their own choosing. (Dills Act, § 3519, subd. (a).) To establish a prima facie case of retaliation, the charging party must prove that: (1) the employee exercised rights under the Dills Act; (2) the employer had knowledge of the employee's exercise of those rights; (3) the employer took adverse action against the employee; and (4) the employer took the adverse action because of the employee's exercise of those rights. (*State of California (Department of Corrections & Rehabilitation)* (2010) PERB Decision No. 2118-S, p. 5; *Novato Unified School District* (1982) PERB Decision No. 210, pp. 6-7 (*Novato*).)

Once the charging party establishes a prima facie case of retaliation, the burden shifts to the employer to prove it would have taken the same adverse action even if the employee had not engaged in protected activity. (*Novato, supra*, PERB Decision No. 210, p. 14; *Martori Brothers Distributors v. Agricultural Labor Relations Bd.* (1981) 29 Cal.3d 721, 729-730; *Wright Line* (1980) 251 NLRB 1083, 1089.) To prevail, the employer must show that it had an alternative non-discriminatory reason for imposing the adverse action and that it acted because

of this alternative non-discriminatory reason, not because of the employee's protected activity. (*Palo Verde Unified School District* (2013) PERB Decision No. 2337, pp. 12-13.)[4]

Here, the ALJ found a prima facie case of retaliation because the Department demoted Wilson shortly after she requested union leave and without first giving her a case management plan, which it had done for other DEAs with similar performance issues. The ALJ ultimately concluded, however, that the Department proved its affirmative defense that it would have demoted Wilson even if she had not engaged in protected activity. SEIU raises three grounds for reversing the proposed decision.[5] We address each in turn.

1. Evidence Regarding Wilson's Policy Violations

The ALJ concluded that the Department proved it had a non-discriminatory reason for demoting Wilson, viz., that she violated Department policy by clearing tickles without taking meaningful action on cases, and that the Department acted because of this reason and not because of her union activity. SEIU raises several arguments about the Department's claim that Wilson's policy violations caused harm to claimants, which SEIU asserts the ALJ improperly accepted without sufficient evidentiary support.

First, SEIU asserts that Wilson did not delay in processing her cases and therefore did not cause harm to claimants seeking disability benefits. In support of this argument, SEIU asserts Wilson granted presumptive disability to claimants in "several" of the 13 claims that formed the basis for her demotion. DEAs are empowered to grant presumptive disability status

[4] While the *Novato* framework is not the exclusive means for analyzing discrimination and retaliation allegations, it is typically applied in cases such as the instant one that involve alleged discrimination or retaliation against an individual employee. (See *Los Angeles County Superior Court* (2018) PERB Decision No. 2566-C, pp. 11-16 [explaining discrimination and retaliation theories under PERB precedent].)

[5] SEIU filed four exceptions, but two of the three grounds discussed below are common to multiple exceptions.

to claimants for supplemental security income during the pendency of a final determination, if the evidence suggests likely disability. Because presumptive disability allows a claimant to begin receiving benefits expeditiously, SEIU suggests that Wilson's actions did not cause harm to at least some of the 13 claimants. Yet the record contains only one example of Wilson placing a claimant on presumptive disability. The record thus does not support SEIU's contention that Wilson granted presumptive disability status to multiple claimants.

The record does not indicate whether any of the other 12 claimants suffered harm because of Wilson's failure to take meaningful action before clearing tickles in their cases. But the purpose of the Department's policy requiring meaningful action before a tickle is cleared is to track case progress, ensure cases are not lost in the system, and prevent delays which could result in harm to claimants. The potential for harm therefore exists whenever a DEA clears a tickle without taking meaningful action on a case. When an employee's misconduct creates potential harm to the public, the employer need not wait until actual harm occurs before disciplining the employee. (See *County of Siskiyou v. State Personnel Bd.* (2010) 188 Cal.App.4th 1606, 1615 ["'in the context of public employee discipline,' the 'overriding consideration' is 'the extent to which the employee's conduct resulted in, *or if repeated is likely to result in*, harm to the public service.'"], emphasis added, quoting *Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194, 218.) The lack of evidence of actual harm to claimants resulting from Wilson's policy violations thus does not assist SEIU's case.

SEIU also claims Wilson was not simply clearing tickles but was actually taking steps to move cases toward closure, and that no precise action was required to progress a case and thus clear a tickle. As support, SEIU cites Wilson's testimony regarding the discretion DEAs are afforded in addressing issues that a claimant raises or that a DEA discovers while

reviewing a case. Even taking into account such discretion, the record does not show any specific steps Wilson took to move any of the 13 cases toward closure at the time she cleared the tickle in each case.

Instead of presenting such evidence, SEIU relies on a finding in the SPB's decision on Wilson's demotion appeal. Specifically, the SPB found that the Department failed to establish Wilson cleared tickles without entering substantive information into the case management system. SEIU argues the SPB's finding precludes PERB from finding Wilson did not take meaningful action before clearing tickles.

PERB may grant collateral estoppel effect to an SPB decision if it resolved one or more disputed issues of fact properly before the SPB that are also before PERB, and the SPB afforded the parties an adequate opportunity to litigate such issue(s). (*State of California (Department of Corrections)* (1995) PERB Decision No. 1104-S, adopting proposed decision at pp. 11-12.) Here, neither party has expressly asked the Board to give the SPB decision collateral estoppel effect nor briefed the extent to which the collateral estoppel factors are satisfied. The parties also did not reach any relevant stipulations regarding the SPB's determinations, nor did they put the evidentiary record from the SPB proceedings into the record in this case. As a result, we have neither a reason nor the ability to determine whether collateral estoppel would be appropriate here. Nonetheless, considering the decision for its persuasive value, we see no reason to limit our review to the findings favorable to SEIU while ignoring that the SPB upheld the charges of inefficiency, neglect of duty, and willful disobedience, and also found that Wilson failed to prove her affirmative defense that the Department demoted her because of her union leave requests. Thus, notwithstanding its

finding in favor of Wilson on the dishonesty charge, the SPB decision tends to support the ALJ's findings and conclusions.

Furthermore, nothing precludes PERB and the SPB from reaching contrary findings based on the evidence before the respective agencies. For instance, in *State of California (Department of Transportation)* (1984) PERB Decision No. 459-S, the Board refused to defer to an SPB decision upholding an employee's two-day suspension when the record before PERB showed that the employee was suspended because he engaged in protected activity. (*Id*. at pp. 8-9.) Here, the ALJ found based on the evidence presented by the parties in this proceeding that Wilson was clearing tickles without taking meaningful action on cases. That the SPB found differently on the evidence before it does not render the ALJ's finding erroneous.

In sum, we do not find that the ALJ's factual findings overstate the potential for harm stemming from Wilson's policy violations. We also find nothing in the SPB decision that persuades us the ALJ made erroneous factual findings based on the record in this proceeding. We thus affirm the ALJ's conclusion that the Department proved it demoted Wilson because of her policy violations, and not because of her service as a union officer or her use of union leave.

2. Howard's Credibility

The ALJ found Howard's testimony credible based upon his clear and comprehensive answers, thorough knowledge of the case review process, and complete understanding and memory of the cases summarized in Wilson's NOAAs. (Proposed Decision, p. 18, fn. 9.) SEIU excepts to the ALJ's credibility determination on the grounds that Howard allegedly did not testify accurately about the timing of the decision to issue a second NOAA against Wilson,

and that the ALJ accepted without any evidentiary basis Howard's testimony that there was no reason to place Wilson on a case management plan prior to the second NOAA.

Although the Board applies a de novo standard of review and is free to draw its own conclusions from the record, it recognizes that "a hearing officer who has observed the testimony of witnesses under oath is better positioned than the Board itself to make credibility determinations based on observational factors, such as the demeanor, manner, or attitude of witness[es]." (*Santa Ana Unified School District* (2017) PERB Decision No. 2514, p. 29.) We accord no deference, however, to those aspects of a credibility determination not based on the ALJ's firsthand observations. (*State of California (Department of Corrections & Rehabilitation)* (2012) PERB Decision No. 2285-S, pp. 10-11.) Nonetheless, the Board will normally defer to an ALJ's findings of fact involving credibility determinations "unless they are unsupported by the record as a whole." (*Anaheim Union High School District* (2016) PERB Decision No. 2504, p. 14.)

The ALJ's determination that Howard was a credible witness appears to be based on both her observation of his testimony at the hearing and the substance of the testimony itself. Our review of the record reveals no basis to overturn her credibility determination.

First, SEIU contends that Howard was not credible when testifying about the Department's decision to pursue a second NOAA in May 2015, because the record evidence reflected that many of the case issues highlighted in Wilson's second NOAA occurred in October 2015. According to SEIU, because the Department printed the case activity records in October 2015, that is when it decided to take adverse action against Wilson in retaliation for her continual usage of union leave, and in particular, for the leave request she made on October 9, 2015.

This assertion is without merit, as Howard's notes reflect he started auditing Wilson in May 2015. In addition, only four of the 13 cases highlighted in the second NOAA reveal case activity in October 2015; the balance of the cases were all closed, reassigned, or otherwise processed prior to October 2015. Howard also testified that the Department's legal division required him to update the case information contained in the second NOAA each time he returned a draft to them. Considering that Howard sent the third and final draft of the second NOAA to the legal division in late October 2015, it is unsurprising that some of the entries would reflect activity from that month. Thus, the fact that some of the case activity records supporting the NOAA were printed in October 2015 does not indicate Howard made the decision to demote Wilson at that time rather than in May 2015.

Second, SEIU argues that the ALJ erroneously accepted Howard's testimony that there was no reason to place Wilson on a case management plan given the nature of her policy violations. In support of its exception, SEIU refers to Wilson's long tenure with the Department, her caseload of 600 claims, her 431 case closures during the 2014-2015 fiscal year, and her overall average quality rating. But the undisputed evidence shows that Wilson previously had been counseled, placed on an IDP, and disciplined for failing to take meaningful action before clearing tickles, yet the conduct nonetheless persisted. Thus, the record supports Howard's testimony that he did not believe a case management plan would correct Wilson's continuing policy violations.

3. Disparate Treatment

SEIU also asserts that the record shows the Department treated Wilson disparately. We disagree. Although Wilson was not put on a case management plan like the other three DEAs with demonstrated performance issues related to case processing, Wilson's demotion was

commensurate with the penalties imposed on the other DEAs: two were also demoted, while the third was suspended for one year. The evidence thus fails to show that Wilson was treated less favorably than other DEAs with similar performance issues.

In this same vein, SEIU excepts to the proposed decision's omission of any discussion relating to the Department's claims processing backlog. It argues that it is unreasonable for the Department to expect claims to be processed in 60 to 90 days given that more than 25% of the branch's claims are older than 90 days. SEIU then implies that because processing delays were common, Wilson's demotion without receiving a case management plan must have been unlawfully motivated by her union activity.

We do not find that taking explicit note of the Department's backlog compels a finding that the Department demoted Wilson in retaliation for protected activity. Although the ultimate result of Wilson's improper tickle clearing was a significant delay in claims processing, the basis for the demotion was her repeated violations of departmental policy. That these violations occurred when there was a backlog does not establish that the Department treated her disparately or that its asserted reasons for discipline were pretextual. We accordingly find no error in the ALJ's failure to discuss the Department's case processing backlog.

ORDER

The complaint and underlying unfair practice charge in Case No. SA-CE-2073-S are DISMISSED.

Members Banks and Krantz joined in this Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 1000, Charging Party, v. STATE OF CALIFORNIA (DEPARTMENT OF SOCIAL SERVICES), Respondent.	UNFAIR PRACTICE CASE NO. SA-CE-2073-S PROPOSED DECISION (June 20, 2017)

Appearances: Daniel Luna, Staff Attorney, for Service Employees International Union Local 1000; State of California (Department of Human Resources) by Camille K. Binon, Labor Relations Counsel, for State of California (Department of Social Services).

Before Robin W. Wesley, Administrative Law Judge.

INTRODUCTION

A union alleges that the State employer violated the Ralph C. Dills Act (Dills Act)[1] when it demoted an employee because she engaged in protected activity. The employer denies any violation of law.

PROCEDURAL HISTORY

On March 30, 2016, Service Employees International Union Local 1000 (SEIU or Union) filed an unfair practice charge against the State of California (Department of Social Services) (State). On May 5, the State filed a position statement in response to the charge.

On July 15, 2016, the Office of the General Counsel of the Public Employment Relations Board (PERB or Board) issued a complaint alleging that the Department of Social

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

Services (DSS) demoted Carey Wilson (Wilson) in retaliation for serving as a District Labor Council (DLC) President and taking union leave. The complaint alleges that by this conduct the State violated Dills Act section 3519, subdivisions (a) and (b).

On August 5, 2016, the State filed an answer to the complaint, admitting some allegations, denying others, and asserting affirmative defenses.

On September 19, 2016, the parties participated in a PERB settlement conference, but the matter was not resolved. A formal hearing was held January 24-25, 2017, and the case was submitted for decision on March 17, after receipt of post-hearing briefs.

FINDINGS OF FACT

The State is the State employer within the meaning of Dills Act section 3513, subdivision (j). SEIU is a recognized employee organization within the meaning of Dills Act section 3513, subdivision (b), of an appropriate unit of employees. Wilson is a State employee within the meaning of Dills Act section 3513, subdivision (c).

The federal Social Security Administration (SSA) contracts with the DSS Disability Determination Services Division (DDSD) to process disability claims. Once the SSA submits a claim to DDSD, the goal is to process it within 60 to 90 days. After DDSD makes a disability determination, the claim is returned to the SSA for review and final processing.

The SSA policy on disability determinations is contained in the Program Operations Manual System (POMS). The DDSD must develop legally defensible decisions that comply with the POMS, and provide good customer service by giving claimants unable to work and needing disability benefits timely determinations.

In 1999, Wilson was hired by DSS as a Program Technician II in DDSD. In 2005, Wilson promoted to Disability Evaluation Analyst (DEA). Wilson's supervisor from December 2013 to August 2015 was Unit Manager Jon Howard (Howard).

Wilson and Howard were both appointed DEAs in September 2005, and sat next to each other during the six-month DEA training class. In October 2009, Howard promoted to DEA III, serving as professional relations contact for outside consultative medical examination providers. In December 2011, Howard became a unit manager supervising a team of DEAs, program technicians, and medical consultants. Wilson was assigned to Howard's team in December 2013.

Howard considers Wilson a friend. Before he became a supervisor, he was a SEIU member. Howard continues to support labor unions and believes Wilson has a right to use union leave. Occasionally, after Wilson returned from union leave, Howard asked her how things went. Before he supervised Wilson, Howard once talked with her about her passion for union work. Howard asked why she hadn't pursued a full-time position with SEIU. Wilson responded that State benefits were better than those offered by the Union.

DEAs determine if a claimant qualifies for disability benefits based on a medical and vocational assessment. Claims are evaluated to determine whether a claimant is precluded from the type of work they previously performed or precluded from all work.

DEAs process disability claims by opening a case and reviewing the application; submitting requests for medical records; requesting functional, and vocational evidence from various sources; reviewing and summarizing the medical, functional and vocational evidence received; making a disability recommendation; and submitting the case to medical consultants for review. After the medical consultant review is completed, the case returns to the DEA to

review the claimant's past work and limitations of his/her impairment to make a final determination on disability before closing the case and returning it to the SSA.

DEAs use three different computer programs to adjudicate and track cases: MIDAS, E-view, and eCAT. MIDAS organizes the caseload and tracks actions taken on a case. MIDAS creates a "tickle," which sets a date or timeframe for completing the next action in the case. Every open case must have a tickle, setting the next action so the case does not get "lost." E-view is the electronic folder where medical and functional evidence is posted. DEAs use E-view to open and review medical records. DEAs use eCAT to summarize the evidence, note actions taken or reasons for delays, and record the medical/vocational determinations.

On April 4, 2012, DDSD distributed the policy on Maintaining the Integrity of the Electronic Folder, which states, in part:

> When electronic evidence is received, a tickle is automatically created. The tickle posts to the Caseload Summary Screen as an alert that action is needed. The evidence must be reviewed and appropriate action taken before the tickle is cleared as Completed ("P'd") or Not Performed ("Q'd") to remove it from the Caseload Summary Screen. Examples of appropriate actions include, but are not limited to, annotating, bookmarking, categorizing, and/or adding pertinent findings to the consult or eCAT document, according to branch procedures. Failure to take appropriate action in accordance with established Program guidelines prior to entering a "P" or "Q" on a tickle is a disservice to the claimant. **Any individual who "P's" or "Q's" a tickle without taking the appropriate action may be subject to disciplinary action.**
>
> . . . When a case is in the "No Action in 30+ Days" category because action is overdue, it is expected that staff will give priority to taking productive action on that case in accordance with Program guidelines. A productive action is one that moves the case toward closure. Creating a blank document or editing the tickle with an entry such as "Needs Review" to remove it from the "No Action in 30+ Days" category is not a productive action and is a disservice to the claimant. **Any individual taking a nonproductive action just to remove a case from the "No**

> **Action in 30+ Days" category may be subject to disciplinary action.**

[Emphasis in original.]

On May 9, 2012, DDSD distributed the Workload Management policy, which provides in part:

> Once a case has been assigned to a Disability Evaluation Analyst (DEA), the Division **goal** is to complete all case actions within 48 hours after the due date. . . .
>
> The Division **expectation** is that all case actions will be completed within no more than 5 working days of when they are due.
>
> Each branch will maintain a branch contingency plan for case action coverage for staff who are on vacation. . . .
>
> All open cases must have a tickle.
>
> Tickles must not be cleared as Completed ("P'd") or Not Performed ("Q'd") without taking appropriate/meaningful action.
>
> All medical evidence of record (MER) and consultative examination (CE) reports should be reviewed, categorized, bookmarked, and summarized within the Division goal/expectations timelines noted above.

[Emphasis in original.]

On March 15, 2013, DDSD issued a revised Workflow Expectations policy, which states in part:

> This memo details the minimum expectations regarding casework workflow. . . .
>
> 2. Openings must be opened within 48 hours of assignment to the analyst.
>
> 3. All cases must have a tickle.
>
> 4. Action must be taken on your two oldest EMMs every day.

On August 11, 2014, the updated Workflow Expectations policy was issued, which added:

> 5. Tickles must not be cleared as Completed ("P'd") or Not Performed ("Q'd") without taking appropriate/meaningful action.

Wilson acknowledged receiving these policies, stating that the Workflow Expectations policy must be reviewed and signed annually. In an August 21, 2014 team meeting, Howard reviewed the August 2014 Workflow Expectations policy, and explained that clearing tickles without taking appropriate action constitutes fraud and would result in disciplinary action.

Wilson knew it was wrong to clear tickles without taking appropriate action. In a December 2, 2014 email to Howard, Wilson asked for guidance on a case based on a delay in requested evidence, stating that, "removing the tickle or moving the tickle could be misinterpreted as fraudulent activity."

Each DEA is assigned 2-3 new cases per day, up to 14 cases per week. On average, it takes 15-20 minutes to open a case and request medical, functional, and vocational evidence. The goal is to open a case within two business days of assignment. Once a case is opened, MIDAS generates a 28-day tickle to remind the DEA to follow up and move the case toward closure. A tickle is also generated when medical records are received, notifying the DEA that records are available for review. The goal is to review and summarize records within two business days. Meaningful action to clear a tickle includes reviewing, bookmarking, highlighting, and summarizing the evidence in eCAT.

At the 28-day tickle, there are three options to move a case toward closure: (1) seek supplemental evidence; (2) order a consultative examination with an outside medical provider

when the medical records are insufficient to make a determination;[2] or (3) write the case up for review by the team's medical consultant.

When an outside consultative exam is ordered, DEAs adjust the 28-day tickle to allow time to receive the report. When the team medical consultant completes a review of the case, a tickle is created to notify the DEA that the assessment is complete and a final disability determination should be made.

Each week, MIDAS generates a list of cases where no action has been taken by the DEA in more than 30 days. Unit managers use the "No Action in 30+ Days" list as a "red flag" to audit the case. Howard testified that it is "dishonest" to clear a tickle without taking appropriate action just to remove a case from the 30-day list, and it violates DDSD policy.

When DEAs are absent, cases continue to be assigned for the first two days of an absence. For example, a DEA on vacation for one week has cases assigned the first two days of the absence. A DEA out for only two days would continue to have cases assigned during that time.[3]

Contingency coverage for an absent DEA is the assignment of other DEAs to work on the most pressing tickles of the absent DEA. Coverage begins on the first day of a planned absence and the second day of an unplanned absence, such a sick leave, and is provided every other day during an absence. DEAs have covered Wilson's cases during her absences, and Wilson has provided contingency coverage for other DEAs.

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[2] DSS pays consultative exam providers to examine a claimant and issue a report. Because of the cost, DEAs are cautioned against ordering unnecessary consultative exams.

[3] DEAs can choose to frontload or backload cases assigned during a planned absence. Frontloaded cases are assigned before the absence so they can be opened and medical records ordered; records may be received by the time the DEA returns to work. Cases can also be assigned at the end of the leave, giving the DEA time to open them within two days of returning to work.

DEAs can request to be assigned overtime "contract" cases in addition to regular case assignments. Each contract case comes with two and one-half hours of overtime, and must be completed within 90 days. If a DEA takes 10 contract cases, they are given 25 hours of overtime to work these cases. Wilson requested contract cases in addition to her regularly assigned workload.

In 2007, Wilson became a job steward. Between 2008 and 2014, Wilson was a member of a statewide joint labor-management committee and participated in meetings also attended by DDSD Deputy Director Eva Lopez (Lopez). In April 2009, SEIU issued recommendations on disability claim processing, which proposed ending case assignments when DEAs were absent from work.

In Spring 2015, Wilson was designated DLC President 772. She also served as chair of the Human Rights Committee and Women's Committee, and represented SEIU on three other labor boards.

Wilson has long used union leave. To obtain union leave, SEIU submitted a request to DSS Labor Relations identifying the specific dates of leave requested for Wilson. DSS Labor Relations then sent an email to Howard and his supervisors advising of SEIU's request. Howard had no role in approving union leave requests for Wilson, but sometimes his supervisor asked about his staffing needs.

Wilson's union leave started to increase in 2012, and continued into 2015. In 2012, Wilson's union leave was intermittent, a day or two here and there, until Fall when she was on full-time union leave from November 2012 through March 2013.

After returning to work in March 2013, Wilson's union leave was intermittent. In 2014, union leave continued to be intermittent until Fall when she was approved for another long-term leave.

In 2015, Wilson used a total of 172 hours or 21.5 days of union leave.[4] Most union leave was intermittent, ranging from one hour to two days. Two of 22 union leave requests were denied; four days in February, and a three and one-half month leave request from July to October.

SEIU's request that Wilson be granted union leave for October 28-29, 2015, to attend a special council meeting, was initially denied on October 12. Wilson told her supervisor, Unit Manager Laura Lindlief,[5] that she needed to attend the meeting, but was told to go through SEIU to get information, not DDSD management. Wilson used vacation leave to attend the October council meeting. After SEIU contacted the California Department of Human Resources (CalHR), the union leave request was approved on November 6, and Wilson's vacation leave was restored.

In December, two weeks of union leave were approved. Another December request for over one year of union leave, through January 2017, was denied, but long-term leave from January 4, through April 29, 2016, was approved.

Shortly after Wilson's assignment to Howard's team in December 2013, he periodically sent her email noting specific case deficiencies and delays, and providing direction to move cases toward closure.

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[4] During 2015, Wilson also reported 166.5 hours or 20.8 days of sick leave, and 150.5 hours or 18.8 days of vacation leave. Including union leave, Wilson was on leave for at least 61.1 days in 2015.

[5] In August 2015, Howard was promoted to Branch Training Coordinator, responsible for DEA training and assisting struggling DEAs.

On July 21, 2014, Wilson received an Individual Development Plan (IDP), prepared by her previous supervisor, Jeanne Driscoll (Driscoll).[6] The IDP noted that Wilson maintained a 92.4% accuracy rate. Howard explained that this is an average accuracy rate for DEAs.

The IDP described areas of improvement needed, and identified as major issues: (1) tickles were cleared with no action taken; (2) entries referencing an action were made before the action was taken; and (3) completion of actions without making MIDAS entries resulted in 30+ day no action entries reflecting unnecessary case delays and poor customer service. The IDP provided specific case examples of tickles cleared without taking action, medical records not reviewed, cases not opened within timelines, tickles changed without meaningful action taken, and entries made for actions not completed.

On August 22, 2014, Howard counseled Wilson about her work performance. Wilson's case statistics showed she had the highest number of pending cases, and her progress to become current was slow. Wilson had nearly half of her contract cases remaining, but had used over 75 percent of authorized overtime to work the cases. To assist her, Howard assigned other DEAs to work on 17 of Wilson's cases over the prior month. Howard also identified examples of tickles being cleared without appropriate action taken, and stressed that it violated policy. They also discussed a plan to continue working on some of the oldest cases while maintaining progress on current cases.

Despite several communications with Wilson, Howard noticed that she continued to clear tickles inappropriately. After Howard discussed the matter with his supervisor, they decided the policy violation was so significant that further action was necessary. Howard

[6] Testimony about a statement made by Driscoll is hearsay for which no exception applies. Therefore, the statement cannot be considered.

audited Wilson's cases, identified the most egregious cases, and drafted a Notice of Adverse Action (NOAA).

The NOAA, signed by Deputy Director Lopez and given to Wilson on November 10, 2014, reduced her salary by five percent for four months. The NOAA provided the 12 most egregious examples of policy violations. In 11 cases, Wilson cleared tickles without taking meaningful action. In one case, Wilson put a notation in the case record to remove it from the 30+ day no action list, but did not take meaningful action. As a result, delays in the cases ranged from 16 to 85 days.

Howard explained that Wilson's improper clearing of tickles was not a training issue, but rather a deliberate action to clear a tickle when the work had not been completed. Improperly clearing tickles without taking meaningful action caused delays which harmed claimants needing disability benefits. Howard testified that the NOAA imposed a very minor penalty, hoping it would stop Wilson from taking improper action on tickles. The NOAA was settled in January 2015, reducing the penalty to a five percent salary reduction for two months.

Howard continued to monitor Wilson's caseload, periodically sending her email between December 2014 and August 2015, which identified delayed case openings, documents available to review, and cases ready to close. On May 1, 2015, Howard asked Wilson to attend a "tune-up" training session to assist her with case management. In July 2015, Howard assigned other DEAs to work on Wilson's cases to give her time to catch up on her oldest tickles and case openings.

In March 2015, Howard noticed another pattern of Wilson improperly clearing tickles. He started auditing Wilson's cases again. Howard and his supervisors considered putting Wilson on a case management plan but concluded there was no corrective action plan for the

policy violation except to stop clearing tickles inappropriately. In May, Howard and his supervisors decided to impose further adverse action.

Howard continued auditing Wilson's cases, completing the first draft of the adverse action in July 2015. The concerns addressed in the new NOAA were exactly the same as the issues in the November 2014 NOAA. The draft was reviewed by DSS Legal and returned for additional information in late August 2015. A second draft was sent to Legal in September, and a third and final draft was reviewed and returned in October. On October 29, Howard and his supervisors signed a formal request to DSS management to issue the NOAA to Wilson.

On December 31, 2015, Wilson was issued a NOAA, signed by Deputy Director Lopez, demoting her from a DEA to a Program Technician II. The NOAA summarized the 13 most egregious examples of policy violations. The NOAA described numerous examples of clearing tickles without taking meaningful action, delays in opening cases, untimely requests for records and review of records, reporting actions taken before the actions were completed, adjusting a tickle without taking the noted action, and ordering unnecessary consultative medical exams. The actions resulted in the delay of final disability determinations by two to six months.

Wilson appealed the demotion to the State Personnel Board (SPB). After an evidentiary hearing, SPB upheld the demotion.

SEIU Resource Center Coordinator Tracy Peake (Peake) maintains records of adverse actions received by members. Peake provided copies of NOAAs received by three DEAs.[7] The primary concerns in these NOAAs were untimely actions, lack of knowledge of program requirements, failure to recognize issues and apply policy/program criteria, and inability to

[7] Neither the employees nor their supervisors testified about the conduct described in the NOAAs. None of the three DEAs served as job stewards.

work independently. The NOAAs concluded that this conduct resulted in significant delays in making disability determinations and case management issues. In contrast, although the NOAAs issued to Wilson noted delays in case processing, the primary focus in both of her NOAAs was the clearing of tickles without taking appropriate action.

On January 6, 2012, Deborah Lawson (Lawson) received a NOAA demoting her from a DEA to a Program Technician II. Lawson was previously placed on a caseload management plan, and a merit salary adjustment (MSA) and range change were denied.[8]

On December 5, 2012, Sally Bill (Bill) was issued a NOAA demoting her from a DEA III to a DEA for six months. The NOAA identified one incident of clearing a tickle without taking appropriate action. Prior to receiving the NOAA, Bill's MSA was denied in 2010 and 2011, and she was placed on two case management plans.

On May 28, 2014, Bill received a second NOAA, demoting her from DEA III to Program Technician II. Bill was not placed on a case management plan prior to receiving this NOAA.

On August 12, 2013, Roberto Pena (Pena), a DEA III, was issued a NOAA imposing a one-year suspension. The NOAA reported one incident of clearing a tickle without reviewing records. Pena's supervisor implemented two case management plans, but he was not denied an MSA.

[8] Howard never granted or denied Wilson an MSA because she was at the top step of the pay range and was not eligible for further MSAs.

ISSUE

Did the State demote Wilson in retaliation for serving as a DLC President and taking union leave?

CONCLUSIONS OF LAW

State employees have the right to "form, join, and participate in the activities of employee organizations of their own choosing." (Dills Act, §3515.) The State employer violates this right when it imposes reprisals on employees because of their participation in protected activities. (Dills Act, §3519, subd. (a).)

To demonstrate a prima facie case of retaliation in violation of Dills Act section 3519, subdivision (a), a charging party must show that: (1) the employee exercised rights under the Dills 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 the action because of the exercise of those rights. (*Novato Unified School District* (1982) PERB Decision No. 210.)

Protected Activity

Serving as a union officer demonstrates participation in protected activity. (*Santa Clara Valley Water District* (2013) PERB Decision No. 2349-M [union officer, joint labor-management committee member]; *Klamath-Trinity Joint Unified School District* (2005) PERB Decision No. 1778 [chapter president, bargaining team member, job steward]; *Oakdale Union Elementary School District* (1998) PERB Decision No. 1246 [union president]; *Healdsburg Union High School District* (1997) PERB Decision No. 1185 [chief negotiator].)

The record contains ample evidence that Wilson participated in protected activity. In 2015, Wilson was designated as DLC President. She also participated in numerous union

board meetings and organizing activities, and was a member of a statewide joint labor-management committee between 2008 and 2014.

Taking union leave to participate in union activities is also protected. (*City & County of San Francisco* (2004) PERB Decision No. 1664-M.) Wilson has long used union leave to participate in activities as a union officer. Her union leave began increasing in 2012, for periods as short as one hour, up to a five month union leave from November 2012 through March 2013.

Employer Knowledge

To establish retaliation for protected activity, the employer must know that the employee engaged in protected activity. (*Sacramento City Unified School District* (1985) PERB Decision No. 492.) Howard admitted that he knew Wilson was a union officer. On occasion, Howard asked Wilson about her union activities. In addition, Deputy Director Lopez, who signed both of Wilson's NOAAs, attended the joint labor-management committee meetings in which Wilson participated between 2008 and 2014. Thus, Lopez was also aware of Wilson's service as a union officer.

Howard and his supervisors also knew of Wilson's union leave. They received email from DSS Labor Relations each time SEIU submitted a request for union leave for Wilson. Accordingly, the State was aware that Wilson was a union officer and used union leave to participate in union activities.

Adverse Action

The Board uses an objective test to find adverse action and will not rely upon the subjective reactions of the employee. (*Palo Verde Unified School District* (1988) PERB

Decision No. 689.) In *Newark Unified School District* (1991) PERB Decision No. 864, the Board explained:

> The test which must be satisfied is not whether the employee found the employer's action to be adverse, but whether a reasonable person under the same circumstances would consider the action to have an adverse impact on the employee's employment.

A demotion has been found to be an adverse action because it has an adverse impact on an employee's employment. (*Regents of the University of California* (1983) PERB Decision No. 310-H.) Wilson's disciplinary demotion from a DEA to a Program Technician II is an adverse action.

Unlawful Motivation

Finally, a charging party must show that the employee's protected activity was a motivating factor in the employer's decision to impose adverse action. (*Carlsbad Unified School District* (1979) PERB Decision No. 89; *Omnitrans* (2010) PERB Decision No. 2121-M.) In the absence of direct evidence, an inference of unlawful motivation may be drawn from circumstantial evidence in the record. (*Carlsbad Unified School District*, *supra*, PERB Decision No. 89.)

Although the timing of the employer's adverse action in close temporal proximity to the employee's protected conduct is an important factor (*North Sacramento School District* (1982) PERB Decision No. 264), it does not, without more, demonstrate the necessary connection or "nexus" between the adverse action and the protected conduct. (*Moreland Elementary School District* (1982) PERB Decision No. 227.) Facts establishing one or more of the following additional factors must also be present: (1) the employer's disparate treatment of the employee (*State of California (Department of Transportation)* (1984) PERB Decision No. 459-S); (2) the

employer's departure from established procedures and standards when dealing with the employee (*Santa Clara Unified School District* (1979) PERB Decision No. 104); (3) the employer's inconsistent or contradictory justifications for its actions (*State of California (Department of Parks and Recreation)* (1983) PERB Decision No. 328-S); (4) the employer's cursory investigation of the employee's misconduct (*City of Torrance* (2008) PERB Decision No. 1971-M; *Coast Community College District* (2003) PERB Decision No. 1560); (5) the employer's failure to offer the employee justification at the time it took action (*Oakland Unified School District* (2003) PERB Decision No. 1529) or the offering of exaggerated, vague, or ambiguous reasons (*McFarland Unified School District* (1990) PERB Decision No. 786); (6) employer animosity towards union activists (*Jurupa Community Services District* (2007) PERB Decision No. 1920-M; *Cupertino Union Elementary School District* (1986) PERB Decision No. 572); or (7) any other facts that might demonstrate the employer's unlawful motive (*North Sacramento School District*, *supra*, PERB Decision No. 264; *Novato Unified School District*, *supra*, PERB Decision No. 210).

Wilson was designated DLC President in Spring 2015, and continually used union leave throughout 2015. She was issued the NOAA in December 2015. The NOAA was issued while Wilson continued to use union leave for her work as DLC President. Thus, Wilson's protected activity was in close temporal proximity to the adverse action.

SEIU contends that nexus is established by the unreasonable processing of Wilson's union leave requests and failure to properly provide coverage during Wilson's leave. SEIU asserts that union animus is demonstrated by Howard suggesting that Wilson should leave to work for the Union. SEIU also argues that Wilson was treated differently than other DEAs who were not union officers.

Wilson has used union leave for a number of years, and several leave requests were approved for long-term leave up to five months. In 2015, two of 22 union leave requests were denied. SEIU does not contend that the denial of these two leave requests demonstrates unlawful motivation. Rather, SEIU points to a single request for union leave on October 28-29, which was initially denied. After SEIU contacted CalHR, the leave request was approved and Wilson's vacation leave was restored. Although the approval of union leave was delayed, the leave was eventually granted. Wilson was not harmed by the delay because she attended the union meeting and her vacation leave was restored. The delay in granting a single leave request does not establish nexus.

SEIU contends that the initial denial of the October 28-29, 2015 leave is suspicious because Howard and his supervisors signed the formal request to issue the NOAA on October 29, the same day that Wilson was on the disputed leave. However, the leave request was denied on October 12, before the formal request to impose discipline was signed. Furthermore, Howard and his supervisors made the decision to issue the NOAA in May, with the first draft completed by July. The October 29 request to impose discipline was the final step before issuing the NOAA. Thus, the timing of the final step in imposing discipline at the same time Wilson was out on the initially denied union leave does not demonstrate unlawful motive.[9]

[9] SEIU contends Howard's testimony is not credible because he could not remember when he printed final caseload summary reports related to Wilson's NOAA, and he did not know that the SSA Office of the Inspector General issued a report in May 2015 on case processing times for each State. I find Howard's testimony to be credible. His answers were clear and comprehensive, he demonstrated a thorough knowledge of the case review process, and his understanding and memory of the cases summarized in Wilson's NOAAs was complete. His testimony and demeanor did not demonstrate animosity toward Wilson.

SEIU also contends that the assignment of cases on the first two days of an absence demonstrates a failure to properly provide coverage for Wilson's use of union leave. Since 2009, SEIU has sought to end the practice of assigning cases on days that a DEA is absent from work. Notwithstanding SEIU's desire for change, the policy applies to all DEAs and all types of absences, vacation, sick leave, and union leave. Thus, the evidence does not demonstrate that Wilson was treated differently than other employees when cases continued to be assigned on the first two days of an absence.

SEIU also argues that union animus was established when Howard asked Wilson why she didn't go to work for the Union.

Outward expressions of animus toward the union or protected activity may provide evidence of unlawful motive. However, statements must be interpreted in their proper context. (*Rio School District* (2015) PERB Decision No. 2449.) The standard is whether a reasonable person under the same circumstances would understand the comments to demonstrate union animus. (*Garden Grove Unified School District* (2009) PERB Decision No. 2086.)

Howard supports unions, and believes Wilson has a right to use union leave. On occasion, after she returned from union leave, Howard asked how things went. Once, before he began to supervise Wilson, Howard talked with her about her work with the Union. At the time, Wilson was a job steward and served on the labor-management committee, but was not yet serving as DLC president. Howard noted her passion in working for the Union, and asked why she didn't pursue full-time work with SEIU.

In the context that this statement was made, there is not the slightest hint of union animus. The conversation occurred before Howard supervised Wilson. Howard was interested in Wilson's union work, and suggested she would be an asset to the Union. A reasonable

person would find the comment supportive of Wilson's advocacy on behalf of the Union. Howard's comment does not demonstrate union animus.

Finally, SEIU asserts Wilson was treated differently than other DEAs because she was not first denied an MSA and given a case management plan before adverse action was imposed.

The denial of an MSA was not an option. Wilson was not eligible for further MSAs because she was at the top step of her pay range. Thus, the failure to deny Wilson an MSA before issuing the NOAA does not demonstrate disparate treatment.

Three other DEAs were placed on case management plans. Lawson was placed on one case management plan, and Bill and Pena were placed on two case management plans, before NOAAs were issued to them. Bill was not given a case management plan before receiving the second NOAA. The case management plans directed the DEAs to focus on certain types of actions such as the oldest cases, or complete a number of specific actions each day.

In August 2014, Howard counseled Wilson about her work performance. Wilson had the highest number of pending cases and her progress was slow. Howard also noted that Wilson cleared tickles without taking appropriate action and stressed that it violated policy. Howard also discussed a plan with Wilson, directing her to continue working on some of the oldest cases while maintaining progress on current cases although he did not identify this as a case management plan. Wilson was issued the first NOAA in November 2014.

In March 2015, Howard noticed that Wilson continued to clear tickles inappropriately. Howard and his supervisors considered putting Wilson on a case management plan but concluded there was no corrective action plan for the deliberate violation of policy except to stop improperly clearing tickles.

The State contends that the conduct leading to discipline for Wilson was different than that of the other DEAs, and a case management plan would not stop Wilson's continued policy violations.

The focus on Wilson's conduct in improperly clearing tickles was slightly different than the other DEAs. Some deficiencies described in her NOAA, however, were similar, such as ordering unnecessary consultative exams and delays in opening cases and reviewing records.

The other DEAs were charged with lack of knowledge of program requirements, failure to recognize issues and apply policy criteria, inability to work independently, and untimely actions. Although the focus of the other DEA's NOAAs was different than Wilson's, the overall impact in all was the same – significant delays in processing claims.

There is no evidence that a progressive discipline policy requires a case management plan before discipline is imposed. Other DEAs with significant case delays, were given case management plans to assist them with case processing before discipline was imposed. That Wilson did not first receive a case management plan for some of the same conduct causing delays in case processing suggests disparate treatment. Although slight, evidence of nexus is present and a prima facie case of retaliation is established.

State's Burden

Once the charging party establishes a prima facie case of retaliation, the burden shifts to the employer to prove it would have taken the same adverse action even if the employee had not engaged in protected activity. (*Novato Unified School District, supra,* PERB Decision No. 210; *Martori Brothers Distributors v. Agricultural Labor Relations Bd.* (1981) 29 Cal. 721, 729-730; *Wright Line* (1980) 251 NLRB 1083.) When it appears that the employer's

adverse action was motivated by both lawful and unlawful reasons, "the question becomes whether the [adverse action] would not have occurred 'but for' the protected activity." (*Martori Brothers Distributors v. Agricultural Labor Relations Bd., supra*, 29 Cal. 721, 729-730.) The "but for" test is "an affirmative defense which the employer must establish by a preponderance of the evidence." (*McPherson v. Public Employment Relations Bd.* (1987) 189 Cal.App.3d 293, 304.) When conducting the "but for" analysis, the proper inquiry is whether the employer's true motivation for taking the adverse action was the employee's protected activity. (*Regents of the University of California* (1993) PERB Decision No. 1028-H.) The employer must show that it had an alternative non-discriminatory reason for imposing the adverse action and that it acted because of this alternative non-discriminatory reason, not because of the employee's protected activity. (*Palo Verde Unified School District* (2013) PERB Decision No. 2337.)

The State provided ample evidence to prove it would have taken the same action even if Wilson had not engaged in protected activity. In July 2014, Wilson's IDP described areas of needed improvement, including directing Wilson to stop clearing tickles without taking action. The first NOAA issued in November 2014 disciplined Wilson for improperly clearing tickles. Howard hoped the "minor penalty" would correct Wilson's behavior and stop her from clearing tickles before taking appropriate action.

Howard continued to monitor Wilson's cases. In March 2015, he observed that Wilson continued to clear tickles without performing the required action.

DDSD policy specifically highlighted that improperly clearing tickles could result in discipline. Wilson was aware of this policy. She testified that DEAs were required to review

and sign the policy annually. She also admitted in a December 2, 2014 email to Howard that adjusting a tickle without performing the work was "fraudulent activity."

Before receiving the December 2015 NOAA, Wilson was given assistance and many opportunities to stop violating this policy. She was counseled about improperly clearing tickles, and Howard gave her a plan to manage her caseload. Other DEAs were assigned to work on her cases, she received additional training on caseload management, and was eventually given minor discipline so she would stop clearing tickles improperly. But Wilson continued to clear tickles in violation of policy. The impact was a significant delay in case processing, and the ultimate harm was a delay in benefits to claimants unable to work.

Wilson was not the only DEA disciplined for delays harming claimants. Other DEAs with case management issues received similar discipline. Lawson and Bill were demoted, and Pena received a one-year suspension.

Union activists are not guaranteed "a right to be insulated from non-discriminatory personnel actions." (*Los Angeles Unified School District* (2016) PERB Decision No. 2479, Proposed Decision, p. 33.) The State attempted to stop Wilson's policy violations with progressive discipline, including counseling, assistance, training, and a minor NOAA. When Wilson continued to violate policy, the State took the next step, imposing the demotion. The harm to claimants was significant, and the State's prior corrective actions were ineffective in bringing an end to the policy violations. Therefore, the State has established by persuasive evidence, that it had, and acted because of, an alternative non-discriminatory reason when it demoted Wilson, and not because she served as a union officer or took union leave.

PROPOSED ORDER

Based on the foregoing findings of fact and conclusions of law, and the entire record in this matter, the complaint and underlying unfair practice charge in Case No. SA-CE 2073-S, *Service Employees international Union Local 1000 v. State of California (Department of Social Services)* are hereby DISMISSED.

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
(916) 322-8231
FAX: (916) 327-7960
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 or received by electronic mail before the close of business, which meets the requirements of PERB Regulation 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, 32091 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).)