STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

STATEWIDE UNIVERSITY POLICE ASSOCIATION, Charging Party, v. TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY, Respondent.	)	Case Nos. S-CE-32-H S-CE-33-H Request for Reconsideration PERB Decision No. 805-H PERB Decision No. 805b-H November 14, 1990

Appearances: Mastagni, Holstedt & Chiurazzi by Mark R. Kruger, Attorney, for Statewide University Police Association; William B. Haughton, Attorney, for Trustees of the California State University.

Before Hesse, Chairperson; Craib, Shank, Camilli and Cunningham, Members.

DECISION

CRAIB, Member: This case is before the Public Employment Relations Board (PERB or Board) on a request for reconsideration, filed by the Trustees of the California State University (CSU), of PERB Decision No. 805-H. In that case, the Board held that CSU violated section 3571, subdivisions (a) and (b), of the Higher Education Employer-Employee Relations Act (HEERA or Act)[1]

[1]**HEERA** is codified at Government Code section 3560 et seq. Unless otherwise indicated, all statutory references are to the Government Code. Prior to January 1, 1990, section 3571, subdivisions (a) and (b) stated:

> It shall be unlawful for the higher education employer to:
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> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce

by imposing discipline on Officer John Moseley (Moseley) due to his exercise of protected activities.

Since the filing of its request for reconsideration, CSU filed a motion asking the Board to give collateral estoppel effect to a conflicting decision of the State Personnel Board (SPB), which became final while the request for reconsideration was pending before PERB.[2] On June 14, 1990, the Board issued Decision No. 805a-H, granting the request for reconsideration so that the Board could examine the propriety of applying collateral estoppel in these circumstances.

For the reasons stated below, we find it improper to apply collateral estoppel principles to the situation herein and reaffirm the holding of PERB Decision No. 805.[3]

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employees because of their exercise of rights guaranteed by this chapter.

(b) Deny to employee organizations rights guaranteed to them by this chapter.

[2]The SPB decision, in which it was held that CSU had cause for disciplining Moseley and would have taken the actions against him even in the absence of his protected activity, became final when the 30-day period for applying for rehearing expired. (See Cal. Code of Regs., title 2, sec. 70; State of California (Department of Developmental Services) (1987) PERB Decision No. 619-S, p. 2, fn. 1 (petition for writ of mandamus does not prevent SPB decision from being considered final for the purposes of collateral estoppel.))

[3]In its original request for reconsideration, CSU asserted, based on findings in the not yet final decision of the SPB, that the Board's decision contained prejudicial errors of fact. As the findings underlying Decision No. 805 are amply supported by the record, we find that it contains no errors of fact. Nor are the findings of the SPB binding upon this Board. (See discussion, infra.)

DISCUSSION

The doctrine of collateral estoppel is applied to preclude the relitigation of an issue already decided in another proceeding where: (1) the issue decided in the prior proceeding is identical to that sought to be relitigated; (2) the previous proceeding resulted in a final judgment on the merits; and (3) the party against whom collateral estoppel is asserted was a party or in privity with a party in the prior proceeding. (The People v. June Leora Loues Sims (1982) 32 Cal.3d 468, 484 [186 Cal.Rptr. 77]; The People v. Alvin Taylor (1974) 12 Cal.3d 686 [117 Cal.Rptr. 70].) Collateral estoppel effect may be given to decisions of administrative agencies when: (1) the agency is acting in a judicial capacity; (2) it resolves disputed issues of fact properly before it; and (3) the parties have had an adequate opportunity to litigate such disputed issues. (The People v. June Leora Lopes Sims, supra.)

We agree that, if the present circumstances presented a simple case of two administrative agencies with concurrent jurisdiction reaching conflicting decisions, each unbeknownst to the other,[4] it would be appropriate to give collateral estoppel

[4]While PERB was unaware of the SPB proceedings until the filing of the instant request for reconsideration, the SPB was fully aware of the pending PERB proceedings. Prior to the commencement of the SPB hearing, a PERB administrative law judge had issued a proposed decision. In fact, the transcripts from the PERB hearing and the proposed decision were entered into evidence before the SPB. More importantly, Moseley requested the SPB to stay its proceedings until those before PERB were completed, but that request was never formally acted upon and was, therefore, by implication, denied.

effect to SPB's decision. (See e.g., Valerie Baughman, et al. v. State Farm Mutual Automobile Insurance Company (1983) 148 Cal.App.3d 621 [196 Cal.Rptr. 35].) However, that is not the case presented here.

The SPB's authority to examine disciplinary matters involving CSU employees is derived not from the California Constitution, as is its authority vis-a-vis state civil service employees, but from the Education Code.[5] Education Code section 89539 states, in pertinent part:

> Any employee dismissed, suspended, or demoted for cause may request a hearing by the State Personnel Board by filing such a request, in writing, with the board within 20 days of being served with the notice. The request may be on the grounds that the required procedure was not followed; that there is no ground for dismissal, suspension, or demotion; that the penalty is excessive, unreasonable, or discriminatory; or that the employee did not do the acts or omissions alleged as the events or transactions upon which the causes are based; or that the acts or omissions alleged as the events or transactions upon which the causes are based were justified.
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> The State Personnel Board shall hold a hearing, following the same procedure as in state civil service proceedings and shall render a decision affirming, modifying or revoking the action taken. In a hearing, the burden of proof shall be on the party taking the dismissal action.

[5]Article VII, section 3, subdivision (a) of the California Constitution vests the SPB with the authority to review disciplinary actions against civil service employees. Article VII, section 4, subdivision (h) specifically exempts officers and employees of the CSU from civil service.

PERB's jurisdiction over unfair practices arising under HEERA is conferred by the Government Code (sec. 3560 et seq.). However, this does not mean that the SPB and PERB have concurrent jurisdiction, for the language of HEERA provides that PERB's jurisdiction is preemptive in nature. HEERA section 3563.2, which was enacted after Education Code section 89539, states, in pertinent part:

> The initial determination as to whether the charges of unfair practices are justified, and, if so, what remedy is necessary to effectuate the purposes of this chapter, shall be a matter within the exclusive jurisdiction of the board. (Emphasis added.)

Education Code section 89539, in contrast, contains no language that can be construed to provide the SPB with exclusive jurisdiction.

The preemptive nature of PERB's jurisdiction has been recognized consistently by the courts. In San Diego Teachers Association, et al. v. The Superior Court of San Diego County (1979) 24 Cal. 3d 1 [154 Cal.Rptr. 893], the California Supreme Court annulled contempt orders against strike conduct in defiance of a restraining order and preliminary injunction. The Court found that, in light of PERB's initial, exclusive jurisdiction to determine if the strike constituted an unfair practice and, if so, what the appropriate remedy should be, the superior court's orders were an invalid infringement upon PERB's jurisdiction.[6]

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[6]While the San Diego case arose under the Educational Employment Relations Act (EERA), the result would be the same under the HEERA, as the jurisdictional language in the two

(cf. William Leek, et al. v. Washington Unified School District, et al. (1981) 124 Cal.App.3d 43 [177 Cal.Rptr. 196] (trial court properly dismissed action where claims were within the exclusive jurisdiction of PERB).) In San Lorenzo Education Association v. Larry A. Wilson, et al. (1982) 32 Cal.3d 841 [187 Cal.Rptr. 432], the court found a court action to be proper where the claim presented did not fall within PERB's jurisdiction, stating: "We do not dispute that PERB has exclusive jurisdiction over issues concerning unfair labor practices (citation omitted). The case at bar, however, does not involve a dispute over an unfair practice." (Id. at p. 853; cf. Wygant v. Victor Valley Joint Union High School District (1985) 168 Cal.App.3d 319 [214 Cal.Rptr. 205]; California School Employees Association, et al. v. Travis Unified School District, et al. (1984) 156 Cal.App.3d 242 [202 Cal.Rptr. 699]; California School Employees Association v. Azusa Unified School District, et al. (1984) 152 Cal.App.3d 580 [199 Cal.Rptr. 635].)[7]

The impact of PERB's initial, exclusive jurisdiction upon the SPB's authority to address disciplinary matters involving CSU employees, where the adverse action is alleged to have been due

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statutes is identical. (See EERA section 3541.5.)

[7]In each of the above cited cases, contrary to the dissent's assertions, the issue addressed was whether the claims asserted fell within the scope of PERB's exclusive jurisdiction, and not whether the complainant was bound to exhaust administrative remedies.

to protected activity under HEERA, is apparent.[8] If the courts must defer to PERB's exclusive jurisdiction, so must an administrative agency.[9] Where the matter before the SPB arguably involves an unfair practice, it is incumbent upon the SPB to stay or continue its proceedings until remedies before PERB have been exhausted.

Here, the SPB was made aware of pending proceedings before PERB, yet proceeded to a final decision. Thus, the SPB acted in excess of its authority and its decision may not be given collateral estoppel effect. As noted above, one requirement for applying collateral estoppel to a decision of an administrative agency is that the agency resolved disputed issues of fact properly before it. (People v. Sims, supra, p. 479.) As a general matter, a judgment rendered in excess of jurisdiction will not be given collateral estoppel effect. (7 Witkin, Cal.

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[8]The SPB's authority to address disciplinary matters not involving an alleged unfair practice is, of course, unaffected by PERB's exclusive jurisdiction.

[9]The dissent fails to acknowledge the logic of this proposition, and cites no authority in defense of its position. Presumably, the dissent is relying on its peculiar view that "initial, exclusive jurisdiction" refers to nothing more than the doctrine of exhaustion of administrative remedies. However, as exhaustion of administrative remedies is automatically implicated by the creation of a comprehensive administrative remedy such as that contemplated by HEERA, (Frank Abelleira, et al. v. District Court of Appeal of the State of California (1941) 17 Cal.2d 280, 292 [109 P.2d 942]), the Legislature's deliberate inclusion of specific language providing for "initial, exclusive jurisdiction" must carry some additional meaning, or this language becomes mere surplusage. Such an interpretation is to be avoided. (City and County of San Francisco v. John C. Farrell (1982) 32 Cal.3d 47, 54 [184 Cal.Rptr. 713]; Gay Law Students Association v. Pacific Telephone & Telegraph Co., et al. (1979) 24 Cal.3d 458, 478 [156 Cal.Rptr. 14].)

Procedure (3d ed. 1985) Judgment, sec. 194, p. 630.) In addition, for this Board to give collateral estoppel effect to the SPB's failure to defer to PERB's initial, exclusive jurisdiction would violate our statutory duty to decide those matters falling within our exclusive jurisdiction and would require us to ignore the plain language of HEERA section 3563.2.[10] The statute plainly provides that PERB has initial, exclusive jurisdiction, and we must presume that the Legislature meant what it said.

Moreover, remaining true to the plain language of the controlling statutes best serves the principles of administrative accommodation. Deferring to PERB when the HEERA is implicated allows PERB to decide those issues within its expertise, i.e., whether HEERA has been violated. In a case such as the instant

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[10]In light of our discussion here, certain elements of Kern County Office of Education (1987) PERB Decision No. 630 and San Diego Unified School District (1987) PERB Decision No. 631 are called into question. San Diego involved instructions by the Board on remand to a Board agent to consider the appropriateness of giving collateral estoppel effect to the earlier findings of a local personnel commission. In Kern County, the Board stated, in dicta, that application of the collateral estoppel doctrine might have been required had all the elements of the doctrine been satisfied. In that case, the collateral estoppel doctrine was not applied, however, as the Board affirmed the dismissal of the charge by the Board agent. To the extent these decisions contradict this opinion, both decisions should be overruled. We note that both Kern County and San Diego cite State of California (Department of Developmental Services), supra, PERB Decision No. 619-S in support of the conclusion that collateral estoppel might be applicable to the decisions of local personnel commissions. Department of Developmental Services addressed the effect of a prior decision rendered by the SPB while acting within its constitutional authority, and thus that case should not have been considered controlling in Kern County and San Diego.

one, if PERB were to decide that the discipline would not have taken place but for the exercise of protected activity, there would be no reason to waste resources by then proceeding before the SPB. However, if no violation is found, there remains the issue of whether the discipline was for cause, which is within the SPB's expertise. In contrast, this Board does not examine the propriety of an employer's personnel policies nor is its purpose to ensure that those policies are applied fairly. Our inquiry is limited to determining if the adverse action is taken in retaliation for protected activity.

Our dissenting colleagues rely heavily on the holdings in Pacific Legal Foundation, et al. v. Edmund G. Brown, Jr. (1981) 29 Cal.3d 168 [172 Cal.Rptr. 487] (hereafter PLF). However, that case is inapposite. In PLF, the California Supreme Court rejected a facial attack on the constitutionality of the State Employer-Employee Relations Act.[11] The Court determined that the statute itself was not an infringement upon the SPB's constitutional authority and that any potential interference with the SPB's constitutional authority could be avoided by administrative accommodation or by the "sensitive application of evolving judicial principles." (Id. at p. 200.) In its conclusion, the Court stated:

> Finally, the statute's grant of initial jurisdiction to the Public Employment Relations Board to adjudicate "unfair practices" creates no facial invalidity

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[n]This statute has since been renamed the Ralph C. Dills Act.

> because, in case of future disputes, an overlap of the two boards can be reconciled either by negotiation or litigation, (Id, at p. 202.)[12]

The Court implicitly recognized a potential problem if, in the case of an actual conflict, PERB's jurisdiction interfered with the constitutional authority of the SPB; however, the Court did not have to decide that issue because it was presented only with a facial attack on the statute. Instead, the Court suggested that the two boards might avoid an actual conflict with the SPB's constitutional authority through accommodation or negotiation. This Board stands ready to seek such accommodation in order to avoid interfering with the SPB's constitutional authority. (See, e.g., State of California (Dept, of Developmental Services, supra, PERB Decision No. 619-S.) However, the present case does not involve any actual or potential conflict with the SPB's constitutional authority over the discipline of state civil service employees. Instead, it involves an actual conflict between the SPB's statutory authority under the Education Code and PERB's initial, exclusive jurisdiction under HEERA.[13] Therefore, unlike the situation

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[12]Contrary to the dissent's statement at p. 34 of its opinion, the Supreme Court acknowledged the exclusive nature of PERB's unfair practice jurisdiction in the statement quoted above, and has done so in other cases. (San Diego Teachers Association v. Superior Court of San Diego County, supra. 24 Cal.3d 1, 12.)

[13]Without any supporting authority, the dissent states that in "hybrid" unfair practice cases, PERB does not have exclusive jurisdiction, contrary to the plain language of HEERA, but concurrent jurisdiction, with whatever other agency may be implicated. Thus, under the dissent's line of reasoning, PERB

presented in PLF, there is no legal impediment to the enforcement of PERB's exclusive jurisdiction.

ORDER

For the reasons stated above, the Board finds that it would be improper to apply collateral estoppel effect to the conflicting decision of the SPB and hereby REAFFIRMS the findings and order in PERB Decision No. 805.

Member Cunningham joined in this Decision.

Chairperson Hesse's concurring opinion begins on p. 12.

Members Shank and Camilli's dissenting opinion begins on p. 29.

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has exclusive jurisdiction over an unfair practice only if the claim is not cognizable before any other agency. Such reasoning, of course, makes the "exclusive jurisdiction" language in the statute meaningless. "Exclusive" is defined as excluding or tending to exclude all others. (Webster's New World Diet. (2d college ed. 1976) p. 489.)

> [C]ourts are bound to give effect to statutes according to the usual, ordinary import of the language employed in framing them. . . . [Citations.] If the words of the statute are clear, the court should not add to or alter them to accomplish a purpose that does not appear on the face of the statute or from its legislative history. [Citations.] (California Teachers Association v. San Diego Community College District, et al. (1981) 28 Cal.3d 692, 698 [170 Cal.Rptr. 817].)

The dissent's interpretation of the term "exclusive" ignores this basic rule of statutory construction.

Hesse, Chairperson, concurring: While I agree with the majority's conclusion that collateral estoppel should not be applied in this case, I disagree with the majority's analysis, especially its false premise that the Public Employment Relations Board (PERB or Board) and the State Personnel Board (SPB) do not have concurrent jurisdiction. Rather, the Board is faced with a case presenting the issue not addressed, but alluded to, by the California Supreme Court in Pacific Legal Foundation, et al. v. Edmund G. Brown, Jr. (1981) 29 Cal.3d 168: an actual jurisdictional conflict between PERB and the SPB. As stated by the court:

> Because no actual jurisdictional conflict between PERB and the State Personnel Board confronts us in this proceeding, we have no occasion to speculate on how some hypothetical dispute that might be presented for decision in the future should properly be resolved. As numerous authorities in other jurisdictions make clear, however, any conflicts which may arise in this area can be resolved either by administrative accommodation between the two agencies themselves [fn. omitted] or, failing that, by sensitive application of evolving judicial principles. . . .
> (Id. at p. 200.)

In State Personnel Board et al. v. Fair Employment and Housing Commission, et al. (1985) 39 Cal.3d 422, the court also discussed the potential jurisdictional conflict between the SPB and another state agency with concurrent jurisdiction. The court stated:

> The degree of deference that should be given to the [SPB's] findings and conclusions will depend on the individual case. If the [Fair Employment and Housing Commission] is satisfied that a particular issue presented to it was sufficiently explored and decided

> by the [SPB], then it may, in comity, bar relitigation of the issue. As a general matter, however, preclusion of adjudication at the outset would be inappropriate, because the issues presented to the [SPB] and the [Fair Employment and Housing Commission] will not often be identical and because the statutory schemes under which they operate serve different public policies, fid, at p. 443.)

Clearly this case is an example of the lack of administrative accommodation between PERB and the SPB. While the parties officially informed the SPB of the pending PERB proceedings, as evidenced by the motion to take the SPB matter off calendar pending PERB proceedings, no such notice was accorded to PERB. Although the SPB decision does not address the above motion, the fact that the SPB proceeded with its decision indicates it did not defer to PERB's proceedings. Further, as stated in the SPB transcripts and decision, the SPB used the entire record, including the transcripts, exhibits, and PERB administrative law judge (ALJ) proposed decision, as part of its own record. The SPB record consists of only two days of hearing. During the hearing, the California State University (CSU) called four witnesses. The attorney for Statewide University Police Association (SUPA) and Officer John Moseley (Moseley) did not call any witnesses, but relied upon the introduction of PERB's record into the SPB's record.[1]

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[1] In late May 1990, after receiving CSU's motion for reconsideration, the Board requested the SPB record. On June 4, 1990, the Board sent a written request to the SPB and was informed that it would take six to eight weeks to transcribe the hearing. Subsequently, the Board placed the instant case in abeyance pending receipt of the SPB record. On August 15, 1990,

Neither the parties nor the SPB informed PERB of the SPB proceedings. On April 17, 1990, the Board issued its decision finding that CSU violated section 3571(a) and (b) of the Higher Education Employer-Employee Relations Act (HEERA) when it unlawfully disciplined Moseley for his exercise of protected activity. Specifically, the Board found that CSU violated HEERA when it issued: (1) a letter of reprimand; (2) a 5-day suspension; and (3) a 3-month suspension. (California State University (1990) PERB Decision No. 805-H.) By CSU's motion for reconsideration of PERB Decision No. 805-H, PERB was first informed of the SPB proceedings and that the SPB had adopted its ALJ decision only four days before this Board issued its decision. The SPB decision finds that CSU was justified in imposing the 5-day and 3-month suspensions.

Under an application of the collateral estoppel doctrine, the SPB's decision prevails over the Board's decision. However, it is inconceivable that the difference of only four days determines which decision prevails. The purpose of the collateral estoppel doctrine is "to promote judicial economy by

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PERB was informed that the hearing had not yet been transcribed. On August 23, 1990, the SPB projected that the hearing transcript would be presented to PERB as early as September 12, 1990 (four months from the date of the initial record request). On September 17, 1990, PERB finally received a copy of the SPB transcripts. However, PERB has never received the complete record of SPB's proceedings. This delay and lack of response is further evidence of SPB's lack of administrative accommodation. In the interest of judicial economy and efficiency, the Board proceeded with its decision.

minimizing repetitive litigation, to prevent inconsistent judgments which undermine the integrity of the judicial system [and] to protect against vexatious litigation." (Sandra Sue Lockwood, et al. v. The Superior Court of Santa Clara County (1984) 160 Cal.App.3d 667, 671.) Here each agency proceeded with its case involving CSU's discipline of Moseley.

In PERB proceedings, the ALJ conducted the hearing and heard the testimony of the witnesses. In his proposed decision, PERB's ALJ discredited the testimony of one CSU witness involving one of the alleged incidents used by CSU in its discipline of Moseley. Unlike the PERB ALJ, SPB's ALJ was not in a position to make any credibility determinations from PERB transcripts. Rather, SPB's decision is based on PERB's record, without the benefit of hearing the testimony of the witnesses.

The SPB's use of PERB's record to decide its case, with the knowledge that PERB was proceeding with its case, is contrary to the promotion of judicial economy and prevention of inconsistent judgments. Even though PERB expended its resources in preparing the record and had the benefit of making credibility determinations, the SPB proceeded with its decision. Clearly this result does not serve the purposes of collateral estoppel.

For the reasons that follow, I find the doctrine of collateral estoppel is inapplicable due to the different issues decided by PERB and the SPB and the different burdens of production placed upon the parties by PERB and the SPB. Further, I decline to apply the doctrine of collateral estoppel due to the

inherent differences in the jurisdiction of PERB and the SPB, as well as public policy considerations.

In The People v. June Leora Lopes Sims (1982) 32 Cal.3d 468, the court found that collateral estoppel applies if:

"(1) the issue necessarily decided at the previous [proceeding] is identical to the one which is sought to be relitigated; (2) the previous [proceeding] resulted in a final judgment on the merits; and (3) the party against whom collateral estoppel is asserted was a party or in privity with a party at the prior proceeding." (Id. at p. 484.) For cases involving the collateral estoppel effect of administrative decisions, the California Supreme Court in People v. Sims adopted the standards formulated by the United States Supreme Court in United States v. Utah Construction and Mining Company (1966) 384 U.S. 394. There, the United States Supreme Court stated:

> When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose, (Id, at p. 422.)

Thus, collateral estoppel effect will be granted to an administrative decision made by an agency acting in a judicial capacity to resolve properly raised disputed issues of fact where the parties had a full opportunity to litigate those issues.

The doctrine of collateral estoppel can apply to bar relitigation only if the identical issue was decided at the previous proceeding. (People v. Sims, supra, 32 Cal.3d 468;

Bronco Wine Company v. Frank A. Logolusa Farms, et al. (1989) 214 Cal.App.3d 699.) In the present case, the issue decided by PERB is not identical to the issue decided by the SPB. As recognized by PERB and the courts, the issue of whether cause exists for discipline is different than determining the underlying motivation for discipline. (Department of Developmental Services (1987) PERB Decision No. 619-S; Department of Transportation (1984) PERB Decision No. 459-S; City of Albany v. PERB (1977) 395 N.Y.S.2d 502 [96 LRRM 2500]; City of Hackensack v. Winner (1978) 162 N.J. Super. 1 [392 A.2d 187], affd. (1980) 82 N.J. 1 [410 A.2d 1146].)

The Board is the expert agency charged with interpreting and administering HEERA and possesses initial jurisdiction to resolve and remedy unfair practice charges in three public sector jurisdictions.[2] As exclusively stated in section 3563.2 of EERA:

> The initial determination as to whether the charges of unfair practices are justified, and, if so, what remedy is necessary to effectuate the purposes of this chapter, shall be a matter within the exclusive jurisdiction of the board. . . .

[2]The immediate case arises under HEERA (Gov. Code, sec. 3560 et seq.), a comprehensive statutory scheme enacted in 1978 to govern labor relations in the University of California and California State University systems. The Board also administers the Educational Employment Relations Act (EERA) (Gov. Code, sec 3540 et seq.) governing labor relations between public schools and community college districts and their employees, and the Ralph C. Dills Act (Dills Act) (Gov. Code, sec. 3512 et seq.) governing state employer-employee labor relations.

Sections 3571 and 3571.1 define unfair practices by the employer and employee organization. Here the complaint alleges a violation of section 3571(a) and (b):

> It shall be unlawful for the higher education employer to:
> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.

Further, section 3563.3 provides the remedies available to the Board:

> 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 back pay, as will effectuate the policies of this chapter.

The California Supreme Court has recognized the initial jurisdiction of PERB to investigate and adjudicate unfair practices. (San Diego Teachers Association, v. Superior Court of San Diego County (1979) 24 Cal.3d 1, 12; Pacific Legal Foundation v. Brown, supra. 29 Cal.3d 168, 175.) Based on its initial jurisdiction and expertise, PERB investigated the unfair practice charge, issued a complaint, conducted an evidentiary hearing, issued a proposed decision, and finally a Board decision. In holding that CSU had violated section 3571(a) and (b) of HEERA, the Board found that discipline was motivated by the employee's protected activity. Pursuant to Novato Unified School District

(1982) PERB Decision No. 210, the Board found Moseley had stated a prima facie violation by showing that: (1) he had engaged in protected conduct known to CSU; (2) CSU took adverse actions against Moseley; and (3) the adverse actions were taken because of Moseley's exercise of protected activities. Under Novato once a charging party has established a prima facie violation, the burden shifts to the employer to show that it would have taken the adverse action regardless of the employee's participation in protected activity. In PERB Decision No. 805-H, the Board found Moseley established a prima facie violation, but that CSU had failed to present any credible evidence it would have taken the disciplinary actions against Moseley in the absence of his protected activity.

In contrast to PERB, the SPB's authority under Article VII, section 3, subdivision (a) of the California Constitution is to "review disciplinary actions" against civil service employees. However, Article VII, section 4, subdivision (h) specifically exempts officers and employees of the University of California and California state colleges from civil service. While the CSU employees are exempted from civil service, the SPB authority over CSU employees is derived from the Education Code. Section 89538 of the Education Code provides, in pertinent part:

> Notice of dismissal, demotion, or suspension for cause of an employee shall be in writing, signed by the chancellor or his designee and be served on the employee, setting forth a statement of causes, the events or transactions upon which the causes are based, the nature of the penalty and the effective date, and a statement of the employee's right to

> answer within 20 days and request a hearing before the State Personnel Board.

Further, section 89539 provides the employee the right to request a hearing before the SPB. Section 89539 states, in pertinent part:

> Any employee dismissed, suspended, or demoted for cause may request a hearing by the State Personnel Board by filing such a request, in writing, with the Board within 20 days of being served with the notice. The request may be on the grounds that the required procedure was not followed; that there is no ground for dismissal, suspension, or demotion; that the penalty is excessive, unreasonable, or discriminatory; or that the employee did not do the acts or omissions alleged as the events or transactions upon which the causes are based; or that the acts or omissions alleged as the events or transactions upon which the causes are based were justified.
>
> The State Personnel Board shall hold a hearing, following the same procedure as in state civil service proceedings and shall render a decision affirming, modifying or revoking the action taken. In a hearing, the burden of proof shall be on the party taking the dismissal action.

As explicitly stated, the burden of proof shall be on the party taking the disciplinary action -- CSU. Further, the grounds for the request for a hearing are limited to determining whether the discipline was proper. Thus, under the SPB, the issue is whether or not CSU had cause for its discipline of Moseley. The SPB's limited statutory jurisdiction over CSU employees does not include a determination whether the discipline was motivated by the employee's protected activity. The Board is not deprived of jurisdiction merely because the SPB addressed the issue of

unlawful motivation. The question of whether the discipline was being used by CSU to retaliate against Moseley for his protected activities has no place in the SPB proceeding. (See Town of Dedham v. Labor Relations Commission (1974) 312 N.E.2d 548 [86 LRRM 2918].) Rather, this determination is within PERB's expertise and initial jurisdiction. Even if the SPB determines that CSU had cause to impose the discipline, CSU's conduct may still violate HEERA if the discipline was motivated by the employee's protected activity and would not have been imposed if the employee had not engaged in protected activity.

In addition to the different issues that the SPB and PERB decide, the burden of producing evidence upon the parties is different. In People v. Sims, supra, 32 Cal.3d 468, 485, the court recognized the doctrine of collateral estoppel may not apply where the two proceedings have different burdens of proof. Following this rule, the court, in a recent decision, refused to apply collateral estoppel where the issue had been adjudicated in an earlier proceeding by a preponderance of the evidence standard, and the burden of proof in the subsequent proceeding was a clear and convincing evidence standard. (Department of Social Services v. David P. (1989) 211 Cal.App.3d 660.) In the SPB hearing, Education Code section 89539 provides that CSU has the burden of proving that its disciplinary action was proper. If CSU fails to satisfy its burden, then the SPB must find that the discipline was improper. Simply stated, CSU loses and the employee wins. In contrast, PERB requires that the charging

party, the employee in this case, present evidence showing that the discipline was imposed because of his exercise of protected activities. If the charging party fails to satisfy this burden, then PERB must find that the discipline was not motivated by the employee's protected activity. In other words, the employee loses and CSU wins. Due to the different issues and burdens of producing evidence, I would find that the doctrine of collateral estoppel should not apply as the conditions set forth in People v. Sims, supra, 32 Cal.3d 468 are not satisfied.

Regardless of whether the technical requirements for the application of collateral estoppel are met, the doctrine should not be applied due to public policy considerations. (See, e.g. Arasimo Settemo Lucido v. The Superior Court of Mendocino County (1990) 51 Cal.3d 335.) In Lucido v. Superior Court, supra, the court held that the doctrine of collateral estoppel did not bar prosecution of the defendant despite a probation revocation hearing conducted prior to the criminal trial based on the same underlying conduct. Although the technical requirements of collateral estoppel were satisfied, the court held that the efficiencies of applying collateral estoppel were outweighed by the importance of preserving the criminal trial process as the exclusive forum for determining guilt or innocence. This finding was based on the distinctions and different public interests involved in the revocation hearing and criminal trial. Similarly, in the present case, the distinctions between PERB and the SPB, as well as the different public interests served by the

two agencies, outweigh the efficiencies of applying collateral estoppel. As stated by the court in Sylvester Tipler v. E. I. duPont deNemours and Company, Inc. (6th Cir. 1971) 443 F.2d 125, 128:

> Neither collateral estoppel nor res judicata is rigidly applied. Both rules are qualified or rejected when their application would contravene an overriding public policy or result in manifest injustice. . . .

The SPB was established as the tribunal to administer and enforce the civil service statutes. (Cal. Const., art. VII [formerly art. XXIV].)[3] The purpose of the California civil service system is to promote efficiency and economy in state government. (State Compensation Insurance Fund v. Ray L. Riley (1937) 9 Cal.2d 126, 134.) The use of merit in the appointment, promotion, and demotion of civil service employees serves to abolish the so-called spoils system and, at the same time, increase the efficiency of the civil service by assuring the employees that appointment and promotion will be the award of faithful and honest service, and demotion or discipline will be based on cause. (John F. Skelly v. State Personnel Board, et al. (1975) 15 Cal.3d 194, 210; Steen v. Board of Civil Service Commissioners (1945) 26 Cal.2d 716, 722; see also, Town of Dedham v. Labor Relations Commission, supra, 312 N.E.2d 548.)

Former-Article XXIV of the California Constitution, which established the merit system of state civil service, was adopted

[3]Article XXIV of the California Constitution was amended and later repealed. In 1976, Article VII was added, which was substantially identical to former Article XXIV.

in 1934. As the Court of Appeal stated in California State Employees[7] Association v. Spencer Williams (1970) 7 Cal.App.3d 390, 398:

> Article XXIV was presented to California voters in 1934 as a means of establishing a merit system of employment which would eliminate the spoils system. [Citation.] It was not presented as an organic blueprint for the structure of agencies within the state's executive branch.

At that time the state government was a relatively simple structure. However, in the ensuing years, the Legislature created new statutes and new public agencies to administer those statutes. Specifically the Legislature enacted HEERA, EERA, and the Dills Act and created PERB to administer these three statutes to protect public sector employees in their labor relations with public sector employers. Generally, courts do not construe constitutional provisions "so as to prevent legislative action adjusted to growing needs and the changed condition of the people." (Pacific Legal Foundation v. Brown, supra, 29 Cal.3d 168, 196, citing Veterans' Welfare Board v. Jordan (1922) 189 Cal. 124, 143.) Also in Pacific Legal Foundation v. Brown, the California Supreme Court stated the provisions of Article VII "shall not be construed to preclude the Legislature from adopting the collective bargaining salary setting process established in SEERA [Dills Act]." This same rule applies to the present case involving disciplinary action. The court recognized that the jurisdiction between the SPB and PERB may overlap and that, in such cases, the court should harmonize the disparate procedures.

As a New Jersey court observed in reviewing a conflict between the rulings of a civil service commission and public employment relations board in that state:

> The inquiry is properly not so much which statutory scheme prevails in the context of merit promotions, but rather how each can be harmonized to give them reasonable and full effect. [Citations.] Each agency operates under different statutory schemes, but not to defeat each other's authority. (City of Hackensack v. Winner, supra, 162 N.J. Super.1, 23-24 [392 A.2d 187], affd. (1980) 82 N.J. 1 [410 A.2d 1146].)

As recognized by Pacific Legal Foundation v. Brown, supra, 29 Cal.3d 168, PERB and the SPB are not in competition with each other. Each agency was established to serve a different, but not inconsistent, public purpose. The SPB was granted jurisdiction to review disciplinary actions of civil service employees to protect these employees from politically partisan mistreatment or other arbitrary action inconsistent with the merit principle embodied in Article VII. (Skelly v. State Personnel Board, supra, 15 Cal.3d 194, 202.) On the other hand, PERB was created as the expert administrative agency in labor relations to govern labor relations in the University of California and California State University systems, as well as the state employer-employee labor relations and labor relations between public school and community college districts and their employees. Although the disciplinary actions taken in violation of HEERA transgress the merit principle of the civil service system, the Legislature nonetheless created PERB to administer the HEERA, EERA, and Dills Act.

Absent a jurisdictional bar, a determination arising under one statute should not automatically be binding when a similar question arises under another statute. (See State Personnel Board v. Fair Employment and Housing Commission, supra, 39 Cal.3d 422; Tipler v. E. I. duPont deNemours and Company, Inc., supra, 443 F.2d 125.) As stated by the New Jersey Supreme Court:

> There is no reason, absent an occlusive statutory bar, for an administrative agency to be obtuse to the genuine concerns of other administrative agencies which possess concurrent jurisdiction over the same subject matter. This is especially so where the controversy is multidimensional and legitimately touches the competence of more than one agency. In that context, administrative agencies should never be encouraged to engage in internecine struggles for jurisdictional hegemony. The unilateral and possessive assumption of jurisdiction by one agency to the exclusion of another, perhaps more suitable, agency creates the risk that, although a many-sided controversy may be laid to rest in whole or in part from the vantage of a single administrative agency, in the process other important interests may be mishandled or neglected.
>
> (Monmouth County N.O.W. v. Matawan Regional Board of Education (1978) 77 N.J. 514, 531 [391 A.2d 899.)

Here, the purposes, requirements, perspective, and configuration of the Education Code and HEERA vary. While discipline based on protected activity is an unfair practice under HEERA, discipline based on cause, without reference to protected activity, is not prohibited under the Education Code. Similarly as the Legislature did not render exclusive jurisdiction to either the SPB or PERB with respect to CSU employees, and an individual is not prevented from proceeding under both the SPB and PERB (see

Tipler v. E. I. duPont deNemours and Company, Inc., supra, 443 F.2d 125), the decision under one statute is not intended to automatically bar a decision under another statutory scheme.[4] In State Personnel Board v. Fair Employment and Housing Commission, supra, 39 Cal.3d 422, the court held that where two agencies have concurrent jurisdiction, both agencies can exercise their jurisdiction to protect their respective rights.

> The distinctly separate nature of these [SPB's and Fair Employment and Housing Commission's] contractual and statutory rights is not vitiated merely because both were violated as a result of the same factual occurrence. And certainly no inconsistency results from permitting both rights to be enforced in their respectively appropriate forums. (Id. at p. 443 citing Alexander v. Gardner-Denver Co. (1974) 415 U.S. 36, 49-50.)

Despite the fact that the technical requirements of collateral estoppel have not been satisfied, I find that the inherent differences in the jurisdiction of PERB and the SPB and public policy considerations justify PERB's refusal to apply collateral estoppel to the SPB's decision. Accordingly, I would not apply the doctrine of collateral estoppel in this case. Such

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[4]The difference in the operations of PERB and SPB is another reason why an employee's application to either agency is not considered an election against or a waiver of the employee's right to file an action at the other agency. (See Town of Dedham v. Labor Relations Commission, supra, 312 N.E.2d 548 where the court compared the Civil Service Commission and Labor Relations Commission.)

an application would effectively preclude PERB from exercising its jurisdiction.

Shank, Member, dissenting: The majority correctly sets forth the doctrine of collateral estoppel as it applies to administrative agencies, yet then strains, through a distortion of existing case law and statutory language, to avoid application of the doctrine to the instant case. For the reasons that follow, I would grant collateral estoppel effect to the decision of the State Personnel Board (SPB) issued April 13, 1990 and set aside our own decision issued April 17, 1990.

The majority's analysis is based on the false premise that the SPB and the Public Employment Relations Board (PERB or Board) do not have concurrent jurisdiction to resolve the issue of the impact of improper motive on the discipline imposed on John Moseley (Moseley). The majority recognizes that the SPB's authority to determine the validity of discipline imposed on a California State University (CSU) employee is derived from Education Code section 89539 which specifically provides, in pertinent part, that: (1) an employee suspended for cause may request a hearing before the SPB; (2) the request for a hearing may be on the ground that the discipline was discriminatory; and, (3) the SPB will conduct a hearing following the same procedures it follows in state civil service proceedings. Thus, under section 89539, the SPB had jurisdiction to hold a hearing to determine the impact of the improper motive on the discipline imposed on Moseley; i.e., whether the discipline was imposed for a discriminatory reason.

PERB also had jurisdiction to determine the impact of improper motive on the discipline imposed on Moseley.

Specifically, PERB has jurisdiction to determine whether the discipline was imposed for a discriminatory reason in violation of the Higher Education Employment Relations Act (HEERA).[1] HEERA section 3563.2 states:

> The initial determination as to whether the charges of unfair practices are justified, and, if so, what remedy is necessary to effectuate the purposes of this chapter, shall be a matter within the exclusive jurisdiction of the board. . . . (Emphasis added.)

The majority construes the above-quoted (and emphasized) language to create "preemptive" jurisdiction in PERB, holding that: "Where the matter before the SPB arguably involves an unfair practice, it is incumbent upon the SPB to stay or continue its proceedings until remedies before PERB have been exhausted." (Maj. opn., p. 7.) The majority cites no authority that specifically supports its assumption that when the Legislature granted PERB "initial" and "exclusive jurisdiction," it intended anything other than to exhort our courts to apply the doctrine of exhaustion of administrative remedies and defer to PERB cases solely within its statutory purview. In fact, the cases relied

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[1] **HEERA** is codified at Government Code section 3560 et seq. Unless otherwise indicated, all statutory references are to the Government Code. Under HEERA section 3571(a), it is an unfair labor practice for the higher education employer to:

> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.

upon by the majority to support its theory that PERB's jurisdiction preempts that of the SPB address only the issue of whether a plaintiff is bound to exhaust his or her administrative remedies before PERB before pursuing an action in superior court. In each of the cases cited, San Lorenzo Education Association v. Larry H. Wilson (1982) 32 Cal.3d 841 [187 Cal.Rptr. 432]; California School Employees Association, et al. v. Travis Unified School District, et al. (1984) 156 Cal.App.3d 242 [202 Cal.Rptr. 699]; Nancy J. Wygant v. Victor Valley Joint Union High School District (1985) 168 Cal.App.3d 319 [214 Cal.Rptr. 205];[2] and California School Employees Association v. Azusa Unified School District, et al. (1984) 152 Cal.App.3d 580 [199 Cal.Rptr. 635], the appellate court found that PERB did not have initial exclusive jurisdiction of the claims before the superior court,

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[2]In Wygant, a case arising under EERA, the court held:

> [T]hat PERB does not have exclusive initial jurisdiction where a plaintiff's allegations are confined solely to a unilateral violation of Education Code section 45028 by a school district. The Government Code expressly provides that "[n]othing contained [in Government Code sections 3540-3549.3] shall be deemed to supersede other provisions of the Education Code and the rules and regulations of public school employers which establish and regulate tenure or a merit or civil service system . . . ." (Gov. Code, section 3540.) . . .
> (Id., p. 323.)

Although HEERA does not contain similar language, the policy underlying Government Code section 3540, that applicable provisions of the Education Code are not to be superceded by PERB's exclusive initial jurisdiction, supports a conclusion that PERB's exclusive jurisdiction should not be construed as all inclusive.

and, therefore, exhaustion of administrative remedies before PERB was not required. In William Leek, et al. v. Washington Unified School District (1981) 124 Cal.App.3d 43 [177 Cal.Rptr. 196], the appellate court found the superior court properly dismissed the case before it based on the plaintiff's failure to exhaust administrative remedies before PERB. In San Diego Teachers Association v. Superior Court of San Diego County (1979) 24 Cal.3d 1, 12 [100 Cal.Rptr. 757] the Supreme Court held the superior court was barred from intervening in a strike as the district had not exhausted its administrative remedies before PERB, which had initial exclusive jurisdiction to decide if the strike was an unfair labor practice and, if so, what remedies to seek.

In all of the cases cited by the majority, the issue of PERB's "initial" and "exclusive jurisdiction" was discussed within the context of whether a court had jurisdiction to decide an issue that one party claimed was within PERB's statutory jurisdiction. None of the cases relied upon by the majority address PERB's jurisdiction vis-a-vis another administrative agency with overlapping statutory authority to decide an issue that PERB itself may decide in its own proceedings. Nevertheless, through a leap in logic, and without citing any statutory authority whatsoever, the majority concludes: "If the courts must defer to PERB's exclusive jurisdiction, so must an administrative agency."

The cases that do address what happens in case of conflict between two administrative agencies, each of which has statutory

authority to address a particular issue, suggest a resolution quite different than that adopted by the majority. In Pacific Legal Foundation, et al. (PLF) v. Edmond G. Brown, Jr. (1981) 29 Cal.3d 168 [172 Cal.Rptr. 487], the California Supreme Court held that the State Employer-Employee Relations Act[3] was not unconstitutional, because the collective bargaining process established by the Act did not conflict with the general merit principle of civil service employment enunciated in Article VII of the California Constitution. The court found that although the authority of the SPB and PERB may overlap to some extent, there is a substantial area in which the jurisdiction of the two boards does not overlap. The court held that familiar rules of construction require an attempt to harmonize the disparate procedures rather than to invalidate one or the other, and that any conflicts which may arise between the two agencies can be resolved either by administrative accommodation between the two agencies themselves or by sensitive application of evolving judicial principles. (PLF v. Brown, supra, at p. 200.)

The majority distinguishes PLF v. Brown, supra, 29 Cal.3d 168, arguing that the court in that case only addressed a potential conflict between the SPB's constitutional authority and PERB's statutory authority. The majority implies that, based on the initial, exclusive nature of PERB's jurisdiction, the SPB

[3]The Ralph C. Dills Act (Dills Act), formerly known as the State Employer-Employee Relations Act, is codified at Government Code section 3512 et seq. The Dills Act was adopted by the Legislature in 1977, to provide formal collective bargaining rights to state employees.

must defer to PERB in cases of conflict unless the SPB is acting under its constitutional authority.

Nowhere in PLF v. Brown, supra, 29 Cal.3d 168, does the California Supreme Court find that the constitutional nature of the SPB's authority is justification for overriding PERB's "exclusive" jurisdiction and applying the doctrine of collateral estoppel. In fact, the "exclusive" nature of PERB's jurisdiction is not specifically discussed by the court at all. The court does quote from the New Jersey case of City of Hackensack v. Winner (1978) 162 N.J. Super. 1 [392 A.2d 187, 198], affd. (1980) 82 N.J. 1 [410 A.2d 1146], in which the New Jersey Court stated:

> The inquiry is properly not so much which statutory scheme prevails [over the other], but rather how each can be harmonized to give them reasonable and full effect. [See citations.] Each agency operates under different statutory schemes, but not to defeat each other's authority.

The fact that we have here a conflict of overlapping statutory authority, as opposed to the constitutional versus statutory conflict addressed in PLF v. Brown, supra, 29 Cal.3d 168, is not determinative as to whether collateral estoppel applies.

Furthermore, as recognized by the California Supreme Court in PLF v. Brown, supra, 29 Cal.3d 168, many areas of PERB's unfair practice jurisdiction do not overlap with the SPB's "disciplinary action" jurisdiction at all. For example, PERB has exclusive jurisdiction to determine whether or not its constituents have violated unfair practice laws by failing to meet and confer in good faith. Even in the case of employer reprisals against an employee for protected activity, PERB would

have "exclusive" jurisdiction to determine whether an unfair practice has occurred, so long as the reprisal in question did not take the form of a disciplinary action. Thus, in "pure" unfair practice cases, PERB has exclusive jurisdiction. On the other hand, sometimes a cause of action constitutes not only an unfair practice charge, but also a violation of the principle of "just cause" discipline. In these "hybrid" unfair practice cases, under existing precedent, PERB does not have "exclusive" jurisdiction, but has "concurrent" jurisdiction with whatever agency has been charged with making the determination of whether the principle of "just cause" discipline has been violated.

The California Supreme Court has indicated its intention to "construe the relevant provisions to permit an accommodation of the respective tasks of both the State Personnel Board and PERB." (PLF v. Brown, supra. at p. 198.) Thus, PERB has been charged with resolving any conflicts which may arise by administrative accommodation or, failing that, by sensitive application evolving judicial principles. (Id. at p. 200.)

In State Personnel Board, et al. v. Fair Employment and Housing Commission, et al. (1985) 39 Cal.3d 422 [217 Cal.Rptr. 16], the California Supreme Court held that the Department of Fair Employment and Housing and the Fair Employment and Housing Commission (FEHC) have jurisdiction concurrently with the SPB over disciplinary actions and examinations. In discussing the potential situation where the two agencies arrive at conflicting adjudications concerning the same set of facts, the court noted:

> [T]he Fair Employment and Housing Commission should be sensitive to the constitutional

> functions of the State Personnel Board and should take into account any prior determinations of the board when a matter previously decided by that body comes before the Commission. The degree of deference that should be given to the board's findings and conclusions will depend on the individual case. If the Commission is satisfied that a particular issue presented to it was sufficiently explored and decided by the board, then it may, in comity, bar relitigation of the issue. . . . (Id. pp. 424-425.)

PERB itself has applied collateral estoppel not only in cases wherein the SPB was acting under its constitutional grant of authority (State of California (Department of Developmental Services) (hereafter Department of Developmental Services) (1987) PERB Decision No. 619-S; Department of Personnel Administration (Moore) (1989) PERB Decision No. 772-S), but also in cases where the jurisdictional accommodation involved disciplinary rulings by local personnel commissions. (See Kern County Office of Education (1987) PERB Decision No. 630; San Diego Unified School District (1987) PERB Decision No. 631.)

In Department of Developmental Services, supra, PERB Decision No. 619-S, a union activist was dismissed for allegedly falsifying time records. The SPB administrative law judge (ALJ) specifically found that the employee was an officer in the union and an active job steward. These findings were in response to a contention that the dismissal was for an improper motive, to wit: retaliation for union activities. Relying upon Christo Tom Bekiaris v. Board of Education of the City of Modesto (1972) 6 Cal.3d 575 [100 Cal.Rptr. 16], the SPB ALJ had determined that he was required, under California law, to consider the alleged

unlawful retaliation. (See also William Robinson v. State Personnel Board (1979) 97 Cal.App.3d 994 [159 Cal.Rptr. 222].) Adopting the test set forth in The People v. June Leora Lopes Sims (1982) 32 Cal.3d 468 [186 Cal.Rptr. 77] for application of collateral estoppel, PERB in Department of Developmental Services, supra, found the doctrine applicable in the case before it and found the charging party barred from proceeding before PERB on a retaliation theory. In reaching its conclusion, PERB noted:

> Ordinarily, the Personnel Board is concerned only with the issue of cause for termination and not the underlying motivation, a quite different question. Here, Mr. Pimentel asserted before the Personnel Board that his termination was in retaliation for engaging in protected conduct. Once Mr. Pimentel made that assertion, the issue of motivation was squarely before and was necessarily decided by the Personnel Board. It is the precise same issue which Mr. Pimentel, . . . now attempts to relitigate here, (p. 19.)

(See also Kern County Office of Education (1987) PERB Decision No. 630.)

Just as PERB applied the doctrine of collateral estoppel in the case in Department of Developmental Services, supra, PERB Decision No. 619-S, PERB is bound by the guidelines set forth in People v. Sims, supra, 32 Cal.3d 468 to apply that doctrine to the case under consideration. Under People v. Sims, supra, collateral estoppel may be applied to preclude relitigation of an issue decided in another proceeding when: (1) the agency is acting in a judicial capacity; (2) it resolves disputed issues of

fact properly before it; and (3) the parties have had an adequate opportunity to litigate such disputed issues.

The issue of the impact of improper motive on the adverse action taken against Moseley was decided in the SPB proceeding and is identical to that litigated before PERB. The SPB applied the "but for" test enunciated in Bekiaris v. Board of Education, supra, 6 Cal.3d 575. The SPB determined that the discipline was imposed both for the stated causes and for unstated, improper causes. Specifically, the SPB found that Moseley's acts were childish, needless, willful, insubordinate and discourteous. The SPB further found, based on the findings of the PERB administrative law judge, that "improper motive" was involved in the taking of the adverse action. Applying Bekiaris v. Board of Education, supra, the SPB concluded that the actions of Moseley were such that the discipline would have been imposed even in the absence of improper motive.

In analyzing the same facts, PERB applied its own, similar test for determining whether the discipline against Moseley constituted reprisal and/or discrimination in violation of HEERA section 3571(a) and (b). Under the test enunciated in Novato Unified School District (1982) PERB Decision No. 210, once the charging party has made a prima facie showing that raises an inference that the employer's actions were motivated, at least in part, by the employee's exercise of activities protected under the Act, the burden shifts to the employer to show, if it can, that it would have taken the same action regardless of the protected activity or its improper motive. (Id., p. 14.) In

this case, PERB found that the discipline imposed on Moseley was imposed for an improper motive and that the University failed to prove that it would have taken the same action absent the improper motive.

Thus, both the SPB and PERB considered and decided the impact of improper motive on the discipline imposed on Moseley, reaching opposite conclusions.[4] What is determinative here is that the SPB issued its final decision prior to PERB's decision on the same issue becoming final.

The doctrine of collateral estoppel is properly applied here since: (1) the issue decided in the prior proceeding is identical to that sought to be relitigated; (2) the previous proceeding resulted in a final judgment on the merits; and (3) the party against whom collateral estoppel is asserted was a party or in privity with a party in the prior proceeding. (People v. Sims. supra. 32 Cal.3d 468, 484; The People v. Alvin Taylor (1974) 12 Cal.3d 686 [117 Cal.Rptr. 70].)

Finality of Adjudication

The SPB proceeding did result in a final judgment on the merits, prior to PERB's own decision becoming final. In

[4]Although I find that PERB is required to apply the doctrine of collateral estoppel to the narrow issue decided by the SPB, I note that the same controlling legal principles and case law should have been followed by the SPB. The SPB received notice that a PERB proceeding on an identical issue was in its final stages when the parties to the SPB hearing stipulated to introducing the transcript of the PERB hearing into evidence in lieu of taking testimony. In the interest of administrative accommodation (PLF v. Brown, supra, 29 Cal.3d 200), and in accord with the policies of judicial economy and efficiency (People v. Sims, supra and (Department of Developmental Services), supra, PERB Decision No. 619-S), the SPB should have stayed its hearing pending a decision by PERB.

Department of Developmental Services, supra, PERB Decision No. 619-S the Board affirmed the ALJ's analysis that for purposes of application of the collateral estoppel doctrine, an SPB decision is final when issued by the SPB itself. In the present case, the proposed decision of an SPB ALJ was formally adopted by the SPB as its own decision on April 13, 1990, four days before PERB issued its April 17, 1990 decision, having considered the exceptions and responses to the proposed decision of the PERB ALJ. Therefore, at the time the PERB decision was issued, the SPB decision had become final for purposes of application of the collateral estoppel doctrine.

Requirement of Privity

The party against whom the doctrine of collateral estoppel is asserted must have been a party or in privity with a party to the prior proceeding. In the present case, CSU seeks to assert the doctrine against the State University Police Association (SUPA or Association). The Supreme Court has addressed the requirement of privity as follows:

> "Privity is essentially a shorthand statement that collateral estoppel is to be applied in a given case; there is no universally applicable definition of privity." [Citations.] The concept refers "to a relationship between the party to be estopped and the unsuccessful party in the prior litigation which is 'sufficiently close' so as to justify application of the doctrine of collateral estoppel."
> (People v. Sims, supra, 32 Cal.3d 468, 486-487.)

In Department of Developmental Services, supra, PERB Decision No. 619-S, the Board held that where the individual employee comes before SPB, and the Association, as his

representative, comes before PERB, the charging party in the SPB action, i.e., the individual employee, "has a clear identity of interest with [the Association] in the case before the PERB." (Department of Developmental Services, supra, at p. 21.) In this case, the section of HEERA alleged to have been violated is one which protects the individual rights of an employee as opposed to those of the Association. Here, as in Department of Developmental Services, supra, the alleged violation of associational rights is derivative, and therefore relies upon a finding of violation of the individual's rights. Clearly, where the individual's rights are sought to be vindicated, and the Association acts as his/her representative in the proceeding, the individual has a clear interest in the outcome of the proceeding. Thus, the charging party in the SPB case is sufficiently aligned with the Association in this case to apply the doctrine of collateral estoppel.

Application of Collateral Estoppel to an Administrative Hearing

Collateral estoppel effect may be given to decisions of administrative agencies when: (1) the agency acts in a judicial capacity; (2) it resolves disputed issues of fact properly before it; and (3) the parties have had an adequate opportunity to litigate such disputed issues. In the present case, the SPB was acting in its judicial capacity in holding a hearing, in taking evidence, and in issuing a judicial determination. The SPB also resolved disputed issues of fact properly before it; specifically, pertinent to the instant matter, whether CSU's response to Moseley's actions would not have occurred "but for"

CSU's improper motive. Further, the parties had adequate opportunity to litigate these issues before the SPB, particularly since both parties stipulated to introduction and use of the PERB transcript in lieu of testimony on the issues litigated before PERB. Based upon the foregoing, I would apply the doctrine of collateral estoppel to the narrow issue decided by the SPB as to the propriety of the discipline in light of the allegations of CSU's improper motive, and I would set aside our prior ruling that CSU violated section 3571(a) and (b) of HEERA.

A clean application of the collateral estoppel doctrine based on the order of issuance of the two decisions would be in accord with the not so subtle hint by the California Supreme Court that agencies should find a way to avoid issuing inconsistent adjudications. By affirming our earlier decision and declining to apply collateral estoppel, the majority ignores PERB precedent, rejects the clear message from the courts, creates confusion among the parties who are now faced with conflicting administrative decisions, and invites an unnecessary and avoidable appeal.

Member Camilli joined in this Dissent.