STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA CORRECTIONAL PEACE OFFICERS ASSOCIATION,	)	
Charging Party,	)	Case No. S-CE-509-S
v.	)	PERB Decision No. 1107-S
STATE OF CALIFORNIA (DEPARTMENT OF CORRECTIONS),	)	May 19, 1995
Respondent.	)	

Appearances: Jeffrey A. Diamond, Attorney, for California Correctional Peace Officers Association; State of California (Department of Personnel Administration) by Roy J. Chastain, Labor Relations Counsel, for the State of California (Department of Corrections).

Before Blair, Chair; Garcia and Caffrey, Members.

DECISION

BLAIR, Chair: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the State of California (Department of Corrections) (State) to the proposed decision of a PERB administrative law judge (ALJ). In his decision, the ALJ found that the State violated section 3519(b) of the Ralph C. Dills Act (Dills Act)[1] when it dismissed Correctional Officer David P. Prasinos (Prasinos).

[1]The Dills Act is codified at Government Code section 3512 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code. Section 3519 states, in pertinent part:

> It shall be unlawful for the state to do any of the following:
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> (b) Deny to employee organizations rights guaranteed to them by this chapter.

The Board has reviewed the entire record in this case, including the proposed decision, the hearing transcript, exhibits, arbitrator's opinion and award, the State's exceptions and the response thereto filed by the California Correctional Peace Officers Association (CCPOA).[2] In accordance with the following discussion, the Board hereby sets aside the ALJ's proposed decision and dismisses the complaint and unfair practice charge and defers to the arbitrator's award as modified and implemented by the parties' settlement agreement.

PROCEDURAL HISTORY

On July 29, 1991, CCPOA filed an unfair practice charge against the State. The charge alleged violations of Dills Act section 3519(b) and (d). On September 12, 1991, CCPOA withdrew that part of its charge which alleged a violation of Dills Act section 3519(d).

After an investigation of the charge, the PERB General Counsel's Office issued a complaint on September 13, 1991, alleging that the State's dismissal of Prasinos denied CCPOA the right to represent its members in violation of Dills Act section 3519(b).

Informal conferences were held on October 10 and 21, 1991, in an attempt to reach voluntary settlement. The parties were unsuccessful in settling their dispute.

[2]The State and CCPOA requested oral argument before the Board. The Board denied the request for oral argument on May 2, 1995.

On October 25, 1991, pursuant to a joint request by the parties, the case was placed in abeyance pending completion of the grievance resolution procedure.

On December 4, 1991, the State filed a motion to dismiss the case for lack of jurisdiction and deferral to the parties' grievance and arbitration procedure. The ALJ denied the motion to dismiss on December 10, 1991.

On December 11, 1991, the State filed an appeal of the ALJ's denial of its motion and requested that the Board stay the formal hearing scheduled for December 17, 1991. On December 16, 1991, the Board issued State of California (Department of Corrections) (1991) PERB Order No. Ad-227-S which stayed the hearing pending resolution of the State's appeal.

CCPOA opposed the State's appeal and requested oral argument before the Board. The Board heard oral argument on March 10, 1992. On April 9, 1992, the Board issued State of California (Department of Corrections) (1992) PERB Order No. Ad-231-S, denying the State's appeal. In affirming the ALJ's denial of the State's motion to dismiss and defer for lack of jurisdiction, the Board applied the pre-arbitration deferral standard set out in Lake Elsinore School District (1987) PERB Decision No. 646.

On May 8, 1992, the State filed a request for a stay and a petition for review of State of California (Department of Corrections), supra, PERB Order No. Ad-231-S with the Third District Court of Appeal. PERB opposed the petition asserting that the administrative decision was not a final order of the

Board which could be appealed. The petition was summarily denied by the Third District Court of Appeal on May 29, 1992.

The formal hearing in this case was held on June 10-11, July 21-22, and September 22, 1992. After an extended briefing schedule, the proposed decision was issued on October 14, 1993.

FACTUAL BACKGROUND

Prasinos was employed as a correctional officer for approximately five years at the Mule Creek State Prison. During the period of July 30, 1990 to January 14, 1991, Prasinos was assigned to Building 9 as the control booth officer on third watch (2:30 p.m. to 10:30 p.m.). Correctional Officers Francis C. Meister (Meister) and Joseph J. Cuevas (Cuevas) were the regularly-assigned third watch floor officers in Building 9.

The floor officers are in charge of the building. They maintain order in the building and are responsible for direct custody and control of the inmates. The control booth officer provides security for both the building and the floor officers. The control booth officer controls all the electrical cell and entrance doors, gives instructions to the inmates and provides rifle coverage in support of the floor officers.

On January 8, 1991, Prasinos received a notice of investigatory interview. On January 13, 1991, Prasinos was reassigned from third watch, Building 9, to second watch, Building 8, as a floor officer.

On January 16, 1991, a formal investigatory interview was held concerning several incidents involving Prasinos' conduct.

These incidents involved eating state food which is provided for inmates who are confined to quarters; accepting food, candy and sodas from inmates; renting a television and watching it while assigned to hospital coverage; and bringing an unauthorized wrestling video tape into Building 9 for the inmates. During this interview, Prasinos learned that Meister and Cuevas had filed reports concerning some of these incidents.

At the Skelly[3] hearing held on April 16, 1991, Prasinos admitted his participation in these incidents and personally apologized to the warden. Warden George E. Ingle (Ingle) gave Prasinos a 30-day suspension, which was effective May 12 through June 10, 1991. Prasinos accepted the suspension, believed it was fair and agreed not to appeal it to the State Personnel Board (SPB).

After Prasinos was notified of the investigation, he talked to a number of his fellow officers about the investigation. Several of these officers were CCPOA job stewards and others were not. In some of these conversations he said that Meister and Cuevas had "ratted him off," or words to that effect. Prasinos insisted he only discussed his adverse action with his fellow officers to "educate them" so they would not commit similar violations. Prasinos also claimed he never used the terms "rat" or "snitch," and that he never volunteered the names of the witnesses but only responded to inquiries as to who they

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[3]Skelly v. State Personnel Board (1975) 15 Cal.3d 194 [124 Cal.Rptr. 14].

were. Two officers testified that Prasinos made comments to them referring to "that snitch, Meister," and that Prasinos had used the terms "rat" and "snitch" in reference to Meister and Cuevas.

On May 23, 1991, Meister approached Lieutenant Jurcak and complained that he and Cuevas were being harassed by their fellow officers because they told the prison administration about Prasinos' violations. Meister said the harassment took several forms, but included various anonymous phone calls to Building 9, referring to "rats" or calling the building a "cheese factory." Meister reported being shunned by several officers. As the lead floor officer of Building 9, he typically received the keys and information from the prior shift. This no longer occurred. The departing shift officers no longer briefed Meister on the prior shift's activities, instead they would just toss the equipment on the desk and exit.

Cuevas also alleged that he was harassed. He also received anonymous phone calls regarding "rats" and "cheese factory" comments. He stated that he found a dead rat on the hood of his car, although no one else saw it. He said he did not show it to anyone else as he felt he had been through enough harassment.

Prasinos claimed that prior to May 31, 1991, he was unaware that other officers had allegedly taken it upon themselves to commit acts of harassment against Meister and Cuevas. On May 31, 1991, while on suspension, Lieutenant Alfred W. Stone called Prasinos at home and directed him to come in for an investigatory interview regarding the alleged harassment of Meister and Cuevas.

On June 28, 1991, Prasinos was served with a Notice of Adverse Action of Dismissal. In that notice, he was charged with inefficiency, inexcusable neglect of duty, dishonesty, discourteous treatment, other failure of good behavior, and unlawful retaliation against another employee. The notice listed seven separate charges for which Prasinos was being held accountable. Five of these charges involved other officers making derogatory statements to or about Meister and/or Cuevas. Two charges alleged direct statements made by Prasinos.

Prasinos' dismissal was effective July 8, 1991. On July 19, 1991, Prasinos filed a grievance alleging the State had breached the contract bargaining agreement (CBA) when it retaliated against him for his exercise of protected activities (i.e., discussion with his fellow employees concerning the circumstances surrounding his adverse action). Prasinos also appealed his dismissal to the SPB.

Correctional Officer Mark Tindall (Tindall), CCPOA chapter president at the Mule Creek State Prison, testified that the "rumor mill" or "grapevine" is important for the purpose of gathering information to determine if there are problems that need to be addressed. Correctional Officer Gary Crist (Crist), chief job steward and former Mule Creek Prison CCPOA chapter president, stated that the flow of information through the grapevine significantly decreased following Prasinos' dismissal. Crist indicated that officers were reluctant to discuss anything other than official business with anyone, including CCPOA

stewards, because they were afraid of being accused of spreading rumors. Both Tindall and Crist stated that Prasinos was the only Mule Creek correctional officer ever disciplined for talking to other officers about his adverse action.

In preparation for the SPB hearing on Prasinos' dismissal, Linda Dizmon, employee relations officer at Mule Creek State Prison, reviewed investigatory reports and found three incidents that had not been listed as specific charges in Prasinos' initial 30-day suspension, although there had been references to them in the documentation. The first involved unlocking inmate cell doors in Building 9 without authorization from the floor officers. The second incident dealt with the specific charge of the allegedly unauthorized release of inmate Newberry from his cell which resulted in Newberry's confrontation with Officer Cuevas. The third concerned Prasinos' alleged repeated cut-off of the VCR during the inmates' viewing period, causing the inmates to become agitated and hostile.

Although these three incidents had been previously overlooked, Warden Ingle believed they were serious enough to warrant supplementing Prasinos' notice of dismissal. On November 21, 1991, the Department served Prasinos with a "Supplemental Notice of Adverse Action" based on these incidents.

CCPOA and the State are parties to a CBA with a term of

May 26, 1989 through June 30, 1991.[4] Article V, section 5.03 states:

> a. The State and the Union shall not 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 the State Employer-Employee Relations Act (Ralph C. Dills' Act).

The CBA also includes a grievance procedure which culminates in binding arbitration (Article VI).

Arbitrator's Award

Prasinos filed a grievance alleging that the State had violated the CBA when it dismissed him for discussing his adverse action with his co-workers. An arbitration hearing concerning Prasinos' grievance was held on January 30-31 and April 21-21, 1992. The arbitrator's opinion and award was issued on August 7, 1992. In her opinion, the arbitrator found that the provisions of section 5.03 essentially incorporate the provisions of Dills Act section 3519(a).[5] Therefore, the arbitrator applied the test

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[4]The Board may take official notice of the terms of a CBA filed with PERB pursuant to PERB Regulation 32120. (Cal. Code of Regs., tit. 8, sec. 17.) (State of California (Department of Forestry and Fire Protection) (1993) PERB Decision No. 999-S.)

[5]Dills Act section 3519(a) states, in pertinent part:

> It shall be unlawful for the state to do any of the following:
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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 employees because of their exercise of rights guaranteed by this chapter.

established by PERB in Novato Unified School District (1982) PERB Decision No. 210 (Novato), to determine whether the State retaliated against Prasinos in violation of section 5.03 of the CBA.

The arbitrator considered the comments Prasinos made to his fellow officers pertaining to the events leading to his suspension and concluded that Prasinos participated in protected activity when he engaged in these discussions with his co-workers. The arbitrator also found that the State was aware of this protected activity and that it took adverse action against Prasinos when it terminated his employment.

Further, the arbitrator concluded that the State's dismissal of Prasinos was unlawfully motivated. The arbitrator noted that other officers who made similar references to "rats" and "snitches" in connection with Meister and Cuevas were not disciplined.

Finally, the arbitrator considered whether the State had a "legitimate operational necessity" for its dismissal of Prasinos. The arbitrator found that the State did not establish that it had just cause to dismiss Prasinos because most of the harassment against Meister and Cuevas occurred as a result of other officers' conduct. Therefore, the arbitrator concluded that the State violated the parties' CBA when it terminated Prasinos. The arbitrator reversed Prasinos' dismissal, ordered the State to reinstate him and imposed a 30-day suspension on Prasinos.

Following the issuance of the arbitrator's award, in late August 1992, the parties entered into a settlement agreement to modify and implement the arbitrator's award. In the agreement, the State agreed to reinstate Prasinos, returning him to duty at California State Prison-Folsom following a 30-day suspension. Prasinos agreed to withdraw the appeal of his dismissal from the SPB, and CCPOA agreed to withdraw from its requested remedy in the instant case its request for Prasinos' reinstatement.

ALJ'S PROPOSED DECISION

To determine whether the State's dismissal of Prasinos impacted the flow of information through the "rumor-mill" or "grapevine," the ALJ applied the test for retaliation or discrimination set out in Novato. The ALJ, making findings similar to those of the arbitrator, determined that the employees' right to communicate with each other about terms and conditions of employment is a protected right and that the State had knowledge of Prasinos' participation in this protected activity.

The ALJ found evidence of unlawful motivation when the State dismissed Prasinos for using the terms "rat", "snitch" and "ratted me off," but it did not discipline other officers for making similar comments. The ALJ also found suspect the State's explanation that it "overlooked" the supplemental grounds for dismissal filed against Prasinos.

Finally, the ALJ dismissed the State's argument that it had a right to discipline Prasinos if his statements were likely to cause dissention or unrest among the correctional officers.

The ALJ concluded that the State violated Dills Act section 3519(b) when it served Prasinos with two notices of adverse action of dismissal and terminated his employment.

THE STATE'S EXCEPTIONS

The State contends that the ALJ erred in finding that it violated the Dills Act when it terminated Prasinos' employment. Specifically, the State argues the ALJ erred when he concluded that CCPOA has a protected right of access to the "rumor-mill" or "grapevine." Furthermore, the State contends the ALJ erred in finding that it acted with unlawful motivation when it dismissed Prasinos.

DISCUSSION

Dills Act section 3514.5 states, in pertinent part:

> The board shall have discretionary jurisdiction to review such settlement or arbitration award reached pursuant to the grievance machinery solely for the purpose of determining whether it is repugnant to the purposes of this chapter. If the board finds that such settlement or arbitration award is repugnant to the purposes of this chapter, it shall issue a complaint on the basis of. a timely filed charge, and hear and decide the case on the merits; otherwise, it shall dismiss the charge.

In Dry Creek Joint Elementary School District (1980) PERB Order No. Ad-81a (Dry Creek). the Board adopted the post-arbitration deferral standard enunciated by the National Labor Relations Board (NLRB) in Spielberg Manufacturing Company (1955)

112 NLRB 1080 [36 LRRM 1152] (Spielberg) and Collyer Insulated Wire (1971) 192 NLRB 837 [77 LRRM 1931]. The Board will defer to an arbitrator's award if:

1. The matters raised in the unfair practice charge were presented to and considered by the arbitrator;

2. The arbitral proceedings were fair and regular;

3. All parties to the arbitration proceedings agreed to be bound by the arbitral award; and

4. The award is not repugnant to the purposes of the Dills Act.

In 01in Corp. (1984) 268 NLRB 573 [115 LRRM 1056] (Olin Corp.), the NLRB further described its standard for deferral to an arbitrator's award:

> We would find that an arbitrator has adequately considered the unfair labor practice if (1) the contractual issue is factually parallel to the unfair labor practice issue, and (2) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice. [Fn. omitted.] In this respect, differences, if any, between the contractual and statutory standards of review should be weighed by the Board as part of its determination under the Spielberg standards of whether an award is "clearly repugnant" to the Act. . . . Unless the award is "palpably wrong," [Fn. omitted.] i.e., unless the arbitrator's decision is not susceptible to an interpretation consistent with the Act, we will defer.

In Yuba City Unified School District (1995) PERB Decision No. 1095, the Board determined that once an arbitration award has been issued, the post-arbitration deferral standard enunciated above must be applied to determine PERB's jurisdiction, regardless of the section of the statute alleged to have been violated in the unfair practice charge.

The arbitrator issued an opinion and award resolving Prasinos' grievance on August 7, 1992, prior to the completion of the hearing before PERB in the instant case. The arbitrator concluded that the State violated Article V, section 5.03 of the parties' CBA when it terminated Prasinos' employment. The parties subsequently entered into a settlement agreement which modified and implemented the arbitrator's award. The parties agreed to a 30-day suspension for Prasinos and thereafter to reinstate him to a position at California State Prison-Folsom.

Applying the Dry Creek post-arbitration deferral standard to this case, the Board finds that this matter should be dismissed and deferred to the arbitrator's award as modified and implemented by the parties' settlement agreement.

The issues and the facts considered by the arbitrator are identical to those raised in the unfair practice charge before the Board. The arbitrator's opinion and award was issued after a hearing in which both parties in the case before PERB had an opportunity to participate. There is no appearance or assertion by either party that the arbitral proceedings were unfair. In addition, the terms of the parties' CBA indicate that the parties have agreed to be bound by the arbitral award.

Finally, the Board will not find an arbitrator's award repugnant to the purposes of the Dills Act unless the award is "palpably wrong" and not susceptible to an interpretation consistent with the Dills Act. (Spielberg; Olin Corp.) Furthermore, the fact that the Board "may have reached a

different conclusion in interpreting the parties' agreement and the evidence does not render the award unreasonable or repugnant." (Los Angeles Unified School District (1982) PERB Decision No. 218.)

The arbitrator applied PERB's own test, set out in Novato, to determine whether the State unlawfully retaliated against Prasinos for participation in protected activity. Regardless of whether the Board would have reached a different result on these issues, there are no findings in the arbitrator's award which are clearly repugnant to the purposes of the Dills Act. The Board finds that the arbitrator's award is not repugnant to the purposes of the Dills Act and the Board's standard for dismissing the unfair practice charge and deferring to the arbitrator's award has been met. Accordingly, the Board dismisses and defers the unfair practice charge to the arbitrator's award as modified and implemented by the parties' settlement agreement.

ORDER

The complaint and unfair practice charge in Case No. S-CE-509-S are hereby DISMISSED.

Member Caffrey joined in this Decision.

Member Garcia's dissent begins on page 16.

GARCIA, Member, dissenting: The majority conclusion is a change in policy that is not consistent with the Ralph C. Dills Act (Dills Act) and legal doctrine. It is error to employ a repugnancy analysis to an arbitrator's award involving other parties and use it as a bridge to establish a collateral estoppel bar to a decision on a different issue. Furthermore, the conclusion is a paradox because it adopts a finding of a violation in the arbitrator's award to reverse a finding of a violation in the administrative law judge's (ALJ) decision.

First I will provide a brief background of the relevant facts. After learning that the State of California (Department of Corrections) (State) planned to dismiss him from his position, David P. Prasinos (Prasinos) filed a grievance against it that ultimately went to arbitration. The California Correctional Peace Officers Association (CCPOA) was not a party in interest to that arbitration, which focused on the disciplinary action taken against the grievant Prasinos. The arbitrator applied the Novato Unified School District (1982) PERB Decision No. 210 (Novato) test for reprisal and found a violation by the State. The arbitrator ruled that although the employer has a limited right to control communication, termination of employment was too severe and a 30-day suspension was appropriate.

CCPOA filed an unfair practice charge with the Public Employment Relations Board (PERB or Board), alleging that the impact of many of the events analyzed in the arbitration constituted a violation by the State of the rights guaranteed to

CCPOA under Dills Act section 3519(b).[1] The essence of the complaint before PERB was that the discipline of the employee caused other employees to withhold communication via the grapevine and this in turn reduced communication between CCPOA and its members. The ALJ also applied the Novato analysis used by the arbitrator and found that the State committed a violation because the discipline had an impact on communication via the grapevine.

Without a request from any party, the majority opinion examines the arbitrator's award and rules that it is "not repugnant to the purposes of the Dills Act," and then dismisses the complaint in a different case, in effect reversing the ALJ's proposed decision that was consistent with the arbitrator's award. Dills Act section 3514.5 provides, in pertinent part:

> The board shall have discretionary jurisdiction to review [a] settlement or arbitration award reached pursuant to the grievance machinery solely for the purpose of determining whether it is repugnant to the purposes of this chapter. If the board finds that such settlement or arbitration award is repugnant to the purposes of this chapter, it shall issue a complaint on the basis of a timely filed charge, and hear and decide the case on the merits; otherwise, it shall dismiss the charge. [Emphasis added.]

The majority is erroneously using the repugnancy jurisdiction as a device to bring in the arbitrator's award as a

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[1]The State filed a motion to dismiss section 3519(b), which was denied and appealed. The Board affirmed that ruling in State of California (Department of Corrections) (1992) PERB Order No. Ad-231-S) because it found that the collective bargaining agreement did not prohibit the disputed conduct (denial of Dills Act rights to an employee organization).

collateral estoppel bar that justifies dismissing CCPOA's separate cause of action, on a different issue, before PERB.

In the misapplied deferral analysis, the majority cites the four standards established in Dry Creek Joint Elementary School District (1980) PERB Order No. Ad-81a that must be met before the Board will defer to an arbitrator's award. The majority ignores the fact that two of the four standards are not satisfied. As recited by the majority, the deferral requirements are:

> 1. The matters raised in the unfair practice charge were presented to and considered by the arbitrator;
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> 2. The arbitral proceedings were fair and regular;
>
> 3. All parties to the arbitration proceedings agreed to be bound by the arbitral award; and
>
> 4. The award is not repugnant to the purposes of the Dills Act.

These standards test whether the collateral estoppel doctrine should be applied to prevent cases from being retried in a second forum. The majority, in a cursory manner, deems the standards satisfied and orders post-arbitration deferral, effectively preventing a separate case from being decided by PERB, despite the fact that half of the four standards (standards 1 and 3) are not met in the case at bar.

After a lengthy recitation of the sources of PERB's post-arbitration deferral standard, the majority provides only a cursory, conclusory "application" of the test itself. Since the question of whether or not CCPOA has a forum for its statutory

cause of action hangs in the balance, it would seem appropriate to provide detailed reasons[2] for ruling that CCPOA is collaterally estopped from proceeding here.

For example, standard 1 tests for identity of issues in the two proceedings, a matter which is crucial to the concept of collateral estoppel. The majority's entire discussion of that standard consists of the bare statement that, "The issues and facts considered by the arbitrator are identical to those raised in the unfair practice charge before the Board." Besides being brief and unsupported, this statement is inaccurate; the arbitrator never considered whether CCPOA has a protected right of access to the grapevine, much less whether the action taken against Prasinos impacted CCPOA's communication rights.

Under standard 3, prior to deferral the decision maker must ensure that the persons affected by the present ruling are the same persons involved in the prior proceeding, and that they agreed to be bound by that proceeding. The majority sidesteps this standard and disposes of the requirement by stating that, "The arbitrator's opinion and award was issued after a hearing in which both parties in the case before PERB had an opportunity to participate." The problem with this conclusion is that CCPOA was

[2]See Louisiana Pacific Corp. v. NLRB (9th Cir. 1995) 149 LRRM 2080, in which the court held that administrative orders are required to meet a standard of clarity.

not a party in interest to the arbitration,[3] nor is there evidence that it agreed to be bound by the arbitration award.

Through the contortion of a misapplied repugnancy jurisdiction that violates standards of deferral, the majority inducts collateral estoppel to deny CCPOA's statutory right of access to PERB. That strategy was born in Yuba City Unified School District (1995) PERB Decision No. 1095 (Yuba City), and is extended here to further embed an unfair policy into precedent. My dissent in Yuba City explains the legal deficiencies of the attempted change in policy; Member Carlyle's dissent in State of California (Department of Corrections) (1995) PERB Decision No. 1100-S is also instructive on this error.

Finally, the majority fails to squarely face the question of whether the indirect impact on communication via the grapevine, caused by the State's action in disciplining the employee, was sufficient to constitute a violation of CCPOA's rights. That is the central issue raised by the State's exceptions and it is avoided by this attempt at collateral estoppel.

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[3]See State of California (Department of Youth Authority) (1995) PERB Decision No. 1080-S, where the Board affirmed an ALJ's proposed decision dismissing an unfair practice charge on the basis of collateral estoppel. At page 19 of the proposed decision, the ALJ stated that collateral estoppel was appropriate despite differences in named parties, if the parties in the first proceeding have a "clear identity of interest" with the parties in the second proceeding.