STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA STATE EMPLOYEES ASSOCIATION, LOCAL 1000, SEIU, AFL-CIO, CLC, Charging Party, v. STATE OF CALIFORNIA (DEPARTMENT OF CONSUMER AFFAIRS), Respondent.	Case No. SA-CE-1385-S PERB Decision No. 1711-S November 23, 2004

Appearances: Lois Kugelmass, Senior Labor Relations Representative, and Tiffany Harris, Labor Relations Representative, for California State Employees Association, Local 1000, SEIU, AFL-CIO, CLC; State of California (Department of Personnel Administration) by Robert J. Allen, Labor Relations Counsel, for State of California (Department of Consumer Affairs).

Before Duncan, Chairman; Whitehead and Neima, Members.

DECISION

DUNCAN, Chairman: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the State of California (Department of Consumer Affairs) (State or Department) to an administrative law judge's (ALJ) proposed decision. The ALJ found that the State violated the Ralph C. Dills Act (Dills Act)[1] by interfering with the rights of bargaining unit employees when it disciplined a supervisor; and failing or refusing to provide necessary and relevant information.

[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.

The Board has reviewed the entire record in this case, including the proposed decision, hearing transcript and exhibits, and the filings of the parties.[2] The Board hereby reverses the ALJ's proposed decision and dismisses the unfair practice charge and complaint in accordance with the following discussion.

FACTUAL SUMMARY

The Bureau for Private Postsecondary and Vocational Education (BPPVE) is located within the Department. The functions of the BPPVE were originally performed by an independent agency, the Council on Private Postsecondary and Vocational Education (Council). The Council's authority to operate sunset in December 1997, and the BPPVE assumed the duties of the Council in January 1998.

The work of the BPPVE involves the licensing and oversight of privately owned postsecondary schools and education programs. The BPPVE is comprised of several units, including the Degree and Non-Degree Units. The Degree Unit reviews applications for licensing of private schools that confer postsecondary degrees. The Non-Degree Unit processes applications from vocational or technical schools that provide training in a broad range of areas such as cosmetology, computers, culinary arts and automotive repair.

After a school owner files a licensing application, an initial review of the application must be completed within 30 days. The school owner is then notified of any deficiencies in the application and provided an opportunity to submit additional information. A further comprehensive review includes an evaluation of areas such as the proposed program's curriculum, facilities, instructors, library and financial resources. If appropriate, temporary approval is granted and the school owner can begin to operate. A site visit is conducted prior to a final determination whether to approve an application.

[2]The Department's request for oral argument was denied by the Board on June 15, 2004.

Sheila Hawkins (Hawkins) is employed as an education administrator assigned to supervise the Degree Unit. Hawkins previously served as deputy director of the Council. After the Council sunset and its work moved to the BPPVE, Hawkins transferred to the Department. Instead of being assigned to the BPPVE, however, Hawkins was placed in the Bureau of Automotive Repair. After Hawkins filed an appeal, the State Personnel Board (SPB) ordered the Department to assign her as an education administrator in the BPPVE. Hawkins returned to the BPPVE in February 1999.

Michael Abbott (Abbott) became the chief of the BPPVE in November 1999. Hawkins applied for the position of deputy chief, but withdrew from consideration after the interview process. Hawkins accused Abbott of breaching a promise to select her as the deputy chief. Bill Young (Young), the education administrator for the Title 38 Unit, was appointed deputy chief in June 2000.

When Abbott arrived at the BPPVE, there were numerous working out of class grievances pending. In December 1999, Marcia Trott (Trott) and Latanaya Johnson (Johnson), both staff services analysts in the Degree Unit, filed out of class grievances asserting that they were performing the work of education specialists. Eventually, the Department of Personnel Administration (DPA) concluded that Trott and Johnson were working out of class and ordered that they receive out of class pay. The BPPVE, in consultation with Department management, decided to allow Trott and Johnson to continue working out of class. The BPPVE initiated the process to promote them to education specialists and their promotions formally became effective on November 1, 2000.

Prior to July 2000, the Legislature became concerned with the timely processing of applications filed with the BPPVE. The Legislature included language in the 2000/2001 State budget which required the BPPVE to provide quarterly status reports on its backlog.

In order to prepare the reports to the Legislature, several meetings were held with unit managers to develop a quarterly report form. Young sent a memo to unit managers instructing them to count each application that was more than 365 days old as backlogged. Young established this definition for purposes of the quarterly reports after consulting with legislative budget committee staff. Once data was received from each unit manager, the information was consolidated into a report and submitted to the Legislature.

Hawkins did not agree with Young's definition of a backlogged application. She instructed the Degree Unit staff to identify an application as backlogged if it had not been "touched" within one year. Hawkins also informed her staff that applications were complete once temporary approval had been granted. While the Degree Unit had applications pending since at least 1996, the unit did not report a backlog.

The BPPVE and the Department also decided in July 2000 to examine the organization and duties of the BPPVE to meet workload issues and make sure that staff did not work out of class. With the assistance of DP A, the BPPVE conducted a study of the work that needed to be accomplished, the legal requirements and an evaluation of the employee skills necessary to perform the work. There were numerous meetings where unit managers provided input regarding the reorganization plan. Hawkins participated in these meetings. Upon completion of the review, the study concluded that the work could be accomplished by assigning one senior education specialist to each unit. The remainder of the positions in the units would be classified as education specialists.

Hawkins did not agree with the reorganization plan. Under the prior Council, the Degree Unit had been staffed with senior education specialists. Hawkins believed that the work of the Degree Unit was sufficiently different from that of the other units and that it should be performed only by senior education specialists. Abbott testified that Hawkins[1]

comments were taken into consideration but she was told that only one senior education specialist would be assigned to each unit. Hawkins was informed numerous times of this decision and was told that she needed to manage the workload and supervise staff to ensure that staff was not working out of class. There were discussions with Hawkins regarding how work should be assigned to avoid staff working out of class. The more complex applications were to be assigned to the Degree Unit's senior education specialist. A master's degree level program and above is typically considered a more complex application.

Implementation of the reorganization plan began in September 2000. On October 2, 2000, Trott and Johnson filed a second out of class grievance asserting that they were performing the work of senior education specialists.

An arbitration hearing was held in January 2002 to take evidence on Trott's and Johnson's out of class grievance. Hawkins was subpoenaed to testify. Prior to the hearing, Young and BPPVE Administrative Officer Sylvia Ramos (Ramos) spoke with Hawkins, telling her that the Department was upset and wanted to win the grievance. Hawkins testified that Young and Ramos, "more than hinted that DCA would be very unhappy if they lost this."

Hawkins testified at the arbitration hearing that under the prior Council the Degree Unit was staffed by senior education specialists. She testified that although she had an obligation as the supervisor to ensure that staff was not working out of class, she did not differentiate between the workload assigned to the education specialists and the senior education specialist. She stated that the work was divided up among the Degree Unit staff as it came in the door. Hawkins testified that Trott and Johnson were performing the work of senior education specialists.

A few days after the hearing Young accused Hawkins of "costing DC A the hearing." The following week, Young initiated a schedule of weekly meetings with Hawkins to review

the Degree Unit's workload. Hawkins testified that Young paid particular attention to the work of Trott and Johnson, questioning their handling of applications and their recommendations.

Abbott and Young had been receiving complaints from school owners about lengthy delays in the processing of their applications. A review of the quarterly report provided to the Legislature, however, showed no application backlog in the Degree Unit.

On June 6, 2002, Young went to Hawkins' office to request that she provide information on the discrepancy in the backlog reports to the Legislature. Hawkins believed that Young's request for workload information was unreasonable. She viewed the request as harassment and an attempt to discredit her. Hawkins[1] voice got louder and she became visibly angry. Hawkins stated that her unit was not the only one with backlogs. She told Young that she was going to "scorch this place" and be "the only one standing when it is over." When Young stood up to leave, Hawkins also said, "I'm very angry with [Ramos]. She tried this with me once before and she knows who won that."

The incident was witnessed by Abbott's secretary, Anita Keaton (Keaton). She stated during the investigation conducted by the California Highway Patrol (CHP) that Hawkins appeared angry and she raised her voice to Young. Keaton also said that she had felt threatened by Hawkins in the past.

Hawkins denied making a threatening statement. She later explained to CHP investigators that her statement was made in reference to an application she was working on. She indicated that she was going to take a "scorch the earth" approach to the application. CHP investigators concluded that Hawkins made the statements as described by Young.[3]

[3]The CHP's investigative report was admitted into evidence at the PERB hearing by California State Employees Association, Local 1000, SEIU, AFL-CIO, CLC (CSEA). The State speculated that the report was provided to CSEA by Hawkins.

Young immediately reported Hawkins[1] comments to Abbott and Ramos. Young provided a written summary of the meeting in an e-mail to Department Personnel Director Sandra Mayorga (Mayorga). Young also reported that Ramos "expressed extreme concern for her personal health and safety based on Ms. Hawkins[1] expressed anger toward her." Young's e-mail continued, "I too feel very threatened and concerned with Ms. Hawkins' continued and recent meeting anger and threats." Young concluded:

> There are also other documented incidents of Ms. Hawkins[1] threats to the Bureau Chief and her combative and insubordinate behavior is detrimental to the Bureau and its employees. Thus, I believe her continued erratic and angry behavior require us to consider her threats serious and possibly could jeopardize the health and safety of Bureau employees.
> (Department's Exhibit 506.)

Abbott consulted with the Department's personnel and internal affairs units, and the decision was made to place Hawkins on administrative time off pending an investigation.

On June 7, 2002, Young asked Hawkins to report to the conference room. Two investigators from the Department's Division of Investigation (DOI) gave Hawkins a memo informing her that she was being placed on administrative time off. The investigators accompanied Hawkins to her office to retrieve her personal belongings and then escorted her from the building.

On June 13, 2002, Denise Brown, Department chief deputy director, made a written request to the CHP to conduct an investigation into whether Hawkins violated the workplace violence policy.[4] Due to concern over the accuracy of the backlog information submitted to the Legislature, the investigation was expanded to include a review of the unit's workload data.

[4]The Department has previously requested that the CHP investigate workplace violence complaints. Hawkins filed a workplace violence complaint against Abbott in October 2001 that was investigated by the CHP.

On June 28, 2002, CHP investigators advised Mayorga that Hawkins[1] return to work prior to the completion of the investigation would be detrimental as she would have access to witnesses. Mayorga obtained an extension of Hawkins[1] administrative leave from DPA to July 22, 2002. On July 15, 2002, a second extension request was made by CHP investigators to further extend Hawkins' leave pending completion of the investigation.

CHP investigators conducted interviews of 20 BPPVE and Department staff members, including managers, other supervisors and employees assigned to the Degree Unit. In August 2002, the Department issued notices to Degree Unit employees directing them to appear for an interview with CHP investigators. The notice stated, in part:

> You are notified that you will be the subject of an administrative interrogation on .... The California Highway Patrol is presently conducting an internal investigation into allegations concerning misrepresentation of official reports.

The interviews were tape-recorded and each Degree Unit employee was represented by CSEA. At the beginning of the interview, Degree Unit staff were informed they were not the subject of the investigation. Degree Unit employees were questioned about their knowledge of statutory and regulatory requirements in the processing of applications and actions taken to track and monitor the status of pending applications.

After the employee interviews had been completed, CSEA Senior Labor Relations Representative Lois Kugelmass (Kugelmass) wrote to the Department on August 21, 2002, requesting information about the investigation regarding the alleged "misrepresentation of official reports," and about a separate employee personal safety issue. Regarding the "investigative interrogation," Kugelmass requested that the Department provide: (1) copies of the "official reports" referenced in the notice of investigative interrogation; (2) the alleged "misrepresentations" being investigated; (3) the Department's request to CHP to conduct the

investigation; and (4) the results of the investigation, including written or electronic reports, recommendations, recordings and background material.

Department Labor Relations Officer Tonya Blood (Blood) responded on September 5, 2002, providing information regarding the Department's efforts to address the safety issue. Blood also informed CSEA that she was advised that the CSEA represented employees were "not" the subject of the CHP investigation. (Emphasis in original.) She stated:

> Given the fact that these employees are not the subjects of the investigation, CSEA is not entitled to the requested information.

Blood invited Kugelmass to contact her if she had any questions about the Department's response. Kugelmass did not clarify or renew her request for information regarding the CHP investigation.

The CHP's investigative report was issued on September 6, 2002. The report made several findings regarding Hawkins' supervision of the Degree Unit. The report made no findings regarding the CSEA represented employees. CHP investigators concluded that Hawkins failed to ensure that employees were completing job functions satisfactorily. Although Hawkins acknowledged that it was her job to provide training for her staff, the Degree Unit staff had never received any formal training. As a result, there was no consistency in interpretation of statutes and regulations between staff members. Hawkins told investigators that she did not want to tell her specialists what to do because they were required to make professional judgments.

Investigators also found that Hawkins had not developed a consistent method for her staff to track the progress of their workload. Applications were not assigned when they came into the Degree Unit. Rather, they were placed on a shelf and staff would pick up the next application as their workload allowed. Oftentimes, applications sat on the shelf well beyond the initial 30-day preliminary review timeframe. Hawkins also gave directions to her staff that

were inconsistent with management's directives when she instructed them to identify backlog as any application that had not been touched. The report concluded that Hawkins' ineffective supervisory style constituted "inexcusable neglect of duty and inefficiency."

CHP investigators also concluded that while the statements Hawkins made in her meeting with Young did not rise to the level of a criminal threat, Hawkins had violated the Department's workplace violence policy.

Just prior to the release of the CHP report, the arbitrator issued her decision on September 4, 2002, granting Trott's and Johnson's out of class grievance. Thereafter, the BPPVE and the Department decided to discontinue working the education specialists out of class. Trott, Johnson and Education Specialist Shirley Geddes (Geddes)[5] were notified on September 9, 2002, that they would be transferred to other units within the BPPVE to remedy their performing out of class work.[6]

Following the release of the arbitrator's decision, Geddes filed an out of class grievance on September 13, 2002, stating that she had also been working out of class as a senior education specialist. On September 19, 2002, the Department granted Geddes' grievance informing her that she would receive out of class pay.

On September 12, 2002, the Department notified Hawkins that the investigation was complete and she could return to work. Hawkins was also informed that she would be issued an adverse action and demotion. Hawkins returned to work on September 16, 2002, and the adverse action was issued on October 3, 2002.

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[5]Geddes came to the Degree Unit in 2001. She was not a party to the out of class grievance filed by Trott and Johnson in October 2000.

[6]Section 14.2 of the parties' MOU states, in part:

> (B)(4) Out-of-class work may be discontinued by departments at any time;

The adverse action reported instances of Hawkins' failure to manage Degree Unit staff and its workload. Most of the failure to manage allegations derived from the findings of the CHP report. The adverse action also alleged that although Hawkins participated in the reorganization study and stated that she was aware of her responsibility to ensure that staff was not assigned work out of class, she failed to ensure that employees in the Degree Unit did not perform out of class work. The adverse action noted that Hawkins allowed staff to choose to perform higher-level duties and she testified at the arbitration hearing that the two education specialists were performing senior education specialist level work.

The adverse action also alleged eight incidents of rude and unprofessional contact with Young, Abbott and other BPPVE staff. These incidents began on August 12, 2000, when it was alleged that Hawkins inappropriately questioned an employee about his role in the annual report. On January 12, 2001, Hawkins received a counseling memo regarding both insubordinate conduct when she refused to follow directions from Abbott to allow him to review a notice before she mailed it to postsecondary schools and the anger she demonstrated during their meeting. Hawkins also repeatedly told a secretary that she did not look happy and commented on her hairstyle. Young verbally counseled Hawkins regarding these comments. Hawkins[1] "scorch the place" comments were also cited. The remaining allegations accused Hawkins of speaking loudly and rudely to staff regarding her efforts to obtain office keys on her return to the office on September 16, and making inappropriate comments to the supervisor of the Non-Degree Unit about her work situation.

Hawkins appealed the adverse action to the SPB. During the course of the hearing, allegations concerning Hawkins[1] management of the Degree Unit and her arbitration testimony were withdrawn. No evidence was provided at the PERB hearing on the reasons for the withdrawal of these allegations from the adverse action.

The SPB issued a decision on September 30, 2003, upholding some and dismissing other allegations of rude and unprofessional conduct.[7] The SPB modified the discipline from a demotion to a six-month reduction in salary.[8]

West Haven Investigation

An application seeking approval of the West Haven University was filed by its owner on November 30,2000. Temporary approval was granted on June 1, 2001. In October 2001, the application was reassigned to Trott for a comprehensive review.

On April 29, 2002, West Haven submitted an application to add a Bachelor's of Science in Nursing degree to its program.

In early June 2002, the applicant's level of communication with BPPVE staff increased. The applicant called and sent lengthy e-mails and faxes expressing his frustration with the delay in approving his application. He complained of the cost of maintaining facilities and staff while waiting approval of the application. In addition to BPPVE and Department staff, some of the applicant's e-mails were directed to legislators and the Governor. His e-mail indicated that he had been in communication with both Trott and Abbott, and both had made multiple promises over the prior months that the application would soon be resolved. In March 2002, Abbott indicated to the applicant there was a possibility that his application would be denied, but that a final decision had not been made.

[7]There was evidence of counseling or progressive discipline against Hawkins prior to the notice of adverse action. The record established that Hawkins was verbally counseled on several occasions regarding her responsibility to manage staff and workload; counseled by Young regarding her inappropriate comments to a secretary; and she was given a counseling memo regarding insubordinate conduct and her expression of anger during a meeting with Abbott.

[8]The ALJ took administrative notice of the SPB decision as a public record and considered it in the preparation of the proposed decision.

Trott became concerned with the tenor and frequency of the applicant's communications. Some e-mail messages were sent in the early hours of the morning. His e-mail referenced his military background and his expertise in bioterrorism.[9] The applicant complained about abuses by the government and compared himself to Rodney King. He also threatened to sue individuals involved in the delay of his application. The applicant pleaded for a decision either approving or disapproving his application. Trott testified at the PERB hearing, "I didn't want to be the one that knew that Ted Kaczynski was around and nobody figured out that he was the Unabomber until he blew somebody up."

On July 15, 2002, Trott sent an e-mail to Abbott stating that she had just picked up another 10 page fax from the applicant. She found his writings disturbing and considered him dangerous and believed him capable of violence.

On July 15, 2002, Abbott contacted the applicant and advised him that his application was nearing completion. He also informed the applicant that his communications with BPPVE staff were "inappropriate and counterproductive." He directed the applicant to communicate only with Abbott and Young. The applicant complied with the request and further communications were directed to BPPVE managers.

Young discussed the situation with the CHP. In addition, the DOI was contacted to evaluate the applicant's conduct and assess whether he was a threat. Abbott informed Trott and other Degree Unit employees of these actions on July 18, 2002.

During this period, Trott was working with Department legal counsel Kristy Shields (Shields) to evaluate what evidence might be necessary to make a case for denial of the West Haven application.

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[9]The applicant is a retired Navy Master Chief Hospital Corpsman. The West Haven University program offered free training to healthcare professionals in the treatment of victims of biological terrorism.

Abbott had numerous conversations with Shields about the West Haven application. Abbott testified that Shields advised him "that there was insufficient evidence to make a plausible case for denial that would likely stand up in an administrative hearing. It was also her opinion that we had exhausted all of the possibilities for gathering that sort of evidence."

On July 23, 2002, Abbott granted temporary approval of the West Haven application to add the Bachelor of Science in Nursing to its program. A comprehensive review of the application was still required.

On July 29, 2002, DOI Senior Investigator Kim Trefry (Trefry) interviewed Trott for approximately 30 minutes regarding her complaints about the applicant. Trefry questioned Trott about the timelines for the West Haven application and asked her about her concerns for her safety.

Trefry did not speak to other employees in the Degree Unit because Trott did not tell her that they were also concerned about the applicant's communications. Trefry consulted with a member of the Governor's protective detail after noting that the Governor had also received an e-mail from the applicant. The protective detail reviewed the information Trefry provided and information in its database, and concluded that the applicant was not a threat. Trefry did not interview the applicant but she did check various law enforcement resources and investigated his background to determine if there were any other concerns. Trefry ultimately concluded that the applicant had not committed any criminal acts and his behavior did not rise to the level of an immediate threat. She characterized the applicant's repetitious communications as "annoying," but noted that they did not reoccur after BPPVE managers spoke with him. Trefry testified that she prepared an 8 to 15 page investigative report.

In an e-mail to Abbott dated July 31, 2002, Trott expressed concern for her safety and requested that the West Haven application be reassigned. Her e-mail also discussed some of

the staff deliberations regarding application. Trott stated that she had notified outside expert witness Dr. Faye Bower of Abbott's reasons for granting temporary approval. Trott concluded by noting that she had copied CSEA on her e-mail, "because of my continuing concern regarding the retaliatory and punitive actions of you and [Young]."

On August 15, 2002, Trott and Kugelmass met with Young. Trott expected Young to discuss her request for reassignment. Instead, Young counseled Trott for disclosing confidential information regarding the West Haven deliberations to outside parties. When pressed about Trott's safety concerns, Young stated that the complaints about the applicant had been "found unwarranted." A counseling memo dated September 19, 2002, directed Trott to refrain from sharing confidential information with outside parties.

On August 22, 2002, CSEA filed a health and safety grievance on behalf of Trott, alleging that Trott had been threatened with adverse action for bringing her safety concerns to CSEA. Kugelmass also submitted an information request dated August 21, 2002, seeking, "the findings and conclusions of the investigation by Trefry and all reports, summaries, notes, recordings, and documents, either written or electronic, upon which DOI and/or the Bureau relied on in its decision not to reassign Trott."

Department Chief Deputy Denise Brown (Brown) responded to the grievance on August 26, 2002. She found that all health and safety issues were appropriately addressed in accordance with Department policies. Brown also noted that Trott's request had been granted and the West Haven application had been reassigned. Thereafter, CSEA withdrew the grievance.

On September 5, 2002, Blood responded to CSEA's request for information concerning the West Haven investigation, stating in part:

> Although this seems to be a moot point, given that this matter seems to be resolved, the department is unable to provide the

> requested information at this time. The department's Division of Investigation has continued to proceed with the investigation of this matter and the findings will be available in the near future. Once the findings are made available, Ms. Trott will receive a formal response from the Department and a courtesy copy will be provided to you.

DOI Supervising Investigator Lynda Swenson sent a memo to Trott dated September 6, 2002, regarding the investigation of the West Haven University owner. The memo stated in part:

> The assessment has been completed and it was determined that the allegations against [the applicant] were **"Unfounded".** [The applicant's] behavior did not rise to the level of criminal conduct and he did not pose an immediate threat to employees at BPPVE. (Emphasis in original.)

On September 23, 2002, Kugelmass renewed her request for information concerning the West Haven investigation. Kugelmass acknowledged the Department's conclusion that the applicant was not a threat but stated that, "neither Ms. Trott nor the Union have any evidence that DOI conducted a thorough investigation."

The Department has not provided the requested information.

POSITIONS OF THE PARTIES

CSEA alleges that the State interfered with the rights of bargaining unit employees when it disciplined the supervisor for testifying in support of the out of class grievance. CSEA also asserts that the requested CHP investigative information is necessary and relevant to its representation of the Degree Unit employees because they were interviewed by the CHP. Finally, CSEA contends that the West Haven investigative information is relevant to determine whether the Department conducted a thorough investigation.

The State responds that the evidence does not establish that it interfered with employee rights when it disciplined Hawkins. The State asserts that Hawkins would have been disciplined regardless of her testimony at the arbitration hearing. The State contends that there

is ample evidence to demonstrate a pattern of antagonistic conduct by Hawkins toward her supervisors and others and this antagonism both predates and postdates her grievance testimony. In addition, Hawkins' arbitration testimony revealed that she was not properly managing the unit's workload and staff assignments, contrary to her earlier representations to BPPVE managers.

The State also argues that the principles of collateral estoppel should apply. The SPB has already concluded that Hawkins' engaged in inappropriate behavior. The State contends that PERB is precluded from relitigating matters addressed in the SPB hearing.

In regard to the information request allegations, the State contends that CSEA is not entitled to details of an investigation of a supervisor. The bargaining unit employees were not the subject of the CHP investigation. The employees were simply witnesses who had pertinent information and their interviews were a normal part of an investigation. The State asserts there is no evidence this information was relevant and necessary to CSEA's representation of bargaining unit employees or that any need for the information by CSEA would, on balance, prevail over constitutional privacy rights.

Concerning the West Haven investigation, the State contends that criminal investigations are exempt from disclosure under the Public Records Act. The State asserts that to permit further prying into a citizen's affairs by CSEA would violate the citizen's constitutional privacy rights, especially where, at Trott's request, further contact with the citizen was eliminated.

DISCUSSION

Dills Act section 3515 grants state employees the right to form, join and participate in the activities of employee organizations for the purpose of representing them in matters of employer-employee relations. Section 3519 prohibits the State employer from discriminating

or retaliating against employees for participating in these activities. The Legislature has, however, expressly excluded supervisors from the definition of employee under the Dills Act (Sec. 3513(c)) and PERB does not have jurisdiction to remedy supervisors' claims of unfair labor practices. (State of California. Department of Health (1979) PERB Decision No. 86-S (Department of Health); State of California (1980) PERB Decision No. 118-S.)

An employer's discipline of a supervisor may be found unlawful, however, if it interferes with bargaining unit employees' exercise of their rights under the Dills Act. In Department of Health, the union alleged that the rights of supervisors were impinged when the department informed them they could not hold office in employee organizations. While PERB dismissed the charge for lack of jurisdiction to enforce the rights of supervisors, the Board suggested that action taken against a supervisor may interfere with employees' Dills Act rights. In granting the union an opportunity to amend its charge, the Board stated:

> An employer's conduct against supervisors is generally not grounds for an unfair practice charge. However, if there is a reasonable inference that the conduct had an adverse effect on nonsupervisory employees in the exercise of their rights, an unfair practice charge will be entertained vis à vis the nonsupervisory employees.

Because PERB has not directly addressed the issue of whether an employer's discipline of a supervisor interfered with employees' protected rights, it is appropriate to look to cases arising under the National Labor Relations Act (NLRA)[10] for guidance.

The NLRA similarly excludes supervisors from coverage under that act. The National Labor Relations Board (NLRB) will not remedy discharges of supervisors for participation in union activity, except in limited circumstances. In Parker-Robb Chevrolet, Inc. (1982) 262 NLRB 402 [110 LRRM 1289] (Parker-Robb). the NLRB described the circumstances under which it would consider reversing a supervisor's discharge.

[10]The NLRA is codified at 29 U.S.C., sec. 151, et seq.

> [A]n employer may not discharge a supervisor for giving testimony adverse to an employer's interest either at an NLRB proceeding or during the processing of an employee's grievance under the collective-bargaining agreement. Similarly, an employer may not discharge a supervisor for refusing to commit unfair labor practices, or because the supervisor fails to prevent unionization. In all of these situations, however, the protection afforded supervisors stems not from any statutory protection inuring to them, but rather from the need to vindicate employees' exercise of their [rights under the NLRA].
> (Parker-Robb at 402-403; fns. omitted.)

The NLRB's analysis continues with a determination of the employer's motivation in the supervisor's discharge. When one of the limited circumstances above are present, and a "mixed motive" for the employer's action is apparent, the NLRB applies the analysis set forth in Wright Line (1980) 251 NLRB 1083 [105 LRRM 1169] (Wright Line). Under the Wright Line test, adopted by the Board in Novato Unified School District (1982) PERB Decision No. 210 (Novato), the burden is on the charging party to prove that the protected conduct was a motivating factor in the adverse action. Once unlawful motivation is established, the burden shifts to the employer to prove that it would have taken the same action despite the protected activity. (NLRB v. Oakes Machine Corp. (1990) 897 F.2d 84 [133 LRRM 2753].)

In the present case, CSEA alleges that by taking disciplinary action against Hawkins, the Department interfered with the bargaining unit employees' exercise of protected rights.

In January 2002, Hawkins was subpoenaed to testify in the arbitration hearing held to gather evidence on Trott's and Johnson's grievance. Hawkins testified in support of their claims that they were working out of class as senior education specialists. Several months after her testimony, Hawkins was placed on administrative time off, served with an adverse action and demoted.

By testifying in support of the grievants at the arbitration hearing, this situation falls squarely under the limited circumstances where it is appropriate to consider whether the disciplinary action taken against a supervisor interferes with employees' protected rights.

Under Novato, and its line of cases, PERB has described factors which may demonstrate an inference of unlawful motivation in the employer's action. Although the timing of an employer's adverse action in close temporal proximity to the employee's protected conduct is an important factor, it does not, without more, demonstrate the necessary connection or nexus between the adverse action and the protected conduct. (Moreland Elementary School District (1982) PERB Decision No. 227.) Facts establishing one or more of the following additional factors must also be present: (1) disparate treatment of the employee; (2) departure from established procedures and standards; (3) inconsistent or contradictory justifications for the employer's actions; (4) cursory investigation of the employee's misconduct; (5) failure to offer the employee justification at the time the employer took action or the offering of exaggerated, vague, or ambiguous reasons; (6) animosity towards union activists (Cupertino Union Elementary School District) (1986) PERB Decision No. 572.); or (7) any other facts which might demonstrate the employer's unlawful motive. (Novato; North Sacramento School District (1982) PERB Decision No. 264.)

BPPVE managers were aware that Hawkins had disagreed with the reorganization plan and they had spoken with her numerous times about the need to manage workload to ensure staff was not working out of class. After the efforts taken to resolve the working out of class issues, the Department was understandably sensitive to such claims. When they learned that Hawkins had been subpoenaed to testify, Young and Ramos spoke to Hawkins before the arbitration hearing and made it clear that the Department would be unhappy if it lost the grievance. After she testified in support of the grievants, Young accused Hawkins of "costing

DC A the hearing." These comments are sufficient to suggest an inference that the discipline imposed on Hawkins was motivated by her testimony in support of the grievants.

Once an inference that unlawful motivation is established, the burden shifts to the employer to prove that it would have taken the action regardless of the employee's protected conduct. (Novato; Martori Brothers Distributors v. Agricultural Labor Relations Board (1981) 29 Cal.3d 721 [175 Cal.Rptr. 626].)

There is ample evidence to establish that the Department would have issued the adverse action against Hawkins regardless of her support for the grievants in the arbitration hearing. A reorganization study was conducted by the Department with the assistance of DPA to examine the workload while ensuring that the staff performed the proper class of work. As a result of the study, only one senior education specialist was assigned to each unit, with the remaining positions classified as education specialists.

During numerous meetings with BPPVE managers discussing her responsibility to manage the unit's workload, Hawkins was directed to ensure that the staff in her unit was assigned to perform the appropriate classification of work. However, Hawkins testified in the arbitration hearing that, instead, she assigned the work as it came in the door without differentiating in the assignment of classification work. Therefore, Hawkins admitted that she did not properly perform her duties as directed.

Hawkins' refusal to even attempt to manage workload and staff assignments to avoid staff working out of class is distinguished from Hawkins testifying in support of the grievants. It was not her testimony in support of the employees' grievance, but her revelation that she ignored directives and allowed, perhaps even encouraged, her staff to perform out of class work that drew the attention of her supervisors. It was this fact that motivated the Department to take adverse action against Hawkins, not that Hawkins testified in the arbitration hearing.

Further evidence of Hawkins' pattern of insubordinate conduct is found when she ignored Abbott's instructions to allow him to review a draft notice before it was mailed to postsecondary schools. Hawkins also gave her staff directions that were inconsistent with Young's express directive when she instructed them to identify backlog as any application that had not been touched.

Finally, the CHP report concluded that while Hawkins' June 6, 2002, statements did not rise to the level of a criminal threat, she violated the violence in the workplace policy. Hawkins exhibited angry behavior during the meeting which was witnessed by Abbott's secretary. Keaton confirmed that she had felt threatened by Hawkins' conduct in the past. Ramos also expressed concern for her safety as some of the comments were specifically directed toward her. Young urged the Department to take Hawkins[1] comments seriously based on her prior "erratic and angry behavior." While Hawkins' behavior was ultimately not found to be a criminal threat, the Department had a reasonable basis for removing Hawkins from the workplace pending an investigation.

It is clear from the record that the Department had other motivations, including personal animus in disciplining Hawkins. What is not at issue here, however, is whether just cause existed for the discipline imposed on Hawkins. Rather, based on the evidence in this case, we do not find that the Department was motivated by any of Hawkins' activities subject to the Dills Act. Therefore, as the Department had a legitimate basis for its action, the evidence does not establish that the Department interfered with employee rights when it disciplined Hawkins.[11]

[1]'Collateral estoppel is not applicable in this case because the SPB did not consider the identical issues now before PERB, whether the discipline was motivated by protected activity and interfered with the rights of bargaining unit employees. (People v. Sims (1982) 32 Cal.3d 468 [186 Cal.Rptr. 77]; State of California (Department of Developmental Services) (1987)

Information Request Allegations

CSEA also alleges that the Department violated its duty to bargain in good faith when it refused to provide copies of the investigative reports on Hawkins and the West Haven University owner, and related documents and electronic recordings.

PERB has long held that an exclusive representative is entitled to all information that is necessary and relevant to the discharge of its duty of representation in negotiations, processing of grievances and administration of the contract. (Stockton Unified School District (1980) PERB Decision No. 143 (Stockton); Modesto City Schools and High School District (1985) PERB Decision No. 479 (Modesto').') An employer's refusal to provide such information violates the duty to bargain in good faith unless the employer can demonstrate adequate reasons for its failure to provide the requested information. (Stockton; State of California (Departments of Personnel Administration and Transportation) (1997) PERB Decision No. 1227-S (State of California).)

Information immediately pertaining to a mandatory subject of bargaining is presumptively relevant. (State of California.) An employer's duty to provide relevant information, however, is not absolute. An employer may be excused from providing information if the information is unavailable or the request is unduly burdensome. (State of California; Chula Vista City School District (1990) PERB Decision No. 834 (Chula Vista).) The employer need not furnish information in a form more organized than its own records. (State of California.) No violation will be found where the employer responds and the union does not reassert or clarify its request for information. (Oakland Unified School District (1983) PERB Decision No. 367.) Further, if the employer questions the relevance of the information, the exclusive representative must give the employer an explanation. (Modesto;

PERB Decision No. 619-S.) Thus, collateral estoppel effect cannot be given to the decision of the SPB.

San Bernardino City Unified School District (1998) PERB Decision No. 1270 (San Bernardino).)

Requests for information that do not concern mandatory subjects of bargaining are not presumed relevant and the exclusive representative bears the burden of demonstrating that the information is necessary and relevant to its representational duties. (State of California.) The Board has found that information requests pertaining to non-bargaining unit employees are not presumed relevant. An exclusive representative bears the burden of demonstrating the "probable or potential relevance" of the requested information to its representation of bargaining unit employees. (Chula Vista; San Bernardino; San Diego Newspaper Guild v. NLRB (1977) 548 F.2d 863 [94 LRRM 2923].)

Hawkins Investigation

After the Degree Unit employees were interviewed by CHP investigators, CSEA made a written request for information about the CHP investigation. The request identified the represented employees and stated that they were the subject of the investigation. CSEA was clearly seeking information in its efforts to represent the identified bargaining unit employees concerning the investigation. The Department responded that CSEA was not entitled to the information because the bargaining unit employees were not the subject of the investigation. In fact, the investigation's findings demonstrate that the inquiry pertained only to a non-bargaining unit supervisor.

Information pertaining to non-unit employees is not presumed relevant. Thus, CSEA had the burden to show that the information was relevant to its duty to represent bargaining unit employees. CSEA made no effort to meet this burden. After being informed that the represented employees were not the subject of the investigation, CSEA did not reassert its interest in the information or explain its relevance to CSEA's representational duties.

Even assuming the information was presumptively relevant, the Department's response to the information request clearly questions CSEA's need for the information because it did not pertain to CSEA represented employees. No adverse action had been taken against represented employees, no grievances had been filed relating to the investigation and the investigation concerned a non-unit employee. Thus, the relevance of the information was not apparent to the Department.

Once the Department indicated that it did not believe the information was relevant for CSEA's representational purposes, CSEA had an obligation to clarify its request and explain how the information was necessary and relevant to its duty to represent bargaining unit employees. Clearly, CSEA was familiar with this obligation as it renewed and clarified its request for the West Haven information. However, in this case, CSEA failed to meet this obligation when it did not renew its interest in the information and clarify its need for the information. Therefore, the Department did not violate its duty to bargain in good faith when it failed or refused to provide the information regarding the Hawkins investigation.

West Haven Investigation

CSEA also sought information regarding the investigation of the West Haven University applicant. After the Department granted Trott's request to reassign the application, CSEA withdrew its safety grievance. At the conclusion of the investigation, the Department notified Trott and CSEA that the investigation had determined that the applicant's communications did not rise to the level of criminal conduct and he did not pose an immediate threat to employees. In this case, after the Department responded to the request for the West Haven investigation information, CSEA did clarify and renew its request for the information. CSEA asserted that the information was necessary to determine whether the Department had conducted a thorough investigation.

Workplace safety issues are matters within the scope of representation. (State of California (Department of Corrections) (2000) PERB Decision No. 1381-S.) The parties have addressed health and safety issues in the memorandum of understanding, granting employees the right to file grievances challenging workplace safety. Information pertaining to the investigation of workplace safety matters is presumptively relevant. However, constitutional rights of personal privacy may also limit requests for confidential information. (Modesto; Los Rios Community College District (1988) PERB Decision No. 670 (Los Rios).) Where production of information may infringe on a right of privacy, the NLRB has balanced the union's need for the information with the individual's privacy interests. PERB has also adopted this approach in situations where these competing interests conflict. (Modesto; Los Rios.)

CSEA is well aware of the actions taken by the Department in response to Trott's safety concerns. After being alerted to Trott's concerns regarding the tenor and increased frequency of the applicant's communications, the Department notified the CHP and initiated a formal investigation to assess the applicant's threat potential. BPPVE managers also advised the applicant that his communications were inappropriate and must be directed only to the managers. Thereafter, the applicant complied with this directive. These actions were communicated to Degree Unit employees. In addition, Trott's request to reassign the West Haven application was granted, eliminating her need to contact the applicant. Finally, approval of the West Haven application was granted, further reducing the applicant's need to make contact with the BPPVE. Trefry testified that after these actions were taken, the applicant's repetitious communications did not continue.

In her investigation, Trefry delved into the applicant's background and made inquiries with various law enforcement resources. Such inquiries are typically intended to evaluate an

individual's motive and ability to act on potential threats. Information obtained from these sources could well encompass sensitive personal information involving the applicant.

Further, Trefry testified that she involved the Governor's protective detail in her investigation of the applicant. Evidence of security procedures in evaluating threat assessments for elected officials could be compromised by release of investigative information and such information may impair future investigations. (Postal Service (1992) 306 NLRB 474 [140 LRRM 1136].)

CSEA does not challenge the conclusion reached by the investigation, but indicates that it wants to independently evaluate whether the investigation was thorough. The Board frowns on broad requests that may extend beyond necessary and relevant information stating that, "the right to information cannot be turned into a broad-ranging fishing expedition." (State of California.) The actions taken by the Department to mitigate the safety concerns regarding the applicant and the lack of evidence of his continued communications, suggest that CSEA's need for the information is not significant. Balancing CSEA's need for this information against the applicant's privacy interests, weighs against disclosure of the investigative information. Therefore, the failure to provide the West Haven investigative information did not violate the duty to bargain in good faith.

ORDER

The unfair practice charge and complaint in Case No. SA-CE-1385-S are hereby DISMISSED WITHOUT LEAVE TO AMEND.

Member Neima joined in this Decision.

Member Whitehead's dissent begins on page 28.

WHITEHEAD, Member, dissenting: I dissent from the majority's opinion. After a review of the record in this matter, I respectfully disagree with majority's findings of facts and legal conclusions as discussed below.

Adverse Actions against Hawkins

It is undisputed that Sheila Hawkins (Hawkins) is a supervisor under the Ralph C. Dills Act (Dills Act)[1] and that normally the Public Employment Relations Board (PERB or Board) has no jurisdiction over employer conduct directed to supervisors. However, the Board may find an unfair practice in employer actions against supervisors in limited circumstances. In State of California. Department of Health (1979) PERB Decision No. 86-S (Department of Health), the Board stated that:

> [I] f there is a reasonable inference that the conduct had an adverse effect on nonsupervisory employees in the exercise of their rights, an unfair practice charge will be entertained vis a vis the nonsupervisory employees. [Fn. omitted.] In this case, if CSEA can show that the personnel officer's comments would have had the effect of restraining, coercing or interfering with nonsupervisors in the exercise of their SEERA rights, the unfair practice process is the proper vehicle for resolving the dispute. (Emphasis added.)

More recently, in NLRB v. Nevis Industries. Inc. (9th Cir. 1981) 647 F. 2d 905, 910, [107 LRRM 2890] (Nevis), the court opined:

> There are limited exceptions to the rule that employer conduct towards supervisors does not violate the Act. These exceptions protect employees' right 'to have the privileges secured by the Act vindicated through the administrative procedures of the Board.' [Cit.] The exceptions have been construed narrowly. [Cit]
>
> Courts have found a violation of section 8(a)(l) and ordered reinstatement of supervisors in three basic situations. [Cits.] The first is where a supervisor is disciplined for refusing to commit an unfair labor practice. [Cits.] The second is where a supervisor is disciplined for testifying before the Board. [Cits.] The third is

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'Ralph C. Dills Act is codified at Government Code section 3512, et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

> where a supervisor who hired his own crew was discharged as a pretext for terminating his pro-union crew. [Cit]
>
> In these cases reinstatement was ordered only to remedy harm done to rank and file employees.

The National Labor Relations Board reaffirmed this principle in Parker-Robb Chevrolet, Inc. (1982) 262 NLRB 402, at pp. 402-404 [110 LRRM 1289] (Parker-Robb):

> Notwithstanding the general exclusion of supervisors from coverage under the Act, the discharge of a supervisor may violate Section 8(a)(1) in certain circumstances, none of which are present here. Thus, an employer may not discharge a supervisor for giving testimony adverse to an employer's interest either at an NLRB proceeding [Fn. omitted.] or during the processing of an employee's grievance under the collective bargaining agreement. [Fn. omitted.] Similarly, an employer may not discharge a supervisor for refusing to commit unfair labor practices, [Fn. omitted.] or because the supervisor fails to prevent unionization. [Fn. omitted.] In all these situations, however, the protection afforded supervisors stems not from any statutory protection inuring to them, but rather from the need to vindicate employees' exercise of their Section 7 rights.
> . . . . . .
>
> In the final analysis, the instant case, and indeed all supervisory discharge cases, may be resolved by this analysis: The discharge of supervisors is unlawful when it interferes with the right of employees to exercise their rights under Section 7 of the Act, as when they give testimony adverse to their employers' interest or when they refuse to commit unfair labor practices. The discharge of supervisors as a result of their participation in union or concerted activity - either by themselves or when allied with rank-and-file employees - is *not* unlawful for the simple reason that employees, but not supervisors, have rights protected by the Act. [Emphasis added.]

The majority opinion did not include various key facts discussed by the administrative law judge (ALJ) in his analysis. The out-of-class grievances filed by unit employees Marcia Trott (Trott) and Latanya Johnson (Johnson) in December 1998 and October 2000, and Hawkins' testimony at the arbitration of the latter grievance in January 2002 closely precede the adverse actions taken against Hawkins. The ALJ found that both Sylvia Ramos, the Bureau for Private Postsecondary and Vocational Education (BPPVE) administrator and Bill Young (Young), the BPPVE assistant chief and Hawkins' supervisor, advised Hawkins before

her arbitration testimony that "DCA[2] was very upset. DCA wanted to win this . . . ." Hawkins testified at the Board hearing that her supervisors "more than hinted that DCA would be very unhappy if they lost this [grievance appeal]." At the January 2002 arbitration hearing, Hawkins testified in favor of Trott and Johnson's positions. A few days after the arbitration hearing, Young approached Hawkins and accused Hawkins of "costing DCA the hearing." It was shortly after the hearing that Young took a more active role in overseeing the Degree Unit and became critical of Trott and Johnson's work product. Again, Young did not testify at the Board hearing to either substantiate, deny, or justify his conduct.

These events set the stage for the animated discussions between Young and Hawkins regarding organization of workload and deadlines, the heated discussion on June 6, Hawkins' escort from the DCA offices by law enforcement on June 7, Hawkins' three months administrative time off, the Notice of Administrative Interrogation (Notice of A.I.) in August, the adverse action taken against Hawkins, and the involuntary transfer of Trott and Johnson out of the Degree Unit. Management's discussions with Hawkins before and after her arbitration testimony bolster the California State Employees Association's (CSEA) allegation of the negative impact on unit employees from management's conduct toward Hawkins.

In August 2002, Hawkins and the employees she supervised were served with a Notice of A.I. The Notice of A.I. stated that the California Highway Patrol (CHP) was "conducting an internal investigation into allegations concerning misrepresentation of official reports." Johnson was told by a CHP officer during the investigation that "there is not an active internal investigation on her, however, information obtained during the administrative interrogation has the potential to lead to adverse action." The ALJ found that the seven employees were interrogated under threat of charge for insubordination. Each of the employees, accompanied

[2]DCA refers to State of California (Department of Consumer Affairs) (State or Department).

by a representative, was interrogated for at least two hours, most spending between three to four hours with the investigating officers. The CHP investigation ultimately resulted in a report regarding the work product of the Degree Unit, which Hawkins supervised, not about a crime committed on State property, a principal function of the CHP.[3] The CHP investigation thus appears to be an overreaction by the Department to workload issues and a heated statement by Hawkins.

As a result of the CHP report, Hawkins received a notice of adverse action demoting her from the education administrator position.[4] The stated reasons for the notice include: (1) failure to direct her staff in such a manner to avoid out-of-class work; (2) submitting inaccurate backlog statistics to Bureau management, consequently tainting the reports to the Legislature; and (3) Hawkins' involvement in a series of interpersonal workplace conflicts, the worst of which involved a violation of the workplace violence policy.

In the incident prompting CHP investigation, Hawkins allegedly stated to Young that she was "going to scorch this place" and that she "would be the only one standing when all was said and done." This statement occurred at a meeting on June 6, 2002 in which Young and Hawkins discussed workload and both individuals' conflicting views regarding its resolution

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[3]The CHP's mission as stated on its website is:

> The mission of the California Highway Patrol is to provide the highest level of safety, service, and security to the people of California, and to assist governmental agencies during emergencies when requested.

[4]Interestingly, the counsel from the Department of Personnel Administration (DPA) opposing Hawkins' appeal of the notice of adverse action agreed to delete several of the causes for discipline in the notice, such as references to Hawkins' arbitration testimony, alleged failure to maintain accurate workload/backlog statistics, and alleged failure to properly train and direct her staff. As a result, the DPA attorney agreed to eliminate the allegation that Hawkins was guilty of Government Code section 19572(c), inefficiency. There was also no evidence at the State Personnel Board hearing of counseling or any other form of progressive discipline against Hawkins.

within the agency. On June 7, 2002, with no advance warning, law enforcement officers escorted Hawkins from the premises. Hawkins was placed on administrative time off for over three months until September 16, 2002. Her return date occurred twelve days after the arbitrator rendered her award in the out-of-class grievance. Significantly. Young, the manager involved in this incident, did not testify at the Board hearing.

It is therefore clear that the Department's treatment of Hawkins had the effect of threatening reprisals and coercing Trott and Johnson because of their filing out-of-class grievances and of punishing Hawkins for her arbitration testimony on behalf of Trott and Johnson regarding these grievances. This conduct has the effect of chilling the protected activities of Trott and Johnson. This is a classic case in which the adverse treatment of a supervisor harms the protected conduct of unit employees under Department of Health. Nevis, and Parker-Robb, above.

CSEA Request for Information Pertaining to CHP Degree Unit Report

I disagree with the majority that CSEA is not entitled to access to the CHP report. The Department refused to provide the report allegedly because the investigation was directed at Hawkins and not unit employees. Under the Dills Act, failure to provide information relevant to the representation of employees has been deemed a refusal to meet and confer in good faith. The request must involve matters within scope and is subject to a "liberal discovery standard." (State of California (Departments of Personnel Administration and Transportation) (1997) PERB Decision No. 1227-S.) The determination of whether disclosure is appropriate is made on a case-by-case basis. (Id.)

The Notice of A.I. provided to each degree unit employee stated that the CHP was "conducting an internal investigation .. . concerning misrepresentation of official reports." (Emphasis added.) There was nothing in the notice that limited the investigation to Hawkins. The punitive tone of the notice was evidenced by the warning in the notice not to discuss the

investigations' existence with anyone other than the employees' representative or to have contact with any witnesses or parties regarding the investigation. Further, Johnson was informed by a CHP officer that the investigation could lead to adverse action. Trott and Johnson were ultimately involuntarily transferred out of the Degree Unit. The connection between the report and the threat of adverse action show that the investigation report is directly related to discipline, a mandatory subject of negotiation. I find that under Mt. San Antonio Community College District (1982) PERB Decision No. 224, the information requested by CSEA is relevant to the representation of the subject employees to determine whether the investigation was retaliation for filing out-of-class grievances. CSEA is entitled and has an obligation to request information relevant to representing unit employees in a potential disciplinary matter.

The Department insists that CSEA is not entitled to the report under the Public Records Act, Government Code sections 6250 et seq. I would confirm the Board's decision in Trustees of the California State University (2004) PERB Decision No. 1591-H, citing Stockton Unified School District (1980) PERB Decision No. 143 (Stockton), that the Public Records Act cannot be used to deny an information request that is otherwise required by the Higher Education Employer-Employee Relations Act (HEERA).[5,6] In fact, contrary to the Department's argument, the Public Records Act specifically sanctions such disclosures:

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[5]In Stockton, the Board declared that:

> In general, the exclusive representative is entitled to all information that is necessary and relevant to discharging its duty to represent unit employees. [Cit] An employer's refusal to provide such information evidences bad faith bargaining unless the employer can supply adequate reasons why it cannot supply the information. [Cit.]
>
> In defining the parameters of 'necessary and relevant information' to which the representative is entitled, the courts have concluded that information pertaining immediately to

> The provisions of this chapter shall not be deemed in any manner to affect the status of judicial records as it existed immediately prior to the effective date of this section, nor to affect the rights of litigants, including parties to administrative proceedings, under the laws of discovery of this state, nor to limit or impair any rights of discovery in a criminal case. (Government Code sec. 6260, emphasis added.)

Contrary to the Department's contention, CSEA and the Department are clearly litigants to an administrative proceeding in this matter.

Refusal to Provide CSEA with Information about the Charles Frye (Frye) Investigation

Frye, owner of Westhaven University, was a licensing applicant who harassed Trott and other Department employees through threatening phone calls and e-mails during the processing of his application by Trott. The testimony of Trott and others evidenced Trott's reasonable concern for her safety. The concern was exacerbated by Frye's repeated references to his expertise in bio-terrorism. Trott's coworkers agreed that Frye's behavior fell outside of normal boundaries. The Board has long held the health and safety of employees to be within the scope of representation. (See e.g., Regents of the University of California (1983) PERB Decision No. 319-H.) The Department only provided Trott with a brief response to her complaint that her complaint was "unfounded." CSEA's request for the detailed investigatory report of Frye's conduct was therefore appropriate, relevant, and reasonable under the circumstances. Again, the Department has expressed a concern that by

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> mandatory subjects of bargaining is so intrinsic to the core of the employer-employee relationship that it is considered presumptively relevant and must be disclosed unless the employer can establish that the information is plainly irrelevant or can provide adequate reasons why it cannot furnish the information. [Cit, underlining in original.]

The Department's concern about Hawkins' privacy is disingenuous given Hawkins' willingness to disclose the documents.

[6]HEERA is codified at Government Code section 3560, et seq.

not disclosing the report, it is protecting Frye's privacy. The basis for doing so was to label the investigation a "criminal investigation." However, the investigation was initiated at the behest of Trott and the terse response was insufficient to alleviate her concerns, those of her co-workers, or potentially, of the individual who took over Frye's application from Trott. CSEA's request for the documents supporting the Department's response to Frye is therefore reasonable in that it asks for relevant information needed for CSEA to effectively represent Trott and other unit employees with regard to Frye's potential to harm them.

In light of the above, I conclude that the Department has violated Dills Act section 3519(a), (b) and (c) and that the Board should adopt the ALJ's proposed decision and implement the proposed order as is.