STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

INTERNATIONAL UNION OF OPERATING ENGINEERS, Charging Party, v. STATE OF CALIFORNIA (STATE PERSONNEL BOARD), Respondent. STATE OF CALIFORNIA (DEPARTMENT OF PERSONNEL ADMINISTRATION), Interested Party.	Case No. SA-CE-1295-S PERB Decision No. 1864-S November 14, 2006

Appearances: Weinberg, Roger & Rosenfeld by Matthew Gauger, Attorney, for International Union of Operating Engineers; Dorothy Bacskai Egel, Senior Staff Counsel, for State of California (State Personnel Board); Linda D. Buzzini, Deputy Chief Counsel, for State of California (Department of Personnel Administration).

Before Duncan, Chairman; Shek, McKeag and Neuwald, Members.

DECISION

NEUWALD, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the State of California (State Personnel Board) (SPB) of an administrative law judge's (ALJ) proposed decision. The complaint alleged that SPB violated the Ralph C. Dills Act (Dills Act)[1] by refusing to approve settlement agreements in disciplinary actions for employees in State of California (State) bargaining Units 12 and 13 who participated in collectively bargained board of adjustment (BOA) procedures.

[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 ALJ found that SPB adopted a policy in its precedential decisions under which it would not approve settlement agreements or otherwise recognize settlement agreements in disciplinary actions that were the product of the procedure in the Memoranda of Understanding (MOU) covering Units 12 and 13. The ALJ found that SPB interfered with the right of employees to be represented by the International Union of Operating Engineers (IUOE) in an employment matter and with IUOE's right to represent employees in Units 12 and 13 on a matter of employer-employee relations. By this same conduct, the ALJ found that SPB discriminated against employees. Thus, the ALJ found that SPB violated Dills Act section 3519(a) and (b) respectively.[2]

The Board has reviewed the entire record in this matter,[3] and hereby reverses the ALJ's proposed decision and dismisses the unfair practice charge and complaint in accordance with the following discussion.

[2]In relevant part, Dills Act section 3519 states:

> It shall be unlawful for the state to do any of the following:
>
> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter. For purposes of this subdivision, 'employee' includes an applicant for employment or reemployment.
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.

[3]Including the parties supplemental briefing.

BACKGROUND

SPB Review of Adverse Actions

In 1934, the voters of California passed an initiative creating SPB, a constitutional agency, to oversee the revised civil service system. One of SPB's duties was, and is, to review disciplinary actions of State agencies.[4] (Larson v. State Personnel Bd. (1994) 28 Cal.App.4th 265 [33 Cal.Rptr.2d 412] (Larson) ["Under our statutory scheme for employee discipline, the appointing power is vested with the initial authority to determine and impose appropriate discipline. The [SPB], in turn, is vested with the authority to review the appointing power's action."]

The Government Code sets forth a comprehensive scheme for administering discipline. When taking an adverse action, State agencies are required to serve upon the affected employee a written notice specifying: (1) the nature of the punishment; (2) its effective date; (3) the causes therefore; (4) a statement advising the employee of the right to answer the charges; and (5) the employee's right to appeal. (Gov. Code 19574.) The State agency must also file the written notice with SPB "not later than 15 calendar days after the effective date of the adverse action." (Gov. Code 19574.)

With the exception of minor discipline, employees have the statutory right to challenge the adverse action by filing a written answer with SPB within 30 calendar days after the effective date of the adverse action. If an employee fails to file an answer within the specified

[4]The Constitution, article VII, section 2(a) provides:

> The board shall enforce the civil service statutes and, by majority vote of all its members, shall prescribe probationary periods and classifications, adopts other rules authorized by statute, and review disciplinary actions. [Emphasis added.]

time, the adverse action taken by the State agency is final. Where the affected employee files an answer within the prescribed period, SPB holds a hearing within a reasonable time whereby it:

> may modify or revoke the appointing power's imposition of discipline for one of three reasons: (1) the evidence does not establish the fact of the alleged cause for discipline; (2) the employee was justified; or (3) the cause for discipline is proven but is insufficient to support the level of punitive action taken. (Gov. Code 19578; Larson, at p. 274.[5])

In addition to reviewing discipline, SPB also has authority to approve settlement agreements in disciplinary actions pending before it:

> Whenever any matter is pending before the [SPB] involving a dispute between one or more employees and an appointing power and the parties to such dispute agree upon a settlement or adjustment thereof, the terms of such settlement or adjustment may be submitted to the board, and if approved by the board, the disposition of the matter in accordance with the terms of such adjustment or settlement shall become final and binding upon the parties. [Gov. Code 18681; emphasis added.]

SPB receives settlements in one of two ways: (1) directly from the parties or (2) they are sent in the form of an administrative law judge's proposed decision where the case has settled at hearing. When a settlement is submitted to SPB and approved, the terms of the agreement are enforceable in court as a SPB decision. State agencies and employees, however, are not required to submit settlement agreements to SPB. (Larson, at p. 274.)

[5]Generally, the case is referred to the board's hearing officer who conducts a hearing and prepares a proposed decision which may be adopted, modified or rejected by the board. (Gov. Code 19582.)

Units 12 and 13 MOUs' Alternative Dispute Resolution Provisions

Effective September 21, 1999, IUOE[6] and DPA[7] entered into MOUs for Units 12 and 13 which provided substantially similar alternative dispute resolution mechanisms for litigating disciplinary actions in a forum other than SPB.[8] Specifically, the MOUs provided a mandatory, binding grievance procedure for "minor" adverse actions, as defined in the MOUs without an independent disciplinary review by SPB.[9] [10] (Unit 12 MOU, art. 15, secs. A.2, B.I, B.2.C.; Unit 13 MOU, art. 6, secs. A.2, B.I., B.2.c.) For major adverse actions, the MOU provided employees with the option of making an irrevocable election to either appeal to SPB and proceed in the usual manner, or proceed under the binding grievance and arbitration procedures outlined in the MOUs without SPB review. (Unit 12 MOU, art. 15, secs. A.2, B.l.b., D.l.b; Unit 13 MOU, art. 6, secs. A.2, B.l.b, D.l.b.) When an employee elects to appeal a disciplinary action via the grievance procedure, he or she submits a waiver of the right to appeal to SPB along with the grievance. These contractual procedures were ratified by the Legislature with its approval of the MOUs in Chapter 457, Statutes of 1999 (SB 401).

[6]IUOE is the exclusive representative of State bargaining Units 12 and 13.

[7]DPA is the organization designated under Government Code section 19815.4(g) to represent the State under Section 3517 of the Dills Act.

[8]Because these two MOUs have substantially the same binding grievance and arbitration procedures for adverse actions, we jointly summarize their provisions.

[9]Minor discipline is defined as "a written reprimand, suspension for 3 working days or less, or reduction in pay of 5 percent (or one step) for 3 months or less (or equivalent reduction in salary)." (MOU Unit 12, art. 15, sec. B.2.c; MOU 13, art. 6, sec. B.2.c.)

[10]Despite the wording in the MOUs requiring employees to challenge minor disciplinary actions through the grievance procedure, IUOE District Representative, Bart Florence testified that, in fact, the IUOE did not use the MOUs to deprive employees of the right to appeal minor disciplinary actions to the SPB.

The binding grievance and arbitration procedures involve the BOA. The BOA is composed of four members, two management and two IUOE representatives. Under the BOA procedures, the parties have a right to present oral testimony, but the procedures do not require sworn testimony, the subpoenaing of witnesses, or the receipt of evidence of documents. (Unit 12 MOU, art. 15, secs. D.3.b.(l), (3) and (5), and E.2.b; Unit 13 MOU, art. 6, sec. D.3.b.(l), (3), and (5).) If the BOA decides the matter by majority vote, the decision is final and binding and may be enforced as an arbitration award. (Unit 12 MOU, art. 15, sec. D.4.a.(l); Unit 13 MOU, art. 6, sec. D.4.a.(l).) If the BOA deadlocks or otherwise fails to reach a binding decision, the action is sustained unless the union elects to appeal by way of arbitration. (Unit 12 MOU, art. 15, sec. D.4.a.(2); Unit 13 MOU, art. 6, sec. D.4.A.(2).) An employee, therefore, has no independent right to appeal to arbitration, and a binding decision is subject only to limited judicial review pursuant to Code of Civil Procedure sections 1285, et seq. Where the matter is appealed to arbitration, the arbitrator's award is final and binding and is only subject to limited judicial review pursuant to Code of Civil Procedure sections 1285, et seq.[11]

The decision of the BOA is implemented by the parties as outlined in the MOU. If the BOA or arbitrator sustains the adverse action, the union must withdraw the grievance with prejudice; if the BOA or arbitrator modifies the adverse action, the employer must amend the action consistent with the decision; if the BOA or arbitrator revokes the adverse action, the employer must withdraw the disciplinary action with prejudice. (Unit 12 MOU, art. 15, sec. G; Unit 13 MOU, art. 6, sec. G.)

[11]As discussed in greater detail later, the California Supreme Court in State Personnel Bd. v. Department of Personnel Admin. (2005) 37 Cal.4th 512 [36 Cal.Rptr.3d 142] (SPB v. DPA) found the BOA procedures unconstitutional.

With respect to minor adverse actions, the BOA is empowered to sustain, modify or revoke minor disciplinary actions by majority vote. If the BOA deadlocks, the parties are required to request assistance from the State Mediation and Conciliation Service, who will assist them to reach a "majority decision." (Unit 12 MOU, art. 15, sec. E.2.a.(a); Unit 13 MOU, art. 6, sec. E.2.a.(l).) No provision is made for appeal to arbitration in such cases.

Initial Difficulty Processing Agreements

In early 2000, IUOE and DPA began utilizing the alternative dispute resolution process set forth in the MOUs.[12] Shortly thereafter, IUOE and some State departments began to encounter opposition in having the State Controller's Office (SCO) process the required forms to implement changes concerning disciplinary matters. SCO refused to process agreements unless first approved by SPB. Initially, SCO failed to process or timely process the paperwork for the following individuals: William Sweeney (Sweeney), Emanuell Leonard (Leonard), and Magdelino Solorio (Solorio). Each individual is discussed in turn:

1. Sweeney, a member of Unit 12 and an employee of the Department of Corrections (CDC), was dismissed on May 4, 2000. He elected to appeal the adverse employment action under the MOU rather than to SPB. Shortly before the BOA proceeding began, Sweeney and the CDC settled the matter in the hallway outside the meeting room.[13] CDC agreed to rescind the termination and replace it with a three-month suspension. After Sweeney served his suspension, however, CDC, refused to permit Sweeney to return to work because SCO would not process the paperwork. On August 15, 2000,

[12]DPA and IUOE also continued to utilize the SPB for those employees who appealed to the SPB.

[13]Whether the BOA process actually began is irrelevant to our analysis. Pursuant to the MOU, Sweeney waived his right to a hearing before SPB by grieving his discipline.

IUOE filed a petition for writ of mandate to require SCO to execute the form required to reinstate Sweeney.[14]

2. Leonard, a Unit 12 employee, was dismissed by CDC on March 24, 2000. He filed a grievance pursuant to bargaining Unit 12 MOU. The BOA heard his case on May 10, 2000. The BOA reduced his termination to a ninety (90) day suspension. On June 23, 2000, he was reinstated. On September 7, 2000, Leonard was again dismissed. This time, he timely filed an appeal with SPB. SPB and IUOE settled Leonard's September 7 and March 24, 2000 dismissals. The parties agreed that the May 10, 2000, BOA decision was null and void.

3. Solorio, a Unit 12 employee, was dismissed by the Department of Transportation (Caltrans) on April 10, 2000. Solorio appealed to SPB and the matter was set for hearing before an administrative law judge. The matter was settled prior to the hearing on or about July 17, 2000. The settlement agreement provided that "the parties enter into this agreement freely and voluntarily and hereby waive any right of appeal." The agreement also provided that "this matter is properly before the [BOA] and that the terms set forth herein shall be null and void on the parties if the [SPB] does not approve this stipulation." Chief Labor Relations for Caltrans, Dave Brubaker (Brubaker) testified that the reference to the BOA was a mistake. When SPB refused to approve the agreement, Brubaker, on October 2, 2000, sent SPB a letter explaining that:

> [T]he settlement that is before you is a mutual agreement reached between employer and union independently from and outside of the Bargaining Unit 12 [BOA] process. It is in every way a 'normal' stipulated settlement. (CP. Ex. 39.)

[14]The writ also included Leonard.

Despite Brubaker's letter, SPB refused to approve the agreement. Prior to this time, neither DPA or IUOE ever experienced SPB rejecting/denying a stipulated agreement with the exception of those agreements containing Pamela Martin clauses.[15]

E-mail

During the time IUOE experienced difficulties with having Sweeney, Leonard, and Solorios' settlement agreements processed, an e-mail exchange occurred between SPB Chief Counsel, Elise Rose (Rose) and SCO Analyst, Linda Danko (Danko). In a July 5, 2000, e-mail regarding a disciplinary matter processed through the BOA, Danko asked Rose to clarify SPB's position regarding BOA decisions. Specifically, Danko wrote:

> Corrections submitted a PAR[16] for an S41V (void of a dismissal). The support document attached is a letter from DPA indicating the attachment is a copy of the written decision of the [BOA]. I believe you told me the [BOA] is not constitutional, therefore we could not accept it. Shouldn't this still go through SPB? I can fax you a copy if you would like.
>
> Thanks for your help.

Rose responded on July 10, 2000:

> The position of the [SPB] is that the [BOA] process violates the California Constitution which provides that the [SPB] shall review discipline. I have previously sent you a copy of the decision of Judge Connelly, which decision is currently on appeal, which finds that a similar process that did not provide for ultimate and meaningful review by the [SPB] violated the constitution. The SPB will not approve or recognize decisions rendered by the [BOA] as it has not had the opportunity to provide any review of the discipline imposed in the cases submitted to that process.

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[15]In Pamela Martin. SPB Decision No. 91-03, the SPB held that it would not approve a settlement agreement that restricts a State agency from providing relevant information about discipline to a prospective employer.

[16]"PAR" is an acronym for Personnel Action Requests, forms utilized by the SCO's office to process personnel actions.

Rose testified that she never explicitly told Danko or anyone else at SCO not to process employee settlements that went through the BOA process. She stated that SPB has no authority over SCO.

On August 2, 2000, IUOE Counsel, Adam Stern, wrote to Danko in an attempt to process Leonard's settlement agreement. When this attempt failed, IUOE filed a petition for writ of mandate on August 15, 2000, to require SCO to execute the form required to reinstate Sweeney and Leonard.

On November 14, 2000, Rose offered to reinstate Sweeney and other employees on the condition that IUOE and DPA agree to place a moratorium on use of the disciplinary procedures set forth in the Unit 12 MOU. Specifically, the proposal conditioned the settlement on several key points that would remain in effect until such time as the constitutionality of the MOUs was finally litigated: (1) IUOE and members of Unit 12 must agree to no longer participate in the MOU procedure "in any way whatsoever"; (2) IUOE must agree "that it will advise members of Bargaining Unit 12 who have suffered disciplinary actions that choosing the grievance/BOA/arbitration process over an SPB appeal is no longer an option for appealing a disputed disciplinary action;" and (3) IUOE and DPA must meet and confer about putting the Unit 12 disciplinary procedure in abeyance and not replace it with any similar process that does not provide for the "ultimate and meaningful review by the SPB" of disputed disciplinary actions. IUOE rejected the offer of settlement to which Rose responded on November 30, 2000, "in the absence of an agreement between IUOE and the SPB, it is the position of the SPB that the four employees remain dismissed from state service."

Gordon Gunderson (Gunderson) and Robert Lawrence (Lawrence) Settlement Agreements

The disciplinary cases that are the basis for the complaint involved employees Gunderson and Lawrence. Gunderson, a Unit 12 employee in Department of Developmental Services, was disciplined for failing a drug test. He did not file a grievance under the terms of the MOU, but instead appealed to SPB. The matter was set for hearing before an administrative law judge on January 23, 2001.[17] At the hearing, the parties agreed to a settlement which the administrative law judge adopted as his proposed decision. On March 13, 2001, SPB approved the Gunderson settlement agreement with the following conditions:

> WHEREAS, it appears to SPB that appellant is a member of a State Bargaining Unit covered by a memorandum of understanding that provides, among other things, for the adjudication of disputed disciplinary actions by a BOA or other process that does not provide for the ultimate and meaningful review of disciplinary actions by SPB;
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> WHEREAS, any process that fails to provide for the ultimate and meaningful review of disputed disciplinary actions by SPB, including, but not limited to, any process before a BOA pursuant to a memorandum of understanding, violates SPB's constitutional mandate to review discipline;
>
> WHEREAS, by approving this stipulation for settlement pursuant to the provisions of Government Code section 18681, SPB assumes that this matter is properly pending before it, and that the stipulation for settlement does not incorporate or reflect a decision rendered by or a settlement approved by or negotiated while the case was pending before a BOA or any other person or entity outside the jurisdiction of SPB that purports to have the authority to render final and binding decisions in disciplinary actions;

[17] Gunderson was represented by IUOE.

> WHEREAS, by approving this stipulation for settlement pursuant to Government Code section 18681, SPB does not agree that the matter was ever properly pending before any BOA or any other person or entity outside the jurisdiction of SPB that purports to have the authority to render final and binding decisions in disciplinary actions;
>
> WHEREAS, if in fact this stipulation for settlement does incorporate or reflect a decision rendered by or a settlement approved by or negotiated while the case was pending before a BOA or any other person or entity outside the jurisdiction of SPB that purports to have the authority to render final and binding decisions in disciplinary actions, this approval is NULL and VOID.

Rose testified that the SPB included said conditions in its approval of the settlement agreement because of the potential that the agreement arose from the BOA process. She stated that SPB was concerned that the parties were appearing before an administrative law judge and representing a decision of the BOA as a settlement agreement. Rose also testified that SPB inserted these conditions in the Gunderson matter because it did not want to prejudice its position in pending litigation. Under cross examination, Rose only recalled one instance where a settlement agreement arguably arose out of the BOA process and was presented as a settlement agreement, the Lundsford agreement. The Lundsford agreement, however, arose in 2002 or 2003, a year or two after Rose placed conditions on the Gunderson settlement. On the same day Gunderson's agreement was approved, the SPB similarly conditioned its approval of a settlement agreement in the Lawrence case. Like Gunderson, Lawrence was a Unit 12 employee who worked for Caltrans. Caltrans dismissed Lawrence because he failed a drug test. Lawrence did not file a grievance under the MOU, but instead appealed to the SPB. The matter was scheduled for hearing before an administrative law judge. The case settled before the hearing and the settlement agreement was submitted to SPB for approval. SPB approved

the proposed settlement agreement under the same conditions attached to the Gunderson approval.

Unfair Practice Charge

After the Gunderson and Lawrence decisions were issued, IUOE filed an unfair practice charge against SPB on May 3, 2001, alleging that SPB violated the Dills Act:

> ... by refusing to approve and by stating it would refuse to approve adverse action settlements achieved through a Larson Alternative Dispute Resolution process solely because the worker used his or her collective bargaining agreement rather than private counsel or other representative.

The general counsel issued a complaint on July 30, dated July 27, 2001 against SPB. On August 28, 2001, SPB filed a motion to dismiss the complaint asserting that SPB was not a "State employer" or "employer" under Dills Act section 35130) and that PERB lacked jurisdiction to determine the California constitutional question upon which this case ultimately rested. The following day, PERB ALJ, Jim Tamm (Tamm) held an informal conference with the parties. Shortly thereafter, on August 31, ALJ Tamm issued a notice of a second informal conference to be held on September 24, 2001. That same day, PERB ALJ, Ron Blubaugh (Blubaugh) issued a notice of a formal hearing to be held January 10 and 11, 2002. On September 5, 2001, SPB answered the complaint generally denying all allegations and asserting a number of affirmative defenses. ALJ Tamm canceled the September 24 informal conference. On September 24, 2001, ALJ Blubaugh dismissed the complaint on the ground that SPB was not a "State employer" under Dills Act section 3513(j). ALJ Blubaugh reasoned that SPB was not a "State employer" because:

(1) DPA never delegated authority to SPB to represent the State;[18]

(2) SPB was not the appointing authority over the affected employees;[19] and

(3) SPB was acting in its adjudicatory capacity.

IUOE appealed ALJ Blubaugh's ruling.

Court Proceeding—Superior Court

It should be noted that in early 2001, SPB filed a petition for writ of mandate challenging the disciplinary procedures in the Units 12 and 13 MOUs as unconstitutional. On October 17, 2001, Superior Court Judge Ohanesian (Judge Ohanesian) found the disciplinary procedures in the MOU covering Units 12 and 13 unconstitutional due to their failure to provide for ultimate, final review by SPB. On November 27, 2001, a final judgment was entered.

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[18]The ALJ noted that while DPA is typically the "State employer" in cases involving bargaining about State employee wages and working conditions, it has the power to delegate authority to an individual department.

[19]The ALJ stated:

> In cases involving unilateral changes in negotiable subjects made by individual State departments and affecting employees of those departments, PERB has found the individual departments to be the State employer. If a violation is found, the ordered remedy is directed toward the department found to have committed the unfair practice. (See for example, State of California (Department of Youth Authority) (2000) PERB Decision No. 1374-S and State of California (Department of Corrections) (2000) PERB Decision No. 1381-S.) Similarly individual State departments also have been held to be the State employer in cases involving interference with protected conduct or discriminatory acts against employees of those departments. If a violation is found, the ordered remedy is directed toward the department found to have interfered with protected rights or discriminated against an employee participant. (See for example, State of California (Department of Corrections') (2001) PERB Decision No. 1435-S.) [Emphasis added.]

Michael Wellins' (Wellins) Settlement Agreement

Shortly after Judge Ohanesian's ruling, on December 11, 2001, SPB refused to approve Wellins' settlement agreement in a disciplinary action. The settlement agreement provided:

> WHEREAS, THE PARTIES TO THE MATTER HEREIN now pending desire to avoid the expense, inconvenience and uncertainty attendant upon possible litigation of an appeal before Arbitrator Alexander Cohn, or possible Arbitration of the action herein settled, and
>
> WHEREAS, the parties to the matter herein have agreed upon a settlement, the parties to the above-captioned dispute submit this stipulation to the State Personnel Board for approval and adoption pursuant to Section 18681 of the Government Code.

The stipulated agreement provided further that "this matter is properly before Arbitrator Alexander Cohn and that the terms set forth herein shall be null and void and not binding on the parties if not approved by Arbitrator Cohn." In rejecting the stipulated settlement agreement, SPB stated that it did not disagree with the substantive provisions therein and "would approve the substantive terms of the stipulation but for the fact that the matter has been submitted to arbitration and the matter [was] not properly pending before the [SPB], no appeal having been timely filed with the [SPB] and the dismissal taken against appellant thus having become final." However, SPB ordered that its disapproval was without prejudice to the parties' right to submit a new stipulation containing the same substantive claims and that SPB would approve it on two conditions: (1) the parties withdraw the action from Arbitrator Alexander Cohn [Arbitrator Cohn] and agree to divest him of jurisdiction over the matter; and (2) Wellins agree to appeal the disciplinary action to SPB and submit to SPB's jurisdiction for the purpose of approval of the stipulated settlement. On January 18, 2002, IUOE filed with the Sacramento Superior Court a petition to confirm the arbitration awards pertaining to the appeal

of Wellins. The court denied the petition. Eventually, the parties agreed with these terms and the Wellins settlement agreement was approved by SPB.

Antonio Archuleta (Archuleta) Decision

In February 2002, SPB issued the Antonio Archuleta decision, SPB Decision No. 02-01, in which it rejected the settlement agreements of six employees. Five of the employees were members of Unit 12 while one was a member of Unit 11.[20] Of the six employees, four appealed their discipline to SPB, not through the BOA/Arbitration procedure. Two of the Unit 12 employees entered into settlement agreements prior to their scheduled hearing before an SPB administrative law judge. One Unit 12 employee entered into a settlement agreement on the record before a SPB administrative law judge. The remaining two Unit 12 employees did not appeal to SPB. It is worthy to note, however, that within two weeks of being served with a Notice of Adverse Action, the departments submitted a stipulated agreement. The settlement agreements noted that the settlement was reached to avoid "the expense, inconvenience and uncertainty attendant upon possible litigation of an appeal before the [SPB], or possible Arbitration of the action herein settled."

SPB rejected these decisions because it had "no way of knowing whether the parties to these agreements entered into them after the matters were submitted to a grievance/arbitration process or even whether these agreements implement[ed] a decision arising out of one of these processes." The decision states, in relevant part:

> The Board cannot condone the submission of disputed disciplinary actions to a process that conflicts with its constitutional mandate to review disciplinary actions and then issue a decision approving a settlement agreement that may have arisen out of one of those processes. Since the parties to these

[20] The Unit 11 MOU contains a similar provision to the Unit 12 MOU regarding the procedure for processing disciplinary actions.

> settlement agreements may have previously submitted the disciplinary actions at issue to the grievance and arbitration processes provided for in their respective MOUs, since the Board contends that the processes are unconstitutional, and since the parties have been enjoined from using them, the Board must have some assurance that the agreements did not arise out of such processes and that employees had the opportunity to exercise their constitutional right to have the Board review their disciplinary action before agreeing to settle their cases.
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> Therefore, prior to approval of the instant settlement agreements, the Board will require the parties either: resubmit the agreements to the Board with language that provides that the disciplinary actions settled by these agreements have not been subject[ed] to, submitted to, or settled by any process for review other than that provided by the Board, including but not limited to, any [BOA], arbitrator, or any other similar process outside of the Board that has not been sanctioned by the Board as consistent with its constitutional review function; or submit to the Board a separate declaration ... that attests to the fact that the disciplinary action settled by the agreement has not been subject to or settled by any process for review other than the Board, including but not limited to, any [BOA], arbitrator, or any other similar process outside of the Board that has not been sanctioned by the Board as consistent with its constitutional review function.
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> Moreover, since it is possible that parties to future settlement agreements may have submitted the disciplinary action at issue in those agreements to a similar process at some time, the Board will require similar assurances in all future cases.

Rose testified that SPB was concerned that BOA settlements were not voluntarily entered into by employees: "If it's going to the [BOA] and the [BOA] is issuing a decision, and then that decision is recast in the form of a settlement, and the parties sign off on it, that's not a settlement. That's a decision." Rose further testified that the BOA procedures were unconstitutional because they did not provide for ultimate and meaningful SPB review.

Appeal of Dismissal of Unfair Practice Charge

Several months later, on July 18, 2002, in State of California (State Personnel Board) (2002) PERB Decision No. 1491-S and 1491a-S (State Personnel Board), the Board remanded the matter to the ALJ "for a hearing on the merits of SPB's motion to dismiss" for the following reasons:[21] (1) "[T]he ALJ's dismissal of this matter without obtaining IUOE's position [did] not yield a just result." There was confusion between the informal and formal processes as to whether a briefing schedule was to be negotiated; (2) "[T]he significance of the issues involved in this case demand[ed] that the Board create a fully-developed record of the facts and legal arguments before rendering its decision"; and (3) The ALJ's ruling that PERB "lack[ed] jurisdiction over state agencies acting in their adjudicatory capacities [was] overly broad."

The ALJ then conducted a hearing from March 18 through March 20, 2003.

Court Proceeding—Appellate Court

Before PERB's ALJ issued his proposed decision, the Third District Court of Appeal issued a decision on August 27, 2003. The appellate court addressed the following issue: "whether the disciplinary provisions of the MOUs negotiated by the DPA and Units 8, 11, 12 and 13, and the legislation which sanction[ed] the MOUs, violate[d] the constitutional mandate that the SPB "review disciplinary actions." The appellate court held the MOU provisions unconstitutional. In reaching this conclusion, the appellate court determined that SPB's level

[21]It should be noted that in State Personnel Board, the Board on its own motion ordered that DPA be joined as a party to the case.

of review was not appellate but rather adjudicatory.[22] The appellate court noted that "SPB's powers derive[d] from the California Constitution of 1934 when the adjudicatory power to discipline employees was transferred from various officials and departments to the SPB." The appellate court further noted that:

> The meaning of 'review disciplinary actions' is thus a question of constitutional law which the Legislature is not free to change. That is the conclusion reached by the California Supreme Court. It has said that review of disciplinary actions ensures the 'continuance of [civil service] employees' right to appeal to the Board.' [Cit. omitted.] **The term 'appeal' in this context refers to the entire adjudicatory procedure and not just the appellate review of a decision made in another forum.** [Fn. omitted.] That meaning is embodied in the constitutional requirement that the SPB 'review disciplinary actions.' (Emphasis added.) An 'action' is the act taken by the agency in imposing discipline. It does not refer to the procedural means by which the action is reviewed. Rather, the power is reserved to 'the Legislature to prescribe the procedures by which employee appeals [are] to be resolved.' [Cit. omitted.] 'The [SPB] is the administrative body charged with the enforcement of the Civil Service Act, including the review of punitive action taken against employees.' [Cit. omitted.]
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> These provisions, which set forth the SPB's adjudicatory functions, generally define the statutory scope of the constitutional mandate to 'review disciplinary actions.' When considered in the light of its historical context and the constitutional mandate that the civil service system be based upon merit, **the term 'review' must be construed to refer to an adjudicatory function rather than a limited appellate function over an adjudicatory procedure vested in some other body.** To hold otherwise would severely restrict and undermine the SPB's ability to enforce the merit principle by insulating agency disciplinary decisions from de novo review. (Emphasis added.)

[22] In regards to the Unit 8 MOU provisions, DPA and California Department of Forestry Firefighters Association argued that the term "review disciplinary actions" referred only to SPB's non-delegable review function, and was limited to appellate review.

The appellate court stated:

> No such harmony can be achieved in this case. The MOUs simply provide an alternative means by which the SPB is deprived of its jurisdictional authority to review disciplinary actions. The MOUs set forth procedures which, at the election of the employee, preclude the SPB from adjudicating disciplinary actions except where the employee is authorized to seek the limited appellate review of an arbitration which is adverse to the employee. This plainly conflicts with the adjudicatory function which is embodied in the direction that the SPB 'shall.. . review disciplinary actions.'
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> . . . . . .
>
> As we have explained, the authority to review disciplinary actions is constitutionally derived and has been recognized as such by the Supreme Court since Boren. [Cit. omitted.] Cal. Correctional Peace Officers Assoc, is not inconsistent with that conclusion. When the phrase 'review disciplinary actions' was added to the Constitution in 1970 the language derived its meaning from this history. While the Legislature has authority to regulate the procedures by which the SPB reviews disciplinary actions, **there is no constitutional warrant for assignment of the adjudicatory function to any other body than the SPB.** '[A]ll such legislation must be subordinate to the constitutional provision, and in furtherance of its purpose, and must not in any particular attempt to narrow or embarrass it.' [Cit. omitted; emphasis added.]

ALJ'S PROPOSED DECISION

Shortly after the appellate decision was issued, the ALJ issued his proposed decision on December 5, 2003. The ALJ found:

> [T]hat the SPB has adopted a policy in its precedential decisions under which it [would] not approve settlement agreements or otherwise recognize settlement agreements in disciplinary actions that are a product of the procedure in the MOUs covering Units 12 and 13. By this conduct, the SPB has interfered with the right of employees to be represented by IUOE in an employment matter and with IUOE's right to represent employees in Units 12 and 13 on a matter of employer-employee relations. By the same conduct, the SPB has discriminated against employees because they exercised the right to be represented by IUOE on an

> employment matter and against IUOE because it represented employees in Units 12 and 13 on a matter of employer-employee relations. Accordingly, it is found that the SPB has violated section 3519(a) and (b).

In reaching this conclusion, the ALJ first found that PERB had jurisdiction over the matter.

SUPREME COURT DECISION

After the ALJ issued his decision, the California Supreme Court, on December 1, 2005, decided SPB v. DPA. In SPB v. DPA, the Supreme Court addressed the following issue: "Does this bypass of the [SPB] violate article VII, section 3 of the California Constitution, which provides that the [SPB] 'shall. . . review disciplinary actions' taken against state civil service employees?" The Supreme Court concluded that it did. The Supreme Court noted "[t]hat public interest would be subverted if various ad hoc arbitral boards, operating beyond the control of the [SPB] and not bound to apply to its merit-based standards, could review and reverse disciplinary actions taken against state civil service employees."

DISCUSSION

The issue in this case is whether SPB violated the Dills Act when it refused to exercise its power to review proposed settlement agreements submitted to it for employees who participated in the BOA process. Prior to determining whether a violation occurred, the Board must first determine whether it may exercise jurisdiction over SPB as a State agency as opposed to an employer.

Jurisdiction

Whether SPB is an "employer" pursuant to Dills Act section 3513(j) is not dispositive of whether SPB violated the protected rights of State employees and their exclusive representative. The ALJ correctly reasoned in his proposed decision that:

[S]ection 3516 sets out the 'Unlawful actions by state.' It goes on to provide that 'It shall be unlawful for the state to do any of the following.' The section then lists the various unfair practices. By comparison, section 3513(j) sets out the definition of the 'State employer' or the 'employer' under the Dills Act. It provides in its entirety that the '"State employer" or "employer," for purposes of bargaining or meeting and conferring in good faith, means the Governor or his or her designated representative.' For the following reasons, I conclude that these two sections address separate subjects, and that the word 'state,' as used in section 3519, is not synonymous with 'State employer' or 'employer,' as those terms are used in section 3513(j).

The Dills Act in section 3513(j) defines State employer for a limited purpose. It provides that the State employer, for purposes of bargaining or meeting and conferring good faith, is the Governor or his designated representative. Because the definition of 'State employer' in section 3513(j) is so narrow, it cannot reasonably be given a meaning beyond that which the Legislature assigned to it in the first place. There is no basis to conclude that the terms 'State employer' or 'employer,' as used in section 3513(j), do anything more than designate the State representative for the purpose of bargaining or meeting and conferring in good faith. Any conclusion that the section 3513(j) definition of the State employer applies to a purpose other than that expressly set forth in that section would run afoul of two rules of statutory interpretation. It would, in effect, rewrite the definition and expand it to encompass a purpose the Legislature chose not to include. It would also render the language 'for purposes of bargaining or meeting and conferring in good faith' mere surplusage. (Dyna-Med, Inc. v. Fair Employment and Housing Commission (1987) 43 Cal.3d 1379, 1387 [241 Cal.Rptr. 67]; see also Halberet's Lumber Company, Inc. v. Lucky Stores, Inc. (1992) 6 Cal.App.4th 1233, 1238-1239 [8 Cal.Rptr.2d 298] [words are to be given their usual and ordinary meaning unless they are otherwise defined in the statute].) If the Legislature intended the scope of the definition of State employer in section 3513(j) to include the State employer for other purposes—such as establishing who may commit an unfair practice—it could have done so, but it did not. [Fn. omitted.] Therefore, the claim that section 3513(j) excludes the SPB and thus prevents PERB from asserting jurisdiction over the issues presented in this matter is rejected.

By comparison, section 3519 covers a completely different subject, unfair practices by 'the state.' There is no limitation on

> that term in section 3519, nor does the Dills Act define 'the state' elsewhere. As the Board observed, 'Section 3519 indeed makes it illegal for the "state," not the "employer," to violate the protected rights of state employees and their exclusive representatives. As DPA noted, the correct inquiry may be to determine whether, as the "state," SPB's conduct violated the Dills Act [fn. omitted].' [Fnt. omitted.] (State of California (State Personnel Board), supra. PERB Decision No. 1491a-S, p. 5.)

Thus, whether the SPB is a "state employer" for purposes of determining whether it committed an unfair practice is irrelevant. SPB, as a State agency, is subject to the Dills Act section 3519.[23] [24] [25]

Furthermore, PERB's jurisdiction is not eviscerated simply because SPB was acting in an adjudicatory capacity. The Supreme Court found that PERB, as well as the Department of

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[23]It should be noted that SPB argued that "[a]fter finding that the SPB is not the 'state employer' as that term is used in Government Code section 3513(j) the Proposed Decision then impermissibly expands the scope of the Complaint to read in the allegation that PERB may assert jurisdiction over SPB because SPB is the 'state' as that term is used in Government Code section 3519." The ALJ did not expand the scope of complaint for the complaint stated, in pertinent part:

> 3. In or about March 2001, Respondent refused to approve proposed settlement agreements for employees who participated in the contractual Board of Adjustment disciplinary review procedure.
>
> 4. By the acts and conduct described in paragraph 3, Respondent interfered with employee rights guaranteed by the Ralph C. Dills Act in violation of Government Code section 3519(a).

Thus, SPB was on notice that its actions, regardless of whether it was a "State employer," allegedly violated Government Code section 3519(a).

[24]By implication, State of California (Office of the Lieutenant Governor') (1992) PERB Decision No. 920-S is overruled.

[25]The ALJ, therefore, was correct in his determination that the court's finding in the appellate decision that SPB was not an employer pursuant to Dills Act section 3513(j) did not preclude PERB from determining whether SPB committed an unfair practice.

Fair Employment and Housing, are vested with the authority to review, for a limited purpose, the SPB's quasi-adjudicatory actions. (Pacific Legal Foundation v. Brown (1981) 29 Cal. 3d 168 [172 Cal. Rptr. 487];[26] State Personnel Bd. v. Fair Employment & Housing Com. (1985) 39 Cal.3d 422 [217 Cal.Rptr. 16] (Fair Employment & Housing).)[27] In reaching this conclusion, the Supreme Court noted that the "merit principle governing state civil service was

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[26]In SPB v. DPA, the Supreme Court noted:

> In Pacific Legal Foundation, this court rejected a facial challenge to the State Employer-Employee Relations Act of 1978 (SEERA), enacted by the Legislature to provide for collective bargaining to state civil service employees. We also rejected a facial challenge to the SEERA's statutory provisions allowing the [PERB] to investigate and devise remedies for unfair labor practices. (Pacific Legal Foundation, supra, 29 Cal.3d at p. 197, fn. 19.) We saw no conflict with the language in section 3, subdivision (a) of article VII of the state Constitution vesting jurisdiction in the [SPB] to 'review disciplinary actions.' (Pacific Legal Foundation, supra, 29 Cal.3d, at p. 196.) We explained that the PERB's authority over unfair labor practices did not overlap with the [SPB's] jurisdiction over review of disciplinary actions because the [SPB] and the PERB were created to serve "different, but not inconsistent, public purpose[s]." (Id, at p. 197.) We noted that the [SPB's] constitutional grant of authority was to review disciplinary actions against civil service employees whereas the PERB's legislatively created function was 'a somewhat more specialized and more focused task: to protect both employees and the state employer from violations of the organizational and collective bargaining rights' secured under the SEERA. (Id, at p. 198.) [Emphasis in original.]

[27]In Fair Employment & Housing, three applicants rejected for state civil service employment asserted that their rejections constituted physical disability discrimination in violation of the Fair Employment and Housing Act (FEHA) (Sec. 12900, et seq.). The trial court enjoined enforcement of the FEHA in matters involving the state civil service, concluding that it conflicted with the [SPB] board's exclusive jurisdiction over state civil service employment. (Fair Employment & Housing, at p. 427.) The Supreme Court held that the merit principle governing state civil service was actually reinforced, rather than hindered, by enforcing the FEHA, which "guarantees the non-merit factors such as race, sex, [and] physical handicap" and that it would play no role in appointing state civil service employees. (Fair Employment & Housing, at p. 439.)

actually reinforced, rather than hindered." The Dills Act guarantees that non-merit factors such as union animus play no part in the merit system. Thus, SPB's adjudicatory authority does not insulate it from PERB's jurisdiction for the limited purpose of determining an unfair practice.

Interference

The test for whether a respondent has interfered with the rights of employees under the Dills Act does not require that unlawful motive be established, only that at least slight harm to employee rights results from the conduct. The Board described the standard as follows:

> [I]n order to establish a prima facie case of unlawful interference, the charging party must establish that the respondent's conduct tends to or does result in some harm to employee rights granted under EERA. (State of California (Department of Developmental Services) (1983) PERB Decision No. 344-S, citing Carlsbad Unified School District (1979) PERB Decision No. 89; Service Employees International Union, Local 99 (Kimmett) (1979) PERB Decision No. 106.)

Under the above-described test, a violation may only be found if the Dills Act provides the claimed rights. In Clovis Unified School District (1984) PERB Decision No. 389, the Board held that a finding of coercion does not require evidence that the employee actually felt threatened or intimidated or was in fact discouraged from participating in protected activity. The same test has been applied to interference with the rights of employee organizations, and it has been applied to claims under the Dills Act. (See State of California (Department of Developmental Services) (1983) PERB Decision No. 344-S.)

The Dills Act does not provide the claimed right, submitting "settlement agreements" achieved through the BOA process to SPB. In SPB v. DPA, the State Supreme Court found it unconstitutional for parties to negotiate a process whereby ad hoc arbitral boards review

discipline, even if the decision, couched as a "settlement," is submitted to the SPB after the fact. The Supreme Court made it clear that SPB shall solely, singly, and exclusively review discipline. Specifically, the Supreme Court stated:

> It would be inimical to California's constitutionally mandated merit-based system of civil service, which is administered by the [SPB], to wholly divest that board of authority to review employee disciplinary actions in favor of an MOU-created review board. This is so because a state civil service based on the merit principle can be achieved only by developing and consistently applying uniform standards for employee hiring, promotion, and discipline. By vesting in the nonpartisan [SPB] the **sole** authority to administer the state civil service system (Cal. Const, art., VII. sec. 2), our state Constitution recognizes that this task must be entrusted to [a] **single** agency, the constitutionally created [SPB], Because employee discipline is an integral part of the civil service system, the [SPB's] **exclusive** authority to review disciplinary decisions is a critical component of the civil service system. [Emphasis added.]

The Supreme Court further stated:

> That public interest would be subverted if various ad hoc arbitral boards, operating beyond the control of the [SPB] and not bound to apply its merit-based standards, could review and reverse disciplinary actions taken against state civil service employees. As we have explained, the public interest in a merit-based civil service is best served by recognizing that the [SPB's] authority to review employee discipline is exclusive.

Based on this language, we believe that no other entity may review discipline even where such review is subsequently submitted to SPB.

In further support of our position, that BOA decisions submitted to SPB is not a claimed right, is the fact that the Supreme Court found a similar provision unconstitutional. "[T]he amended Unit 8 MOU requires an arbitrator's decision to be submitted to [SPB] to ensure that the decision does not conflict with 'merit principles.'" Were the practice of having an ad hoc arbitral board review discipline and then submit its "review" to the SPB

constitutional, the Supreme Court would have reversed the appellate court.[28] Additionally, the Supreme Court would not have deleted "the condition attached to the judgment in case number C034943 that [barred implementation of the Unit 8 MOU] 'unless and until provisions [were] made in the procedures for the [SPB]'s ultimate and meaningful review of disputed civil service disciplinary actions resolved by grievance or arbitration pursuant to the procedures.'" Because the amended Unit 8 MOU is similar, if not identical to, the issue before this Board, we cannot find the unconstitutional activity, submitting BOA "settlement agreements" for review by the SPB, constitutes a claimed right under the Dills Act.

The Board therefore finds that the Dills Act does not provide the claimed right. As such, they failed to establish a prima facie case of interference and the complaint is hereby dismissed.[29]

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[28]The appellate court stated:

> The SPB has been deprived of its general statutory authority to investigate and hear a disciplinary action. [Cit. omitted.] Under the grievance procedure provided in the Amended Unit 8 MOU, the SPB has no adjudicatory function. In fact, it has no function whatever unless there is an arbitration which the employee disputes. At that point the SPB reviews only the arbitration record and, if it finds a violation of the merit principle, refers the matter back to the arbitrator.

[29]Because there is no claimed right under the Dills Act, SPB did not discriminate against IUOE and the employees it represents in Units 12 and 13.

ORDER

The unfair practice charge and complaint in Case No. SA-CE-1295-S are hereby DISMISSED WITHOUT LEAVE TO AMEND.

Member McKeag joins in this Decision.

Member Shek's concurrence begins on page 29.

Chairman Duncan's dissent begins on page 37.

SHEK, Member, concurring: I concur in the dismissal of the complaint, but disagree with the rationale for the dismissal.

I respectfully disagree with the plurality's findings that the State of California (State Personnel Board) (SPB), on the sole basis of being a state agency, is subject to the Ralph C. Dills Act (Dills Act) section 3519, that the Dills Act guarantees that non-merit factors such as union animus play no part in the merit system, and that SPB's adjudicatory authority does not insulate it from the jurisdiction of the Public Employment Relations Board (PERB or Board) for the limited purpose of determining an unfair practice. On the contrary, to abide by the intent and purpose of the Dills Act, I submit that PERB should refrain from exercising jurisdiction over the present unfair labor practice charge.

This charge was filed by the International Union of Operating Engineers (IUOE) against SPB, based on SPB's refusal to approve a disciplinary settlement agreement that derived from a Board of Adjustment (BOA)/Arbitration procedure in the Memorandum of Understanding for Units 12 and 13. The SPB did not act as the appointing authority, and IUOE did not represent SPB employees in this matter. The SPB and IUOE were not parties to any collective bargaining agreement. The SPB simply took a legal position based on its interpretation of its constitutional mandate. Accordingly, SPB, in performing its duty to review disciplinary actions, is not encompassed within the term "state," as set forth in Section 3519.

On December 5, 2003, the administrative law judge (ALJ) issued a proposed decision (proposed decision) in this matter. Relying on State of California (State Personnel Board) (2002) PERB Decision No. 1491-S (State Personnel Board), the ALJ found that PERB had jurisdiction to determine whether or not SPB had committed an unfair practice on the ground

that the SPB was encompassed within the meaning of "state" in Dills Act section 3519. The State Personnel Board stated, at page 10:

> Taken to an extreme, as stated by IUOE and DPA, SPB, acting in its quasi-adjudicatory capacity, could deny an employee union representation at a disciplinary appeal hearing or could rule against an employee because of the employee's protected activities and still be insulated from the dictates of the Dills Act. PERB would be abdicating its statutory responsibilities in allowing such an absurd result. After a hearing on the merits, it could be determined that SPB, whether or not acting as a quasi-adjudicatory agency, is an 'employer' under Section 3513(j) and that its actions violated the Dills Act.

I respectfully submit that this Board erred in its analysis in State Personnel Board. Even in the "extreme" case that employees were denied union representation at a disciplinary appeal hearing before SPB, that would not constitute an unfair practice. PERB precedents have long established that SPB proceedings are constitutional, statutory, and extra-contractual, and there is no duty for fair representation (DFR) at such proceedings. The DFR is a quid pro quo for the right of exclusivity enjoyed by the employee organization, which is under no obligation to represent the interests of a unit member unless the exclusive representative possesses the exclusive means by which such employee can obtain a particular remedy, through the negotiation, grievance and arbitration procedure.[1] The employee organization has no duty to pursue extra-contractual remedies.[2]

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[1] San Francisco Classroom Teachers Association, CTA/NEA (Chestangúe) (1985) PERB Decision No. 544, adopting the Board agent's dismissal, at p. 3; California State Employees' Association (Damns) (1985) PERB Decision No. 546-S, adopting the Board agent's dismissal, at p. 3; California Faculty Association (Pomerantsev*) (1988) PERB Decision No. 698-H, adopting the Board agent's dismissal, at p. 12.

[2] California State Employees' Association (Lemmons and Lund) (1985) PERB Decision No. 545-S, adopting the Board agent's dismissal, at p. 3.

PERB has specifically ruled that an exclusive representative has no duty to represent an employee before SPB.[3] The right of State employees to appear before SPB is an individual right granted by the California Constitution, and not one connected with any aspect of negotiation or administration of a collective bargaining agreement.[4] Thus, SPB procedures are extra-contractual remedies that fall outside of the realm of negotiation or administration of collective bargaining agreements.

There would be no unfair labor practice if an administrative law judge of SPB denied the union the right to represent an employee at a SPB hearing just as there would be no unfair labor practice if a Superior Court judge denied the union the right to represent an employee litigant. There could be a violation of some other constitutional or statutory rights, but there would not be an unfair labor practice.

The finding in the ALJ's proposed decision that the term "state" in Dills Act section 3519 embraces SPB simply because it is a state agency requires further discussion. The SPB is the "state" to its own employees when it is acting as the appointing authority. However, its adjudicatory authority to review disciplinary actions, as set forth in Article VII, section 3, subsection (a) of the California State Constitution, is not subject to the Dills Act.

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[3]American Federation of State, County and Municipal Employees, Local 2620 (Moore) (1988) PERB Decision No. 683-S, adopting the Board agent's dismissal, at p. 3; California State Employees Association (Finch) (1992) PERB Decision No. 959-S, adopting the Board agent's warning letter, at p. 3; California Correctional Peace Officers Association (Kashtanoff) (1993) PERB Decision No. 1007, adopting the Board agent's warning letter, at p. 3; California State Employees Association (Bradford) (2001) PERB Decision No. 1421-S, adopting the Board agent's warning letter, at p. 2.

[4]California State Employees Association (Parisi) (1989) PERB Decision No. 733-S, at p. 8; California Union of Safety Employees (John) (1994) PERB Decision No. 1064-S, at p. 9; California State Employees Association (Fox) (1995) PERB Decision No. 1099-S, adopting the Board agent's warning letter, at p. 2.

The Dills Act was enacted in 1977 to promote employer-employee communication and improve employer-employee relations. The Dills Act provides a reasonable method for resolving disputes regarding wages, hours, and other terms and conditions of employment. It also recognizes the right of state employees to join and be represented by organizations of their own choosing in their employment relations.[5] In addition, the Dills Act provides for resolution of potential conflict with existing merit principles in state employment and entitlements of civil service employees.[6] With the enactment of the Dills Act, PERB was given the responsibility to administer employer-employee relations for state employees.[7]

Dills Act section 3512 states:

> It is the purpose of this chapter to promote full communication between the state and its employees by providing a reasonable method of resolving disputes regarding wages, hours, and other terms and conditions of employment between the state and public employee organizations. It is also the purpose of this chapter to promote the improvement of personnel management and employer-employee relations within the State of California by providing a uniform basis for recognizing the right of state employees to join organizations of their own choosing and be represented by those organizations in their employment relations with the state. It is further the purpose of this chapter, in order to foster peaceful employer-employee relations, to allow state employees to select one employee organization as the exclusive representative of the employees in an appropriate unit, and to permit the exclusive representative to receive financial support from those employees who receive the benefits of this representation.
>
> Nothing in this chapter shall be construed to contravene the spirit or intent of the merit principle in state employment, nor to limit the entitlements of state civil service employees, including those designated as managerial and confidential, provided by

[5]Section 3512.

[6]Section 3512.

[7]Section 3513(h).

> Article VII of the California Constitution or by laws or rules enacted pursuant thereto.

The definition of the term "state," as used in Section 3519, has to be consistent with the intent and purpose of the Dills Act. Since the foundation of the Dills Act is to improve employer-employee relations through collective bargaining, and PERB's primary function is to administer all state collective bargaining statutes, including the Dills Act, I submit that PERB has no jurisdiction over the SPB review of disciplinary actions, absent the existence of a collective bargaining relationship between SPB and the charging party IUOE. As the Supreme Court succinctly held, PERB "had a specialized function that supplemented rather than supplanted the central adjudicative function of the State Personnel Board .. . ." (State Personnel Bd. v. Department of Personnel Admin. (2005) 37 Cal.4th 512, 524 [36 Cal.Rptr.3d 142] (SPB v. *DPA)*. If PERB were to assert jurisdiction over a matter that goes to the heart of the SPB review of disciplinary action, the effect would be to supplant rather than supplement the central adjudicative function of SPB.

The Board has considered the question of whether a State agency not acting in the capacity of an employer can be held to be the "state" pursuant to Section 3519. In California State Employees Association (Gonzalez-Coke, et al.) (2000) PERB Decision No. 1411-S, at p. 17, the Board rejected an argument by the California State Employees Association (CSEA) that PERB could itself commit an unfair practice through its administrative decisions. In rejecting this argument the Board stated:

> Section 3513(j) confirms that, for purposes of the Dills Act, PERB itself was not intended by the legislature to be encompassed within the term 'employer.' As section 3513(j) explains:
>
> 'State employer,' or 'employer,' for the purposes of bargaining or meeting and conferring in good faith, means the Governor or his or her designated representatives.

> Nor does the Board agree with CSEA's claim that PERB is encompassed within the term 'state,' as set forth in section 3519. Section 3512 shows that the 'state,' for purposes of application of the Dills Act, pertains to the state as an employer. [Fn. omitted.] It does not pertain to all agencies of the state, such as PERB, which may jurisdictionally interface with either the state as an employer or with state employee organizations. (Emphasis added.)

Thus, the decision held that PERB is not included as the "state" in Section 3519. Similarly, Section 3519 does not apply to SPB in this case.

PERB is an administrative agency of limited jurisdiction. Administrative agencies "have only such powers as have been conferred on them, expressly or by implication, by constitution or statute. [Citations omitted.] An administrative agency, therefore, must act within the powers conferred upon it by law and may not validly act in excess of such powers." (Ferdig v. State Personnel Bd. (1969) 71 Cal.2d 96, 103-104 [77 Cal.Rptr. 224].)

It is undisputed in the present matter that SPB acted in its adjudicatory capacity when reviewing settlement agreements regarding disciplinary actions. The SPB was not the appointing authority of the employees involved and the IUOE was not the exclusive representative of SPB employees. The SPB has taken a legal position based on its interpretation of its constitutional mandate. While its position may affect individual employees, SPB was not acting as an employer when it refused to approve BOA settlement agreements in disciplinary actions between the State and IUOE, or conditioned its approval on the confirmation that such agreements did not derive from the BOA process. If IUOE believes that the SPB has acted illegally, it may file a legal challenge in court.

The decisions in Pacific Legal Foundation v. Brown (1981) 29 Cal.3d 168 [172 Cal.Rptr. 487] (Pacific Legal Foundation)and State Personnel Board v. Fair Employment & Housing Commission (1985) 39 Cal.3d 422 [217 Cal.Rptr. 16] (Fair Employment & Housing

Commission) are distinguishable based upon the differences in the applicable statutes. The court stated in Pacific Legal Foundation that many areas of PERB's unfair practice jurisdiction do not overlap with the SPB's "disciplinary action" jurisdiction. (Id., at pp. 196-197.) PERB and the State Personnel Board are not in competition with each other; rather, each agency was established to serve a different, but not inconsistent, public purpose. (Id., at p. 197.) The SPB was granted jurisdiction to review disciplinary actions of civil service employees in accordance with the merit principle embraced by the California Constitution. (Id., at pp. 197-198.) PERB has been given a more specialized and more focused task of protecting both employees and the state employer from violations of the organizational and collective bargaining rights guaranteed by the Dills Act. (Id., at p. 198.) The court should construe the relevant provisions of the Dills Act to permit an accommodation of the respective tasks of both the SPB and PERB. (Id., at p. 198.) Most significantly, the court in Pacific Legal Foundation did not hold that PERB may exert jurisdiction over SPB's exercise of its duty to review disciplinary actions.

The court in Fair Employment & Housing Commission was persuaded to subject SPB to the jurisdiction of the Fair Employment and Housing Commission (FEHC), and the Department of Fair Employment and Housing (DFEH) because historically, SPB acknowledged the power of FEHC and DFEH to enforce the California Fair Employment and Housing Act within the state civil service. (Id., at pp. 430-31.) However, in accordance with the purposes of the Dills Act as set forth in Section 3512, and PERB's role in administering collective bargaining statutes, I would decline to extend PERB jurisdiction to SPB in a case where it was not acting as an employer.

For the reasons stated above, I respectfully disagree with the Board's analysis in State Personnel Board, and accordingly, the plurality's adoption of the ALJ's finding that SPB was

encompassed within the meaning of "state" in Dills Act section 3519. I submit that the above-entitled unfair practice charge and complaint should be dismissed based on the ground that SPB is not the State employer for purpose of the action here. In accordance with my conclusion that PERB lacks jurisdiction over the SPB in this matter, I find it unnecessary to address any issue on the merits of this case, and the dubious reference to the term "claimed rights" under the Dills Act stated in the plurality opinion.

DUNCAN, Chairman, dissenting: I respectfully dissent. The underlying issue in this case is found in the Public Employment Relations Board (PERB or Board) complaint issued in July 2001. The complaint alleges that by refusing to approve proposed settlements submitted to it for employees who participated in the board of adjustment (BOA) process, the State of California (State Personnel Board) (SPB) interfered with employee rights to engage in union activity.

The test for whether a respondent has interfered with the rights of employees under the Ralph C. Dills Act does not require that unlawful motive be established, only that at least slight harm to employee rights results from the conduct. The Board described the standard as follows:

> [I]n order to establish a prima facie case of unlawful interference, the charging party must establish that the respondent's conduct tends to or does result in some harm to employee rights granted under EERA. (State of California (Department of Developmental Services) (1983) PERB Decision No. 344-S, citing Carlsbad Unified School District (1979) PERB Decision No. 89; Service Employees International Union, Local 99 (Kimmett) (1979) PERB Decision No. 106.)

As the plurality opinion recognizes, the administrative law judge (ALJ) found,

> [T]hat the SPB has adopted a policy in its precedential decisions under which it [would] not approve settlement agreements or otherwise recognize settlement agreements in disciplinary actions that are a product of the procedure in the MOUs covering Units 12 and 13. By this conduct, the SPB has interfered with the right of employees to be represented by IUOE in an employment matter . . . .

As stated in the complaint and the ALJ decision, the question to be answered here is whether SPB improperly determined that it would refuse to review and consider settlement agreements reached pursuant to a contractual BOA procedure. The record in this case establishes that the International Union of Operating Engineers attempted to use the BOA procedure to produce settlement agreements and submit them to SPB to insure their validity.

Unlike other settlement agreements, the SPB refused to review the BOA settlements under the factors found in Government Code section 18681. Rather than apply any objective criteria to the BOA settlements, the SPB adopted a policy of rejecting them solely because the process used for settlement was that found in the memorandum of understanding (MOU). The SPB chief counsel testified that she could cite no other examples of SPB questioning the method used to reach a settlement agreement. Other testimony supported a finding by the ALJ that SPB had a past policy of reviewing settlement agreements, not the method used to reach them.

Thus, it is clear that SPB would not perform its standard review of these settlements only because they were the product of a procedure found in the MOU between the parties. The ALJ properly found that such conduct interferes with an employee's right to be represented by a union.

Unfortunately, the plurality opinion addresses a different issue; an issue not found in the complaint nor addressed by the ALJ in his proposed decision. The plurality has taken the position that submitting BOA decisions to SPB is not a protected right because the California Supreme Court determined that binding decisions made pursuant to a BOA procedure interfere with the constitutional mandate of the SPB. The court reasoned that such binding decisions improperly "wholly divest that board of authority to review employee disciplinary actions." With this interpretation of the Supreme Court's decision in State Personnel Board v. Department of Personnel Administration (2005) 37 Cal.4th 512 [36 Cal.Rptr.3d 142], I completely agree. The parties to the MOU have no right to submit binding decisions rendered pursuant to the BOA to the SPB for approval.

However, the case before us does not deal with procedure outlawed by the court; it is not about decisions that wholly divest the SPB of authority to review employee disciplinary

actions. As the state employer (the Department of Personnel Administration) states in its brief, the Supreme Court decision "Is Irrelevant For Purposes Of the Unfair Practice Charge." This unfair practice matter does not regard an attempt to divest SPB of its role in the discipline of state employees. Rather, it addresses the SPB position regarding agreements submitted to it for review in the same manner that SPB reviews other settlements.

As described above, the complaint issued because SPB adopted a policy of refusing to review settlements of employee disciplinary actions solely because the settlements were reached pursuant to a procedure agreed upon by management and labor and placed in an MOU. Accordingly, the question presented is whether that SPB administrative decision, refusing to exercise its authority of review, interferes with employee rights to be represented by their union. Rather than address this issue, the plurality deflects it by merely asserting that these settlements are really "decision[s], couched as a 'settlement.'" The plurality provides no facts to support this jump because the record contains none. There are no facts provided to support a finding that the SPB reasonably believed the subject settlements to be BOA "decisions" or that SPB limited its refusal to review to those cases where it made such a determination.

By not addressing the central issue in this matter, whether the SPB can refuse to review settlements made pursuant to the subject MOUs, they do not explain why the ALJ was wrong in his finding of a violation.

As stated, I would adopt the ALJ's finding that SPB interfered with employee rights.[1]

[1]As in my recent dissent in Contra Costa Community College District (2006) PERB Decision No. 1852, I believe that the ALJ in this matter had no compelling reason to add the Unalleged violation of discrimination and would not adopt that part of the proposed decision. I note the plurality does not discuss this finding by the ALJ. However, I must assume that they reject it because they dismiss this complaint. Additionally, I join the plurality position on the jurisdiction of PERB in this case.