*** * * JUDICIAL APPEAL PENDING * * ***

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA ASSOCIATION OF PSYCHIATRIC TECHNICIANS, Charging Party, v. STATE OF CALIFORNIA (DEPARTMENT OF CORRECTIONS & REHABILITATION), Respondent.	Case No. SA-CE-2047-S PERB Decision No. 2598-S November 27, 2018

Appearances: Sean H. Bedrosian, Attorney and Consultant, for the California Association of Psychiatric Technicians; California Department of Human Resources, by Stanley R. Marubayashi, Labor Relations Counsel, for State of California (Department of Corrections & Rehabilitation).

Before Banks, Shiners, and Krantz, Members.

DECISION

KRANTZ, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions by the State of California (Department of Corrections and Rehabilitation) (CDCR) to the attached proposed decision of an administrative law judge (ALJ). The ALJ ruled that CDCR interfered with the right of Amy Ximenez (Ximenez) to be represented by the California Association of Psychiatric Technicians (CAPT) during an unclothed body search, and with CAPT's corresponding right to represent Ximenez during the search, in violation of the Ralph C. Dills Act (Dills Act) section 3519, subdivisions (a) and (b).[1] As a remedy, the ALJ ordered that CDCR cease and desist from interfering with

[1] The Dills Act is codified at Government Code section 3512 and following. Government Code Section 3519, subdivisions (a) and (b), provide that it shall be unlawful for the State to:

employees' right to have a union representative present during an invasive body search, and to cease and desist from denying CAPT the right to represent its members.

CDCR asserts various grounds for reversing the proposed decision, primary among them its assertion that there is no right to representation when an employer performs an invasive search of an employee's person[2] but asks no questions. In the alternative, CDCR excepts to the ALJ's failure to find that the employee consented to go forward with the search without the presence of a representative, affirmatively waiving any representation right she may have had. CAPT contends that each of CDCR's arguments is without merit and urges the Board to affirm the proposed decision.

We have reviewed the entire record in this matter and considered the parties' arguments in light of applicable law. The primary issue is whether an invasive search of an employee's person is the type of investigatory meeting which triggers a right to union representation.[3] We uphold the ALJ's conclusion that an invasive search of an employee's person, including an

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> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter. 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.

Unless otherwise indicated, all statutory references are to the Government Code.

[2] An unclothed body search is one form of invasive search of an employee's person. (See CDCR Departmental Operations Manual section 52050.15 [procedures for "more intensive search than is normally required" of an employee's person, which involves the touching of the employee's clothed body or visual inspection of the employee's unclothed body].)

[3] An employee must affirmatively request union representation, directly or through a union representative, in order to invoke representational rights. (*Bay Area Air Quality Management District* (2006) PERB Decision No. 1807-M, p. 2.)

unclothed body search, is the type of investigatory meeting which gives rise to the right to union representation. We further hold that if an employer rejects an employee's request for representation, she cannot be found to have voluntarily waived her right to representation. Moreover, an employee does not waive her right to union representation by signing an acknowledgement of the employer's rule that she is subject to search at any time while on the employer's grounds.

We conclude that the ALJ's findings of fact are supported by the record, as supplemented below, and we adopt them as the findings of the Board itself. The ALJ's legal conclusions are generally well reasoned and in accordance with applicable law, and we therefore affirm the proposed decision, except where noted and subject to the following discussion of CDCR's exceptions.

BACKGROUND

There is no need to repeat here the ALJ's factual and procedural history. We summarize the background for context.

CDCR hired Ximenez as a psychiatric technician in July 2005, and assigned her first to California State Prison (CSP) Coalinga, later transferring her to CSP Sacramento. At all relevant times, Ximenez worked as a group facilitator, assisting mental health inmates with coping skills and anger management. In order to obtain her CDCR identification, Ximenez signed a preprinted form (Form 894-A) acknowledging the departmental rule against bringing any drug or other contraband into a prison or making any such items accessible to an inmate, and further acknowledging that she is subject to search at any time while on CDCR grounds.[4]

[4] Form 894-A states in pertinent part:

> No employee or person shall take, carry, convey, or make accessible to any inmate within a Department facility any intoxicant, opiate, narcotic, drug, or any other contraband articles,

At the time of the events at issue in this case, Ximenez had no disciplinary record, had not received a negative performance evaluation, and had never been interviewed by a CDCR investigator.

On June 26, 2015,[5] the CSP Investigative Services Unit (ISU)[6] received a written note from an inmate claiming that on July 1, Ximenez was going to bring narcotic powder into the prison. This tip was forwarded to OIA, which opened an "exigent" criminal investigation and assigned two OIA criminal investigators, Special Agents Antonio Gold (Gold) and Chuck King (King), to search Ximenez's person, bags, and vehicle when she reported for work on July 1.

In preparation for the search and in order to demonstrate to Ximenez that she had authorized the search, Gold obtained a copy of Ximenez's signed Form 894-A. Prior to July 1, OIA contacted an ISU Officer, Lieutenant Robert Sparks (Sparks), to inform him that OIA

> nor traffic with any inmate in any matter. Violation of this rule is a felony punishable by imprisonment.
>
> [¶ . . . ¶]
>
> No employee or person shall be permitted to receive or give, buy or sell, or trade any article with any inmate for any reason whatsoever.
>
> [¶ . . . ¶]
>
> It is your duty to read and be guided by the rules while working in the Department's facilities.
>
> I have received, read, and understand the project procedures and security requirements, and the above rules and agree to govern myself accordingly while [employed at this facility]. I understand that I am subject to search at any time while on [department grounds].

[5] All dates refer to the year 2015, unless otherwise stated.

[6] As part of its role investigating inmates, ISU acts as a liaison between CSP Sacramento and Office of Internal Affairs (OIA) investigators who investigate allegations made against employees.

agents would be coming to CSP Sacramento on July 1, and to arrange for Ximenez to be stopped at the entrance gate at the beginning of her shift.

On July 1, Gold and King stopped Ximenez as she was entering her work site. They were joined by Sparks. After Gold, King and Sparks identified themselves, Gold asked Ximenez to go with them to the ISU office so that they could "have a word with [her]." Ximenez then asked Gold if she needed an attorney and inquired whether she was going to be "walked off" the prison grounds.[7] Gold told Ximenez that she was not getting walked off the prison grounds, and that "[w]e just wanted [to] talk to her." Ximenez was visibly upset and repeatedly asked why the agents wanted to speak with her.

Gold and King escorted Ximenez into the ISU interview room. Gold told Ximenez that he and King were conducting a criminal investigation into an allegation that she was smuggling contraband into the prison and they were going to search her bags, her vehicle, and her person. Ximenez consented to the search of her bags, placing them on the table for the agents to go through them. She also consented to the search of her truck, providing her keys to King. Gold announced that while he and King were searching her vehicle, two female officers, Susan Mireles (Mireles) and Norma-Jean Fay (Fay), would search her person.

Fay guarded the door while Mireles prepared to perform the search by putting on examination gloves and telling Ximenez that she needed to remove her clothes for an unclothed body search. Ximenez stood up, pointed her finger down toward the ground, and demanded the presence of a union representative, a supervisor, or someone from peer support. Mireles stopped her preparations for the search. Fay informed Sparks, who was just outside the door to the interview room, that Ximenez was requesting union representation. Sparks relayed that information to Gold and King. First Sparks and then Gold entered the interview

[7] To be "walked off" the prison grounds is a colloquial phrase for being escorted back to the parking lot and restricted from returning to prison grounds until further notice.

room, and sequentially told Ximenez that she did not have a right to a union representative because: (1) she was "only being searched, not questioned," and (2) she signed a consent to search, Form 894-A, when she was first hired.

After being told twice that she was not entitled to representation, Ximenez was visibly upset and said words to the effect of, "let's just get this done," and started to take off her clothes. Mireles, who testified that Ximenez was acting out of frustration, told her not to remove her clothes until the male agent left the room, and cautioned that she had to follow the search protocol in the manner in which she removed her garments. Once Gold exited the room, Mireles conducted an unclothed body search. The search, which lasted approximately four minutes, included Ximenez completely disrobing, her clothing being searched, and her body being visually inspected, but not touched. Lastly, Ximenez had to bend over, spread her buttocks apart, and cough, while Mireles inspected that area.

After the search concluded, Mireles informed Ximenez, who was still visibly distraught, that she could get dressed. Mireles then informed Sparks and the agents that the results of the search were negative.

Gold again entered the interview room. A distraught Ximenez demanded to know why she had been searched. In response, Gold asked who might be trying to hurt her. Ximenez mentioned internal "bickering [among coworkers] about unfair workloads," and Gold prodded her not to think of coworkers but instead to think about inmates and recent events in which she may have been involved. Ximenez gave him the names of three or four inmates who might want to harm her. Sparks entered the room and offered to accompany Ximenez back to her worksite. Ximenez was crying, and Sparks offered to call a peer support counselor for her.

DISCUSSION

Although the Board reviews exceptions to a proposed decision de novo, to the extent that a proposed decision adequately addresses issues raised by certain exceptions, the Board need not further analyze those exceptions. (*City of Calexico* (2017) PERB Decision No. 2541-M, pp. 1-2.) The Board also need not address alleged errors that would not impact the outcome. (*Los Angeles Unified School District* (2015) PERB Decision No. 2432, p. 2; *Regents of the University of California* (1991) PERB Decision No. 891-H, p. 4.)

At the outset of our analysis, we briefly summarize applicable law regarding a state employee's right to request that a union representative be present for certain interactions with management, as well as an exclusive representative's right to represent employees in such circumstances. These rights derive from Dills Act section 3515, which guarantees employees the right to "participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations," and from section 3515.5, which guarantees an exclusive representative's right to represent unit employees in their relations with the state employer. An investigatory or disciplinary interview falls within the broad definition of "all matters of employer-employee relations," and section 3515 therefore guarantees state employees representational rights that are at least as broad as those afforded private-sector employees under *NLRB v. J. Weingarten, Inc.* (1975) 420 U.S. 251 (*Weingarten*) and other federal authorities interpreting section 7 of the National Labor Relations Act (NLRA). (*Capistrano Unified School District* (2015) PERB Decision No. 2440, p. 11 (*Capistrano*); *State of California (Department of Forestry)* (1988) PERB Decision No. 690-S (*Department of Forestry)*, adopting proposed decision at pp. 7-9.)

In *Weingarten*, the Supreme Court affirmed a decision by the National Labor Relations Board (NLRB) that an employer must grant an employee's request to have a union

representative present at an investigative interview which the employee reasonably believes may result in discipline. (*Weingarten*, *supra*, 420 U.S. at p. 257.) PERB and California courts recognize that, in at least several respects, the language of our state collective bargaining laws is "considerably broader than the federal law on which *Weingarten* rests." (*Capistrano*, *supra*, PERB Decision No. 2440, p. 13; *Redwoods Community College District v. PERB* (1984) 159 Cal.App.3d 617, 623; *Placer Hills Union School District* (1984) PERB Decision No. 377, p. 40 (*Placer Hills*).) Where California law provides for "broader or additional rights not found in the federal private-sector law, PERB must follow the intent of the Legislature to effectuate the purpose of the [state] statute." (*Capistrano*, *supra*, PERB Decision No. 2440, p. 16.)

We have therefore held that "not all meetings with management must conform to the requirements of *Weingarten* before the right to representation attaches." (*Capistrano*, *supra*, PERB Decision No. 2440, p. 13 and p. 29, fn. 15 [the *Weingarten* line of cases under federal law is illustrative, but not exhaustive, of the representational rights of employees under California statutory and decisional law].) For example, California law extends the right of representation to interactive process meetings pertaining to an employer's duty to provide reasonable accommodations, as well as to employer-initiated meetings held under "highly unusual circumstances," even if such meetings are not "investigative" or "disciplinary." (*Sonoma County Superior Court* (2015) PERB Decision No. 2409-C, p. 8; *Capistrano*, *supra*, PERB Decision No. 2440, p. 13, and cases cited therein.)

To prove a violation of the right to representation during an investigatory or disciplinary meeting, the charging party must demonstrate that: (1) the employee requested representation either directly or through the representative; (2) for an investigatory meeting; (3) which the employee reasonably believed might result in disciplinary action; and (4) the

employer denied that request. (*Capistrano*, *supra*, PERB Decision No. 2440, p. 16, citing *Lake Elsinore Unified School District* (2004) PERB Decision No. 1648, p. 5 (*Lake Elsinore*); *Fremont Union High School District* (1983) PERB Decision No. 301, pp. 9-10; *Social Workers' Union, Local 535 v. Alameda County Welfare Dept.* (1974) 11 Cal.3d 382.) The same elements are sufficient to show both that an employer violated the employee's right to be represented and the union's right to represent the employee. (*Capistrano*, *supra*, PERB Decision No. 2440, p. 14, citing *State of California (Department of Parks and Recreation)* (1990) PERB Decision No. 810-S, pp. 6-7; *California State University, Long Beach* (1991) PERB Decision No. 893-H, p. 23 (*CSU Long Beach*).)

It is undisputed that Ximenez requested union representation at the time that she learned that Officers Mireles and Fay sought her cooperation in an unclothed body search, and that CDCR denied her request. CDCR contends that Ximenez was not entitled to representation and that she waived any right she may have had when she consented to go forward with the search. We turn now to these arguments.

I. Ximenez Was Entitled to Representation Prior to and During the Invasive Body Search

CDCR argues that "there was no investigatory interview, and thus no need for the assistance of a representative to assist in a 'confrontation' between employer and employee." We disagree.

The ALJ relied on *Manhattan Beer Distributors LLC* (2015) 362 NLRB No. 192, enf'd. mem. (2d Cir. 2016) 670 Fed.Appx. 33 (*Manhattan*), to support his finding that Ximenez had a right to union representation prior to and during the search. In *Manhattan*, the NLRB reaffirmed that "[w]here an employer insists that an employee submit to a drug and/or alcohol test as part of an investigation into an employee's alleged misconduct, the employee has a right to union representation before consenting to take the test." (*Id*. at p. 2, citing *Safeway Stores*

(1991) 303 NLRB 989; *System 99* (1988) 289 NLRB 723, 727 (*System 99*); see also *Ralph's Grocery Co.* (2014) 361 NLRB No. 80 [employer violated employee's right to representation by requiring him to submit to a drug and alcohol test, notwithstanding his request for *Weingarten* representation].) In such circumstances, the employee is entitled to the presence of a union representative in order to provide advice and active assistance. (*Manhattan*, *supra*, 362 NLRB No. 192, p. 3, citing *Weingarten*, *supra*, 420 U.S. at p. 260; *Washoe Medical Center* (2006) 348 NLRB 361; *Barnard College* (2003) 340 NLRB 934.) In advance of a reasonable suspicion drug test, a union representative can observe the employee's physical condition (which often gives rise to the reasonable suspicion to order the test), advise the employee as to whether to consent to the test (and the consequences for not consenting), describe the drug testing procedural protocols, and ensure or determine if they are followed. (*Manhattan*, *supra*, 362 NLRB No. 192, p. 3.)

CDCR contends that *Manhattan* is inapposite because its agents were performing what it calls "a pure search,"[8] and intended to interrogate Ximenez only if contraband were found. CDCR's position is not in line with our precedent regarding what constitutes an "investigatory" meeting and when representational rights attach.

Following NLRB law, in *Rio Hondo Community College District*, PERB Decision No. 260 (*Rio Hondo*), we reaffirmed that the right to union representation applies to a disciplinary interview, whether labeled investigatory or not, so long as the interview in question is not merely for the purpose of informing the employee that she is being disciplined. (*Capistrano*, *supra*, PERB Decision No. 2440, p. 20; *Rio Hondo*, *supra*, PERB Decision No. 260, pp. 17-19, citing with approval *Baton Rouge Water Works Co.* (1979) 246 NLRB 995, 997; see also *State of California (Department of Corrections)* (1998) PERB Decision

[8] CDCR deems a "pure search" one in which no interview or questioning is contemplated.

No. 1297-S, adopting proposed decision at p. 12.) In *Capistrano* we again addressed the issue of what constitutes an "investigatory" meeting:

> As explained in *County of Santa Clara* (2012) PERB Decision No. 2267-M, regardless of how a meeting may be characterized or envisioned by management, if it serves to elicit incriminating evidence with the potential to impact the employment relationship, then it is "investigatory" for the purposes of the representational rights guaranteed by the PERB-administered statutes.

(*Capistrano*, *supra*, PERB Decision No. 2440, p. 20 [citing *County of Santa Clara*, *supra*, PERB Decision No. 2267-M, adopting proposed decision at pp. 19-20].)

Here, the purpose of the meeting was clearly investigatory: to determine whether Ximenez was smuggling drugs into the prison, and not simply to deliver notice of discipline. (*Capistrano*, *supra*, PERB Decision No. 2440 at p. 21; *Rio Hondo*, *supra*, PERB Decision No. 260, adopting proposed decision at pp. 17-18; accord *Lake Elsinore*, *supra*, PERB Decision No. 1648, p. 7 [if employer engages in any conduct beyond merely informing the employee of a previously made disciplinary decision, the full panoply of protections accorded the employee under *Weingarten* may be applicable].) As the NLRB found in *Manhattan*, an invasive search of an employee's person, including an unclothed body search, is always part of an employer investigation. As in a drug testing situation, an invasive body search is such an unusual and stressful situation that an employee is likely to volunteer information in an effort at self-defense, and therefore has a right to union representation even if the employer does not intend to ask questions. The right to union representation therefore attaches *before* an employee is invasively searched, just as it attaches before an employee takes a drug or alcohol test. (*Manhattan*, *supra*, 362 NLRB No. 192, p. 2 ["[w]here an employer insists that an employee submit to a drug and/or alcohol test as part of an investigation into an employee's

alleged misconduct, the employee has a right to union representation before consenting to take the test"].)

Our holding is also premised on the fundamentally confrontational nature of any invasive body search, as well as the fact that many people might infer guilt—rightly or wrongly—from an employee's hesitation or refusal to comply with such a search. In *System 99*, *supra*, 289 NLRB 723, the NLRB found that a sobriety test is similarly confrontational. The employer's testing has an investigative quality, particularly given that it poses to the employee an implicit question: "Will you submit to a sobriety test?" (*Id*. at p. 727 [employee's refusal to accept the invitation to take the sobriety test would be seen as an "admission" for disciplinary purposes equal in strength to an employee's outright admission of misconduct in a meeting called to investigate whether the employee had engaged in misconduct].) As the NLRB explained in *System 99*:

> Where, as here, an employee is advised by his employer—and therefore he "reasonably believe[s]"—that he may be disciplined if he refuses to submit to a proposed set of tests, there appears to be no reason for concluding that he should not be entitled to the services of [a] representative before deciding what he will do. Indeed, it is commonplace for employers to tell employees that their "rights" in a given situation are limited to a single set of alternatives. And it is equally a phenomenon common to industrial life that employees will mistrust such "either/or" statements as correctly expressing their legal or contractual options. It is therefore evident that, as an exercise of the Section 7 right of employees to engage in mutual aid and protection, an employee may wish to consult with an employee representative before accepting an employer's ultimatum; and, being denied that request, that he may wish to "dummy up" in the face of further attempts by his employer to question him.

(*Ibid*.)[9]

[9] Our cases hold that an employee has the right to consult with a union representative prior to taking other actions which may have an impact on significant terms and conditions of employment. (*Sonoma County Superior Court* (2017) PERB Decision No. 2532-C, pp. 18-19, citing with approval *Placer Hills*, *supra*, PERB Decision No. 377, p. 37 [right to consult with a

The instant facts further support our holding. A union representative could have asked to review the search authorization ostensibly signed by Ximenez upon her hiring,[10] advised her as to whether to consent to the search (and the range of possible or likely consequences for not consenting), described the search procedural protocols, and ensured or determined if they were followed.

Ximenez also would have benefitted from a union representative's presence even after the search produced no contraband. As every percipient witness testified, Ximenez, who had never been subject to discipline or been questioned before by prison authorities, was visibly upset, tearful, agitated, and by all rights scared and humiliated by the process. Indeed, Ximenez testified that she felt "cornered" and afraid her failure to submit to the search would be seen as an admission of guilt. The *Weingarten* rule exists to protect and assist employees in the face of such trying circumstances.[11] (See, e.g., *Capistrano*, *supra*, PERB Decision No. 2440, p. 32 [the *Weingarten* rule was specifically fashioned to protect "fearful" or "inarticulate" employees during work-related interviews, quoting *Weingarten*, *supra*, 420 U.S. at pp. 262-263].)

We therefore hold that the right to union representation attaches whenever an employer demands that an employee submit to an invasive body search, or subjects an employee to such a search.

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union representative when employee asked to supply immediate response to the material placed in his/her personnel file].)

[10] CDCR did not show Ximenez the authorization, and she did not ask to see it.

[11] An employer is not required to postpone indefinitely an invasive search. Rather, an employer must afford the employee a reasonable period of time to obtain union representation. Because Ximenez was denied the right to contact a union representative, the issue of what amount of time is reasonable is not before us. (See *Manhattan*, *supra*, 362 NLRB No. 192, p. 4.) To the extent that the proposed decision can be read to suggest that an employee and her union lose representational rights if invoking those rights would require the employer to delay an invasive body search until after the end of a shift, we do not adopt that suggestion.

II. Ximenez Did Not Waive Her Right to Union Representation by Acknowledging CDCR's Policy Regarding Employee Searches or by Acceding to the Unclothed Body Search After the Employer Denied Her Right to Representation

CDCR excepts to what it deems "the ALJ's failure to address its affirmative defense that the employee consented to the search without the presence of a union representative." We do not find that Ximenez waived her right to such representation.

Form 894-A, which Ximenez was required to sign in order to receive her CDCR identification, does not contain an express waiver of a right to union representation, or indeed refer to union representation at all. By signing the form, Ximenez merely acknowledged her understanding that she is "subject to search at any time while on state grounds." The bare acknowledgement of such an eventuality does not by itself strip employees—or exclusive representatives, for that matter—of their representational rights. (*Capistrano*, *supra*, PERB Decision No. 2440, p. 41; *Mt. San Antonio Community College District* (1982) PERB Decision No. 224, p. 12 [waiver of statutory rights must be "clear and unmistakable"].)[12]

CDCR has not met its burden to show that Ximenez voluntarily agreed to continue with the invasive body search without representation. Once an employee communicates a request for representation, the employer must: "(1) grant the request; (2) dispense with or discontinue the interview; or (3) offer the employee the choice of continuing the interview unaccompanied by a union representative or of having no interview at all, and thereby dispensing with any benefits which the interview might have conferred on the employee." (*CSU Long Beach*, *supra*, PERB Decision No. 893-H, adopting proposed decision at p. 20, citing *Roadway*

[12] Even if the form did purport to waive an employee's *Weingarten* rights with respect to searches conducted on the department's premises, requiring employees to sign such a waiver would be ineffective and, indeed, would constitute an independent unfair practice. (*State of California (California Correctional Health Care Services)* (2015) PERB Decision No. 2465-S, adopting proposed decision at p. 19 [employer rule unlawful if it explicitly restricts statutorily protected rights, has been applied in a manner that restricts such rights, or could be construed as doing so].)

Express, Inc. (1979) 246 NLRB 1127, 1129; *County of San Bernardino (Office of the Public Defender)* (2015) PERB Decision No. 2423-M, p. 38, fn. 20.) "The employer, however, may not continue the interview without granting the requested union representation unless the employee 'voluntarily agrees to remain unrepresented after having been presented by the employer with the choices' described above or 'is otherwise made aware of these choices.'" (*CSU Long Beach*, *supra*, PERB Decision No. 893-H, adopting proposed decision at p. 20, quoting *U.S. Postal Service* (1979) 241 NLRB 141.) Here, none of the CDCR investigators or officers informed Ximenez that she had a choice between submitting to the search without union representation or foregoing the search. Nor is there any indication that Ximenez was aware of these options. On the contrary, she testified that after being denied the right to union representation—first by Sparks and then by Gold—she complied because she felt that she was "cornered," that her job was in jeopardy, and that not complying would "be like an automatic guilt of some kind, and I didn't want them to think I was hiding anything, but I just felt like I had no way out." Under these circumstances, she did not waive her right to have union representation prior to or during the search.

In sum, there was nothing "voluntary" in Ximenez's submission to the invasive body search, and Ximenez did not waive her right to representation. (*Capistrano*, *supra*, PERB Decision No. 2440, p. 42, citing *Lake Elsinore*, *supra*, PERB Decision No. 1648, pp. 8-9.) Because CDCR continued the interrogation after Ximenez requested representation, CDCR effectively denied the request, thereby committing an unfair practice. (*Capistrano*, *supra*, PERB Decision No. 2440, p. 41, citing *CSU Long Beach*, *supra*, PERB Decision No. 893-H, adopting proposed decision at pp. 20, 22, 24.)

We therefore affirm the ALJ's conclusion that CDCR denied Ximenez her right to union representation prior to and during the invasive body search on July 1, 2015, and the

ALJ's further conclusion that CDCR simultaneously denied CAPT its right to represent Ximenez before and during the search.

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, it is found that the State of California (Department of Corrections and Rehabilitation) (CDCR) violated the Ralph C. Dills Act (Dills Act), Government Code section 3519, subdivisions (a) and (b), when it denied Amy Ximenez's request to be represented by a California Association of Psychiatric Technicians (CAPT) representative on July 1, 2015, prior to and during an invasive body search. This conduct by CDCR interfered with Ximenez's right to be represented by CAPT and CAPT's right to represent its unit member, Ximenez.

Pursuant to section 3541.5, subdivision (c), of the Government Code, it is hereby ORDERED that CDCR and its representatives shall:

A. CEASE AND DESIST FROM:

1. Interfering with employees' right to have a union representative present prior to and during an invasive body search.

2. Denying CAPT the right to represent employees in Bargaining Unit 18.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE ACT:

1. Within ten (10) workdays following the date this decision is no longer subject to appeal, post at all work locations at California State Prison, Sacramento, where notices to employees represented by CAPT customarily are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the CDCR, indicating that it will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. In addition to physical posting of paper notices, the Notice shall be posted by electronic message, intranet, internet site, and

other electronic means customarily used by CDCR to communicate with its employees in the bargaining unit represented by CAPT. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced, or covered with any other material.

2. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of the Public Employment Relations Board (PERB or Board), or the General Counsel's designee. CDCR shall provide reports, in writing, as directed by the General Counsel or his designee. All reports regarding compliance with this Order shall be concurrently served on CAPT.

Members Banks and Shiners joined in this Decision.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD
An Agency of the State of California

After a hearing in Unfair Practice Case No. SA-CE-2047-S, *California Association of Psychiatric Technicians v. State of California (Department of Corrections and Rehabilitation)*, in which all parties had the right to participate, it has been found that the State of California (Department of Corrections and Rehabilitation) violated the Ralph C. Dills Act (Dills Act), Government Code section 3519, subdivisions (a) and (b), when it interfered with its employee's right to be represented by the California Association of Psychiatric Technicians (CAPT) and with CAPT's right to represent the employee, by denying the employee's request to be represented by a CAPT representative on July 1, 2015, prior to and during an invasive body search.

As a result of this conduct, we have been ordered to post this Notice and we will:

A. CEASE AND DESIST FROM:

1. Interfering with employees' right to have a union representative present prior to and during an invasive body search.

2. Denying CAPT the right to represent employees in Bargaining Unit 18.

Dated: _____

STATE OF CALIFORNIA (DEPARTMENT OF CORRECTIONS AND REHABILITATION)

By: _____
Authorized Agent

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR AT LEAST THIRTY (30) CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE REDUCED IN SIZE, DEFACED, ALTERED OR COVERED WITH ANY OTHER MATERIAL.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA ASSOCIATION OF PSYCHIATRIC TECHNICIANS, Charging Party, v. STATE OF CALIFORNIA (DEPARTMENT OF CORRECTIONS & REHABILITATION), Respondent.	UNFAIR PRACTICE CASE NO. SA-CE-2047-S PROPOSED DECISION (June 28, 2016)

Appearances: Sean H. Bedrosian, Attorney and Consultant, for the California Association of Psychiatric Technicians; California Department of Human Resources, by Stanley R. Marubayashi, Labor Relations Counsel, for State of California (Department of Corrections & Rehabilitation).

Before Shawn P. Cloughesy, Chief Administrative Law Judge.

INTRODUCTION

This case alleges that a state employer denied a state employee the right to a union representative during an unclothed body search and thereby violated the Ralph C. Dills Act[1] (Dills Act) by interfering with state employee rights. The employer denies committing any unfair practice.

PROCEDURAL HISTORY

On July 21, 2015, the California Association of Psychiatric Technicians (CAPT) filed an unfair practice charge (charge) against the State of California (Department of Corrections & Rehabilitation) (CDCR). The charge alleged, inter alia, that CDCR denied a psychiatric

[1] Unless otherwise indicated, all statutory references are to the Government Code. The Dills Act is codified at Government Code section 3512 and following.

technician's right to a union representative during an unclothed body search and unilaterally changed its policy when it did not conduct the search "in accordance with the CDCR Operations Manual."

On September 25, 2015, the Office of General Counsel of the Public Employment Relations Board (PERB) issued a complaint alleging that CDCR violated Dills Act section 3519, subdivisions (a), (b), and (c), on July 1, 2015, by refusing to permit a psychiatric technician to have a union representative during an unclothed body search, and that CDCR unilaterally changed its policy by allowing unclothed body searches of departmental employees when it did not do so before, without meeting and conferring with the exclusive representative.

On October 15, 2015, CDCR answered the complaint by denying any violation of the Dills Act and alleging multiple affirmative defenses. On October 20, 2015, an informal conference was conducted, but the matter was not resolved.

Motion to Amend the Complaint

On February 9, 2016, a prehearing conference was conducted where the parties discussed CDCR's statutory, regulatory, and departmental authority to conduct unclothed body searches and whether there was a need to preserve the confidentiality of the department's confidential informant and the name of the employee searched. CAPT stated that it would be filing a motion to amend the complaint which more accurately reflected the charge that was filed with PERB.

On or about February 16, 2016, CAPT requested to amend paragraphs 8 and 9 of the complaint (unilateral change in policy allegation) to read:

> 8. Before July 1, 2015, Respondent did not subject employees to strip searches without reasonable suspicion that they are involved in the unauthorized or unlawful possession or movement of anything into or out of an institution, and without notifying the employee of the reason for the search and the name of the official ordering the search before the search begins.
>
> 9. On or about July 1, 2015, Respondent changed this policy by instituting a policy where employees could be strip searched without reasonable suspicion that they are involved in the unauthorized or unlawful possession or movement of anything into or out of an institution, and without notifying the employee of the reason for the search and the name of the official ordering the search before the search begins.

CAPT argued that CDCR was not prejudiced as the amendment related back to the language in the original charge, which stated in pertinent part:

> [T]he search was not done in accordance with the CDCR Operations Manual, as there was absolutely no reasonable suspicion and the proper procedures were not followed.

On February 18, 2016, CDCR filed its opposition to the amendment of the complaint requesting that the proposed amendment be denied. Specifically, among other arguments, CDCR argued that CAPT did not allege facts sufficient to show that the alleged unilateral change of policy was anything more than an isolated breach, and that the policies involved were fundamental managerial or policy decisions which fell outside of the scope of representation.

On February 19, 2016, a prehearing conference was conducted regarding the motion to amend the complaint. The ALJ found that the level of causation/suspicion required for the employer to order an unclothed body search of an employee (no cause, reasonable suspicion, or probable cause) constituted a fundamental managerial or policy decision for which the employer must have unencumbered decision-making authority and, therefore, fell outside the scope of representation, especially as it concerned the public sector law enforcement agency's

ability to conduct internal investigations or dictate the manner in which it enforced the laws in which it was charged with enforcing. (*Association of Orange County Deputy Sheriffs v. County of Orange* (2013) 217 Cal.App.4th 29, 45; *Association for Los Angeles Deputy Sheriffs v. County of Los Angeles* (2008) 166 Cal.App.4th 1625, 1644; *San Jose Peace Officer's Association v. City of San Jose* (1978) 78 Cal.App.3d 935, 946.)

While the ALJ acknowledged that the employee notification provisions of the policy as to the disclosure of the reason for the unclothed body search and the name of the official authorizing the order of the unclothed body search were closer to matters which fell within the scope of representation, the allegation set forth in the original charge constituted an isolated breach of a policy, rather than a repudiation of a policy. When the dispute surrounds the "application of" and not a "change" of the terms of a policy, then a change in policy is not found, as it has not been demonstrated to have a generalized effect or continuing impact on terms and conditions of employment of bargaining unit members. (*City of San Juan Capistrano* (2012) PERB Decision No. 2238-M, p. 4.) As a result, the Administrative Law Judge denied the motion to amend the complaint, stating among other things, that the language set forth in the original charge did not demonstrate that "the proper procedures not being followed" was anything more than an isolated breach.

Formal Hearing

Formal hearings were conducted on February 22 and 23, 2016. The matter was submitted upon the receipt of reply briefs on May 6, 2016.

FINDINGS OF FACT

CDCR is a state employer within the meaning of Dills Act section 3513, subdivision (j). California State Prison, Sacramento (CSP Sacramento) is a state prison within CDCR. (Penal

Code, § 5003.) CAPT is a recognized employee organization within the meaning of Dills Act section 3513, subdivision (b), and exclusively represents statewide Bargaining Unit 18 (Psychiatric Technicians). Amy Ximenez (Ximenez) is a state employee within the meaning of Dills Act section 3513, subdivision (c), and for all times pertinent was employed as a Psychiatric Technician.

Statutory, Regulatory, and Departmental Authority to Conduct Unclothed Body Searches

Penal Code section 6402, provides in part:

> The Department of Corrections and Rehabilitation (CDCR) shall develop policies related to the department's contraband interdiction efforts for individuals entering CDCR detention facilities. When developed, the policies shall include, but not be limited to, the following specifications:
>
> (a) Application to all individuals, including visitors, all department staff, including executive staff, . . .
>
> [¶ . . . ¶]

Cal. Code Regs., tit. 15, §§ 3270, 3410, and 3410.1, provide in pertinent part:

> **3270 General Policy.**
>
> The primary objectives of the correctional institutions are to protect the public by safely keeping persons committed to the custody of the Secretary of Corrections and Rehabilitation, and to afford such persons with every reasonable opportunity and encouragement to participate in rehabilitative activities. . . .
>
> **3410 Intoxicants and Drugs.**
>
> [¶ . . . ¶]
>
> (c) Employees must not bring any kind of alcoholic beverage or any kind of drugs upon the grounds of an institution, . . . unless specifically authorized to do so by the warden, ...
>
> (d) Any employee obtaining for, or delivering to, an inmate or parolee any alcoholic preparations of any kind, or a drug of any type, except as specifically authorized by the warden,

> superintendent or regional parole administrator, will be subject to dismissal from service and to prosecution by the district attorney.
>
> **3410.1 Search of Employees, Contractors, Attorneys, and Volunteers for Contraband and Illegal Drugs.**
>
> (a) All persons who are employed by the department, . . . who come onto institutional grounds are subject to a search of their person, private property, and vehicles for contraband and illegal drugs before entering, or while inside, any department facility or department grounds via the use of contraband and/or metal detection equipment and/or electronic drug detectors including, but not limited to, ION scanners and other available contraband and/or metal detecting device(s) technology, and passive alert canine may be used for this purpose.
>
> (b) By entering or attempting to enter a department facility or department grounds, employees, . . . consent to being searched for contraband or drugs.

(Emphasis added.)

The CDCR Departmental Operations Manual (DOM) sets forth the following policies regarding conducting searches of employees.[2] Specifically, DOM section 52050.15 provides in pertinent part:

> As with all persons who come on the grounds or into the institutions and facilities of the Department, all persons employed by the Department are subject to inspection and search of their person, property, and vehicles, to the extent deemed necessary by the official in charge. Consent to search is a condition of employment which may not be withdrawn while in or on the grounds of an institution or facility of the Department.
>
> - The appropriate supervisor/administrator shall inform each new employee of departmental consent to search policy.
>
> - An employee may be subjected to a more intensive search than is normally required when the official in charge has

[2] Upon CDCR's motion and with no objection from CAPT, the ALJ took official notice of the entire DOM.

reasonable suspicion that the employee is involved in the unauthorized or unlawful possession or movement of anything into or out of an institution or facility of the Department. Such an intensive search may include the employee's person, vehicle, and any locker, desk, or storage space assigned to or used by the employee.

- When the intensive search includes the employee's assigned locker, desk, or storage space provided by the Department, it shall be searched in the employee's presence, or with his/her consent, or with prior notification that a search will be conducted,[3] or after a valid search warrant has been obtained. Whenever possible the employee shall be present during the search.

- When an employee is subjected to a more intensive search than is normally required,[4] the employee shall be informed of the reason for the search and of the name of the official ordering the search before the search begins.

- Any search of an employee's person which involves the touching of the employee's clothed body or visual inspection of the employee's unclothed body shall be conducted in private and out of the sight and hearing of other employees and inmates. Such searches shall only be conducted, observed, and supervised by officials of the same sex as the employee.

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[3] The Firefighters Procedural Bill of Rights Act (FPBR), Government Code section 3250, et seq. and the Public Safety Officers Procedural Bill of Rights Act (PSOBR), Government Code section 3300, et seq. set forth rights of firefighters and peace officers in California regarding employer's searches and interrogations. The purpose of both statutes is to promote the maintenance of stable employee-employer relations between firefighters/peace officers and their employers. (Government Code section 3301.) Specifically, sections 3259 and 3309 provides that a firefighter/peace officer shall not have his or her locker or space for storage searched "except in his presence, or with his consent, or unless a valid search warrant has been obtained or where he has been notified that a search will be conducted." Both the FPBR and the PSOBR do not set forth a specific right to the physical presence of an employee representative for these types of searches, but only the right to be present or notified.

[4] The DOM sets forth three primary types of searches which are conducted on a person by another departmental employee: a clothed body search, an unclothed body search, and a body cavity search. (DOM sections 52050.16.3 through 52050.19.) A body cavity search must be performed by a physician and not by correctional personnel.

(Emphasis added.)

The DOM also contains sections regarding the implementation of canine searches (DOM section 52050.27.1) and electronic drug detection equipment such as ion scanners (DOM section 52050.28.5.). Alerts or positive scans can result in more invasive follow-up searches.

It is a felony for a departmental employee to possess or bring controlled substances into a penal institution, or to, sell or give away controlled substances to an inmate incarcerated in a penal institution. (Penal Code sections 4573, 4573.6, and 4573.9.) Additionally, the DOM contains a section regarding standardized disciplinary penalties for employees. (DOM section 33030.19.) The base penalty[5] issued to a departmental employee for bringing contraband into the security area of a prison for an inmate and/or for personal gain is dismissal from state service.

CDCR Office of Internal Affairs

The CDCR Office of Internal Affairs (OIA) is the investigative arm of the department which conducts both criminal and administrative investigations on departmental employees. The investigators, Special Agents, are assigned to criminal or administrative units and are supervised by Senior Special Agents. An OIA Special Agent-in-Charge supervises a regional office of investigations.

DOM sections 31140.20 and 31140.21 provide the following parameters regarding criminal and administrative employee investigations:

[5] A "base" penalty represents the starting point as to the level of penalty to be issued to the employee by the hiring authority before considering mitigating or aggravating circumstances.

31140.20 Criminal Investigations

A criminal investigation should be conducted for an allegation of employee misconduct when there is reason to believe the employee has committed a violation of criminal law and an outside law enforcement agency is not conducting an investigation. The [Central Intake Unit] shall identify and document the potential criminal violation and the facts and evidence represented in support of the complaint. . . .

. . . Upon completion of the investigation, if probable cause exists to believe that a crime has been committed, the investigation shall be referred to the appropriate agency for prosecution.

Criminal investigations shall be conducted in compliance with all laws, regulations, and departmental policies.

31140.21 Administrative Investigations

An administrative investigation shall be conducted into allegations of staff misconduct that are violations of policy, procedure, or law. Administrative investigations may be conducted concurrently or subsequent to a criminal investigation. . . . An administrative investigation, adverse action, or both, shall not be delayed unless it clearly would jeopardize the criminal prosecution.

In an administrative investigation, an employee does not have a right to refuse to answer questions likely to lead to the discovery of relevant evidence as determined by the investigating entity. When the employee is compelled to answer these questions, the answers cannot be used against the employee in a criminal or state court civil proceeding subject to certain exceptions. In an administrative investigation of a peace officer involving possible criminal conduct, the peace officer shall be advised of his/her constitutional rights before questioning, followed by the "Lybarger warning"[6] if he/she refuses to answer the questions on the grounds the answer may be self-incriminating. (Refer to Government Code Section 3303 (f) and (h).)[7]

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[6] The warning is named after the California Supreme Court case *Michael Lybarger v. City of Los Angeles et al.,* (1985) 40 Cal.3d 822, 829-830 (*Lybarger*).

[7] These Government Code sections are part of the PSOBR.

(Emphasis added.)

An OIA investigation begins with the hiring authority requesting OIA to investigate a matter by completing Form 989 which sets forth criminal and/or administrative allegation(s) committed by an employee. The request for investigation is forwarded to the Central Intake Unit. The Central Intake Unit is comprised of a multi-disciplinary panel of staff from the Office of Inspector General (OIG),[8] the CDCR Vertical Advocates,[9] and the OIA. Within 30 days, the panel decides whether to investigate the matter, and whether to characterize the investigation as criminal, administrative, or both. The investigation is then assigned to an OIA Special Agent. On occasion, due to the need for the OIA to act quickly as a result of a tip that a crime or administrative violation is going to be committed, an "exigent case" is opened and a Special Agent is assigned to conduct a search and/or an interview.

When the subject of the investigation is interviewed during a criminal investigation, the subject is either given a *Miranda* admonition[10] (the subject has the right to remain silent and the right to an attorney - when the subject is in custody) or a *Beheler* admonition[11] (the subject is free to leave and does not have to answer any questions - when the subject is not in custody). If the employee exercises his *Miranda* or *Beheler* rights by not answering any questions, the

[8] Penal Code section 6125, et seq., gives the OIG statutory authority over the internal affairs investigation and disciplinary processes of CDCR employees.

[9] A vertical advocate is defined by the DOM as a CDCR employment law attorney, within the Employment Advocacy and Prosecution Team, who is assigned to one or more hiring authority locations to consult with CDCR investigators and hiring authorities (i.e., wardens) concerning investigative findings, disciplinary decisions, and the prosecution of those disciplinary decisions. (DOM sections 31140.3 and 31140.4.13.)

[10] *Miranda v. Arizona* (1966) 384 U.S. 436.

[11] *California v. Beheler* (1983) 463 U.S. 1121.

criminal investigative interview is concluded. However, if the employee voluntarily answers the questions of the Special Agent, those non-coerced statements can also be used in an administrative investigation.

In an administrative investigation, an employee must answer questions from an OIA Special Agent, under the threat of insubordination. The hiring authority can take disciplinary action against an employee for refusing a lawful order to answer questions. However, the coerced statement cannot later be used in a criminal proceeding. (*Lybarger*, *supra*, 40 Cal.3d 822, 829-830.)

After an OIA Special Agent conducts the investigation (criminal or administrative) and prepares an investigative report, the report is forwarded to the hiring authority to make the decision as to whether to take disciplinary action against the employee. The OIA criminal investigative report is forwarded to the appropriate prosecutorial agency (district attorney's office) for that prosecuting agency's decision as to whether the employee should be prosecuted.

Some employee offenses, such as the trafficking of narcotics, can lead to both criminal prosecution and disciplinary action. If an employee refuses an order to be searched, the employee can be restricted from returning to institutional grounds and the hiring authority can take disciplinary action against the employee for refusing a lawful instruction.[12]

[12] The standardized base penalty listed for an employee's failure to follow lawful instructions or refusal to act as lawfully directed by a supervisor or higher ranking official is a salary reduction or punitive suspension. (DOM sections 33030.16 and 33030.19.) That base penalty can be increased due to aggravating factors. (DOM section 33030.18.)

Ximenez

Ximenez has been employed as a psychiatric technician with the State of California since July of 2005. She began state employment working for Coalinga State Hospital. She later transferred to CSP Sacramento.

On or about August 1, 2007, Ximenez signed a preprinted form (CDC 894-A or 894-A form) in order to obtain her CDCR identification. The form stated in pertinent part:

> No employee shall take, carry, convey, or make accessible to any inmate within a Department facility any intoxicant, opiate, narcotic, drug, or any other contraband articles, nor traffic with any inmate in any manner. Violation of this rule is a felony punishable by imprisonment.
>
> [¶ . . . ¶]
>
> No employee or person shall be permitted to receive or give, buy or sell, or trade any article with any inmate for any reason whatsoever.
>
> [¶ . . . ¶]
>
> It is your duty to read and be guided by the rules while working in the Department's facilities.
>
> I have read and understood the above rules and shall govern myself accordingly while employed at this facility. I understand that I am subject to search at any time while on department grounds.

(Emphasis added.)

Ximenez is assigned to Facility A. She is a group facilitator who works with mental health inmates to assist them by giving them coping skills, such as anger management. She has no disciplinary record and has not received a negative performance evaluation. She has never been interviewed by a CDCR investigator.

Inmate Informant Tip

On Friday, June 26, 2015, the CSP Sacramento Investigative Services Unit[13] (ISU) Sergeant received a written note from an inmate informant that the informant had observed physical contact between Ximenez and specific inmates in the program. The informant stated that on July 1, 2015, Ximenez was going to bring into the prison a powder form of narcotic. The note and a request for investigation were eventually forwarded to Senior Special Agent Ernie McCoy (Senior Agent McCoy). Senior Agent McCoy opened an "exigent" criminal investigation and assigned Special Agents Antonio Gold (Agent Gold) and Chuck King (Agent King) of the OIA criminal investigation team to conduct a search of Ximenez's person, bags, and vehicle when she reported for work at the institution on July 1, 2015. No interview was to be conducted.

Prior to July 1, 2015, Agents Gold and King conducted a brief background investigation on both Ximenez and the inmate informant. This background investigation included checking Ximenez's criminal database information, personnel file, and personal social media site. As to the inmate, Agent Gold checked whether the inmate informant had provided credible information to staff in the past or provided inaccurate information. Agent Gold could not find any information which would discredit the inmate informant.[14] Agent Gold also obtained Ximenez's signed 894-A form in order to provide to Ximenez, if needed.

[13] ISU is responsible for the investigation of inmates at CSP Sacramento. ISU also acts as a liaison between CSP Sacramento and OIA investigators coming to the prison to conduct investigations on employees. ISU Lieutenant Robert Sparks (Lt. Sparks) is the highest ranking uniformed officer within the unit who reports directly to the Chief Deputy Warden and Warden of CSP Sacramento.

[14] This proposed decision does not express any opinion as to whether CDCR had the requisite reasonable suspicion to conduct the unclothed body search, as that matter is not before PERB.

Prior to July 1, 2015, Senior Agent McCoy contacted ISU Lt. Sparks and notified him that OIA agents would be coming to CSP Sacramento on July 1, 2015, and Lt. Sparks should arrange that Ximenez be stopped at the pedestrian entrance gate to Facilities A/B at the beginning of Ximenez's shift.

July 1, 2015: Unclothed Body Search of Ximenez

On July 1, 2015, at approximately 0640 hours Agents Gold and King and Lt. Sparks met at the Facility A/B pedestrian gate. Ximenez drove into the prison parking lot at approximately 0740 hours, exited her vehicle, and approached the pedestrian gate. After clearing the gate, Ximenez started walking towards Facility A as it was in the direction of her work location. Agent Gold verbally called Ximenez by her first name and Ximenez stopped. Agents Gold and King approached Ximenez. Agent Gold identified Agent King and himself as OIA investigators, showed her his badge, and asked if they could go to the ISU offices (in Facility B) and speak with her about something. Ximenez agreed to go with them and they walked toward Facility B. Lt. Sparks trailed behind them. Ximenez then asked Agent Gold if she needed an attorney and inquired whether she was going to be "walked off" prison grounds.[15] Agent Gold responded that she was not getting walked off prison grounds, but that he wanted to speak with her and they could speak about it in detail when they got to the ISU office. All four walked up the outer stairway to Facility B and entered into ISU office. As they entered Facility B, Agent Gold escorted Ximenez to the ISU interview room located outside of the ISU office. The interview room had a frosted window so that employees

[15] To be "walked off" of prison grounds is a colloquial phrase that the employee was being escorted back to the parking lot and would be restricted from returning to prison grounds until further notice.

walking in the hallway could not see inside. Ximenez continued to ask why they wanted to speak with her. She was visibly upset.

The interview room is approximately ten feet by twelve feet with a table and chairs. After Agents Gold and King and Ximenez sat down, Agent Gold notified Ximenez that Agent King and he were conducting a criminal investigation into an allegation that she was smuggling contraband into the institution and they were going to search her bags, her vehicle, and her person. Ximenez placed her bags on the table and Agents Gold and King began to methodically go through her large carry bag and her lunch pail. Agent King removed items from Ximenez's bags and passed anything which needed further inspection to Agent Gold. One of those items was a brown frozen food substance. Agent Gold asked what it was. Ximenez responded that it was frozen cooked oatmeal, which she froze before transporting to work. Agent King asked if he could inspect it further. Ximenez gave him permission to do so. The result of searching the bag and lunch pail did not reveal any contraband.

During the search of Ximenez's bags, her truck keys were located and segregated. Eventually, Agent King took control of the truck keys. Agent Gold advised Ximenez that they needed to search her truck. She asked them to leave the vehicle in the same condition in which they found it. Agent Gold announced that as Agent King and he were going to search her vehicle, two female officers were going to search her.

Two female officers, Officers Susan Mireles[16] (Officer Mireles) and Norma-Jean Fay (Officer Fay), entered into the interview room while the two agents left to search Ximenez's vehicle. Officer Mireles was the one to perform the search while Officer Fay remained by the

[16] Officer Mireles had been employed with CSP Sacramento for approximately 27 years, except for a two-year assignment at the correctional training academy.

door of the interview room to secure it by restricting others from entering the interview room. Officer Mireles put on examination gloves and stated that she had to perform an unclothed body search and Ximenez needed to remove her clothes. At this point, Ximenez stood up, pointed her finger down toward the ground, and demanded the presence of a union representative, a supervisor, or someone from peer support. Ximenez again asked why she was being searched.

Officer Mireles stopped the search and directed Officer Fay to inform the agents that Ximenez was requesting a representative. Officer Mireles maintained visual contact of Ximenez, while Officer Fay exited the interview room. Officer Fay immediately contacted Lt. Sparks and informed him that Ximenez was asking for a union representative. Lt. Sparks then yelled down the hallway toward Agents Gold and King, who were only 30 to 40 feet away, and informed them that Ximenez was asking for a union representative. Agent King replied that Ximenez was only being searched and not questioned and she therefore did not need a representative at this time. Agent King further stated that she signed a form which stated that she could be searched.

Lt. Sparks then entered the interview room to speak with Ximenez and repeated what Agent King stated: that Ximenez was only being searched, not questioned, and she did not have a right to a union representative at this time. Lt. Sparks also informed Ximenez that she signed a consent to search form, 894-A form, when she was first hired. Agent Gold then entered the interview room and Lt. Sparks left. Officers Mireles and Fay remained in the interview room. Agent Gold informed Ximenez that she did not have the right to a union

representative[17] and instructed her that the officers were only doing a search and would not be interviewing her. He then informed her that when she was hired, she signed a form acknowledging that CDCR could search her. Agent Gold then began to search for the form among his papers in order to show it to Ximenez.

Ximenez was frustrated and visibly upset. She stated, "Let's just get this done." She started to kick off her shoes and unbutton the top button of her blouse. She testified that she decided to proceed without a representative because she did not want to lose her job.

Officer Mireles instructed Ximenez not to take her clothes off until Agent Gold had exited the room. Ximenez complied with the directive. Officer Mireles noticed that Ximenez was upset and informed her that she was going to conduct the search as quickly as possible.

Officer Mireles conducted an unclothed body search which lasted approximately three to four minutes. The search comprised of Ximenez being completely disrobed, her clothing being searched, and her body being visually inspected, but not touched. Lastly, Ximenez had to bend over, spread her buttocks apart, and cough, while being inspected in that area.

After the search was concluded, Ximenez dressed herself and sat down at the table visibly distraught. Officer Mireles informed the agents and Lt. Sparks that the results of the search were negative.

Agent Gold went into the interview room and sat across the table from Ximenez. Ximenez stated that she was upset and wanted to go home. Agent Gold told Ximenez that she

[17] There was conflicting testimony on this matter. Agent Gold testified that he did not say that Ximenez could not have a union representative. Officer Mireles testified that Agent Gold affirmatively stated that she did not have the right to a union representative. Officer Mireles' testimony was buttressed by a written statement that she prepared on the day of the search as she was very disturbed by the entire incident. Officer Mireles' testimony was also buttressed by Officer Fay's written statement prepared on the day after the search. As a result, Officer Mireles' testimony is credited over that of Agent Gold where they conflict.

was brave and that searches were a part of working at a prison. He encouraged her to hold her head high, go back to work, and to not let "them" win. Ximenez replied that she would do that. Ximenez demanded to know why she was being searched. In response, Agent Gold asked Ximenez who would be trying to hurt her. Ximenez started to describe some of the bickering among coworkers about unfair workloads, and Agent Gold responded that she should not think that it was coworkers, but to think about inmates, and about something that happened recently. Ximenez then mentioned the names of a few inmates. Agent Gold informed her that she had "pretty much" narrowed it down. Ximenez then returned to work.

Frequency of Unclothed Body Searches

Agent Gold had been employed as a Special Agent with OIA for approximately nine years[18] and was aware of three to four unclothed body searches of employees which took place in the ISU interview room that same year as Ximenez. Agent King had been employed as an OIA Special Agent for two and a half years and was aware of employees who were subjected to an unclothed body search in the ISU interview room. Officer Mireles, a 27-year veteran who was currently working in ISU, had never performed an unclothed body search on an employee before Ximenez.

Special Agent-in-Charge Reuben Fuentes (Fuentes), who had been employed with OIA in the Central Region for over eight years conducted between 15 to 20 unclothed body searches during that time. Fuentes also testified that CDCR has conducted random searches at various institutions on a monthly basis. Fuentes testified that providing employees who are subject to search with a union representative would undermine OIA's ability to conduct a thorough investigation, as the search would be delayed if a union representative was unavailable and the

[18] Agent Gold at the time of the hearing was retired from state service.

agency would be holding the suspect in custody until the arrival of the union representative, which could lead to a de-facto arrest of the employee.

ISSUE

Did CDCR interfere with Ximenez exercise of protected activity on July 1, 2015, by denying her request for a union representative during the unclothed body search?

CONCLUSIONS OF LAW

Right to Representation

The Dills Act provides the following pertinent sections:

> 3515 [S]tate employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations. . . .
>
> 3515.5 Employee organizations shall have the right to represent their members in their employment relations with the state, except that once an employee organization is recognized as the exclusive representative of an appropriate unit, the recognized employee organization is the only organization that may represent that unit in employment relations with the state. . . .
>
> 3519 It shall be unlawful for the state to do any of the following:
>
> (a) [I]nterfere with, . . . employees because of their exercise of rights guaranteed by this chapter. . . .
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.

1. Right to Representation at Investigatory or Disciplinary Meetings

In *National Labor Relations Board v. Weingarten* (1975) 420 U.S. 251 (*Weingarten*), the United States Supreme Court held that an employee who has a reasonable fear that discipline may result from an investigatory or disciplinary meeting with the employer has a right to union representation at such a meeting. Specifically, the high court reasoned:

> The action of an employee in seeking to have the assistance of his union representative at a confrontation with his employer clearly falls within the literal wording of § 7 that "[e]mployees shall have the right to . . . engage in . . concerted activities for the purpose of . . . mutual aid or protection" [Citation omitted.]
>
> [¶ . . . ¶]
>
> A single employee confronted by an employer investigating whether certain conduct deserves discipline may be too fearful or inarticulate to relate accurately the incident being investigated, or too ignorant to raise extenuating factors. A knowledgeable union representative could assist the employer by eliciting favorable facts, and save the employer production time by getting down to the bottom of the incident occasioning the interview. Certainly his presence need not transform the interview into an adversary contest.

(*Weingarten,* pp. 262-263, emphasis added.)

Footnote 7 of *Weingarten* sets forth further clarification as to the assistance that a union representative can provide, which states in part:

> [Participation by the union representative] might reasonably be designed to clarify the issues at this first stage of the existence of a question, to bring out the facts and policies concerned at this stage, to give assistance to employees who may lack the ability to express themselves in their cases, and who, when their livelihood is at stake, might in fact need the more experienced kind of counsel which their union steward might represent. The foreman, himself, may benefit from the presence of the steward by seeing the issue, the problem, the implications of the fact, and the collective bargaining clause in question more clearly. Indeed, good faith discussion at this level may solve many problems, and prevent needless hard feelings from arising . . . . [It] can be advantageous to both parties if they both act in good faith and seek to discuss the question at this stage with as much intelligence as they are capable of bringing to bear on the problem.

(*Weingarten*, pp. 262-263, fn. 7, emphasis added.)

Noticeably, however, *Weingarten* makes a distinction between investigatory meetings and other routine employment supervisory contacts when it states:

> The employee's right to request representation as a condition of participation in an interview is limited to situations where the employee reasonably believes the investigation will result in disciplinary action. [footnote omitted.] Thus the Board stated in [*Quality Mfg. Co.,* 195 NLRB 197, 199]
>
> > We would not apply the rule to such run-of-the mill shop floor conversations as, for example, the giving of instructions or training or needed corrections of work techniques. In such cases, there cannot normally be any reasonable basis for an employee to fear that any adverse impact may result from the interview, and thus we would then see no reasonable basis for him to seek the assistance of his representative.

(*Weingarten*, pp. 257-258.)

In describing the role of the union representative at such an investigatory meeting, the NLRB in *Washoe Medical Center* (2006) 348 NLRB 361 provides:

> Under *Weingarten*, an employee at a union-represented workplace has a Section 7 right to ask for union representation at an investigatory interview that she "reasonably believes . . . will result in disciplinary action." If the employer grants the request, the union representative is entitled not only to attend the investigatory interview, but to provide "advice and active assistance" to the employee.

(Citations omitted, emphasis added.)

PERB adopted *Weingarten* as the rule to determine whether union representation should be provided to employees subjected to disciplinary interviews for employees covered under EERA in *Rio Hondo Community College District* (1982) PERB Decision No. 260 and for employees covered under the Dills Act in *State of California (Department of Forestry)* (1988) PERB Decision No. 690-S.

A violation of employee's right to union representation at an investigatory meeting with the employer can be demonstrated when (a) the employee or the union representative[19] requested representation, (b) for an investigatory meeting, (c) which the employee reasonably believed might result in disciplinary action; and (d) the employer denied the request. (*Capistrano Unified School District*, *supra*, PERB Decision No. 2440; *Redwoods Community College District v. Public Employment Relations Board* (1984) 159 Cal.App.3d 617; *Trustees of the California State University* (2004) PERB Decision No. 1658-H; *Fremont Union High School District* (1983) PERB Decision No. 301.)

A represented employee is not required to repeatedly request representation, especially if it has already been denied. (*Lake Elsinore Unified School District* (2004) PERB Decision No. 1648, p. 8.) However, an employee or union representative must affirmatively request a union representative in order to invoke one's representational rights. (*Bay Area Air Quality Management District* (2006) PERB Decision No. 1807-M.)

For the employee's representational rights to trigger, the meeting must be investigatory and should not be for the purpose of delivering a notice of discipline, but rather to "elicit damaging facts." (*State of California (Department of Corrections)* (1998) PERB Decision No. 1297-S, adopted ALJ's decision, p. 12.) Additionally, whether the employee reasonably believes that the investigation may result in disciplinary action is an "objective inquiry based upon a reasonable evaluation of all the circumstances, not upon the subjective reaction of the employee." (*Alfred M. Lewis, Inc. v. NLRB* (9th Cir. 1978) 587 F.2d 403.) An employer's notification of the charges to be investigated assist the employee in meaningfully making such an objective assessment of whether the matter may result in disciplinary action. (*State of*

[19] *Capistrano Unified School District* (2015) PERB Decision No. 2440, p. 29, fn. 15.

California (Department of Corrections), *supra*, PERB Decision No. 1297-S, adopted proposed decision, p. 12.)

2. Right to Representation at Investigatory Meetings and its Application to Invasive Searches of the Person

While PERB may not have yet ruled whether an employee's right to representation at an investigatory meeting covers invasive searches of an employee's person, the NLRB, in *Manhattan Beer Distributors* (2015) 362 NLRB No. 192 (*Manhattan*), has ruled that unionized employees have the right to the physical presence of a union representative in order to actively assist the employee before a reasonable suspicion substance abuse test, even if it may cause some delay in the administration of the drug or alcohol test. The NLRB reasoned that the union representative could have independently observed the employees' physical condition to potentially contest the grounds upon which the drug testing order was based and advised the employee on drug testing procedural protocols. Clearly, the purpose of the drug and alcohol test (search) was to elicit information from the employee's person or biological system which could be possibly used against him and demonstrate cause for disciplinary action.

Similarly, the physical presence of a union representative during an invasive unclothed body search could have also been of "assistance" to Ximenez. A union representative could have suggested to the employer the use of less invasive means to obtain similar information and even eliminate the need of a further search if a negative result was indicated, by using contraband and/or metal detection equipment and/or electronic drug detectors, or trained canines, before the Special Agents resorted to the more intrusive unclothed body search. Additionally, the union representative could help calm the employee subject to the search and insure that the employee notification provisions of DOM section 52050.15 were followed (the

employer providing the reason for the search and the name of the employee ordering the search). Lastly, a union representative's physical presence could help assist the employee in filing a timely grievance, if need be, based upon lawfully grievable matters which the representative personally observed.

CDCR argues that to compel the employer to wait for the arrival of a union representative would inordinately delay the investigation and create the possibility of a custodial arrest.[20] Such arguments of delay do not withstand scrutiny under *Manhattan*, where the NLRB held that a "reasonable accommodation" must be achieved between the employer's investigatory interests and the employee's representational interests rather than to serve one parties' interest at the complete expense of the other. (*Manhattan*, *supra*, 362 NLRB No. 192, slip op. at p. 3.) Unlike *Manhattan*, in the instant case the dissipation of alcohol or drugs in the person's human body was not an issue as Ximenez was either carrying contraband on or within her body and she was under constant observation in a secured area (the interview room). Although CDCR expressed its concern as to affecting a custodial arrest, in fact, Ximenez was still on her scheduled work shift and could be directed to remain in that area under observation until a representative arrived, if her desire was to have a representative present. Obviously, while the delay of the search cannot be postponed indefinitely until the arrival of a representative, CDCR never allowed Ximenez to see if a representative could be obtained in a timely manner. There was no evidence that granting Ximenez's request would have delayed the search beyond her regularly scheduled shift.

[20] Obviously, the employer need not provide advance notice of the search to the employee as it would remove any surprise in apprehending the employee while committing the act of trafficking contraband into the prison. However, once the employee was informed of that he or she would have to submit to an unclothed body search, a union representative would have to be contacted.

CDCR argues that the right to a union representative does not arise during criminal investigations. While this argument may carry more weight during a criminal interrogation where the employee has the right to refuse to answer questions and/or obtain an attorney, it does not carry weight where an employee cannot refuse to be searched or face a disciplinary penalty for insubordination. Additionally, any evidence which was obtained from the search could be used both to criminally prosecute Ximenez as well as terminate her employment, unlike the constitutional guarantees for verbal disclosures set forth in *Lybarger*, *supra*, 40 Cal.3d 822, 829-830, where an employee can choose to exercise Fifth Amendment rights, and then give a coerced statement that cannot be used against the employee in a criminal proceeding. Lastly, in other public sector forums, the right to a union representative has been found in employer-initiated criminal investigations. (*U.S. Department of Justice v. Federal Labor Relations Authority* (D.C. Cir. 2001) 266 F.3d 1228.)

3. Application to the Instant Case

As stated earlier, a violation of the employee's right to representation at an investigatory or disciplinary meeting can be demonstrated when: (a) the employee or the union representative requested representation; (b) for an investigatory meeting; (c) which the employee reasonably believed might result in disciplinary action; and (d) the employer denied the request. (*Capistrano Unified School District*, *supra*, PERB Decision No. 2440; *Redwoods Community College District v. Public Employment Relations Board*, *supra*, 159 Cal.App.3d 617; *Trustees of the California State University*, *supra*, PERB Decision No. 1658-H.)

It is not disputed that Ximenez requested union representation when the two female officers wanted to conduct an unclothed body search. She was denied representation by both

Lt. Sparks (who repeated what Agent King informed him) and Agent Gold. She is not required to renew her request for representation at every denial of representation. (*Lake Elsinore Unified School District*, *supra*, PERB Decision No. 1648, p. 8.) An invasive search of one's physical person constitutes an investigatory meeting as the employer is attempting to "elicit damaging facts." (See *State of California (Department of Corrections)*, *supra*, (1998) PERB Decision No. 1297-S, adopted proposed decision, p. 12.) Additionally, an unclothed body search is not the type of "routine" search conducted on employees on a day-to-day basis.[21]

The only question remaining is whether Ximenez reasonably believed the search might result in disciplinary action. Agent Gold informed her that she was being searched because she was suspected of smuggling contraband into the institution. While Ximenez knew she did not have any contraband on her, it is reasonable to believe that being investigated for such an allegation could lead to dismissal from state service, which justifies her request for a representative. For all of these reasons, it is found that CDCR violated Dills Act section 3519, subdivisions (a) and (b), for interfering with Ximenez right to represented by CAPT during the unclothed body search of July 1, 2015, and denying CAPT the right to represent its members.[22]

REMEDY

Pursuant to Dills Act section 3514.5, subdivision (c), PERB is given the authority to:

> [I]ssue a decision and order directing an offending party to cease and desist from the unfair practice and to take such affirmative

[21] The finding of a violation in this case is limited to invasive searches of an employee's person.

[22] As a violation was found under the analysis of an employee's right to representation at an investigatory meeting, it is not necessary to determine whether Ximenez's July 1, 2015 meeting with two OIA special agents who would order her to submit to an unclothed body search also constituted "highly unusual circumstances" under *Redwoods Community College District v. Public Employment Relations Board*, *supra*, 159 Cal.App.3d 617.

> action, including but not limited to the reinstatement of employees with or without back pay, as will effectuate the policies of this chapter.

It has been found that CDCR denied Ximenez a right to a union representative on July 1, 2015. By this conduct, CDCR violated Dills Act section 3519, subdivisions (a) and (b). It is an appropriate remedy that CDCR be ordered to cease and desist from such conduct. (*State of California (Department of Corrections)* (1995) PERB Decision No. 1104-S.)

It is also appropriate that CDCR be required to post a notice incorporating the terms of the order at CSP Sacramento. The notice should be subscribed by an authorized agent of CDCR, indicating that it will comply with the terms thereof. The notice shall not be reduced in size and reasonable effort will be taken to insure that it is not altered, covered by any material, or defaced and will be replaced if necessary. Posting such a notice will inform employees that CDCR has acted in an unlawful manner, and is being required to cease and desist from this activity and will comply with the order. It effectuates the purposes of the Dills Act that employees be informed of the resolution of the dispute and CDCR's readiness to comply with the ordered remedy. (*State of California (Department of Personnel Administration, et al.)* (1998) PERB Decision No. 1279-S.)

The notice posting shall include both a physical posting of paper notices at all places where CAPT members at CSP Sacramento are customarily placed, as well as a posting by electronic message, intranet, internet site, and other electronic means customarily used by the institution to communicate with its employees in the bargaining unit. (*Centinela Valley Union High School District* (2014) PERB Decision No. 2378, pp. 11-12, citing *City of Sacramento* (2013) PERB Decision No. 2351-M.)

CAPT also requested as a remedy that PERB order CDCR to read aloud the notice posting at the worksite. In light of the electronic posting ordered in the previous paragraph such an order would be duplicative and unnecessary. Additionally, such a notice reading would become an overt indication of a division between management and the employees at a worksite in front of the inmate population which could lead to inmate manipulation, especially as it was an inmate tip which led to the search of an employee. As such, the notice reading is denied.

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, it is found that the State of California (Department of Corrections & Rehabilitation) (Respondent) violated the Ralph C. Dills Act (Dills Act), Government Code section 3519, subdivisions (a) and (b), by denying Amy Ximenez a requested union representative during an unclothed body search. All other allegations are dismissed.

Pursuant to section 3514.5, subdivision (c), of the Government Code, it hereby is ORDERED that the State of California (Department of Corrections & Rehabilitation), and its representatives, shall:

A. CEASE AND DESIST FROM:

1. Interfering with employees' right to have a union representative during an unclothed body search, upon request.

2. Denying the California Association of Psychiatric Technicians (CAPT) the right to represent its members.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE ACT:

1. Within ten (10) workdays of the service of a final decision in this matter, post at all work locations at California State Prison, Sacramento, where notices to employees represented by CAPT are customarily posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the State of California (Department of Corrections & Rehabilitation), indicating that it will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. In addition to physical posting of paper notices, the Notice shall be posted by electronic message, intranet, internet site, and other electronic means customarily used by the institution to communicate with its employees in the bargaining units represented by CAPT. Pursuant to *City of Sacramento*, *supra*, PERB Decision No. 2351 and other applicable authority, the State of California (Department of Corrections and Rehabilitation) shall identify and include in its electronic posting any and all affected employees represented by CAPT employed at California State Prison, Sacramento, who are no longer employed as of the date of posting, or use personal delivery or some alternative means of notification reasonably devised to ensure that any and all affected employees who are no longer employed at California State Prison, Sacramento, by the State of California (Department of Corrections & Rehabilitation) are advised of their rights and remedies under this Decision. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced, or covered with any other material.

2. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of the Public Employment Relations Board (PERB or Board), or the General Counsel's designee. Respondent shall provide reports, in writing, as directed by

the General Counsel or his/her designee. All reports regarding compliance with this Order shall be concurrently served on CAPT.

Right to Appeal

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Public Employment Relations Board (PERB or Board) itself within 20 days of service of this Decision. The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
(916) 322-8231
FAX: (916) 327-7960
E-FILE: PERBe-file.Appeals@perb.ca.gov

In accordance with PERB regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (Cal. Code Regs., tit. 8, § 32300.)

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet or received by electronic mail before the close of business, which meets the requirements of PERB Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 32090, 32091 and 32130.)

Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a

party or filed with the Board itself. (See Cal. Code Regs., tit. 8, §§ 32300, 32305, 32140, and 32135, subd. (c).)