STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

AMERICAN FEDERATION OF STATE, COUNTY & MUNICIPAL EMPLOYEES, LOCAL 2620, Charging Party, v. STATE OF CALIFORNIA (CALIFORNIA CORRECTIONAL HEALTH CARE SERVICES), Respondent.	Case No. SA-CE-2198-S PERB Decision No. 2888-S February 8, 2024

Appearances: Beeson, Tayer and Bodine by Sarah S. Kanbar, Attorney, for American Federation of State, County and Municipal Employees, Local 2620; California Department of Human Resources by Jennifer M. Pearson, Tawni O. Parr, and Amir Dorafsha, Labor Relations Counsel, for State of California (California Correctional Health Care Services).

Before Krantz, Paulson, and Nazarian, Members.

DECISION

KRANTZ, Member: This case is before the Public Employment Relations Board (PERB or Board) on both parties' exceptions to a proposed decision of an administrative law judge (ALJ). The complaint in this matter, as amended, primarily alleges that the State of California (California Correctional Health Care Services) (CCHCS) violated the Ralph C. Dills Act (Dills Act)[1] by: (1) denying a request for union

[1] The Dills Act is codified at Government Code section 3512 et seq. All undesignated statutory references are to the Government Code.

representation that CCHCS pharmacist Sean Kane made during a meeting with his supervisor on November 4, 2020 (the November 4 meeting); and (2) terminating Kane in retaliation for protected activities, including Kane's work as a job steward for his union, American Federation of State, County and Municipal Employees, Local 2620 (AFSCME). CCHCS denies that Kane had a right to union representation at the November 4 meeting, and CCHCS argues that it lawfully terminated Kane for unprotected conduct both during the November 4 meeting and on the day after the meeting.

While AFSCME pursued this case, Kane appealed his dismissal to the State Personnel Board (SPB). An SPB ALJ issued a proposed decision, which SPB itself later adopted. That decision found that Kane engaged in misconduct but directed CCHCS to reduce Kane's discipline to a one-month suspension.

After SPB's decision became final, a PERB ALJ issued the proposed decision in this case, finding that CCHCS violated the Dills Act both by denying Kane union representation at the November 4 meeting and by later terminating him in retaliation for protected activities. However, the ALJ partially agreed with CCHCS on its affirmative defense to the retaliation claim, finding that it would have suspended Kane for at least one month based on his proven misconduct, even had he not engaged in protected activities. The proposed decision's remedy therefore matches SPB's remedy: CCHCS must (if it has not already done so) reduce Kane's penalty to a one-month suspension and make Kane whole for all losses other than those that would be associated with a one-month suspension.

Having reviewed the record de novo, we first find that Kane had no right to union representation at the November 4 meeting. On the retaliation claim, we reverse the ALJ's conclusion on CCHCS's affirmative defense, as we find insufficient record evidence to determine what level of discipline CCHCS would have imposed absent Kane's protected activities. In the unique circumstances of this case, we remand the matter for mediation and, absent a settlement, for further proceedings to determine what level of discipline CCHCS would have imposed absent Kane's protected activities.

FACTUAL AND PROCEDURAL BACKGROUND[2]

CCHCS provides medical, dental, and mental health services to inmates detained at institutions within the California Department of Corrections and Rehabilitation (CDCR), including California State Prison Corcoran (Corcoran). AFSCME is the exclusive representative of State Bargaining Unit 19, which includes pharmacists working in the state prison system.

In 2008, Kane began his state civil service career as a pharmacist. In 2011, he transferred to Corcoran. Prior to the events at issue in this case, Kane had no disciplinary record. During the relevant period, Kane served as a job steward for AFSCME, and he reported to Michael Conner, the Pharmacist-In-Charge at Corcoran. Conner, in turn, reported to CCHCS Chief Executive Officer Celia Bell.

[2] As discussed *post* at pages 24-28, we afford collateral estoppel effect to multiple SPB findings that are relevant to this matter. We supplement those findings where the SPB decision was silent or ambiguous on a salient fact.

CCHCS employees are bound by the standards set forth in the Departmental Operations Manual (DOM), including requirements to demonstrate professionalism and treat colleagues with dignity and respect. The DOM also has a workplace violence prevention policy that purports to cover a wide range of conduct, including use or attempted use of force or violence, threats, intimidation, harassment, and disruptive behavior such as yelling, insubordination, refusing to cooperate with others, and making "inappropriate demands for time and attention" or "unreasonable demands for action," such as demanding "a response to a complaint on the spot."

The following are the most salient events occurring before, during, and after the November 4 meeting.

I. January 2020 Through November 3, 2020[3]

On January 31, for reasons CCHCS has not attempted to explain, Bell issued Kane a memorandum entitled "Cease and Desist Order." The memo stated that CCHCS "had received information that [Kane was] engaging in unprofessional and inappropriate conduct in the workplace" that violated CDCR's workplace violence prevention policy. The memo further stated that its purpose was "not to confirm these allegations," but rather to "admonish" Kane that, "if, in fact they are occurring," he should "cease those actions immediately." The memo did not identify any specific incident or otherwise describe Kane's alleged conduct.

On March 18, Conner issued a memorandum to all Corcoran pharmacy staff, notifying them of expectations within the workplace. Kane signed the memo on

[3] All further dates are in 2020 unless otherwise specified.

April 14, indicating he had received it. Among other expectations, the memo reminded employees to be courteous and professional; to refrain from accusatory or threatening communications; and to interact with colleagues in a manner that encourages mutual respect for one another's positions. The memo also stated that Conner had "zero tolerance" for certain conduct, including: disruptive behavior; insubordination; behavior that "frightens, alarms or scares team members"; refusal to cooperate with others; "making inappropriate demands for time, attention or action"; "divisive behavior that disrupts teamwork"; and verbal or physical conduct that "a reasonable person would find threatening, intimidating or humiliating." After noting that violations may result in discipline "up to and including dismissal," and immediately before the employee signature line where Kane's name is both typed and signed in cursive, the memo includes the following typed language: "I have been given a copy of this document and an opportunity to discuss this memorandum. I acknowledge, but I do not agree as this does not align with my Union Contract."

On June 11, CCHCS distributed a memorandum updating all employees about COVID-19 guidelines in the workplace. The guidelines required employees to maintain at least six feet of distance from others if possible and to wear face masks when in the same office space as another employee.

On September 18, Kane and his co-worker, pharmacist Lauren Kim, filed a grievance alleging that Conner had violated the parties' collective bargaining agreement by discontinuing pharmacists' standby assignments, thereby eliminating their ability to earn extra pay through such assignments, and instead using voluntary callback procedures. On October 7, Bell denied the grievance. Kane then e-mailed

AFSCME representative Juan Vazquez and chief job steward Amir Jafarinejad to request advice about moving the grievance to arbitration and other steps he might take regarding the standby issue. Kane's concerns at the time included information indicating that CCHCS was providing standby assignments to certain pharmacists, even after allegedly discontinuing such assignments.

On October 21 and 27, following a spike in positive COVID-19 tests by staff, Bell e-mailed all CCHCS employees at Corcoran, reminding them to comply with the six-foot distance requirement and to wear face masks covering the mouth and nose.

On an unknown date prior to November 2, pharmacist Joohee Paek informed Kane that Conner might have access to her e-mail account, as well as to Kane's and Kim's e-mail accounts. On November 2, Kane e-mailed Conner to ask whether he had access to Kane's e-mail account.

On November 3, Kane e-mailed Vazquez and Jafarinejad to report his concern that Conner had access to employee e-mail accounts, and to seek their advice for submitting an information request about standby assignments. Jafarinejad suggested Kane submit three separate information requests: one to Conner; one to Labor Relations; and one to Personnel.

Also on November 3, Conner e-mailed all Corcoran pharmacy staff to remind them to avoid interactions at less than six feet distance and to wear masks covering the mouth and nose.

Finally, Conner e-mailed with Kane and Kim throughout the day on November 3, about a chemotherapy medication Conner was having trouble procuring. Conner

directed them to check the primary supplier's stock and, if that supplier was out of stock, obtain a price quote from a second supplier. Kane responded, asking Conner what quantity he needed. After Conner responded, Kane e-mailed again, offering a detailed report from the first supplier, and asking for further instructions. Conner responded that Kane should hold off from contacting the second supplier while continuing to pursue the first avenue. Later in the day, however, after another report on obstacles with the first supplier, Conner e-mailed Kane and Kim that one of them should contact the alternate supplier. Kane did so, provided Conner with the requested price quote, and asked how they should proceed. The record does not show any further response that day.

II. November 4

At 9:35 a.m. on November 4, Kane sent identical information requests in separate e-mails to Conner, Labor Relations Advocate Elane Jalil, and Personnel Specialist Helen Ybarra. In each e-mail, Kane identified himself as an AFSCME steward and asked if any Corcoran pharmacists had received standby pay since September 14.

At 9:37 a.m., Jalil e-mailed Conner about Kane's request. Jalil asked that, while she worked with others to determine what type of response CCHCS needed to provide, Conner should send her any information responsive to the request.

At 9:58 a.m., Ybarra responded to Kane, stating that she could not provide information about other employees' compensation and suggesting that Kane contact Conner. At 10:03 a.m., Kane replied that he was not seeking employee compensation data and did not need to know employee names, as he was simply seeking a

yes-or-no answer whether Corcoran had offered any employee standby. Kane also noted that he was seeking the information as a steward for representational purposes.

At 10:15 a.m., Conner e-mailed Kane and Kim, assigning them to help close an ongoing audit of the pharmacy's processes and procedures for refilling medications.

At 10:22 a.m., Conner e-mailed Jalil that he had had two volunteer callback pharmacists on standby. This e-mail also stated: "I'm guessing Kane may be trying to file discrimination of some sort. However, he has opted out of callback (and also tried to coordinate other pharmacists to opt out as to burden me to bring back his unnecessary [overtime] pay)."

Just prior to or shortly after sending his 10:22 a.m. e-mail to Jalil, Conner asked Kane to meet with him in his office. Kane walked to Conner's office, where he remained standing outside the office, in the doorway. Conner asked if Kane would like to enter the office and sit in the chair across from him, but Kane declined and remained in the doorway.

Conner began the meeting by following up on the prior day's e-mails about procuring chemotherapy medication. Soon after, as Conner attempted to continue discussing work matters, Kane interrupted Conner by demanding responses to the e-mails Kane had sent in his capacity as an AFSCME steward. Conner attempted to resume the prior discussion, while asking Kane not to interrupt him. Kane, however, continued to demand that Conner open and respond to Kane's e-mails. Kane also stated that he was not refusing to cooperate but wanted union representation. Conner told Kane that their meeting was not disciplinary, and that no representative was necessary. Kane continued to talk over Conner and request representation, at which

point Conner told Kane that his actions may constitute insubordination. Kane stated that he had every right to demand a representative, and that Conner could not stop him. Kane, still in the doorway, pivoted toward the pharmacy floor and called for Kim to join as a witness. Conner, who had until then remained sitting at his desk, then stood up, walked to the doorway, and told Kim to remain at her workstation. Kane turned back toward Conner, while leaning forward and curling his fingers. Conner, noticing that Kane's mask was too low to cover his mouth and nose, asked Kane to step back and pull up his mask. Kane pulled up his mask but did not immediately step back. Conner then said he would deal with Kane later and that Kane should return to his workstation. Kane complied.

Tanya Trinidad, a pharmacy technician working at Corcoran, witnessed the part of Kane's exchange with Conner that began when Kane called for Kim to serve as a witness. Trinidad thought that the exchange might escalate into an altercation, and she therefore telephoned security to ask for assistance. However, the interaction ended soon after, at which point Trinidad called security and withdrew her request.

At 10:34 a.m., Conner e-mailed Bell, CCHCS Chief Support Executive Eric McDaniel, and Employee Relations Officer (ERO) Noreen Ayala. Conner wrote: "I will submit a memo statement in a moment, but there has been an incident in the pharmacy (well witnessed) where Kane was again hostile with me and refused to meet. I'd like to follow up with an ECR [Employee Counseling Record] or whatever is appropriate given his previous [counseling/discipline] immediately."[4] Three minutes

[4] DOM Section 33030.4 specifies that an ECR is a documented but non-adverse corrective action that a supervisor can take "to assist an employee in improving his/her work performance, behavior, or conduct." In contrast, the same

later, Conner wrote a brief reply-all to the same group, adding only the following: "He interrupted me, then physically blocked me as I was trying to speak with Dr. Kim outside my office. I asked that he fix his mask and cover his nose and back away from me 6 ft. away and he actually refused and continued to interrupt and block me." Both e-mails had a subject line that read: "Urgent: ECR for Sean Kane."

At 10:43 a.m., Kane e-mailed Vazquez, alleging that Conner had "just attacked [him]." Vazquez forwarded Kane's e-mail to Jalil, requesting that Labor Relations intervene and investigate the incident. Jalil forwarded the e-mail chain to Bell, who, in turn, forwarded it to McDaniel and Conner. Bell then asked McDaniel and Jalil to set up a Workplace Violence Committee Meeting. Thereafter, Jalil e-mailed Vasquez to thank him for making his report and to notify him that the information he provided had been "forwarded to the Hiring Authorities."[5]

III. November 5

On November 5, a panel of Corcoran administrators and officers convened a Workplace Violence Committee Meeting to review the previous day's incident. Participants included Bell, McDaniel, and Lieutenant Che Love, an investigator with the Office of Internal Affairs (OIA). After reviewing written witness statements, the

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DOM section defines an "adverse action" as a "documented action, which is punitive in nature and is intended to correct misconduct or poor performance or which terminates employment."

[5] The term "hiring authorities" means officials or entities with the power, lawfully delegated from the appointing authority, to hire or to "initiate the investigation process by submitting a confidential request for internal affairs investigation or approval for direct adverse action, discipline, and dismiss staff." (Cal. Code Regs., tit. 15, § 3392, subd. (a)(12).)

committee referred the case to OIA for further action. Following standard procedure, the committee also temporarily reassigned Kane to work in the medical warehouse, where he could perform inventory-related tasks for the pharmacy. We follow the parties' parlance in referring to this reassignment as a "redirection."

During the afternoon of November 5, Love and an officer under his supervision, Sergeant David Perez, approached Kane at the pharmacy and issued him a memorandum informing him of the redirection. Kane gathered his personal belongings, including paperwork and a small bag. Kane was calm as he gathered his belongings to prepare to leave. Love and Perez then escorted Kane from the pharmacy to his warehouse workstation. Love and Perez walked beside one another, following behind Kane as the trio walked down a short hallway toward the pharmacy's main door. As Kane passed Conner's office, and without breaking his stride, he kicked Conner's office door closed. Conner, who was in his office at the time, had left his office door approximately 12 inches ajar. The steel door weighed over 100 pounds, and when it slammed shut, it startled Conner.

IV. The Investigation and Subsequent Discipline

The DOM establishes the processes that unfold once a hiring authority refers a matter to OIA. The Central Intake Unit (CIU) at OIA convenes a panel to evaluate the file and decide on the appropriate procedure to follow. In certain instances, such as in Kane's case, panel members determine that OIA should not investigate the matter. The CIU panelists reached this decision regarding Kane because they believed there was already enough documentation to show what had happened and that the hiring authority had all the evidence it needed to proceed with "direct" disciplinary action. In

such cases, the next step is for CIU or a "Vertical Advocate" (VA) from the Employment Advocacy and Prosecution Team to execute CDCR Forms 402 or 403, detailing the reasons for recommending corrective action. The VA then conducts a 402/403 Conference with the hiring authority and ERO, at which time the hiring authority must determine the appropriate disciplinary action.

Here, after the CIU panel approved direct disciplinary action, the VA held a 402/403 Conference with Bell and Ayala. Before determining whether to move forward with discipline, Bell decided she wanted more information, which she asked McDaniel to obtain. Thus, on February 9, 2021, McDaniel wrote Conner with specific follow-up questions about his earlier written statements. Conner responded two days later.

On March 10, 2021, McDaniel issued an investigation closure memorandum on Bell's behalf. This memo notified Kane that an investigation had sustained certain misconduct allegations while rejecting others.

On May 27, 2021, CCHCS issued Kane a Notice of Adverse Action (NOAA), dismissing him from employment effective June 9, 2021. The NOAA described Kane's alleged misconduct as follows:

> "1) Inappropriate Behavior on November 4, 2020
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> "On or about November 4, 2020, you worked as a Pharmacist I at COR. As a Pharmacist I working at COR, you were aware of you [sic] duty to act professionally, avoid violent or intimidating behavior, wear a facemask as well as maintain social distance of at least 6 feet when possible. At approximately 1020 hours you visited Pharmacist-in-Charge (PIC), Michael Conner's, office where he attempted to address an issue regarding a medication refill for an inmate-patient. When the conversation turned to cooperatively working with other staff members via email, you interrupted him and in an intimidating tone told PIC

Conner to ‘open [his] emails and respond to them now’ or words to that effect. PIC Conner asked you not to interrupt him, but you proceeded to interrupt him several times without letting him finish his point.

“You (then left PIC Conner’s office), walked over to Dr. Lauren Kim and asked her to be a witness to what was transpiring with PIC Conner. PIC Conner then stood out of his chair, walked to the doorway of his office, and tried to tell Dr. Kim that it was not necessary for her to serve as a witness. At this time you moved within 1 foot of PIC Conner and leaned towards him with your upper body, trapping PIC Conner near his office doorway. Your facemask was down. He asked you to step back and stop blocking him, but you refused. Instead, you turned more towards him and continued blocking him with your body despite having ample space behind you. PIC Conner asked you to back away and to put on your mask. You pulled up your mask, but did not move. Noting that other employees were alarmed by your behavior, PIC Conner instructed you to return to work and finally moved away from him.

“Your behavior on November 4, 2020, disturbed and disrupted the productivity of your coworkers. Furthermore, your intimidating behavior frightened and alarmed your coworkers to such a degree that Pharmacy Technician Tanya Trinidad called Correctional Officer O. Lopez for assistance in order to prevent the situation from escalating further. Thus, you violated your duties regarding wearing a face covering and social distancing, to act in a professional manner and you violated CDCR zero tolerance policies against workplace violence.

“2) Violent Behavior on November 5, 2020

“On or about November 5, 2020, you worked as a Pharmacist I at COR. As a Pharmacist I working at COR, you were aware of your duty to act professionally and avoid violent or intimidating behavior. When Investigative Lieutenant C. Love and Investigative Services Unit

> Sergeant D. Perez came to the Correctional Treatment Center Pharmacy to issue you a Redirection Memorandum and to escort you out of the institution, you kicked the door to the office of PIC Conner on your way out. PIC Conner was inside his office, the door was open approximately 8 inches, and you kicked it hard enough to slam it shut. You had no reason to kick the door shut as your path to the exit was not obstructed by the door. Your kick, however, frightened and alarmed PIC Conner. Again, your conduct was less than professional, disrupted and scared your coworkers and violated CDCR's zero tolerance policy against work place violence."

V. SPB Proceedings

On June 21, 2021, Kane appealed his dismissal to SPB. He also filed a whistleblower complaint that he later withdrew. After SPB scheduled an evidentiary hearing for January 2022, Kane moved to continue the hearing to allow PERB's ongoing unfair practice proceedings to complete first.[6] The SPB ALJ denied Kane's motion, explaining that:

> "[T]he issues presented in these two proceedings are not the same. Article VII, section 3, subdivision (a) of the state Constitution, and the state Civil Service Act authorizes [sic] the SPB to review disciplinary actions taken against civil service employees, determine if cause for discipline exists and, if so, determines [sic] the appropriate penalty for the proven misconduct. On the other hand, PERB has exclusive jurisdiction under the Dills Act to determine if the adverse action was taken in retaliation for protected union activities. While both of these issues require consideration of the conduct which lead up to [Kane's] dismissal, the issues, however, are different and involve distinctly different legal standards. (See *Professional Engineers in California Government v. State of CA (Department of Industrial Relations)* (1998) PERB Decision No. 1299-S.) Thus, any

[6] AFSCME had filed this charge two months earlier, in April 2021.

> overlap between SPB's and PERB's exclusive jurisdiction over public employment matters does not necessarily result in a jurisdictional conflict. (*Pacific Legal Foundation v. Brown* (1981) 29 Cal.3d 168, 197.)"[7]

The SPB ALJ issued a proposed decision on January 21, 2022, and SPB adopted the proposed decision on March 10, 2022. Kane did not seek further review of the decision, which therefore became final.

SPB's decision stated that, aside from the withdrawn whistleblower complaint, the issues in dispute were: "Did [CCHCS] prove by a preponderance of the evidence that [Kane] committed conduct constituting cause for discipline under one or more of the following subdivisions of Government Code section 19572: (d) inexcusable neglect of duty, (e) insubordination, (m) discourteous treatment, (o) willful disobedience, or (t) other failure of good behavior? [And if so], what is the appropriate penalty?" SPB explicitly noted that it was under no duty to try to match whatever remedy PERB might issue in this case. In explaining itself, SPB noted that "PERB has exclusive jurisdiction to determine violations of the Dills Act," and that under *Pacific Legal Foundation*, *supra*, 29 Cal.3d 197, PERB and SPB have separate jurisdiction to decide distinct types of claims that may result in different remedies.

SPB upheld certain allegations against Kane, while rejecting others. The allegations that SPB sustained included: behaving in a rude, brusque, abrasive, disrespectful, and insubordinate manner toward Conner; undermining Conner's authority; making unjustified demands about unrelated matters while Conner

[7] The PERB ALJ in this case took administrative notice of multiple documents from the SPB proceeding, and we grant AFSCME's unopposed motion for supplemental administrative notice of the SPB ALJ's ruling denying a continuance.

attempted to discuss work assignments; failing to immediately comply with Conner's directive to step back as a COVID-19 precaution; and causing disruption and discord in the pharmacy. The allegations that SPB did not sustain included acting in a manner that was violent, threatening, intimidating, menacing, or physically aggressive.

SPB resolved one credibility issue in Kane's favor. Specifically, while Conner testified at the SPB hearing that Kane intentionally gathered momentum to forcefully kick shut Conner's office door, SPB found that Kane did not do so, crediting testimony from Kane, Love, and Perez. As part of this determination, SPB found that the door made a loud noise because it weighed over 100 pounds, not because Kane kicked it forcefully, in an angry or hostile manner, or with the intent to startle or disturb Conner. SPB also found it plausible that Kane thought he should shut the door so he, Love and Perez could walk through the hallway unimpeded, and likewise plausible that Kane used his foot to close the door because he was carrying belongings and had a bag on his shoulder.

Based on these mixed findings, SPB concluded that a one-month suspension was the appropriate penalty. SPB therefore ordered CCHCS to rescind the dismissal and provide back pay for all but one month of lost pay. While SPB stated that it modified Kane's discipline to bring it into proportion with the proven misconduct, SPB's decision did not mention evidence or comparisons regarding analogous conduct by other employees or the penalties issued in such cases. Instead, SPB noted that it considers "the extent to which the employee's conduct resulted in, or if repeated is likely to result in, harm to the public service; the circumstance surrounding the offense; and the likelihood of recurrence of the employee's conduct." Ultimately, SPB's decision

stated that Kane's conduct warranted discipline at a level that makes clear "the need to respect supervisorial authority, follow directions, and treat coworkers in a courteous manner without disrupting the workplace, but also takes into account [Kane's] lack of prior adverse actions. A suspension for one month meets those requirements. Accordingly, a suspension for one month is a just and proper penalty."

VI. PERB Proceedings

After AFSCME filed this charge, PERB's Office of the General Counsel (OGC) issued a complaint. AFSCME then amended the charge in July 2021, and OGC issued an amended complaint later that month. CCHCS answered the amended complaint in August 2021. After an evidentiary hearing held on November 16, 18, and 19, 2021, and June 21-23, 2022, the ALJ issued the proposed decision on May 15, 2023. Both parties filed timely exceptions.

DISCUSSION

In resolving exceptions to a proposed decision, the Board reviews the claims de novo. (*City of San Ramon* (2018) PERB Decision No. 2571-M, p. 5.) Part I below analyzes whether CCHCS unlawfully denied Kane's request for union representation. Part II analyzes Kane's retaliation claim, including the extent to which SPB's decision precludes the parties from relitigating certain issues.

I. AFSCME's Claimed Denial of Representational Rights

An exclusive representative has the right to represent a bargaining unit employee, and the employee has a corresponding right to union representation, during an investigatory meeting that the employee reasonably believes might result in discipline, as well as in non-investigatory meetings held under other "highly unusual

circumstances." (*Capistrano Unified School District* (2015) PERB Decision No. 2440, pp. 10-16 (*Capistrano*).) Applying this rule, the Board has held that representational rights arise at meetings that may significantly impact the employer-employee relationship, such as an interactive process meeting about accommodating an employee's disability or a meeting about an employee's request for job audit forms that could lead to a reclassification or salary adjustment. (*Sonoma County Superior Court* (2015) PERB Decision No. 2409-C, pp. 12 & 20-24; *Regents of the University of California* (1984) PERB Decision No. 403-H, p. 10.)

In contrast, representational rights normally do not arise during a routine conversation in which a supervisor corrects work technique or gives instruction, assignment, direction, or training. (*Capistrano*, *supra*, PERB Decision No. 2440, p. 19.) "Even though such meetings may involve some amount of 'questioning' in the course of providing instructions or guidance to an employee, such interactions typically do not give rise to a right to representation," because the employee usually has no reasonable basis to fear that discipline will flow from answering standard work-related questions. (*Ibid*.)

Notably, it axiomatic that:

> "[N]ot every meeting serves a single, uniform purpose. What may begin as a 'routine' interaction can transform into an 'investigatory' or 'disciplinary' interview, *even where no such purpose was intended by the employer*. In such circumstances, the meeting need not be exclusively 'investigative' in nature, nor designated as such, so long as it 'concerns a subject matter related to disciplinary offenses' [citation omitted] and is not 'held solely for the purpose of informing the employee of, and acting upon, a previously made disciplinary decision.'"

(*Capistrano*, *supra*, PERB Decision No. 2440, p. 20 [italics in original].) Thus, "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.'" (*Ibid*.)

Here, Conner called the November 4 meeting to discuss routine work matters. The question is whether representational rights arose either because Conner and Kane discussed information requests or because Conner suggested that Kane was behaving insubordinately. We consider both possibilities.

If Conner and Kane had discussed the specifics of the pending information requests relevant to a grievance and to potential supervisory access to employee e-mails, that would have triggered representational rights. But nothing required Conner to discuss the information requests during a brief, work-related meeting he called in the middle of a shift, and he declined to do so. Representational rights did not arise from the mere mention of pending information requests.

A closer question emerged when Conner suggested to Kane that his actions may constitute insubordination—a comment that came after Kane first demanded union representation. While Kane was reasonable in fearing discipline once Conner mentioned insubordination, the meeting never became investigatory. (Cf. *Capistrano*, *supra*, PERB Decision No. 2440, pp. 8 & 20 [supervisor began quizzing employee on whether she had followed directives, causing initially routine work meeting to take on a secondary investigative purpose that caused employee to have a reasonable fear of discipline].) Had Conner and Kane continued to debate whether Kane was insubordinate, that would have veered into the territory of "highly unusual

circumstances" triggering representational rights. Instead, however, after Kane called Kim to join the meeting, Conner told Kim to stay at her workstation, asked Kane to comply with COVID-19 protocols, and ended the meeting without any investigative questions or further mention of insubordination. None of these events triggered representational rights.

For these reasons, AFSCME has not introduced evidence sufficient to establish that CCHCS unlawfully denied union or employee representational rights.

II. AFSCME's Retaliation Claim

In resolving whether CCHCS terminated Kane in retaliation for protected activity, the threshold question is the import of SPB's decision. We therefore turn first to that issue.

A. The Nature of the SPB Decision's Preclusive Effect

When the ALJ began the formal hearing in this matter in November 2021, SPB had not yet issued a final decision. However, SPB's decision was final by the time the PERB hearing resumed for its final three days in June 2022. At that point, the ALJ properly took administrative notice of SPB's decision and directed that the parties' post-hearing briefs should address the decision's preclusive effect.[8] In response to the

[8] In directing the parties to brief preclusion issues, the ALJ avoided the circumstances of *State of California (Department of Social Services)* (2019) PERB Decision No. 2624-S, p. 9 (*DSS*), where the parties did not ask the Board to grant any preclusive effect to an SPB decision on overlapping issues, failed to brief preclusion issues, and did not submit the requisite documents from the SPB proceeding. (*Ibid*.) As a result, the Board's *DSS* decision declined to decide such issues, though it did consider the SPB decision for its persuasive value. (*Ibid*.) Here, unlike in *DSS*, we have before us a specific request to grant collateral estoppel effect to an SPB decision, an adequate record for doing so, and adequate briefing on the issue.

ALJ's directive, both parties asserted that SPB's decision has certain preclusive effects on this case, but they disputed the nature of those effects.

For the reasons explained below, claim preclusion has no application here, but issue preclusion (also known as "collateral estoppel") does apply.[9]

1. Claim Preclusion

Claim preclusion bars claims that were or should have been advanced in a previous litigation. (*DKN*, *supra*, 61 Cal.4th at p. 824.) Claim preclusion applies in a second action only if it involves: (1) the same cause of action (2) between the same parties (3) after a final judgment on the merits in the first action. (*Ibid*.)

SPB's decision does not have a claim preclusion effect here, for multiple related reasons. First, Dills Act section 3514.5 grants PERB exclusive jurisdiction to adjudicate claims that the state retaliated against an employee for activity the Dills Act protects, and SPB has no such jurisdiction, as SPB itself noted. (See *ante* at pp. 14-15.) More than four decades ago, the California Supreme Court explained that SPB and PERB have jurisdiction to hear distinct types of claims challenging discipline against state employees:

> "[SPB] was granted jurisdiction to review disciplinary actions of civil service employees in order to protect [them] from politically partisan mistreatment or other arbitrary action

[9] Courts have fostered confusion by sometimes using the term "res judicata" as synonymous with claim preclusion, while other times using it as an umbrella category encompassing both claim preclusion and issue preclusion. (*DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813, 823-824 (*DKN*) [noting that such inconsistent terminology has caused confusion].) To promote clarity in this decision, we do not use the term res judicata. Instead, for the two types of preclusion falling within the umbrella, we label the first as claim preclusion, while calling the second by either of two synonymous terms: issue preclusion or collateral estoppel.

> inconsistent with the merit principle . . . PERB, on the other hand, has been given 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 guaranteed by [the Dills Act]. Although disciplinary actions taken in violation of [the Dills Act] would transgress the merit principle as well, the Legislature evidently thought it important to assign the task of investigating [such violations] to an agency which possesses and can further develop specialized expertise in the labor relations field."

(*Pacific Legal Foundation*, *supra*, 29 Cal.3d at pp. 197-198.) Notably, the court declined "to construe article VII, section 3, subdivision (a) in a manner that would deprive all state civil service employees of the important safeguards afforded by [PERB and other] specialized agencies." (*Id*. at p. 199.) In reaching this conclusion, the court noted that when the Legislature enacted the Dills Act, it explicitly tailored the law so as not "to contravene the spirit or intent of the merit principle." (*Id*. at p. 185, citing Dills Act, § 3512.)

Second, the court of appeal has repeatedly emphasized the exclusivity of PERB's jurisdiction. For instance, in *McPherson v. Public Employment Relations Bd.* (1987) 189 Cal.App.3d 293, the court noted that because discrimination based on union activity "is a sensitive labor relations issue affecting all public sector employees within PERB's jurisdiction," the Legislature afforded PERB "exclusive initial jurisdiction" over all such claims, meaning that court review is possible only on appeal from a final PERB decision. (*Id*. at p. 311.)

Third, the same types of considerations noted immediately above have led the court of appeal to reject claim preclusion arguments in a similar setting. In *George v. California Unemployment Ins. Appeals Bd.* (2009) 179 Cal.App.4th 1475 (*George*),

the plaintiff worked for California's Unemployment Insurance Appeals Board, and she filed an SPB claim challenging three disciplinary suspensions against her. (*Id*. at p. 1481.) After SPB sustained certain misconduct allegations against George while rejecting others, she filed suit alleging the state disciplined her in retaliation for her prior complaint of gender bias under the Fair Employment and Housing Act (FEHA)—an assertion she had not made before SPB. (*Id*. at pp. 1480-1481 & 1483.) George won a jury verdict. (*Id*. at p. 1482.) On appeal, the court found the state could not prevail on a claim preclusion defense because the FEHA claim asserted a different primary right from George's claim before SPB. (*Id*. at pp. 1483-1485 [even though there may be overlap, the two rights were distinct, and George had no duty at SPB to litigate over alleged retaliation for her prior gender bias claim].)

There is no reason a different claim preclusion rule should apply here merely because the second claim is an unfair practice charge rather than a FEHA claim. Indeed, precedent instructs that PERB is a "watchdog agency" in the same sense as the agencies the Legislature created to hear FEHA claims, and that PERB's jurisdiction to remedy unfair practice charges is independent of SPB's jurisdiction. (*State Personnel Bd. v. Fair Employment and Housing Com.* (1985) 39 Cal.3d 422, 437-440 (*FEHC*) [citing *Pacific Legal Foundation*, *supra*, 29 Cal.3d at p. 197].)

Accordingly, claim preclusion does not apply when PERB resolves a Dills Act discrimination charge after SPB has already issued a final decision as to whether the state had adequate cause to issue discipline.

2. Issue Preclusion

Issue preclusion is a discretionary principle that courts and agencies apply to

prevent parties from relitigating issues conclusively decided in prior proceedings. (*Castillo v. City of Los Angeles* (2001) 92 Cal.App.4th 477, 481 (*Castillo*).) Unlike claim preclusion, issue preclusion does not automatically bar an entire cause of action. (*DKN*, *supra*, 61 Cal.4th at p. 824.) However, issue preclusion can be dispositive in resolving a new claim, if an issue decided in a prior proceeding is sufficient to eliminate a necessary element of the new claim. (*George*, *supra*, 179 Cal.App.4th at pp. 1479 & 1486.)

Under the most comprehensive phrasing of the issue preclusion test, collateral estoppel prevents parties from relitigating an issue if: (1) the issue is identical to that decided in a prior proceeding; (2) the issue was actually litigated in the prior proceeding; (3) the issue was necessarily decided in the prior proceeding; (4) the decision in the prior proceeding is final and on the merits; and (5) preclusion is sought against a party to the prior proceeding or one who was in privity with such a party. (*Castillo*, *supra*, 92 Cal.App.4th at p. 481.)[10]

Collateral estoppel may apply to an administrative agency's decision only if the agency acted in a neutral, judicial capacity to decide an issue over which it had jurisdiction. (*Noble v. Draper* (2008) 160 Cal.App.4th 1, 10; see also *Healdsburg Union High School District* (1997) PERB Decision No. 1185, adopting proposed decision at p. 51 [even assuming a third-party hearing officer was neutral, collateral estoppel cannot apply where hearing officer's decision is subject to review by

[10] As the Board noted in *City and County of San Francisco* (2023) PERB Decision No. 2867-M [judicial appeal pending], this five-element statement of the collateral estoppel test is preferable because it clarifies that the issue must have been necessary to the decision in the prior action. (*Id*. at p. 42.)

non-neutral entity, irrespective of whether that entity adopts the hearing officer's decision].) Moreover, collateral estoppel is a discretionary doctrine that need not apply where application would fail to promote judicial or administrative economy, protect litigants from vexatious litigation, and/or otherwise preserve fairness and integrity in the administration of justice. (*Castillo*, *supra*, 92 Cal.App.4th at pp. 481 & 483.)

As noted above, a state employee's claim at SPB is different from a claim of retaliation under the Dills Act or FEHA, but subsidiary issues may overlap. Thus, while employees and unions often have a choice whether to pursue claims in multiple forums, if they choose to do so, collateral estoppel may apply as to subsidiary issues. The current circumstances demonstrate one example. Where a final SPB decision predates PERB's decision, and SPB has resolved an overlapping, subsidiary issue, the threshold inquiry in a subsequent Dills Act or FEHA retaliation case involves determining whether the remaining collateral estoppel elements are satisfied, and, if so, the extent to which collateral estoppel effects may eliminate a necessary element of the retaliation claim.

For instance, in certain cases, a charging party may argue that PERB should infer retaliatory motive solely based on the relative timing of events combined with the employer allegedly exaggerating or fabricating the employee's misconduct. In such a case, if SPB has sustained all misconduct allegations against the employee, collateral estoppel may be a sufficient basis to dismiss the retaliation claim. (*City of Santa Monica* (2020) PERB Decision No. 2635a-M, p. 46 [timing evidence alone is typically not enough to show a nexus between protected activity and adverse action].)

In other cases, however, a charge may assert that even if an employee engaged in sufficient misconduct that the discipline level the employer chose fell within the range

of its discretion, other evidence shows that unlawful animus against protected activity was a substantial reason the employer exercised its discretion to choose that level of discipline rather than a lower level that also would have fallen within the range of its discretion. (See, e.g., *City of South Pasadena* (2020) PERB Decision No. 2692-M, adopting proposed decision at pp. 19-20 [employer terminated union president for misconduct after he participated in a physically demanding race during a disability leave, but retaliation found where, among other things, employer had taken more lenient approach with employee who publicly announced that he would call in sick whenever he was assigned a Friday or Saturday shift].)

To discern the effect that collateral estoppel has on AFSCME's charge, we begin by noting that *George*, *supra*, 179 Cal.App.4th 1475 involved a fact pattern akin to this case. The court first noted that SPB found "some of the reasons given for the suspensions were legitimate—it upheld two of the suspensions. While these findings are binding on George in her FEHA action under the doctrine of collateral estoppel, we do not believe the findings preclude the *entire* retaliation cause of action." (*Id*. at p. 1487.) George alleged disparate treatment compared to other employees who had not complained of gender bias. (*Id*. at p. 1488.) In those circumstances, the court found that SPB's findings did not "completely defeat the retaliation cause of action," as there remained an open question "whether George was treated more harshly than other employees." (*Ibid*.) Even though SPB had already overturned one of the three suspensions and reduced the length of a second suspension, the court did not find the SPB decision conclusive as to what level of discipline the state would have issued in the absence of George's prior protected activity. (*Ibid*.) In other words, given that SPB did

not consider evidence of retaliation, its decision to sustain a lesser discipline than the state first imposed did not necessarily mean the lesser discipline represented a nonretaliatory level that fully remedied any retaliation that may have occurred. (*Ibid*.) Thus, while collateral estoppel precluded the parties from relitigating which misconduct allegations were valid and which were invalid, it did not preclude George from proving retaliation to a jury and obtaining relief for the remaining suspensions.

The same principles apply here. Collateral estoppel applies to SPB's findings regarding the events of November 4-5, as well as to SPB's findings on the extent to which Kane's conduct violated DOM policies and constituted adequate cause for discipline under the Government Code. Kane and CCHCS fully litigated these issues and SPB necessarily decided them in a decision that is now final.[11]

On the other hand, collateral estoppel does not apply to the ultimate questions at issue in this case, which SPB did not decide. SPB considered whether Kane's conduct on November 4 and 5 constituted adequate cause for discipline, and, if so, the appropriate remedy for such conduct. SPB was concerned with whether there was sufficient cause for termination or a lesser penalty—not whether Kane's protected activity was a motivating or substantial factor in the decision to terminate him, nor what CCHCS would have done in the absence of protected activity, which are critical questions in resolving a Dills Act retaliation claim. (*Garrett v. City and County of San Francisco* (9th Cir. 1987) 818 F.2d 1515, 1520 [even where collateral estoppel applies

[11] There is no dispute that, for purposes of collateral estoppel, Kane is in privity with AFSCME and CCHCS is in privity with CDCR, the named respondent in the SPB matter.

to prior decision finding employer issued discipline that was proportionate to proven misconduct, such a finding does not determine whether the employer would have exercised discretion in the same manner absent discrimination].)

Accordingly, both sides benefit from certain SPB findings. But we do not presume whether the level of discipline SPB found warranted is the level CCHCS would have issued absent Kane's protected activity. It is therefore proper to apply PERB's standard burden-shifting retaliation framework to the factual findings in this case, including those we have reached by affording collateral estoppel effect to SPB's decision.

B. Prima Facie Case and Affirmative Defense Analysis

To establish a prima facie case of retaliation, AFSCME must prove, by a preponderance of the evidence, that: (1) Kane engaged in activity protected by the Dills Act; (2) CCHCS had knowledge of such protected activity; (3) CCHCS took adverse action against Kane; and (4) CCHCS took adverse action "because of" the protected activity, which PERB interprets to mean that the protected activity was a substantial or motivating cause of the adverse action. (*State of California (Correctional Health Care Services)* (2021) PERB Decision No. 2760-S, pp. 20-21 (*CCHCS*).) If these elements are present, but the evidence also reveals a non-discriminatory reason for the adverse action, the burden shifts to CCHCS to prove, by a preponderance of the evidence as an affirmative defense, that it would have taken the exact same action even absent protected activity. (*Id*. at p. 21.) In such "mixed motive" cases, the employer must show both that it had an alternative, non-discriminatory reason for the adverse action and that its justification was in fact the but-for cause of the adverse

action. (*Id*., adopting proposed decision at p. 30; *Palo Verde Unified School District* (2013) PERB Decision No. 2337, pp. 12-13, 31 (*Palo Verde*).)

PERB considers all relevant facts and circumstances in assessing an employer's motivation. However, we have noted that certain management conduct tends to establish a discriminatory motive, intent, or purpose, including: (1) taking adverse action against an employee who has recently engaged in protected activity; (2) exaggerating the employee's alleged misconduct; and (3) selecting a punishment that is disproportionate based on the relevant circumstances, including the employee's length of tenure and previous employment record. (See, e.g., *Regents of the University of California* (2020) PERB Decision No. 2704-H, p. 22; *Id*. at p. 15, fn. 3.)

In the current procedural posture, it is undisputed that AFSCME established a prima facie case because CCHCS's exceptions waived any challenge to that conclusion. CCHCS thus accedes to the ALJ's findings that: (1) Kane engaged in protected activity, including by serving as a job steward, filing a grievance on September 18, continuing to pursue the grievance thereafter, and submitting multiple information requests; (2) CCHCS knew of Kane's protected activity; (3) CCHCS took adverse action against Kane; and (4) Kane's protected activity was at least a substantial or motivating cause of management's course of adverse action.

Even had CCHCS not waived any challenge to these findings, we would nonetheless affirm them. Five primary factors tend to prove that protected activity was a substantial or motivating cause of adverse action against Kane. First, there was close temporal proximity between Kane's protected activity and management's course of conduct against him. Second, the NOAA overstated the severity of Kane's conduct,

thereby evincing an intent to unduly magnify the charges against him and the resulting consequence. Third, Conner further revealed the same tendency when he testified in a manner that contradicted multiple other witnesses, falsely asserting that Kane intentionally gathered momentum to forcefully kick shut Conner's office door. Fourth, CCHCS chose a disproportionate penalty not only considering Kane's actual conduct, but also based on Kane's long tenure without prior discipline.[12] Finally, while Conner's two initial e-mails within minutes of the November 4 incident exaggerated the incident by alleging that Kane had physically blocked Conner and falsely suggesting he had previously been counseled/disciplined for prior hostile conduct, Conner nonetheless titled the two e-mails with the suggestion of an "ECR for Sean Kane." In suggesting an ECR—which is below all the various levels of adverse action that can be issued—Conner virtually acknowledged that even the exaggerated version of the incident might warrant only non-disciplinary corrective action, or a low level of discipline at most. Given that the only conduct occurring after that was the November 5 conduct, about which SPB did not credit Conner's testimony, and in light of the other factors noted above, it is more likely than not that CCHCS decisionmakers consciously chose to drastically upscale the consequences based on their unlawful animus.

In its exceptions, CCHCS has preserved its affirmative defense. CCHCS focuses its argument primarily on asserting that the SPB decision establishes alternative, non-discriminatory reasons adequate to prove that defense. However, as

[12] The January 31 "Cease-and-Desist Order" memorandum that Kane received did not constitute discipline nor a finding of any prior wrongdoing. Indeed, it did not even include any specific allegation against him.

discussed above, even where, as here, we grant collateral estoppel effect to an SPB decision that partially or fully upholds the allegations against an employee, the impact on a subsequent Dills Act retaliation claim can vary.

As noted, this case is akin to *George*, *supra*, 179 Cal.App.4th 1475, in that there remains an open question whether the state treated Kane more harshly than other employees because of his protected activities. (*Id*. at p. 1488.) In *George*, where a jury answered that question in the affirmative, the appellate court was clear that SPB's decision to reject certain misconduct allegations and reduce the penalty against George did not mean the lowered level of discipline was necessarily nonretaliatory, as SPB did not consider what level of discipline the state would have issued in the absence of any protected activity. (*Ibid*.) Thus, the fact that SPB rejected certain misconduct allegations and reduced the state's initial penalty—as in this case—strengthened rather than weakened the employee's parallel claim that the remaining discipline was retaliatory. So too, here.

Moreover, even if SPB sustains every allegation against an employee, that does not mean PERB will always accept the state's affirmative defense. For an employer to prove its affirmative defense, it must demonstrate it had both an alternative, non-discriminatory reason for taking the adverse action and that it, in fact, exercised its discretion to act because of this alternative, non-discriminatory reason, and not because of the employee's protected activity. (*Palo Verde*, *supra*, PERB Decision No. 2337, pp. 31-32 [an employer defending against a prima facie case of retaliation cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place

even in the absence of the protected conduct].) Where SPB has sustained every misconduct allegation against an employee, that will normally satisfy *Palo Verde*'s requirement that there be an alternative, non-discriminatory basis for discipline. But if, for instance, employer agents made statements showing their discriminatory animus, or other employees engaging in similar misconduct received lesser discipline, PERB may find that management would have reached a different result absent protected activity. (See *ante* at p. 26, citing *City of South Pasadena*, *supra*, PERB Decision No. 2692-M.)[13]

As noted above, CCHCS's affirmative defense required it to prove, by a preponderance of the evidence, that it would have taken the exact same action even absent protected activity. (*CCHCS*, *supra*, PERB Decision No. 2760-S, p. 21.) The "exact" same action would mean termination. But by the time the ALJ ruled, CCHCS had a lesser goal: defending the one-month suspension that remained after SPB's decision. The ALJ accepted that the affirmative defense was a means for CCHCS to argue that absent Kane's protected activity, it would still at least have suspended Kane for one month. This was an allowable approach, as resolving an employer's affirmative defense "can involve weighing the evidence supporting the employer's justification against the evidence of the employer's unlawful motive to determine what

[13] This conclusion also reflects a bedrock principle of labor relations law: even when an employer has a managerial, statutory, or contractual right to take an employment action, it violates the law if its actual decision to use that right is based on an unlawful motive, intent, or purpose. (*CCHCS*, *supra*, PERB Decision No. 2760-S, p. 27; *City of San Diego* (2020) PERB Decision No. 2747-M, p. 29; *County of Santa Clara* (2019) PERB Decision No. 2629-M, p. 13; *County of Lassen* (2018) PERB Decision No. 2612-M, p. 6; *Berkeley Unified School District* (2003) PERB Decision No. 1538, pp. 4-5.)

would more likely than not have occurred in the absence of protected activity." (*Id*. at p. 27.) Thus, while an employer is liable for discrimination if the charging party establishes a prima facie case and the employer cannot show it would have taken the "exact" same action absent protected activity, the employer's affirmative defense may nonetheless help ascertain whether to reduce the level of discipline rather than ordering reinstatement with full back pay.[14]

The ALJ concluded that: (1) CCHCS would not have dismissed Kane absent his protected activities, but (2) it would have suspended him for at least one month. We affirm only the first part of this finding, based on the same evidence noted above. Kane had a long tenure at CCHCS, and he had no prior discipline. There is no question that Kane engaged in misconduct, but he did not engage in the significant alleged misconduct that CCHCS severely overstated. In these circumstances, the ALJ jumped too quickly to the conclusion that, absent protected activity, CCHCS would have suspended Kane for at least one month. What is missing is evidence regarding other employees who have received NOAAs for similar conduct, and the penalty imposed, particularly on an employee who had no previous adverse actions. (See, e.g., *DSS*, *supra*, PERB Decision No. 2624-S, pp. 5-6 & 12-13 [discussing evidence

[14] Even where, as here, a disproportionate penalty is one factor in finding retaliatory intent, PERB can simply order reinstatement with full back pay, leaving it to the employer to decide whether to re-discipline the employee at a nonretaliatory level. An employer that thereafter decides to re-issue lesser discipline may trigger a new unfair practice charge challenging the lesser discipline, particularly if the PERB decision in the first case did not identify a different level of discipline that would have been nonretaliatory. In the present circumstances, it is understandable why the ALJ eschewed such an approach, as it would have created a high likelihood of renewed litigation.

regarding the level of discipline issued to other employees charged with similar conduct].) To make an informed determination, the ALJ should have asked both parties to introduce evidence of management's response to similar misconduct by other employees.

While the burden of proving an affirmative defense falls on the respondent, evidence regarding management's response to similar misconduct was equally relevant to AFSCME's prima facie case. (Cf. *San Diego Unified School District* (2019) PERB Decision No. 2634, p. 13, fn. 7 [interplay between the charging party's burden to establish nexus and the respondent's burden to prove an affirmative defense is not formulaic].) For that reason, we do not fault one party over the other for the lack of sufficient evidence, and we remand this matter to PERB's Division of Administrative Law. As we explain further *post* at pp. 37-38, the ALJ shall first refer the matter to a mediator, and if the parties do not reach a settlement, then the ALJ shall reopen the record on the limited issue of what level of discipline CCHCS would have issued absent Kane's protected activities. In advance of a hearing on that issue, the parties shall have the right to subpoena records, including records of discipline against employees both within and outside the bargaining unit. (See *Sacramento City Unified School District* (2018) PERB Decision No. 2597, pp. 9-14.) After accepting such evidence, as well as briefing on the issue identified above and the integrally related issue of remedy, the ALJ shall issue a new proposed decision.

C. Remedy on Remand

The Dills Act vests PERB with the authority to determine "what remedy is necessary to effectuate the purposes of this chapter." (§ 3514.5, 1st par.) In a

separate subdivision, the Dills Act notes that this authority includes directing "an offending party to cease and desist from the unfair practice and to take such affirmative action, including, but not limited to, the reinstatement of employees with or without back pay, as will effectuate the policies of this chapter." (§ 3514.5, subd. (c).) Identical language appears in other statutes under PERB's jurisdiction, and courts have uniformly found it to grant PERB broad remedial power. (See, e.g., *Mt. San Antonio Community College Dist. v. Public Employment Relations Bd.* (1989) 210 Cal.App.3d 178, 189-190.) An appropriate remedy must fully compensate affected employees for harm caused by an unfair practice and serve as a deterrent to future misconduct, so long as the order is not a patent attempt to achieve ends beyond the law's purposes. (*CCHCS*, *supra*, PERB Decision No. 2760-S, p. 35.)

It does not infringe on SPB's jurisdiction for PERB to issue a remedy based upon proof by a preponderance of the evidence establishing what level of discipline the state would have issued absent protected activities. As discussed above, SPB's jurisdiction to review disciplinary actions taken against state civil service employees is consistent with the concurrent jurisdiction of PERB—and other "watchdog" agencies such as the California Civil Rights Department[15]—to provide a full remedy if such employees establish that the state discriminated against them in issuing discipline. (*FEHC*, *supra*, 39 Cal.3d at pp. 437-440 [the Legislature has designated "watchdog agencies" like PERB to remedy discrimination and therefore reinforce the constitutional merit principle].)

[15] The California Civil Rights Department was formerly known as the California Department of Fair Employment and Housing.

Supreme Court precedent further instructs that where SPB jurisdiction overlaps with that of another watchdog agency, "such as where a disciplinary action is alleged to have been motivated by antiunion animus," the proper approach is to "harmonize the disparate procedures rather than simply invalidate one or the other." (*FEHC*, *supra*, 39 Cal.3d at p. 438, citing *Pacific Legal Foundation*, *supra*, 29 Cal.3d at p. 197.) One means of harmonizing is to take a standard approach to collateral estoppel, as explained in *George*, *supra*, 179 Cal.App.4th at pp. 1487-1488, in which granting collateral estoppel to another agency's findings may or may not be dispositive in a separate claim, depending on the circumstances. (See *ante* at pp. 24-28.) In this way, PERB's jurisdiction to enforce the Dills Act does "not supplant" SPB jurisdiction, nor is it "supplanted by" SPB's jurisdiction. (*FEHC*, *supra*, 39 Cal.3d at pp. 431; see also *CCHCS*, *supra*, PERB Decision No. 2760-S, pp. 36-41 [PERB may remedy discriminatory conduct against a state civil service employee despite a contrary order of the SPB]; *State of California (Department of Transportation)* (1984) PERB Decision No. 459-S, pp. 8-9 ["SPB has been granted the authority to review disciplinary actions," but PERB is "charged with reviewing those same disciplinary actions when the charge involves a claim that the exercise of [Dills Act] rights was a motivating factor in the decision to discipline," meaning that an SPB order "poses no impediment" to PERB directing the state to rescind three discriminatory disciplinary actions].)[16]

[16] In *State Personnel Bd. v. Department of Personnel Admin.* (2005) 37 Cal.4th 512, the Supreme Court found that unlike the lawful statutory frameworks authorizing PERB and other "watchdog" agencies to take remedial action based on their specialized functions, private labor contracts cannot create an arbitration scheme that entirely bypass SPB for review of all disciplinary actions. (*Id*. at pp. 524-527.)

In the companion SPB proceeding involving Kane, SPB twice cited *Pacific Legal Foundation*, *supra*, 29 Cal.3d 168, noting that SPB's jurisdiction is entirely separate from PERB's exclusive Dills Act jurisdiction and there is no requirement that the agencies issue the same remedy. (See *ante* at pp. 14-15.) We concur. While the ALJ should afford collateral estoppel effect to SPB's findings in a manner consistent with this decision, there is no requirement that PERB match SPB's remedy if a different remedy more appropriately effectuates the purposes of the Dills Act. SPB and PERB address different potential harms and work toward different statutory goals, which means that there will be instances in which our appropriate remedies are not the same. We express no opinion as to whether this case might fall into that category, as the current record contains insufficient evidence.

CONCLUSION

The events giving rise to this case occurred more than three years ago, during an extraordinarily challenging time for everyone at CCHCS. Since then, the parties have litigated these events extensively, thereby significantly narrowing the range of outcomes. On the one hand, SPB ordered CCHCS to reinstate Kane. On the other hand, consistent with the position of both parties, we have granted collateral estoppel effect to SPB's determinations, meaning there is no longer any dispute that Kane engaged in misconduct. The only remaining question is what level of discipline CCHCS would have issued absent Kane's protected activities. As a result, the highest amount of money that could still be at stake is one month of compensation plus interest, and Kane can attain that full amount only if PERB determines that CCHCS would not have suspended him for any length of time absent his protected activities.

For these reasons, our remand order includes a direction that the ALJ refer the matter to a mediator with PERB's State Mediation and Conciliation Service. The remainder of our order regarding post-remand proceedings before the ALJ shall take effect only if the mediator reports that the parties are unable to settle the matter.

ORDER

This matter is REMANDED to the Division of Administrative Law. The ALJ shall refer the matter to a mediator with PERB's State Mediation and Conciliation Service. If the mediator reports that the parties are unable to settle the matter, the ALJ shall resume proceedings consistent with this decision.[17]

Member Nazarian joined in this Decision.

Member Paulson's concurrence begins on p. 39.

[17] This decision is not a "final decision or order of the board in an unfair practice case" within the meaning of Government Code section 3520, subdivision (b). Accordingly, the period for a party to file a writ of extraordinary relief shall not begin unless and until such a final decision or order issues.

PAULSON, Member, concurring: I agree in all respects with the majority's conclusions as to AFSCME's retaliation claim, including that collateral estoppel applies to SPB's findings regarding: (1) the events of November 4-5, 2020, and (2) the extent to which Kane's conduct violated DOM policies and constituted adequate cause for discipline under the Government Code. By the same token, I agree that collateral estoppel does *not* apply to the question of whether Kane was terminated in retaliation for engaging in activity protected under the Dills Act as he neither raised nor fully litigated the issue before SPB. In sum, I concur with the majority in affirming the ALJ's conclusion that CCHCS would not have dismissed Kane absent his protected activities, and in reversing the ALJ's conclusion on CCHCS's affirmative defense as we cannot determine from the current record whether the one-month suspension SPB ordered is the same level of discipline CCHCS would have issued absent Kane's protected activities.

Unlike the majority, however, I would conclude that Kane had a right to representation at the November 4 meeting because it began and proceeded under highly unusual circumstances. (*Capistrano Unified School District* (2015) PERB Decision No. 2440, p. 13 (*Capistrano*); *State of California (Office of the Inspector General)* (2019) PERB Decision No. 2660-S, pp. 27-30; *Redwoods Community College Dist. v. Public Employment Relations Bd.* (1984) 159 Cal.App.3d 617, 625.) I find the ALJ's observations compelling in this regard: first, rather than approach Kane at his workstation on the open shop floor, where Kane was working beside Kim, Conner summoned Kane to meet with him in his private office. This is salient because the conversation initially centered on procuring a chemotherapy medication Conner

had e-mailed both Kane and Kim about the day before. Removing Kane from his work area, away from Kim and other employees, thus made little sense from the framework of a routine work conversation.

The meeting then continued under highly unusual circumstances once Conner accused Kane of insubordination. In light of the charged context in which the meeting occurred—including that Kane and Kim recently filed a grievance alleging that Conner had violated the parties' collective bargaining agreement; Kane sent information requests relating to the grievance to Conner and other CCHCS personnel; and Conner suggested that Kane's behavior could amount to insubordination, a disciplinable offense—it was reasonable for Kane to believe the meeting to be highly unusual. (*Capistrano*, *supra*, PERB Decision No. 2440, p. 39, fn. 20.) And here, despite Conner's assurance that the meeting was not disciplinary and that Kane did not need a union representative, CCHCS did, in fact, discipline Kane based in part on his conduct during the meeting. (See *Lake Elsinore Unified School District* (2004) PERB Decision No. 1648, pp. 8-9.) I believe Conner should have immediately ceased all further conversation after he told Kane that his behavior could constitute insubordination and continued the conversation only with a representative present, or not pursued discipline against Kane at all consistent with his assurance to him.