STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 521, Charging Party, v. COUNTY OF SANTA CLARA, Respondent.	Case No. SF-CE-1688-M Administrative Appeal PERB Order No. Ad-485-M March 2, 2021

Appearances: Weinberg, Roger & Rosenfeld by Kerianne R. Steele and Katharine R. McDonagh, Attorneys, for Service Employees International Union Local 521; Office of the County Counsel by Nancy J. Clark, Deputy County Counsel, for County of Santa Clara.

Before Banks, Chair; Shiners and Krantz, Members.

DECISION

SHINERS, Member: This case is before the Public Employment Relations Board (PERB or Board) on Service Employees International Union Local 521's appeal of an administrative decision by PERB's Office of the General Counsel (OGC). OGC concluded the dispute alleged in SEIU's unfair practice charge is subject to binding arbitration under the Memorandum of Agreement (MOA) between SEIU and the County of Santa Clara. OGC accordingly placed the charge in abeyance pending completion of arbitration proceedings.

SEIU contends its charge should not have been deferred to arbitration because none of the allegations are appropriate for deferral. The County asserts OGC properly

deferred the charge because all allegations within it center on whether the County violated contractual release time provisions. Based on our review of the administrative decision, the entire case file, and relevant legal authority in light of the parties' submissions, we conclude the charge is not appropriate for deferral to arbitration. We therefore reverse the administrative decision and remand this case to OGC for further investigation and processing consistent with this Decision.

BACKGROUND[1]

Section 4.1(d) of the parties' MOA provides:

> "Release time shall be granted to Local 521 Official Representatives of up to a maximum of fifteen hundred (1500) hours per fiscal year for attendance at meetings of the Board of Supervisors and the Personnel Board. The official representative shall notify his/her supervisor of his/her intention to be on release time as far in advance as reasonably possible, but not later than the end of the normal business hours the day before such meeting, except in emergency situations. Insofar as possible, such release time shall be made through the Department of Labor Relations at least 24 hours in advance of the Board meeting."

Anna Griffin is an administrative assistant in the County's Roads and Airport Department. Griffin is also an SEIU steward. On January 28, 2019, an SEIU internal organizer e-mailed County Labor Relations requesting release time for Griffin to attend the January 29 Board of Supervisors meeting. The charge does not allege that Griffin notified her supervisor, Eric Peterson, about the release time request by the end of

[1] The factual allegations in this section are taken from SEIU's unfair practice charge. When reviewing a charge on appeal, "we assume the charging party's factual allegations are true." (*County of San Diego* (2020) PERB Decision No. 2721-M, p. 2.)

normal business hours on January 28. Griffin attended the January 29 Board of Supervisors meeting.

On February 8, 2019, another SEIU internal organizer e-mailed Peterson about Griffin's release time for January 29. Peterson responded that Griffin's release time was not authorized because she failed to follow the Department's SEIU 521 Release Time Process Policy when requesting the time. He nonetheless approved the release time on Griffin's timecard.

A week later, Peterson reversed his approval of Griffin's release time, writing to the internal organizer that he had since gathered the relevant facts and confirmed that Griffin did not follow applicable procedures. Peterson's decision forced Griffin to use accrued leave to cover her absence from work to attend the January 29 meeting.

On March 8, 2019, SEIU filed a grievance alleging the County violated "Section 2.2 (Union Affiliation), Section 4.1(d) (Bank of Hours), and Article 27 (Full Agreement) of the Memorandum of Agreement" by denying Griffin paid release time to attend the January 29 Board of Supervisors meeting.[2] The grievance alleged: "The County

[2] MOA Section 2.2 states: **"**[n]either the County, nor the Union, shall interfere with, intimidate, restrain, coerce or discriminate against any worker in his/her free choice to participate or join or refuse to participate or join the Union."

MOA Article 27 states: "It is understood this Agreement represents a complete and final understanding on all negotiable issues between the County and its Departments and the Union. This Agreement supercedes all previous memoranda of understanding or memoranda of agreement between the County and its Departments and the Union except as specifically referred to in this Agreement. All ordinances or rules covering any practice, subject or matter not specifically referred to or covered in this Agreement shall not be superseded, modified or repealed by implication or otherwise by the provisions hereof. The parties, for the term of this Agreement, voluntarily and unqualifiedly agree to waive the obligation to negotiate with respect to

erroneously believes that an alleged breach of a unilaterally imposed policy on release time absolves the County of its obligation for payment under the contract." As remedies, SEIU asked the County to authorize paid release time for Griffin's attendance at the Board of Supervisors meeting and "cease and desist application and enforcement of the unilaterally imposed release time policy on the bargaining unit."[3]

One month after the County denied the grievance, SEIU filed this unfair practice charge. The charge alleges that Peterson's rescission of his prior approval of Griffin's paid release time constituted retaliation for her attendance at the Board of Supervisors meeting on behalf of SEIU. It also alleges that the County unilaterally changed the procedure for requesting release time by adding additional requirements to those contained in the MOA and engaged in unlawful direct dealing with bargaining unit employees. The charge alleges that by this same conduct the County interfered with employees' right to request release time.

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any practice subject or matter not specifically referred to or covered in this Agreement even though such practice, subject or matter may not have been within the knowledge of the parties at the time this Agreement was negotiated and signed. In the event any new practice, subject or matter arises during the term of this Agreement and an action is proposed by the County, the Union shall be afforded all possible notice and shall have the right to meet and confer upon request. In the absence of agreement on such as proposed action, the County reserves its right to take necessary action by Management direction."

[3] The County provided a copy of the grievance as an exhibit to its position statement. At the charge investigation stage, PERB may consider information provided by the respondent, when such information is submitted under oath, complements without contradicting the facts alleged in the charge, and is not disputed by the charging party. (PERB Reg. 32620, subd. (c) [PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.]; *Service Employees International Union #790 (Adza)* (2004) PERB Decision No. 1632-M, adopting dismissal letter at p. 1.) Those conditions are met here.

The County filed a position statement arguing that the grievance covered this same dispute, making it subject to binding arbitration under the parties' MOA. Seeking to defer this dispute to arbitration, the County said it would waive any procedural defenses to arbitration of the grievance.

On June 8, 2020, OGC issued an administrative decision placing SEIU's charge in abeyance until the parties' contractual arbitration process was complete and notifying the parties that the charge would be dismissed following arbitration unless the Union sought repugnancy review of the arbitrator's decision. In *County of Santa Clara* (2020) PERB Order No. Ad-482-M, we concluded that a decision by OGC to place a charge in abeyance pending the completion of arbitration proceedings may be appealed directly to the Board itself, and accepted SEIU's appeal. (*Id.* at pp. 10-11.) At the same time, we requested supplemental briefing on two issues:

> 1. The unfair practice charge alleges retaliation/ discrimination, interference, unilateral change, and direct dealing, and also appears to allege a violation of Government Code section 3558.8. Do any of these alleged violations subject the charge to deferral? What is the relevance, if any, of the fact that the allegations reference both a collectively-bargained policy and an employer policy that was not collectively-bargained?
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> 2. Board precedent does not allow an allegation that an employee suffered discrimination or retaliation for filing a PERB charge or participating in PERB proceedings to be deferred to arbitration. Under what additional circumstances, if any, should PERB decline to defer a discrimination/ retaliation allegation to arbitration?

The parties filed supplemental briefs on January 11, 2021.

DISCUSSION

In an appeal from an administrative decision, the appellant must demonstrate how or why the challenged decision departs from the Board's precedents or regulations. (*Regents of the University of California* (2016) PERB Order No. Ad-434-H, p. 8; *County of Santa Clara* (2014) PERB Order No. Ad-411-M, p. 5.) In its appeal, SEIU primarily argues that the Board should substantially extend precedent by holding that allegations of discrimination, retaliation, interference, or direct dealing, as well as unilateral change allegations related to a retaliation claim, may never be deferred to arbitration. For the following reasons, we decline to adopt such categorical exclusions but find deferral of this charge inappropriate under existing precedent.

I. Legal Standard for Pre-Arbitration Deferral

There is a preference in California's public sector "that disputes be resolved through the parties' mutually agreed upon grievance arbitration procedures." (*State of California (Department of Food and Agriculture)* (2002) PERB Decision No. 1473-S, p. 13.) "When considering whether to defer an unfair practice charge to arbitration, the Board, following *Collyer Insulated Wire* (1971) 192 NLRB 837 (*Collyer*), applies a three-part test: (1) whether the dispute arises within a stable collective bargaining relationship; (2) whether the respondent is willing to waive contract-based procedural defenses to the grievance or arbitration and is willing to arbitrate the dispute; and (3) whether the contract and its meaning lie at the center of the dispute."[4] (*Trustees of*

[4] When the charging party is an individual employee and the applicable collective bargaining agreement does not allow an employee to advance a grievance to arbitration, PERB also must determine whether the exclusive representative is

the California State University (East Bay) (2014) PERB Decision No. 2391-H, p. 35 (*Trustees*); cf. *State of California (Department of Food and Agriculture)*, *supra*, PERB Decision No. 1473-S, p. 13 [holding that section 3541.5, subdivision (a) of the Educational Employment Relations Act (§ 3540 et seq.) codified the National Labor Relations Board's (NLRB) "pre-arbitration deferral policy as articulated in Collyer" (underline in original)].)

When a respondent pleads deferral and establishes each of the above elements, PERB defers to the parties' contractual arbitration procedure unless a recognized exception applies. (See, e.g., Gov. Code, § 3505.8 [PERB "shall place [an unfair practice charge] in abeyance if the dispute is subject to final and binding arbitration pursuant to [a] memorandum of understanding"]; PERB Reg. 32620, subd. (b)(6) [a charge must be placed in abeyance "if the dispute . . . is subject to deferral to final and binding arbitration pursuant to a collective bargaining agreement"].)[5]

Here, it is undisputed that SEIU and the County have a stable bargaining relationship, and the County has waived procedural defenses and is willing to arbitrate the merits of SEIU's grievance. This case thus turns on "whether the contract and its meaning lie at the center of the dispute."

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willing to proceed to arbitration on the employee's grievance. (*Claremont Unified School District* (2014) PERB Decision No. 2357, p. 18 (*Claremont*).)

[5] Government Code section 3505.8 is part of the Meyers-Milias-Brown Act (MMBA), which is codified at Government Code section 3500 et seq. All further statutory references are to the Government Code.

"[T]he contract and its meaning lie at the center of the dispute" when two conditions are met. First, "the alleged unfair practice [must be] arguably prohibited by the parties' agreement." (*Fremont Unified School District* (2003) PERB Decision No. 1571, p. 4, underline in original; *Los Angeles Unified School District* (1990) PERB Decision No. 860, pp. 3-4.) "[I]t is not sufficient for the agreement to merely cover or discuss the matter. The conduct alleged to be an unfair practice must be prohibited." (*Fremont Union High School District* (1993) PERB Order No. Ad-248, p. 5.)

Second, resolution of the contractual issue must necessarily resolve the merits of the unfair practice allegation.[6] (*Springfield Day Nursery* (2015) 362 NLRB 261, 280; *Servomation Corp.* (1984) 271 NLRB 1112.)[7] If resolution of the alleged unfair practice requires application of statutory legal standards, and "there is no guarantee that an arbitrator will look beyond the contract and consider statutory principles," deferral is not appropriate. (*North American Pipe Corp.* (2006) 347 NLRB 836, 852; see *International Organization of Masters* (1975) 220 NLRB 164, 168 [deferral inappropriate where "there is no assurance that the arbitrator would necessarily resolve the unfair labor practice issue"].)

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[6] As illustrated *post*, this condition may be met where the parties incorporate the statutory legal standard into their collective bargaining agreement. It also could be met by a stipulation that the parties will ask the arbitrator to resolve the statutory unfair practice issue.

[7] Federal judicial and administrative precedent is not binding on PERB, though we may find such precedent persuasive in construing California's public sector labor relations statutes. (*City of Sacramento* (2020) PERB Decision No. 2702-M, p. 9, fn. 13.)

Further, as a general policy "no allegation is appropriate for deferral, unless the entire matter is appropriate for deferral." (*Claremont*, *supra*, PERB Decision No. 2357, p. 17, fn. 14.) "[S]uch a rule ensures one forum for resolution of a dispute, eliminates overlapping and duplicative proceedings, promotes more timely resolution of disputes and contributes to employer-employee stability." (*State of California (Department of Mental Health)* (2003) PERB Decision No. 1567-S, p. 8 (*Department of Mental Health*); *State of California (Department of Corrections)* (1995) PERB Decision No. 1100-S, p. 14.)

How this general policy against bifurcation applies to a particular charge depends on whether the alleged violations are independent of one another or, alternatively, one violation is derivative of another violation. As the terms suggest, an independent violation can be proven without also proving another alleged violation, while a derivative violation depends entirely on proving another violation. (*Regents of the University of California (Berkeley)* (2018) PERB Decision No. 2610-H, p. 68.)[8]

County of San Diego, *supra*, PERB Decision No. 2721-M, illustrates the distinction. There, the charge alleged interference, discrimination, and maintenance of

[8] Under this standard, interference can be either an independent violation or derivative of another violation, depending upon whether the facts at issue permit a charging party to establish interference without establishing any other violation. Be that as it may, there is little doubt that interference is the most common derivative violation because it may arise from failure to bargain in good faith, discrimination, or retaliation. (See, e.g., *County of Sacramento* (2020) PERB Decision No. 2745-M, p. 26 [county's failure to meet and confer in good faith also interfered with employees' right to be represented by their union and the union's right to represent bargaining unit members]; *City of Santa Maria* (2020) PERB Decision No. 2736-M, adopted proposed decision at p. 47 [city's retaliatory investigation of union executive board members interfered with the union's right to represent bargaining unit members].)

an unreasonable local rule, all arising from the employer's local rule prohibiting members of its governing board from discussing subjects within the scope of representation with employees or union representatives while the employer was engaged in bargaining. (*Id.* at pp. 4-5.) We concluded that the charge established independent, prima facie discrimination and interference violations, but only a derivative unreasonable rule violation that depended upon proving discrimination or interference. (*Id.* at pp. 15-16.)

Department of Mental Health, *supra*, PERB Decision No. 1567-S, demonstrates how the general policy against bifurcation applies to a derivative violation. The charge alleged that the employer made an unlawful unilateral change when it transferred work out of the bargaining unit, and that the alleged transfer of work interfered with the union's right to represent bargaining unit members. (*Id.* at pp. 4-6.) The Board concluded the unilateral change allegation was subject to deferral because the parties' collective bargaining agreement required the employer to bargain over "the impact of changes in negotiable matters that are not covered by the agreement." (*Id.* at pp. 5-6.) The Board then rejected the union's argument that the interference allegation should not be deferred, concluding the alleged interference violation was derivative of the unilateral change allegation. (*Id.* at p. 9.) Thus, an allegation that is derivative of an allegation subject to deferral must also be deferred. (*Ibid.*)

The deferral analysis is more complex, however, when a charge alleges two or more independent violations. If at least one such violation is not deferrable, PERB will not defer any other violation that is "closely related" to it. (*Department of Mental Health*, *supra*, PERB Decision No. 1567-S, p. 7, citing *Clarkson Industries* (1993) 312

NLRB 349.) While “closely related” has not been explicitly defined in this context, the NLRB has recognized that deferral may be appropriate for allegations that “are not in any way factually or legally interrelated with” allegations that are not subject to deferral. (*Clarkson Industries*, *supra*, 312 NLRB at p. 353.) We thus construe “closely related” to mean the allegations are “factually or legally interrelated.”

In *Clarkson Industries*, *supra*, 312 NLRB 349, the complaint included allegations that the employer discriminated against a union steward by disparately enforcing a work rule against him because of his position as a steward and interfered with protected rights by threatening to hold the steward to a higher standard of conduct than other employees. (*Id.* at p. 351.) The NLRB declined to defer the interference allegation because the parties’ contract prohibited the arbitrator from ordering the employer not to apply the work rule disparately against the steward in the future. (*Ibid.*) It then declined to defer the discrimination allegation because it was “closely related” to the interference allegation—even though it would have been subject to deferral standing alone. (*Id.* at p. 352.)

The NLRB reached a similar result in *Graymont PA, Inc.* (2016) 364 NLRB No. 37. There, the complaint alleged that the employer unilaterally changed its absenteeism and discipline policy and refused to provide the union with requested information about the changes. (*Id.* at p. 21.) The NLRB declined to defer the information request allegation under its longstanding policy against deferring such allegations. (*Ibid.*) It then declined to defer the unilateral change allegation because the requested information related to the alleged change to the employer’s absenteeism and discipline policy, and thus whether the employer had a duty to

provide the requested information was dependent upon whether it had a duty to bargain over the change. (*Ibid.*) In so ruling, the NLRB noted that deferral of the unilateral change allegation but not the information request allegation would risk inconsistent results between the NLRB and the arbitrator on "an overlapping and related question." (*Ibid.*)

Based on these persuasive NLRB decisions, we clarify that when a charge alleges two or more independent violations, and one of the alleged violations is not subject to deferral, any allegations that are "closely related" to, i.e., "factually or legally interrelated with," the non-deferable allegation also may not be deferred. (*Claremont*, *supra*, PERB Decision No. 2357, p. 17, fn. 14; *Department of Mental Health*, *supra*, PERB Decision No. 1567-S, p. 7.)

II. Application of Pre-Arbitration Deferral Standard to SEIU's Charge

SEIU's charge allegations arise from the same core set of facts as the grievance—the County's denial of paid release time to Griffin based on her purported failure to comply with a release time policy the County allegedly imposed unilaterally. Because these allegations are factually interrelated, the charge may not be deferred to arbitration unless deferral is appropriate for all allegations. (*Claremont*, *supra*, PERB Decision No. 2357, p. 17, fn. 14; *Department of Mental Health*, *supra*, PERB Decision No. 1567-S, p. 7.) We accordingly analyze each allegation in turn.

A. Unilateral Change

The charge alleges the County made an unlawful unilateral change by adopting the SEIU 521 Release Time Process Policy. To prove an unlawful unilateral change, SEIU must show: "(1) the [County] took action to change policy; (2) the change

concerns a matter within the scope of representation; (3) the change has a generalized effect or continuing impact on represented employees' terms or conditions of employment; and (4) the [County] reached its decision without first providing advance notice of the proposed change to [SEIU] and bargaining in good faith over the decision." (*County of Merced* (2020) PERB Decision No. 2740-M, p. 8.)

In its position statement, the County asserts the SEIU 521 Release Time Process Policy implemented, but did not change, the MOA's paid release time policy. The County does not address the other three elements of the unilateral change test. Thus, it appears the only issue in dispute is whether the County changed the parties' established policy on paid release time.

"[T]here are three primary types of policy changes: (1) deviation from the status quo set forth in a written agreement or written policy; (2) a change in established past practice; and (3) a newly created policy or application or enforcement of existing policy in a new way." (*County of Merced*, *supra*, PERB Decision No. 2740-M, p. 9.) To determine whether the County "took action to change policy," PERB will have to decide whether the SEIU 521 Release Time Process Policy adds to the requirements of MOA section 4.1(d), or deviates from it or enforces it in a new way (as SEIU argues) or is consistent with MOA section 4.1(d) and past practice (as the County argues). Because the alleged policy change is the only disputed issue, the meaning of MOA section 4.1(d) "lie[s] at the center of the [unilateral change] dispute." Moreover, as SEIU alleged in its grievance, unilateral adoption of a release time policy inconsistent with MOA section 4.1(d) is arguably prohibited by the MOA. The unilateral change allegation therefore is subject to deferral. (*Trustees*, *supra*, PERB Decision

No. 2391-H, p. 35; *Fremont Unified School District*, *supra*, PERB Decision No. 1571, p. 4.) Nevertheless, because we find *post* that the direct dealing allegation arising from the same core set of facts is not subject to deferral, we cannot defer the unilateral change allegation. (*Claremont*, *supra*, PERB Decision No. 2357, p. 17, fn. 14; *Department of Mental Health*, *supra*, PERB Decision No. 1567-S, p. 7.)

B. Direct Dealing

The charge alleges the County's adoption of the SEIU 521 Release Time Process Policy constituted unlawful direct dealing. To prove direct dealing in this context, SEIU must show the County "dealt directly with its employees to create a new policy of general application, or to obtain a waiver or modification of existing policies applicable to those employees." (*City of Culver City* (2020) PERB Decision No. 2731-M, p. 22; *Walnut Valley Unified School District* (1981) PERB Decision No. 160, p. 6.)[9] Like the unilateral change allegation, this allegation requires determining whether the County followed existing policy or, alternatively, created a new policy, modified a policy, or obtained a waiver of an existing policy. Although an arbitrator could decide this issue as a matter of contract interpretation, nothing in the MOA indicates that if the arbitrator were to find the SEIU 521 Release Time Process Policy inconsistent with section 4.1(d), the arbitrator would look beyond the contract and engage in the required additional statutory analysis—whether the County "dealt directly with its

[9] In other contexts, a union can establish direct dealing by showing that an employer communicated directly with employees to undermine or derogate a union's exclusive authority to represent unit members. (*Muroc Unified School District* (1978) PERB Decision No. 80, pp. 19-21; see *Trustees of the California State University* (2006) PERB Decision No. 1871-H, adopting dismissal letter at p. 3 [discussing direct dealing related to collective bargaining].)

employees" in adopting the Policy. We therefore cannot find that the meaning of section 4.1(d) "lie[s] at the center" of the direct dealing allegation. (*North American Pipe Corp.*, *supra*, 347 NLRB 836, 852.) Nor does there appear to be a provision in the MOA that arguably prohibits direct dealing. For these reasons, the direct dealing allegation is not subject to deferral.[10]

C. Retaliation

1. SEIU's Proposed Categorical Rule

SEIU urges us to adopt a categorical rule that retaliation, discrimination, and interference allegations may never be deferred to arbitration. Although such a bright line rule would be easy to apply, we reject it because existing precedent properly balances PERB's authority to adjudicate and remedy unfair practices with parties' ability to agree to have those same disputes decided by an arbitrator.

SEIU builds its argument on the foundation of *Trustees*, *supra*, PERB Decision No. 2391-H, where we held that allegations of "retaliation for filing PERB charges or otherwise participating in PERB processes" are not subject to deferral.[11] (*Id.* at p. 39.)

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[10] In so finding, we decline to create a categorical rule that all direct dealing allegations must be excluded from deferral to arbitration, as SEIU urges. Rather, each direct dealing allegation must be evaluated under the particular circumstances to determine whether deferral is appropriate.

[11] SEIU claims "[i]t is unclear whether the holding also extends to claims that an employee was discriminated against for filing a PERB charge or otherwise participating in PERB processes." Consistent with PERB practice, the *Trustees* decision uses "retaliation" and "discrimination" interchangeably. (E.g., *Trustees*, *supra*, PERB Decision No. 2391-H, p. 29 [finding the charging party "failed to establish a prima facie case for retaliation or discrimination on the basis of his protected activities"].) We therefore clarify that the prohibition on deferral announced in *Trustees* applies to allegations that an employee was retaliated or discriminated against for

The rationale for this limitation is that "[p]arties are implicitly guaranteed access to PERB without fear of reprisal or discrimination, and safeguarding that access is a function that more appropriately lies with the Board, rather than an arbitrator." (*Id.* at p. 38.)

Although the Board's animating concern was to protect access to PERB's processes, the Board went on to make the following general observations about the suitability of arbitration as a forum for adjudicating retaliation claims:

> "PERB has adjudicated retaliation claims since its inception, has developed and refined a workable test for assessing such claims, and applies the test uniformly to all the statutes it administers. Even if a retaliation claim could arguably fall within an arbitrator's jurisdiction where, as in this case, the CBA contains a just cause clause, the meaning of the CBA does not generally lie at the center of the dispute in such cases. . . . [¶] Unlike a typical contract interpretation matter, for which arbitration is uniquely suited and bargained for, retaliation cases do not require the trier of fact to discern the meaning of a CBA."

(*Trustees*, *supra*, PERB Decision No. 2391-H, p. 38.)

SEIU cites these general observations to argue for a total ban on arbitration of retaliation claims. But while these observations express a general preference for PERB to decide retaliation claims, they do not support a categorical ban on deferral because existing law does not preclude an arbitrator from deciding a statutory claim if the parties so agree. (See *State of California (Department of Corrections)*, *supra*, PERB Decision No. 1100-S, p. 9 ["the parties have the right to choose a grievance

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filing a PERB charge or otherwise participating in PERB processes. Further, while this case arises under a different labor relations statute than *Trustees*, we find its reasoning applies equally under the MMBA.

and arbitration process, rather than PERB, as that neutral, administrative forum, and the Board should defer to the parties' choice"]; *California Correctional Peace Officers Assn. v. State of California* (2006) 142 Cal.App.4th 198, 210 ["the body of case law governing arbitration has recognized repeatedly that arbitrators may be presented with issues of statutory interpretation and are entitled to resolve those issues"].) For instance, a non-discrimination clause may provide a basis for deferral of a retaliation allegation. (*Fremont Unified School District*, *supra*, PERB Decision No. 1571, p. 4.) Thus, while the above quote from *Trustees* shows that a collectively-bargained "just cause" provision by itself does not provide a sufficient basis for PERB to defer a retaliation or discrimination allegation, deferral is appropriate where parties have explicitly agreed to arbitrate claims involving discrimination or retaliation for union activity—as the parties in this case did in their MOA.

SEIU also relies on another general observation by the Board: "The only assurance PERB and the parties have that an arbitrator correctly applies the statutory standard in judging retaliation claims is through the repugnancy process, which adds a layer of delay onto cases that should be decided without delay." (*Trustees*, *supra*, PERB Decision No. 2391-H, p. 39.) This observation appears to assume that PERB's pre-arbitration deferral standard does not require a determination that the arbitrator will apply the statutory standard. To the extent there is any ambiguity on this point, we clarify that deferral of an allegation is not appropriate unless the arbitrator necessarily

must apply the statutory standard to resolve the contractual dispute.[12] (*North American Pipe Corp.*, *supra*, 347 NLRB 836, 852.)

Under existing precedent, PERB determines the appropriateness of deferring an allegation on a case-by-case basis by focusing on whether an arbitrator would necessarily have to resolve the statutory unfair practice allegation. This standard accommodates the preference for arbitration as a means of resolving labor disputes with PERB's statutory authority and duty to adjudicate and remedy unfair practices. It also accounts for nuances that may arise from particular combinations of contract language and facts. While SEIU clearly would prefer that all retaliation, discrimination, and interference allegations be decided by PERB, it presents no compelling reason why PERB should not defer to the parties' choice to have such allegations decided by an arbitrator where it is clear they have done so. (*State of California (Department of Corrections)*, *supra*, PERB Decision No. 1100-S, p. 9.) Accordingly, we reject SEIU's invitation to extend the limited prohibition on deferral announced in *Trustees* to all retaliation, discrimination, and interference allegations.

2. Application of Existing Deferral Standard

The charge alleges that Peterson's rescission of his prior approval of Griffin's paid release time constituted retaliation for her attendance at the Board of Supervisors meeting on behalf of SEIU. To establish a prima facie case that the County

[12] This clarification ensures that our pre-arbitration deferral standard is consistent with our post-arbitration deferral standard, which requires that the arbitrator actually decide the alleged statutory violation. (*Santa Ana Unified School District* (2008) PERB Decision No. 1951, pp. 9-11; *Yuba City Unified School District* (1995) PERB Decision No. 1095, p 14.)

discriminated or retaliated against Griffin in violation of MMBA sections 3506 and 3506.5, subdivision (a), and PERB Regulation 32603, subdivision (a), SEIU must show that: (1) Griffin exercised rights under the MMBA; (2) the County had knowledge of her exercise of those rights; (3) the County took adverse action against Griffin; and (4) the County took the adverse action because of the exercise of those rights, meaning Griffin's protected activity was a substantial motivating factor in the denial of paid release time. (*City & County of San Francisco* (2020) PERB Decision No. 2712-M, p. 15.) If SEIU establishes a prima facie case, the burden shifts to the County to prove it would have taken the same adverse action even if Griffin had not engaged in protected activity. (*Ibid.*; *Martori Brothers Distributors v. Agricultural Labor Relations Bd.* (1981) 29 Cal.3d 721, 729-730; *Wright Line* (1980) 251 NLRB 1083, 1089.)

The County contends the denial of Griffin's paid release time was consistent with MOA section 4.1(d) and past practice. But "even when an employer has a managerial, statutory, or contractual right to take an employment action, its decision to act cannot be based on an unlawful motive, intent, or purpose." (*City of San Diego* (2020) PERB Decision No. 2747-M, p. 29.) Thus, while an employer's compliance with contractual requirements may be relevant to its motive for taking an adverse action, it rarely is dispositive. Accordingly, we cannot conclude that the meaning of MOA section 4.1(d) "lie[s] at the center" of the retaliation allegation. (*North American Pipe Corp.*, *supra*, 347 NLRB 836, 852.)

Deferral of a retaliation allegation may be appropriate, however, when the agreement contains a non-discrimination clause. (*Fremont Unified School District*,

supra, PERB Decision No. 1571, p. 4.) The MOA contains the following relevant provisions:

> "**Section 2.1 – Employment.** Neither the County nor the Union shall discriminate (except as allowed by law) against workers because of race, age, sex, color, disability, creed, national origin, religion, Union activity, affiliations, political opinions, or sexual orientation.
>
> **"Section 2.2 – Union Affiliation.** Neither the County, nor the Union, shall interfere with, intimidate, restrain, coerce or discriminate against any worker in his/her free choice to participate or join or refuse to participate or join the Union.
>
> **"Section 19.1 – Grievance Defined**
> **a) Definition**
> A grievance is defined as an alleged violation, misinterpretation or misapplication of the provisions of this Memorandum of Agreement, Department Memoranda of Agreement and/or Understanding, Merit System Rules, or other County ordinances, resolutions, Policy and/or Procedure Manuals, or alleged infringement of a worker's personal rights (i.e., discrimination, harassment) affecting the working conditions of the workers covered by this Agreement, except as excluded under Section 19.1(b)."[13]

MOA sections 2.1 and 2.2 explicitly prohibit discrimination because of "Union activity" or participation in SEIU activities, respectively. Alleged violations of sections

[13] In its supplemental brief, the County provided a URL to the full MOA on SEIU's website. PERB may take official notice of documents that meet the criteria for judicial notice under Evidence Code section 452. (*Santa Clara County Superior Court* (2014) PERB Decision No. 2394-C, p. 16.) Evidence Code section 452, subdivision (c) allows a court to take judicial notice of a collective bargaining agreement adopted by a county board of supervisors. (*Association for Los Angeles Deputy Sheriffs v. County of Los Angeles* (2019) 42 Cal.App.5th 918, 924, fn. 2.) We therefore take official notice of the parties' 2015-2019 MOA.

2.1 and 2.2 are subject to the contractual grievance procedure. Indeed, the contractual definition of "grievance" explicitly includes "alleged infringement of a worker's personal rights (i.e., *discrimination*, harassment) affecting the working conditions of the workers." (Italics added.) The MOA's grievance procedure does not exclude such grievances from binding arbitration. Thus, the allegation that the County retaliated against Griffin because of her union activity is subject to binding arbitration under the MOA if the meaning of section 2.1 or 2.2 "lie[s] at the center" of the dispute.

SEIU argues the meaning of MOA section 2.2 does not lie at the center of the dispute because it is "unlikely" an arbitrator would interpret the provision as "includ[ing] all the nuances and contours of the MMBA."[14] While section 2.2 cannot be read to incorporate all MMBA rights, it clearly incorporates the MMBA's prohibition against discrimination because of protected activity. MOA section 2.2 provides: "Neither the County, nor the Union, shall interfere with, intimidate, restrain, coerce or discriminate against any worker in his/her free choice to participate or join or refuse to participate or join the Union." MMBA section 3506 provides: "Public agencies and employee organizations shall not interfere with, intimidate, restrain, coerce or discriminate against public employees because of their exercise of their rights under Section 3502."[15] Because section 2.2 incorporates almost verbatim the language of

[14] SEIU does not address MOA section 2.1, presumably because its grievance did not allege a violation of that section.

[15] MMBA section 3502 provides: "Except as otherwise provided by the Legislature, public 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. Public employees also shall have the right to refuse to join or participate in the activities of employee

MMBA section 3506, the best reading of the MOA is that the parties intended to prohibit by contract the same discriminatory conduct prohibited by statute. Further, the parties' decision not to exclude statutory violations of section 2.2 from the contractual grievance procedure indicates their intent to use that procedure to resolve allegations of County discrimination against employees because of their union activity. (See *Regents of the University of California* (2010) PERB Decision No. 2094-H, pp. 19-20 [recognizing that parties may incorporate external law into their agreement so that statutory violations may be resolved through the contractual grievance process].)[16]

Given the MOA's language, an arbitrator presented with an alleged violation of section 2.2 would necessarily apply the same standard PERB would apply in determining whether the County denied Griffin paid release time because she attended the Board of Supervisors meeting in her role as an SEIU steward.[17] Because under these circumstances an arbitrator would have to apply the statutory retaliation standard, deferral would be appropriate if the charge contained only this retaliation

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organizations and shall have the right to represent themselves individually in their employment relations with the public agency."

[16] Indeed, SEIU asserted a violation of MOA section 2.2 in its grievance. While a union may file a grievance to preserve rights and doing so does not necessarily determine contractual meaning, SEIU's grievance appears to at least be consistent with our contract interpretation.

[17] And if the arbitrator failed to do so, SEIU could ask PERB to find the arbitration award repugnant to the MMBA. (See *Santa Ana Unified School District*, *supra*, PERB Decision No. 1951, pp. 11-12 [finding arbitration award was not repugnant because the arbitrator considered whether the grievant was transferred because of her union activity].)

allegation.[18] (*North American Pipe Corp.*, *supra*, 347 NLRB 836, 852.) But because we have found *ante* that the direct dealing allegation arising from the same core set of facts is not subject to deferral, we cannot defer the retaliation allegation. (*Claremont*, *supra*, PERB Decision No. 2357, p. 17, fn. 14; *Department of Mental Health*, *supra*, PERB Decision No. 1567-S, p. 7.)

D. Interference

The charge alleges the County's denial of paid release time to Griffin interfered with employees' right to request release time. As noted *ante*, MOA section 2.2 incorporates MMBA section 3506's prohibition against interference with employees' participation in union activities. As a result, an arbitrator would necessarily apply PERB's interference standard in deciding an alleged section 2.2 violation, and this allegation accordingly would be subject to deferral standing alone. But because we have found *ante* that the direct dealing allegation arising from the same core set of facts is not subject to deferral, we cannot defer the interference allegation.[19] (*Claremont*, *supra*, PERB Decision No. 2357, p. 17, fn. 14; *Department of Mental Health*, *supra*, PERB Decision No. 1567-S, p. 7.)

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[18] In finding deferral appropriate here, we do not rule that deferral is appropriate whenever a collective bargaining agreement contains a non-discrimination clause. Rather, the appropriateness of deferral must be determined based on the language and context of the particular non-discrimination clause and the facts alleged in the unfair practice charge.

[19] This would be so even if the interference allegation was derivative of the other allegations in the charge, as those allegations also may not be deferred. (See *Department of Mental Health*, *supra*, PERB Decision No. 1567-S, p. 9 [derivative violations are subject to deferral when the allegations from which they derive are subject to deferral].)

CONCLUSION

Applying existing precedent, we conclude SEIU's charge is not subject to deferral because, although the unilateral change, retaliation, and interference allegations meet the criteria for deferral, they arise from the same core set of facts as the direct dealing allegation, which does not. PERB therefore must retain all allegations. (*Claremont*, *supra*, PERB Decision No. 2357, p. 17, fn. 14; *Department of Mental Health*, *supra*, PERB Decision No. 1567-S, p. 7.) Because OGC deferred the charge to arbitration without determining whether the charge states a prima facie case of any of the alleged violations, it is appropriate to remand this case to OGC for further investigation of the charge allegations. (*State of California (Department of Food and Agriculture)*, *supra*, PERB Decision No. 1473-S, pp. 13-14.) If the investigation results in the direct dealing allegation being dismissed or withdrawn, the County may renew its request for deferral.[20]

ORDER

Service Employees International Union Local 521's appeal of the Office of the General Counsel's June 8, 2020 administrative decision in Case No. SF-CE-1688-M is GRANTED. The Board REMANDS this case to the Office of the General Counsel for further investigation and processing consistent with this Decision.

Chair Banks and Member Krantz joined in this Decision.

[20] SEIU avers that it may amend its charge to allege the County violated Government Code sections 3550 and 3558.8. Because no such allegations are in the charge before us, we express no opinion on the extent to which such claims may be subject to deferral.