STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1000, Charging Party, v. STATE OF CALIFORNIA (CALIFORNIA CORRECTIONAL HEALTH CARE SERVICES), Respondent.	Case No. SF-CE-283-S PERB Decision No. 2637-S April 17, 2019

Appearances: Theresa Witherspoon, Attorney, for Service Employees International Union Local 1000; California Department of Human Resources, by Anthony E. Serrao, Legal Counsel, for State of California (California Correctional Health Care Services).

Before Banks, Krantz, and Paulson, Members.

DECISION

PAULSON, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions by Charging Party Service Employees International Union, Local 1000 (SEIU) to the proposed decision of an administrative law judge (ALJ). The complaint alleged that the State of California (California Correctional Health Care Services) (CCHCS) issued Elsa Monroe (Monroe) a Letter of Reprimand in retaliation for her participation in protected activity, in violation of the Ralph C. Dills Act (Dills Act),[1] section 3519, subdivisions (a) and (b). The ALJ dismissed the complaint and underlying unfair practice charge, finding that SEIU did not establish CCHCS (1) knew of Monroe's protected activity, and (2) acted against her because of it.

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

We have reviewed the proposed decision, SEIU's exceptions, CCHCS's responses thereto, and the entire record in light of applicable law. Based on this review, we reverse the proposed decision for the reasons set forth below.

FACTUAL AND PROCEDURAL BACKGROUND

On March 1, 2016, SEIU filed an unfair practice charge against CCHCS for issuing Monroe a Letter of Reprimand in alleged retaliation for her union stewardship and grievance activity. On September 5, 2016, SEIU filed an amended charge. On September 21, 2016, the Office of the General Counsel issued a complaint alleging that CCHCS violated Dills Act section 3519, subdivisions (a) and (b) by reprimanding Monroe in retaliation for her representation by SEIU in a grievance arbitration challenging a 2011 reassignment.

On October 11, 2016, CCHCS answered the complaint by denying any violation of the Dills Act and asserting multiple affirmative defenses including untimeliness. On February 17, 2017, CCHCS filed a motion to dismiss on untimeliness grounds, and SEIU filed its opposition. The case proceeded to formal hearing on March 9 and 10 and April 11, 2017. On the first day of the formal hearing, the ALJ denied the motion to dismiss without prejudice and allowed the parties to develop a factual record regarding the motion. The parties filed their post-hearing briefs on or about May 26, 2017. The ALJ ultimately found the charge was timely filed, and CCHCS has not excepted to that finding. The ALJ dismissed the complaint on its merits, however, and SEIU excepted to multiple factual and legal findings underpinning that result.

Jurisdiction

CCHCS is the state employer within the meaning of Dills Act section 3513, subdivision (j). SEIU is a recognized employee organization within the meaning of Dills Act section 3513,

subdivision (b) and exclusively represents statewide Bargaining Unit 17 (Registered Nurses). Monroe is a state employee within the meaning of Dills Act section 3513, subdivision (c), and at all times relevant to this case was employed as a registered nurse (RN) at San Quentin State Prison.

Monroe's Employment History and Union Involvement

In March 2007, CCHCS hired Monroe as an RN. Monroe began serving as a union steward in 2009. In her role as steward, she attended joint labor-management committee meetings that included both union stewards and management representatives such as the Chief Executive Officer, Chief Nursing Executive (CNE), Director of Nursing, and Associate Warden. Monroe also represented union members at *Skelly*[2] hearings, grievance meetings, investigatory interview meetings, and meetings with supervisors, hiring authorities, and physicians. In addition to her stewardship, Monroe has also held leadership positions within SEIU.

Monroe was a float nurse from 2009 to February 2011, and during part of that period she worked at the North Block Clinic for six weeks to cover for another nurse who was on extended leave. In February 2011, following allegations that Monroe dispensed medication to an inmate-patient without a doctor's order, CCHCS reassigned Monroe to the transfers room, which handles inmate arrivals and departures and does not offer patient care. Monroe remained in the transfers room, where she was without access to a desk, telephone or computer, until February 2013. During this time, Monroe's then-supervisor denied her leave to

[2] A *Skelly* hearing is a pre-disciplinary procedure wherein a public employee is afforded constitutionally-required pre-deprivation due process before losing a property right. The term derives from *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194.

attend union conferences and prohibited her from organizing her coworkers for collective bargaining-related committees.

Monroe subsequently grieved the reassignment as retaliatory. SEIU and CCHCS arbitrated the grievance on February 25 and 26, 2015. On July 3, 2015, the arbitrator sustained the grievance and found that CCHCS was unlawfully motivated when it placed Monroe in a redirected assignment for what was ultimately a medication error. The arbitrator concluded that CCHCS could not sustain its affirmative defense. Specifically, CCHCS did not demonstrate that it would have redirected Monroe absent her "widely known" union activity because it neither disciplined nor reassigned the other nurse who engaged in the same conduct on the same day as Monroe. SEIU also established that CCHCS did not automatically impose reassignments as a matter of course following a medication error such as the one at issue.

Form 7362s and Nursing Encounter Forms

The California Department of Corrections and Rehabilitation (CDCR) Form 7362 (Form 7362 or 7362), also referred to as a "sick call slip," is a form for inmate-patients to request health care services. Inmate-patients complete the top portions of the forms, including their name, CDCR number, housing unit, date, signature, type of service needed (medical, mental health, dental, medication refill), and reason for the request. The bottom portion of the form outlines general assessment information for the RN to complete. Either the inmate-patient or a custody officer submits the 7362 to a designated mailbox, where a nurse collects them each weekday morning and forwards them to appropriate clinics as necessary. For medical concerns, an RN triages the forms as emergent, urgent, or non-urgent. The RN sees inmate-patients with emergent or urgent requests the same day, and an office technician

schedules non-urgent requests for visits. The form consists of an original and three carbon copies.

Unlike 7362s, CDCR nursing encounter forms contain comprehensive nursing protocols for specific symptomology assessments and for this reason are more detailed than 7362s. RNs may select and use an appropriate encounter form depending on the types of symptoms or conditions presented, such as musculoskeletal complaints, inflammatory skin conditions/rashes, or wound care. While RNs have discretion to use a 7362, encounter form, or both for a patient visit, in most cases they use both. Pursuant to the Division of Correctional Health Care Services, Inmate Medical Services Policies and Procedures Manual, RNs are required to record specific information on the 7362 and/or nursing encounter form. After documenting the visit on the Form 7362 and/or nursing encounter form, the RN delivers the forms to the Medical Records department at the end of the day for scanning into the electronic record database.

Supervising Registered Nurses (SRN IIs) audit 7362s on a monthly basis—usually at the end of the month—to ensure that RNs are properly completing them and seeing patients within the appropriate time frames. SRN IIs typically use audits as a coaching tool rather than a mechanism for discipline, unless a nurse demonstrates a repeated pattern of deficiencies in completing forms. Jake Peccia (Peccia) was an SRN II at Folsom State Prison and previously an RN at San Quentin. Peccia testified that he has never written anyone up for a poor audit, since audits are intended to serve as an educational tool. He also testified about the "Performance Improvement Culture Statement" that CCHCS promotes at all its nursing facilities. According to Peccia, the statement reflects CCHCS's policy to promote a culture of learning and improvement, rather than punishment. The statement provides, however, that

CCHCS should appropriately address reckless behavior, defined to include situations in which an individual takes a substantial and unjustifiable risk that may result in patient harm.

Monroe's 2013 Assignment to the North Block Clinic

In 2013, Monroe bid for and secured a nursing post in the North Block Clinic for the 7:00 a.m. to 3:00 p.m. shift. Monroe assumed the position in August 2013, replacing RN Susan Patrick (Patrick). Mark Ogren (Ogren) supervised Monroe from August 2013 to September 2013; Modrate Yogla-Ogbuehi (Ogbuehi) from September 2013 to November 2013; and Bernadette Ezike (Ezike) from November 2013 to February 2014. All of Monroe's supervisors were aware that Monroe was a steward. Monroe worked with her supervisors and the staffing office to obtain coverage when she requested leave to perform union representational duties. Monroe testified that Ogren, Ogbuehi, and Ezike had at times denied her coverage for last-minute representation requests, and that she encountered the most problems from Ezike when requesting leave for union duties. Other than general descriptions, Monroe did not testify about any specific details of the denials.

Patrick testified that she had concerns about how CCHCS had prepared Monroe for her duties at the North Block Clinic. Although nurses usually receive two weeks of training when they start a new position, Monroe received only two days in total. On August 13, 2013, Patrick e-mailed Ogren to advise that she had been training Monroe and to request more training hours for Monroe. Patrick testified that the situation did not thereafter improve.

Patrick subsequently brought Monroe's training needs to Ezike's attention after Ezike became Monroe's supervisor. Ezike testified that she knew Monroe was delayed in seeing patients and therefore enlisted Patrick to help Monroe with her paperwork. Patrick testified that she would assist Monroe by researching Monroe's patients the day before their scheduled

visits, checking for their next doctor appointments, and noting their medical histories. Patrick would leave this information on sticky notes for Monroe to save her the time of doing her own research.

Monroe saw scheduled patients from 8:00 a.m. until 2:00 p.m., meeting with approximately 11 patients daily. Monroe documented her patient encounters on 7362s, and often made notes on an additional nursing encounter form that she attached to the 7362. She testified that she almost daily started 7362s or encounter forms that she would later have to redo because of errors, and she would put the abandoned drafts in an unsecured shredder box under her desk. After meeting with patients and completing the necessary forms, Monroe discarded the carbon copies of the 7362s in the shredder box and filed the forms in a folder in her office she labeled "at the end of the day." At the completion of her shift, Monroe delivered all of these forms to the Medical Records department for scanning into the electronic records database.

Monroe's Union Activity on January 16, 2014

On or about January 16, 2014, Monroe stayed in the clinic past her shift to organize and conduct other union duties. According to Monroe's testimony, Ezike noticed Monroe was in the clinic and asked her why she was there given that her shift was over, adding that Monroe did not have permission to stay and would not be entitled to overtime. Monroe responded that she was doing her union work. Ezike directed her to leave immediately and Monroe refused; Ezike again told Monroe she would not be receiving overtime and Monroe reiterated that she would not be seeking overtime. Ezike then left. Later the same day, Ezike called Monroe to advise her that CNE Tony Laureano (Laureano) had informed the Associate Warden of Monroe's after-hours union work. The Associate Warden approved Monroe's presence and

stated that Monroe was permitted to stay after her shift provided she informed the watch commander she was there. Monroe testified that Ezike's tone of voice during the phone call was "upset" and "bitter." Ezike then memorialized this phone conversation in an e-mail she sent to Monroe later that day.

Ezike's Search of Monroe's Desk

A preponderance of the evidence shows that later on January 16, 2014, after Monroe completed her after-hours union activity and went home, Ezike searched Monroe's desk and found 7362s and nursing encounter forms. According to Ezike, on or about January 16, 2014, between 12:00 p.m. and 2:00 p.m., Patrick went to Ezike's office and asked Ezike, "What would you say if you have your staff . . . if you have your staff that has this stack of 7362 [sic]." Patrick gestured with her hand to reflect an approximate 2-inch stack of documents. Ezike told Patrick that they could not keep 7362s and asked Patrick to whom she was referring. Although Patrick would not give her a name, Ezike surmised that it was Monroe because she was the only RN whom Ezike supervised at the time, and only RNs use 7362s. Ezike then went to the North Block Clinic and searched Monroe's desk where she found a stack of 7362s and nursing encounter forms in a manila folder in one of the drawers. From there, Ezike immediately took the folder and its contents to Laureano and told him that she had discovered them in Monroe's office after Patrick tipped her off to their existence. Per Laureano's directive, Ezike initialed and dated all of the documents to indicate receipt by a supervisor, but did not review them at that time because her shift had ended. Ezike's dated initials on the documents reflect a receipt date of January 16, 2014.

Several witnesses contradicted Ezike's account. Patrick testified that she never had any discussion with Ezike akin to what Ezike described. According to Patrick, she neither raised nor

discussed such a topic with Ezike at any time. Patrick further explained that if she had ever learned of unprocessed forms, her practice would have been to offer help to the nurse directly rather than to report it to a supervisor. Patrick also stated that she had been in Monroe's office when Monroe was not present and had never seen a stack of unfinished documentation in her work area.

Licensed Vocational Nurse Koren Wright (Wright) worked with Monroe at the North Block Clinic in January 2014. Wright testified that she made an effort to keep her desk clear of any paperwork, and she did the same for Monroe by checking all her cabinets and drawers a couple times a week to ensure they did not contain any unprocessed documents. Per Wright's testimony, she had looked in Monroe's desk the day before Ezike searched Monroe's desk, and there had been no unprocessed forms as of then.

Retired RN Raney Dixon (Dixon) was a union steward at San Quentin and worked as a patient advocate coordinator. As part of her duties, Dixon assisted inmates in seeking or following up with their medical care. Dixon testified that she did not recall receiving any complaints from inmate-patients in the North Block Clinic when Monroe was working there. Dixon believed Monroe received extra scrutiny because of Monroe's union activities and cited examples of other nurses who committed serious errors or oversights with inmate-patients and who were only minimally disciplined. She explained that, as a steward, she would be aware of disciplinary actions against nurses, though she admitted she would not necessarily be privy to instances where CCHCS issued written reprimands.

Ezike testified that the day after she discovered the unprocessed forms, Laureano sorted and divided portions of the stack between himself, Ezike, the Chief Medical Officer, and another SRN II, to review and check whether the inmate-patients had been seen and to attend to the ones

who had not. Ezike reviewed more than 10 sick call slips, and the "majority" of the ones she inspected were for inmate-patients who had not been seen. Ezike testified that she did not speak to Monroe about the discovery of the missing forms on January 16, 2014, even though Ezike claims to have found the forms that afternoon, before she spoke to Monroe about her after-hours union activity.

Per Monroe's testimony, on or about January 17, 2014, Ezike went to Monroe's office and told Monroe that she found 72 sick call slips in her desk the night before. Ezike said that she had been in Monroe's office because she was concerned about the safety of her furniture layout. Monroe expressed shock and disbelief at Ezike's allegation, because she kept only blank encounter forms in her desk, not completed medical forms. The only other items Monroe stored in her desk were SEIU-related paraphernalia and documents, office supplies, and personal supplies. Monroe asked to see the forms that Ezike allegedly found, but Ezike said no as they were with Laureano. Monroe told Ezike, "this is a good one, Ezike, this is a damn good one because, you know what, I know what you guys are up to."

February 4, 2014 Reassignment

On February 3, 2014, a guard informed Monroe as she was leaving for the day that she would no longer be allowed access to the medical clinics. When Monroe arrived to work the next morning, Terri McKay, the business manager, advised Monroe that she was being reassigned to the mailroom, effective immediately. On February 5, 2014, CCHCS reassigned Monroe again, this time to the warehouse, where she remained until May 2014. Only two other people worked in the warehouse, and they were in different bargaining units. In May 2014, at SEIU's request that Monroe be moved out of the warehouse, CCHCS reassigned Monroe to the

mailroom until February 2015. CCHCS eventually reassigned Monroe to her North Block Clinic post in February 2015.

The Notice of Adverse Action

On July 21, 2015, CCHCS served Monroe with a Notice of Adverse Action (NOAA). The NOAA included 27 examples of alleged improperly processed 7362s and nursing encounter forms dated between August 29, 2013 and December 31, 2013. Of the examples, 26 involved an alleged failure to submit the forms to Medical Records for scanning, and 16 involved allegedly incomplete notes. In contrast to Ezike's testimony, only two of the 27 forms belonged to inmate-patients who had allegedly not been triaged or seen by an RN. The NOAA reduced Monroe's salary by 10 percent for 12 months effective August 1, 2015. Following a *Skelly* hearing, CCHCS served Monroe with an amended NOAA on September 1, 2015 reducing her penalty to a Letter of Reprimand with the same effective date of August 1, 2015, which would remain in her personnel file for three years.

Monroe appealed the issuance of the official reprimand to the State Personnel Board (SPB). Ezike submitted a declaration in lieu of personal appearance at the SPB hearing. Ezike's declaration is, in many respects, at odds with her testimony before PERB. For example, Ezike's declaration stated that Patrick told Ezike that the unprocessed 7362s and nursing encounter forms were in Monroe's work area, but she later testified that Patrick did not disclose a name. In addition, Ezike stated in her declaration that she told Laureano of the discovery of the missing forms the day after she discovered them, but she later testified that she told Laureano of the forms the same day that she discovered them. An SPB ALJ issued a decision on December 30, 2015, sustaining the penalty. The SPB adopted the ALJ's decision as its own on February 4, 2016.

DISCUSSION

Standard of Review

The Board's review of a proposed decision is de novo. (*City of Milpitas* (2015) PERB Decision No. 2443-M, p. 12.) Thus, we may draw from the factual record opposite inferences than those of the ALJ and may reverse the ALJ's legal conclusions. (*Ibid*.)

Retaliation Allegation

The Dills Act prohibits the State from imposing reprisals on employees because of their exercise of rights guaranteed by the Act. (Dills Act, § 3519, subd. (a).) To demonstrate that an employer has discriminated or retaliated against an employee in violation of Dills Act section 3519, subdivision (a), the charging party must show: (1) the employee exercised rights under the Dills Act; (2) the employer had knowledge of the exercise of those rights; (3) the employer took adverse action against the employee; and (4) the employer took the action *because of* the exercise of those rights. (*Novato Unified School District* (1982) PERB Decision No. 210 (*Novato*), pp. 6-8; *State of California (Department of Corrections and Rehabilitation)* (2010) PERB Decision No. 2118-S, p. 5.) In this case, the ALJ determined that SEIU satisfied only the protected activity and adverse action elements and therefore did not establish a prima facie case of retaliation. As we explain further below, we diverge from both the ALJ's analysis and his conclusion.

1. Protected Activity

State employees 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 employer-employee relations matters. (Dills Act, § 3515.) The ALJ found protected activity based upon Monroe's grievance filing (*Santa Clara Valley Water District* (2013) PERB Decision No. 2349-M, p. 15)

and union stewardship (*State of California (Department of Corrections)* (2001) PERB Decision No. 1435-S, adopting proposed decision at p. 26). CCHCS does not dispute these conclusions.

We have also noted that the right to engage in union activity during nonwork time is protected activity. (See, e.g., *Omnitrans* (2009) PERB Decision No. 2030-M, pp. 20-21.) Here, Monroe's uncontroverted testimony was that she was organizing and doing other SEIU-related work in her office after her shift ended on January 16, 2014. Although the PERB complaint did not allege this as a protected activity, the Board has determined that it may consider previously unalleged protected activities under the same test that it uses for unalleged violations. (*Coachella Valley Unified School District* (2013) PERB Decision No. 2342, adopting proposed decision at pp. 14-15; *Lake Elsinore Unified School District* (2012) PERB Decision No. 2241, pp. 8-10.) Thus, we may review unalleged protected activities or violations where the following criteria are met: (1) charging party has provided defendant with adequate notice and opportunity to defend; (2) the acts are intimately related to the subject matter of the complaint and are part of the same course of conduct; (3) the parties have fully litigated the unalleged violation(s); and (4) the parties have had the opportunity to examine and be cross-examined on the issue(s). (*City of Davis* (2018) PERB Decision No. 2582-M, pp. 10-11.)

We find that SEIU met the applicable criteria. First, SEIU provided CCHCS with adequate notice and an opportunity to defend since it alleged Monroe's January 16, 2014 union activity in its amended unfair practice charge and in its opening statement. Second, Monroe's protected activity on January 16 is intimately related to the subject matter of the complaint and is part of the same course of conduct because it triggered a series of events that culminated in the Letter of Reprimand. (See discussion, *post* at pp. 15-17.) Third, the parties had an opportunity to fully litigate the issue as SEIU raised it repeatedly during its case-in-chief. Finally, the parties

had the opportunity to examine and cross-examine witnesses relating to Monroe's union activity on January 16.

2. Employer Knowledge

To demonstrate employer knowledge of protected activity, at least one of the individuals responsible for taking the adverse action against the employee must be aware of the protected conduct. (*Hartnell Community College District* (2018) PERB Decision No. 2567, p. 9; *Jurupa Unified School District* (2015) PERB Decision No. 2450 (*Jurupa Unified*), pp. 17-18.)

Ezike knew Monroe was conducting union business on January 16, 2014, because she confronted Monroe about her presence in the office after-hours, and Monroe told Ezike that she was doing work for SEIU. Ezike then called Monroe to relay the Associate Warden's consent for Monroe to stay after her shift for her union work, followed by an e-mail from Ezike to Monroe acknowledging the same. She was also aware that Monroe served as a steward. We find that SEIU established CCHCS's knowledge of Monroe's protected activity.

3. Adverse Action

CCHCS did not except to the ALJ's finding that it took adverse action against Monroe by issuing her a Letter of Reprimand. We accept that finding as true.

4. Unlawful Motivation

Unlawful motive is the specific nexus required to establish a prima facie case of retaliation. (*Trustees of Cal. State University v. Public Employment Relations Bd.* (1992) 6 Cal.App.4th 1107, 1124.) Since direct proof of motivation is often not available, a charging party may establish unlawful motivation by circumstantial evidence and inference from the record as a whole. (*Cabrillo Community College District* (2015) PERB Decision No. 2453 (*Cabrillo*), p. 10.)

Timing of the employer's adverse action in relation to the protected conduct is an important factor relating to strength of the unlawful inference to be drawn, but temporal proximity alone is generally insufficient to demonstrate the requisite nexus. (*Los Angeles Unified School District* (2016) PERB Decision No. 2479, adopting proposed decision at p. 26.) We usually examine one or more "nexus" factors, or indicators of unlawful intent, to assess whether a charging party has sufficiently proven the nexus element. (*Palo Verde Unified School District* (2013) PERB Decision No. 2337, pp. 10-11.) An employer's union animus is one such factor. (*Jurupa Community Services District* (2007) PERB Decision No. 1920-M, adopting proposed decision at pp. 15-16; *Coachella Valley Mosquito & Vector Control District* (2009) PERB Decision No. 2031-M, pp. 22-23.) Inconsistent or contradictory justifications for an employer's actions may also support an inference of unlawful motive. (*Novato, supra*, PERB Decision No. 210, p. 7.)

There is no dispute that Ezike learned on January 16, 2014 that Monroe was performing union duties after her shift. Later that night (or the very next day at the latest), Ezike entered Monroe's office and searched her desk. At most, one day separated Ezike's knowledge of Monroe's union activity and Ezike's investigation. We find the timing element was satisfied and highly probative that Ezike likely searched Monroe's desk because of her protected activity.

A. CCHCS's Animus

In addition to Monroe's testimony regarding Ezike's resistance to some of Monroe's requests for union-related leave, SEIU presented specific evidence of Ezike's hostility towards Monroe's union activity, namely Ezike's embittered response to Monroe during their January 16, 2014 phone call regarding Monroe's after-hours union duties. Unlike the ALJ, we find *City of Oakland* to be inapposite to the case before us. (*City of Oakland* (2014) PERB Decision

No. 2387-M.) As relevant here, *City of Oakland* involved the free speech rights of employees and employers in the context of contract negotiations. The Board examined whether a supervisor's expression of personal frustration and anger in response to a personal attack could alone constitute evidence of animus. (*Id*. at pp. 22-23.) In other words, at issue in that case was pure speech between parties, in which a supervisor defended himself against union speech by engaging in his own speech. Here, Ezike's speech (bitter, upset) was not in response to any such personal attack, and was inextricably bound together with her animus against Monroe for engaging in protected activity, as well as with her conduct (search of Monroe's desk). In these circumstances, we infer animus. (See *Jurupa Community Services District*, *supra*, PERB Decision No. 1920-M, adopting proposed decision at p. 16; *City of Davis* (2016) PERB Decision No. 2494-M, pp. 34-35; *Hartnell Community College District* (2015) PERB Decision No. 2452, pp. 50-51.)

Moreover, unlike the ALJ, we consider as additionally significant the arbitrator's decision regarding CCHCS's 2011 retaliatory transfer of Monroe. Observing that "PERB has [previously] declined to give collateral estoppel effect to a decision by an arbitrator," the ALJ rejected the arbitrator's decision and gave the prior finding of animus no weight in his analysis of CCHCS's intent in this action. (Proposed decision, p. 32, citing *Stanislaus Consolidated Fire Protection District* (2012) PERB Decision No. 2231a-M, pp. 6-7 (*Stanislaus CFPD*); *Regents of the University of California (Berkeley)* (1985) PERB Decision No. 534-H, adopting proposed decision at pp. 44-45, fn. 14 (*UC Berkeley*).) In this, we believe the ALJ erred.

Collateral estoppel, or issue preclusion, "'precludes relitigation of issues argued and decided in prior proceedings.' [Citation.]" (*Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 896.) Under California law, a party may be collaterally estopped from relitigating an issue

if: (1) the issue is identical to an issue decided in a prior proceeding; (2) the issue was actually litigated; (3) the issue was necessarily decided; (4) the decision in the prior proceeding is final and on the merits; and (5) the party against whom collateral estoppel is asserted was a party to the prior proceeding or in privity with a party to the prior proceeding. (*Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341; *State of California (Department of Social Services)* (2019) PERB Decision No. 2624-S, p. 9 [Board may grant collateral estoppel effect to disputed issues of fact decided in a prior proceeding provided the record supports a finding of all collateral estoppel factors].) Here, the arbitrator's decision satisfies all these elements. That is, the parties in this case asked the arbitrator in that case to determine whether the CCHCS's 2011 transfer of Monroe was discriminatory or retaliatory under *Novato*.[3] The arbitrator expressly concluded that it was and premised this conclusion on a finding of animus.

Even leaving aside the issue of whether it is appropriate to apply the doctrine of collateral estoppel to this case, we find that the arbitrator's decision was at least a persuasive indicator of CCHCS's historical animus towards Monroe's protected activities. Because it can be difficult to "show the true character" of an employer's motivations, PERB has routinely relied on evidence of prior unfair practices, including events occurring before the six-month statute of limitations or outside the "four corners" of the charge, to determine whether a respondent acted for an unlawful motive. (See *City of Oakland*, *supra*, PERB Decision No. 2387-M, pp. 34-35.) We have also previously ascribed significant weight to evidence of prior demonstrations of antipathy towards union activists in attempting to identify the true motivation for an adverse action. (See, e.g., *Los Angeles Unified School District* (2001) PERB Decision No. 1469, adopting proposed decision at

[3] In light of the fact that CCHCS acquiesced to the arbitrator's application of the *Novato* test, this matter is distinguishable from *Stanislaus CFPD* and *UC Berkeley*, where the tests the arbitrators applied were not identical to PERB's.

pp. 80-82 [finding unlawful motivation where principal and union activist teacher were engaged in repeated "battle" over teacher's ongoing protected activity]; *Marin Community College District* (1980) PERB Decision No. 145, pp. 11-13 [finding unlawful motivation in part due to supervisor's prior antipathy towards union leader].) Similarly, the National Labor Relations Board (NLRB) routinely relies on evidence of past unfair practices to establish unlawful motivation. (See, e.g., *St. George Warehouse, Inc.* (2007) 349 NLRB 870, 878 [employer's prior unfair labor practices relied on as evidence that discipline was motivated by union animus].) Here, the arbitrator's decision establishes that CCHCS was in the habit of targeting Monroe, a longtime union leader and activist, for her protected activities. We are entitled to rely on such evidence and do so here in finding that SEIU has established the necessary nexus between Monroe's union activities and CCHCS's decision to discipline her.

B. Ezike's Inconsistent and Contradictory Justifications

We also find Ezike presented inconsistent and contradictory justifications for undertaking the search of Monroe's desk. SEIU contends, and we agree, the ALJ erred in failing to make a credibility resolution about the witnesses despite presentation of conflicting testimony and evidence. Ezike's testimony was problematic for a number of reasons. First, her testimony was inconsistent with statements regarding the same events in her own SPB declaration, as well as with the explanation she gave to Monroe, and with Patrick's testimony. Ezike's various explanations as to why she searched Monroe's desk are not credible, especially when viewed in light of the timing and the other available evidence. These were not minor variances relating to an inconsequential event, but material facts about *the* critical event in the case, thus raising legitimate questions about Ezike's credibility. We specifically discredit Ezike's testimony on its

central claim that she searched Monroe's desk because of an alleged tip from Patrick rather than because of animus against protected activity.

Furthermore, Wright testified that it was her practice to check Monroe's cabinets and drawers a couple times a week to ensure they did not contain any unprocessed documents. She checked Monroe's desk the day prior to Ezike's discovery of the 7362s and had not seen any such paperwork in there. Finally, Monroe strenuously denied having any unprocessed 7362s in her desk. By her account, she stored only blank encounter forms, SEIU-related materials, and personal items in her desk. She did, however, have a shredder box that she kept under her desk where she discarded carbon copies of the 7362s and encounter forms.

We credit the testimony of Patrick, Wright, and Monroe over that of Ezike. We do so based on the relative clarity and consistency of the competing accounts. (See *Jurupa Unified*, *supra*, PERB Decision No. 2450, adopting proposed decision at pp. 36-37 [students' credibility bolstered by consistency of their testimony across all 13 witnesses].)

Based on the suspiciously close timing of Ezike's search following Monroe's protected activity on January 16, 2014, Ezike's demonstrated hostility towards Monroe's union duties, and Ezike's inconsistent justifications for her search of Monroe's desk that were countered by other witnesses and evidence, we find the search was unlawfully motivated. We also find that the Letter of Reprimand was unlawfully motivated because it was inextricably intertwined with the improper search, as discussed further below. Therefore, SEIU established a prima facie case of retaliation.

For the reasons discussed below, we disallow CCHCS from asserting an affirmative defense based on the forms Ezike allegedly found, because they were the product of an unlawfully-motivated search. We therefore need not determine whether it is more likely than not

that Ezike took from Monroe's shred box forms that Monroe had discarded for legitimate reasons, such as drafts of forms that Monroe later redid to correct an error.

CCHCS's Affirmative Defense

In mixed motive cases where an employer's action is animated both by discriminatory and nondiscriminatory reasons, the Board uses a "but for" test to determine whether the employer would have taken the same action regardless of its improper motivation. (*Los Angeles Unified School District*, *supra*, PERB Decision No. 2479, p. 29; *McPherson v. Public Employment Relations Bd.* (1987) 189 Cal.App.3d 293, 304.) Hence, once a charging party establishes a prima facie case of discrimination, the burden shifts to the employer to show by a preponderance of evidence that it would have taken the adverse action regardless of the employee's protected activity. (*Novato*, *supra*, PERB Decision No. 210, p. 14.) To prevail on its affirmative defense, the employer must establish that it had a legitimate, nondiscriminatory reason for taking the adverse action *and* that the reason proffered was, in fact, the employer's reason for taking the adverse action. (*Cabrillo*, *supra*, PERB Decision No. 2453, p. 12.)

SEIU has demonstrated CCHCS was motivated at least in part by discriminatory intent when it issued Monroe the Letter of Reprimand. Indeed, it was Ezike's unlawful search of Monroe's desk that set off the chain of events leading to the discipline. Arguably, CCHCS also had a legitimate reason for disciplining Monroe, viz., her alleged failure to properly complete 7362s and nursing encounter forms and submit them to Medical Records for scanning.

The Board, however, will bar an employer from meeting its burden of proof when its stated reason for taking the adverse action was discovered through an investigation that itself was tainted by unlawful motive. (*California Virtual Academies* (2018) PERB Decision No. 2584, pp. 33-34 [employer may not rebut a prima facie case of retaliation by introducing evidence it

discovered through an unlawfully motivated investigation] [judicial appeal pending]; *County of San Joaquin (Sheriff's Department)* (2018) PERB Decision No. 2619-M, pp. 11-13 [discipline of employee found unlawful where there would have been no internal affairs investigation and no discipline absent employee's request for representation]; see *Kidde, Inc.* (1989) 294 NLRB 840, 850 ["Employee misconduct, discovered only because of an investigation prompted by the employee's protected activity, cannot serve as a lawful basis for discipline"].) As the NLRB explained, the policy reason underlying this exclusionary rule is that "employers should not be permitted to take advantage of their unlawful actions, even if employees may have engaged in conduct that—in other circumstances—might justify discipline." (*Supershuttle of Orange County, Inc.* (2003) 339 NLRB 1, 3.)

We agree with SEIU that Ezike's investigation into Monroe's 7362s is clouded in shadow. While CCHCS may have been entitled to search Monroe's desk, it was not entitled to do so for an unlawful reason. (See *County of Lassen* (2018) PERB Decision No. 2612-M, p. 6.) Thus, CCHCS is precluded from rebutting SEIU's prima facie case with evidence that some of Monroe's forms were allegedly incomplete or not scanned into inmate-patients' medical records, because it discovered this information only through the results of its unlawfully-motivated search of Monroe's desk. CCHCS presented no other evidence, apart from what Ezike uncovered during this search, that would independently support its issuance of the Letter of Reprimand against Monroe.

We conclude that CCHCS retaliated against Monroe in violation of Dills Act section 3519, subdivisions (a) and (b).

ORDER

Based on the foregoing findings of fact, conclusions of law, and the entire record in this case, it is found that the State of California (California Correctional Health Care Services) (CCHCS) violated the Ralph C. Dills Act (Dills Act), Government Code sections 3519, subdivisions (a) and (b), by issuing Elsa Monroe (Monroe) a Letter of Reprimand because she engaged in activities protected by the Dills Act.

Pursuant to section 3514.5, subdivision (c), of the Government Code, it hereby is ORDERED that CCHCS, its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

1. Retaliating against employees because of their participation in activities protected by the Dills Act.

2. Interfering with the right of Service Employees International Union, Local 1000 (SEIU), to represent bargaining unit employees.

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

1. Rescinding and destroying the Letter of Reprimand it issued against Monroe and striking from the date of its issuance all references to the letter in any CCHCS documentation relating to Monroe.

2. Within 10 (ten) workdays following the date this decision is no longer subject to appeal, post at all CCHCS work locations where notices to employees in the bargaining unit are customarily posted, copies of the Notice attached hereto as an Appendix. In addition to physical posting, the Notice shall be posted by electronic means customarily used by CCHCS to regularly communicate with employees in the bargaining unit. The Notice must be signed by an

authorized agent CCHCS, indicating that it will comply with the terms of this Order. Such posting shall be maintained for a period of 30 (thirty) consecutive workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material.

3. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of the Public Employment Relations Board, or the General Counsel's designee. CCHCS shall provide reports, in writing, as directed by the General Counsel or his/her designee. All reports regarding compliance with this Order shall be concurrently served on SEIU.

Members Banks and Krantz joined in this Decision.

APPENDIX

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

After a hearing in Unfair Practice Case No. SF-CE-283-S, *Service Employees International Union, Local 1000 v. State of California (California Correctional Health Care Services)*, in which all parties had the right to participate, it has been found that the State of California (California Correctional Health Care Services) (CCHCS) violated the Ralph C. Dills Act (Dills Act), Government Code section 3512 et seq.

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

A. CEASE AND DESIST FROM:

1. Retaliating against employees because of their participation in activities protected by the Dills Act.

2. Interfering with the right of Service Employees International Union, Local 1000 (SEIU), to represent bargaining unit employees.

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

1. Rescinding and destroying the Letter of Reprimand it issued against Elsa Monroe and striking from the date of its issuance all references to the letter in any CCHCS documentation relating to Monroe.

State of California (California Correctional Health Care Services)

Dated: _____ By: _____
Authorized Agent

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