STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

STATIONARY ENGINEERS UNION LOCAL 39, Charging Party, v. STATE OF CALIFORNIA (DEPARTMENT OF VETERANS AFFAIRS), Respondent.	Case No. SF-CE-220-S PERB Decision No. 1686-S September 9, 2004

Appearances: Weinberg, Roger & Rosenfeld by Shirley A. Lee, Attorney, for Stationary Engineers Union Local 39; State of California (Department of Personnel Administration) by Wendi L. Ross, Labor Relations Counsel, for State of California (Department of Veterans Affairs).

Before Duncan, Chairman; Whitehead and Neima, Members.

DECISION

DUNCAN, Chairman: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the State of California (Department of Veterans Affairs) (Department) to an administrative law judge's (ALJ) proposed decision (attached). The issue before the ALJ was whether the Department has failed and refused to provide information to Stationary Engineers Union Local 39 (Local 39) that is necessary and relevant for it to represent its members in violation of the Ralph C. Dills Act (Dills Act) section 3519(a), (b) and (c)[1]. The information is a special investigator's report concerning allegations of a hostile work environment at the Yountville Veterans Home Plant Shop.

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

The ALJ found that the report was relevant and necessary for Local 39 to represent its members and that the Department's affirmative defenses were without merit.

The Board has reviewed the entire record in this matter, including the ALJ's proposed decision, the Department's exceptions and the response of Local 39. The Board finds the ALJ's findings of fact and conclusions of law to be free of prejudicial error and adopts the proposed decision as the decision of the Board itself, subject to the discussion below.

DISCUSSION

Under the Dills Act it is the employer's duty to provide the exclusive representative with necessary and relevant information on request. (State of California (Department of Corrections) (1994) PERB Decision No. 1056-S.) If the employer refuses to release the information then it is considered bad faith unless the employer can show adequate reasons for not releasing the information. (Stockton Unified School District (1980) PERB Decision No. 143 (Stockton); State of California (Departments of Personnel Administration and Transportation) (1997) PERB Decision No. 1227-S.)

PERB has held that information pertaining to mandatory subjects of bargaining is so intrinsic to the employer-employee relationship that it is deemed presumptively relevant. (Stockton.) When, as in this particular case, the business representative of the exclusive representative is receiving phone calls from the majority of the members of a bargaining unit who are afraid of a supervisor, then information obtained in an investigation of the place where they all work is necessary and relevant on the grounds of workplace safety. Concerns about a hostile work environment are what started the chain of events that led to the unfair practice charge being filed in this case in the first place.

Local 39 has a credible position that the information is necessary and relevant related to two issues. Those issues are workplace safety and freedom from a hostile work environment.

The racial discrimination aspect based on racial slurs and threats that the supervisor was alleged to have made can be encompassed by either one or both of those areas.

Peter Hogan (Hogan) lied to the exclusive representative and said he was with the Inspector General's office, when he was actually a retired annuitant working only as a representative of the Department (and the People of California). The exclusive representative certainly did not believe Hogan represented the Department because of what he told her.

His report was prepared to investigate the complaints in the Yountville Veterans Home Plant Shop. His report is not a personnel record and was not an internal investigation by the human resources department at the Yountville Veterans Home. Nathan Stout has no expectation of privacy in the report prepared by Hogan.

The report was not prepared by an attorney and contains no attorney advice. PERB has stated that where there is no attorney advice the attorney-client privilege does not apply. In California State Employees Association (Hard and Hackett) (2000) PERB Order No. Ad-304-S, the Board noted that communication written to an attorney by a staff member was not attorney-client privileged. That is a simplification of the issue of attorney-client privilege and the portion of that case which states or implies that there must be advice by an attorney for attorney-client privilege to attach, therefore it is overruled by this decision.

The attorney-client privilege is codified at Evidence Code section 954.[2] However, there are limits to the privilege. "Knowledge which is not otherwise privileged does not become so merely because that subject matter has been communicated to the attorney." (Greyhound Corp. v. Superior Court (1961) 56 Cal.2d 355, 397 [15 Cal.Rptr. 90].)

[2]In relevant part it states that "[t]he client, whether a party or not a party, has a privilege to refuse to disclose and to prevent another from disclosing, a confidential communication between client and lawyer."

In Wellpoint Health Networks, Inc. v. Superior Court (1997) 59 Cal.App.4th 110, 117 [68 Cal.Rptr.2d 844] (Wellpoint), a discrimination action was brought by a terminated employee. In defense of the action, the employer asserted that it had hired an attorney to conduct a prelitigation investigation of the discrimination claims as soon as the employee alerted it. (Id. at p. 117.) After the employee initiated a lawsuit against the employer, the employee served a subpoena on the employer's attorney demanding production of all documents pertaining to the attorney's prelitigation investigation. The employer and its attorney refused production citing the attorney-client privilege and the work product doctrine.

The trial court issued a blanket ruling that the attorney-client privilege and the attorney work-product doctrine did not apply, requiring production of all the documents demanded. (Wellpoint at pp. 114-119.) In doing so, the court found that the attorney was operating in a "non-attorney capacity" in conducting the investigation. (Id. at pp. 118-119.) The employer filed for writ of mandate and in response the employee again asserted that the privileges did not apply because "an attorney retained to investigate employee claims of discrimination is not acting as an attorney but as a fact finder." (Id. at p. 121.)

For this case it is significant to note that the Court of Appeal agreed in principle with the employee. The employer's petition was granted, however, because the trial court had ordered blanket production instead of reviewing the documents individually to determine which were not privileged and said, "The trial court should . . . have based its ruling on the subject matter of each document." (Wellpoint at p. 122.)

In 2,022 Ranch v. Superior Court (2003) 113 Cal.App.4th 1377 [7 Cal.Rptr.3d 197] (2,022 Ranch), the court addressed this issue, "One treatise has interpreted these cases as holding that the attorney client and attorney work product privileges may not be available where attorneys are 'hired *solely* to investigate or adjust a claim, or to negotiate a contract,

rather than provide legal advice." (Weil & Brown, Cal. Practice Guide; Civil Procedure Before Trial (The Rutter Group 2003) 8:217.2 p. 8C-57.) The treatise goes on to conclude, citing Wellpoint that "[w]here an attorney is hired *both to investigate and to advise* the client, the court may have to review the attorney's files *In camera* to determine which documents reflect investigative work and which reflect the rendering of legal advice." (Id. at p. 8C-58; 2,022 Ranch at p. 1394.)

Most significant here is the fact that "The attorney-client or work product privilege may be impliedly waived by placing the contents of the privileged communications at issue in the case." (Wellpoint at p. 129.) "where privileged information goes to the heart of the claim, fundamental fairness requires that it be disclosed for the litigation to proceed." (Steiny & Co. v. California Electric Supply Co. (2000) 79 Cal.App.4th 285, 292 [93 Cal.Rptr.2d 920].)

The information requested by Local 39 in this case was not the analysis of the investigative report which would be protected under attorney-client privilege. This report goes to the very heart of the matter at issue and is necessary for the exclusive representative to determine if there are workplace safety concerns. What is key here is that this information is to be provided because of the agreement between the Department and the exclusive representative. The privileges do not absolve the Department of its obligation in this particular case because they do not apply to this investigative report.

Because we find that this investigative report, in this particular case is an exception to the attorney-client privilege and is not attorney-work product, we find it shall be produced by the Department. Since we find that the privileges do not apply, the Department defenses based on the California Public Records Act (CPRA) fail.

We also believe it is important to note that PERB has rejected CPRA provisions as standing alone as a defense to a request for information under the Higher Education Employer-

Employee Relations Act (HEERA)[3] in Trustees of the State of California (2004) PERB Decision No. 1591-H.

The ALJ also noted the National Labor Relations Board (NLRB) affirmed the administrative law judge in rejecting the employer's absolute defense based on the Freedom of Information Act (FOIA) in United States Postal Service (1991) 305 NLRB 997 [139 LRRM 1073] (U.S. Postal Service).[4]

Each case in which defenses relating to confidentiality and attorney privileges are raised should be looked at based on the facts of the individual case. We believe that in this particular case, based on these particular facts, the report must be produced and given to the exclusive representative as requested.

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, it has been found that the State of California (Department of Veterans Affairs) (Department) violated the Ralph C. Dills Act (Dills Act), Government Code section 3519(a), (b) and (c).

Pursuant to Dills Act section 3514.5(c), it is hereby ordered that the Department and its representatives shall:

[3]HEERA is codified at section 3560, et seq.

[4]The information requested in U.S. Postal Service related to an investigation by the inspection unit of the post office. The NLRB found the FOIA is a statute that regulates rights of the public at large in relation to information in government files. It held that defenses under FOIA do not apply to rights created under the NLRB. It is important to note that in the case at hand the information is not sought for release to the general public. It is sought by Local 39 for the stated purpose of representation of its members.

A. CEASE AND DESIST FROM:

1. Refusing to provide Stationary Engineers Union Local 39 (Local 39) with information necessary and relevant to its duties as exclusive representative.

2. By said conduct, interfering with bargaining unit members' right to participate in the activities of an employee organization of their own choosing.

3. By said conduct, denying Local 39 its right to represent employees in their employment relations with the Department.

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

1. Upon request, provide a copy of the investigative report prepared by Peter Hogan concerning allegations of misconduct involving Nathan Stout at the Veterans Home in Yountville.

2. Within ten (10) workdays of the service of the final decision in this matter, post at all work locations where notices to employees customarily are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the Department, indicating that the Department will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) 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 notice of the actions taken to comply with this Order shall be made to the San Francisco Regional Director of the Public Employment Relations Board in

accord with the director's instructions. Continue to report to the regional director as directed. All reports to the regional director shall be concurrently served on Local 39.

Members Whitehead and Neima 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-220-S, Stationary Engineers Union Local 39 v. State of California (Department of Veterans Affairs), in which all parties had the right to participate, it has been found that the State of California (Department of Veterans Affairs) (Department) violated the Ralph C. Dills Act (Dills Act), Government Code section 3519(a), (b) and (c).

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

A. CEASE AND DESIST FROM:

1. Refusing to provide Stationary Engineers Union Local 39 (Local 39) with information necessary and relevant to its duties as exclusive representative.

2. By said conduct, interfering with bargaining unit members' right to participate in the activities of an employee organization of their own choosing.

3. By said conduct, denying Local 39 its right to represent employees in their employment relations with the Department.

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

Upon request, provide a copy of the investigative report prepared by Peter Hogan concerning allegations of misconduct involving Nathan Stout at the Veterans Home in Yountville.

Dated: _____

STATE OF CALIFORNIA (DEPARTMENT OF VETERANS AFFAIRS)

By: _____
Authorized Agent

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

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

STATIONARY ENGINEERS UNION LOCAL 39, Charging Party, v. STATE OF CALIFORNIA (DEPARTMENT OF VETERANS AFFAIRS), Respondent.	UNFAIR PRACTICE CASE NO. SF-CE-220-S PROPOSED DECISION (5/11/04)

Appearances: Weinberg, Roger & Rosenfeld, by Shirley A. Lee, Attorney, for Stationary Engineers Union Local 39; Wendi L. Ross, Labor Relations Counsel, for State of California (Department of Veterans Affairs).

Before Donn Ginoza, Administrative Law Judge.

PROCEDURAL HISTORY

Stationary Engineers Union Local 39 (Local 39) initiated this action by filing an unfair practice charge against the State of California (Department of Veterans Affairs) (Department) on March 6, 2003. On May 16, 2003, following its investigation of the charge, the general counsel of the Public Employment Relations Board (PERB or Board) issued a complaint alleging that the Department failed and refused to provide information requested by Local 39 in the form of a copy of an investigation report concerning alleged misconduct of a paint shop supervisor. This conduct was alleged to violate Ralph C. Dills Act (Dills Act or Act) section 3519(a), (b), and (c).[1]

[1] Unless otherwise indicated all statutory references are to the Government Code. The Dills Act is codified at section 3512 et seq. In relevant part, section 3519 provides:

> It shall be unlawful for the state to do any of the following:
>
> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because

The Department filed an answer, and amended answer, to the complaint, on June 11, and December 9, 2003, respectively. The amended answer denied all material allegations and asserted a number of affirmative defenses.

The undersigned conducted a formal hearing in Oakland on February 19, 2004. With the receipt of post-hearing briefs on April 26, 2004, the matter was submitted for decision.

FINDINGS OF FACT

The Department is the State employer as defined in section 3513(j) of the Dills Act. The Department is an administrative unit of the State and is the appointing authority of the employees involved in this matter. Local 39 is an employee organization as defined in section 3513(a) and the recognized employee organization, as defined in section 3513(b), of State Bargaining Unit 12.

Unit 12 is composed of skilled trades, crafts, and maintenance employees. The State and Local 39 are parties to a memorandum of understanding (MOU) covering a term of July 3, 2001 through July 2, 2004.

At all times relevant to this matter, Stephanie Allan was a business representative for Local 39. Her duties included representing bargaining unit members employed at the Veterans Home in Yountville. Allan was charged with enforcing the provisions of the MOU and

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> of their exercise of rights guaranteed by this chapter. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.
>
> (c) Refuse or fail to meet and confer in good faith with a recognized employee organization.

negotiating over terms and conditions of employment. Bargaining unit employees assigned to the Veterans Home include painters and window washers.

In early 2002, Allan began receiving complaints from painters and window washers in the Veterans Home Plant Shop. The complaints concerned Nathan Stout, a paint shop supervisor. Approximately twelve bargaining unit employees were under Stout's supervision. Three or four of these employees contacted Allan by telephone. They reported significant discomfort over Stout's references to firearms, including those he owned himself, and his opinion that weapons were a way to resolve conflicts, both societal and interpersonal. A triggering event was a threatening note that Stout posted in the paint shop that allegedly made a disparaging reference to Allan's representation of the employees. The gist of the note was Stout's accusation that some employee in the paint shop had impliedly challenged his temporary assignment of a supervisor to act in his place by removing his notice to that effect. The employees expressed fear of Stout. Allan wrote a letter of complaint to Chief of Plant Operations Andy Ellicock.

Later, in the summer of 2002, stewards called Allan to report that conditions in the paint shop were "very unpleasant" as a result of the situation created by Stout. Allan communicated that if the employees wanted her to take action, they would have to go on record with their complaints.

The paint shop employees and the window washers, in a nearly unanimous show, met with Allan at a distance chosen far from the worksite in order to avoid detection. They posted a look-out. Allan observed that the employees were very fearful of being reported to management. The employees raised two sets of complaints. One concerned alleged racism by Stout toward a newly hired African-American window washer, Larry Thompson. Co-workers reported that Stout referred to Thompson with a racial epithet in their presence and that Stout

appeared to deliberately ignore Thompson, even when Thompson attempted to address or greet him. The second set of complaints concerned Stout's alleged creation of a hostile work environment, by, inter alia, making inappropriate demands on employees and his continuing reference to firearms.[2] Allan challenged the employees to place their complaints in writing.

Seven employees responded with letters confirming the complaints regarding Stout's alleged racism. One raised the issue that Stout also used offensive terms when referring to women. Another reported that around the time of Thompson's hiring, Stout e-mailed him a website containing an essay that used the topic of reparations for slavery as launching point to disparage blacks. The author of that piece also made reference to his possession of a firearm to defend against crime he attributed to blacks in his neighborhood.

As a result of this documentation, Allan wrote Ellicock a letter dated September 30, 2002. Allan recounted some of Stout's history and the failed attempts to correct his behavior. She asserted that Ellicock was responsible for condoning and ratifying Stout's alleged tactics of intimidation and retaliation. Allan demanded that an investigation of Stout commence and a plan of corrective action be proposed. Allan also noted that the employees had communicated their desire that Allan be present if any management employee wished to speak to a bargaining unit employee about the matter. Copies of the letter were also provided to Veterans Home Administrator Marcella McCormack, and to Local 39 counsel William Sokol. Allan received no response to her letter.

Sometime after the letter was written, the Department initiated an internal investigation of the allegations. Department Staff Counsel Karla Broussard-Boyd testified that apart from the letter there had been reports from management of a "hostile work environment" within

[2] One employee reported that Stout had asked him to circumvent the prohibition on direct financial dealings between residents and employees. When the employee refused, Stout responded that it was all right, but he would "remember that."

plant operations. Because she believed she was duty-bound to investigate this type of situation due to its potential liability consequences, Brousssard-Boyd discussed the matter with her superior, Department Chief Counsel Joe Maguire. Broussard-Boyd recommended that Peter Hogan, a retired annuitant who formerly served as an internal investigator, be assigned to the case. Maguire approved, and Broussard-Boyd engaged Hogan as a "special investigator." Broussard-Boyd gave Hogan a scope of investigation, which she defined as the plant operations hostile work environment, broadly construed. Broussard-Boyd explained that allegations surfacing with respect to the Plant Shop did not pertain strictly to Stout.

When Hogan began his investigation he introduced himself to Allan in a telephone conversation sometime in October 2002. He identified himself as a "special investigator" from the "Inspector General's" office. Hogan acknowledged Allan's September 30 letter and asked for her assistance in documenting any of the allegations against Stout. In Allan's mind, Hogan's purposes in the call were to assure her that he was an outside investigator hired to conduct an independent investigation and to seek her assistance in getting the affected employees to speak freely to him, without fear of retaliation. Hogan specifically stated that he was not an employee of the Department. Allan accepted these representations and promised that she would encourage the employees to speak to him.

As a result of the conversation, Allan faxed a notice for posting at the Veterans Home stating that Hogan was not an employee of the Department and that Hogan had given assurances that employees would be protected against management retaliation and harassment. Several employees called Allan acknowledging that they had seen the notice.

In the course of his investigation, Hogan interviewed both bargaining unit and non-bargaining unit employees. Hogan interviewed Stout. When Hogan completed his

investigation, he prepared a report of his findings in December. Thompson learned of this also and sought Allan's assistance in obtaining a copy of the report.

On January 10, 2003, Allan faxed a request to Hogan for a copy of the report. In response, Hogan reported that his report had been submitted to McCormack, but because it contained "highly confidential" material, permission for its release would have to be obtained through McCormack or "the attorney assigned" from the Department. In response, Allan wrote to McCormack on January 31, requesting a copy of the report on behalf of Thompson. Allan's letter was followed by one dated February 7 from Sokol. Sokol cited the Dills Act, the California Public Records Act (CPRA), and the "California [sic] Freedom of Information Act," as legal grounds for disclosure of the report.

McCormack responded in writing on February 20. She declined to share the report because "[o]ur Law Office in Sacramento generated that report." McCormack referred Sokol to Maguire should he wish to pursue the matter.

By this time the instant unfair practice charge had been filed. Department of Personnel Administration Counsel Wendi Ross had given notice of her appearance in the matter. Hence, Sokol wrote to Ross on March 20 and requested that she convince the Department to produce Hogan's report. Ross referred the letter to Broussard-Boyd, who responded to Sokol with her own dated April 4. Broussard-Boyd invoked the attorney-client privilege (because the report was "prepared in anticipation of litigation" and generated at "[her] request") as well as several exemptions under the CPRA (i.e., sections 6254(b), 6254(c) and 6255). Sokol responded in kind on April 14 claiming that Broussard-Boyd had conceded that the "pending litigation" exception under the CPRA did not apply when she admitted that the reported was only generated "in anticipation" of litigation.

At the hearing, Broussard-Boyd admitted that she was unaware of any administrative agency complaints of discrimination or lawsuits involving Stout lodged at the time the report was generated. However, she also stated that it is the policy of the Department's legal staff that any report generated at the request of an attorney remains confidential. Broussard-Boyd had no knowledge that Hogan had represented himself as being from outside the Department. At some unspecified time, Allan did refer Thompson to the Equal Employment Opportunities Commission (EEOC) upon his request.

Allan admitted that the allegations against Stout, particularly those involving race and gender discrimination, are by MOU definition, non-grievable matters. Nevertheless, such discrimination is prohibited by the contract. (Art. 20, sec. 20.8.) Allan categorized such disputes as giving rise to a "complaint." The MOU does not appear to define "complaint" in any way, though it makes reference to the term in the article describing the grievance and arbitration procedure.[3] In Allan's experience, where the matter involves a complaint, she must request that management conduct an investigation. Typically, when the Department agrees to

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[3] Article 14, "Grievance and Arbitration Procedure," section 14.1 ("Purpose") provides:

> This grievance procedure shall be used to process and resolve grievances arising under this Agreement and employment-related complaints.
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> The purposes of this procedure are:
>
> 1. To resolve grievances and complaints informally at the lowest possible level.
>
> 2. To provide an orderly procedure for reviewing and resolving grievances and complaints promptly. [Emphasis added.]

The same article also provides that a "formal grievance" may be filed if the informal resolution step fails. The informal resolution step is described as a "grievance conference." (Art. 14, sec. 14.4.) Allan testified that she understood a complaint to encompass any action affecting terms and conditions of employment that is not grievable. Alternatively, a complaint could more narrowly involve any non-grievance action to address a violation of the MOU (e.g., race and gender discrimination provisions). The precise definition is not important.

investigate, there is a follow-up meeting where the union attempts to obtain some remedial action. In the past, Allan has been able to meet with departments following such investigations and either obtain a copy of the report or learn of the contents thereof. In this case, Allan advised the employees that she would schedule a meeting with the Department when she obtained a copy of Hogan's report. Allan desired to have the report so she could factor it into her decision whether to pursue the issue. She also believed that a favorable report, especially by an independent investigator, would have greatly strengthened her hand with respect to achieving a favorable resolution of the matter.

ISSUE

Did the Department unlawfully refuse to provide necessary and relevant information by failing to produce the special investigator's report concerning allegations of a hostile work environment at the Veterans Home Plant Shop?

CONCLUSIONS OF LAW

There is a duty of Dills Act employers to provide the exclusive representative with necessary and relevant information upon request. (State of California (Department of Corrections) (1994) PERB Decision No. 1056-S; State of California (Departments of Personnel Administration and Transportation) (1997) PERB Decision No. 1227-S.) The employer's refusal constitutes bad faith bargaining unless it can demonstrate adequate reasons why it cannot supply the information. (Stockton Unified School District (1980) PERB Decision No. 143; State of California (Departments of Personnel Administration and Transportation), supra, PERB Decision No. 1227-S.)

The "necessary and relevant" standard relates in the first instance to the exclusive representative's ability to discharge its duty to represent unit members. (Los Angeles Unified School District (1994) PERB Decision No. 1061.) PERB has held that information pertaining

to mandatory subjects of bargaining is so intrinsic to the employer-employee relationship that it is deemed presumptively relevant. (Stockton Unified School District, supra, PERB Decision No. 143; State of California (Departments of Personnel Administration and Transportation), supra, PERB Decision No. 1227-S.) Not limited to purposes of bargaining however, a union's right to information also includes information necessary for the processing of grievances and contract administration. (California State University (1982) PERB Decision No. 211-H; Modesto City Schools and High School District (1985) PERB Decision No. 479.) In cases of contract administration, the duty to provide the information arises before a formal complaint is filed because such information may facilitate resolution of disputes short of formal action. (NLRB v. Acme Industrial Co. (1967) 385 U.S. 432, 438 [64 LRRM 2069].)

If the information does not pertain to a mandatory subject of bargaining it is not deemed presumptively relevant, and the union has the burden of demonstrating that the information is otherwise necessary and relevant to its "representational responsibilities." (State of California (Departments of Personnel Administration and Transportation, supra, PERB Decision No. 1227-S.) For example, the claim can be defeated where the information is not presumptively relevant and it can be demonstrated that the union's sole purpose is to use the information for prosecution of a case in an extra-contractual forum. (See Sahara Las Vegas Corp. (1987) 284 NLRB 337, 344 [128 LRRM 1085] [preparation for the filing of an unfair labor practice charge].)

The determination of whether requested information is relevant is made under a "liberal discovery standard." (State of California (Departments of Personnel Administration and Transportation), supra, PERB Decision No. 1227-S; Soule Glass and Glazing Co. v. NLRB (1st Cir. 1981) 652 F.2d 1055, 1092-1093 [107 LRRM 2781].) "The test of the union's need for such information is simply a showing of 'probability that the desired information was relevant,

and that it would be of use to the union in carrying out its statutory duties and responsibilities.'" (Westinghouse Electric Corp. (1978) 239 NLRB 106, 107 [99 LRRM 1482].)

Assuming these threshold showings are made, the employer may nevertheless prevail on its refusal if one of a number of defenses is available based on the assertion of legitimate countervailing interests. (See Los Rios Community College District (1988) PERB Decision No. 670 [confidentiality]; Chula Vista City School District (1990) PERB Decision No. 834 [unduly burdensome request]; State of California (Departments of Personnel Administration and Transportation), supra, PERB Decision No. 1227-S [information does not exist or does not exist in the form requested].)

In cases where confidentiality is at issue, both PERB and the National Labor Relations Board (NLRB) engage in a balancing test, comparing the weight of the interest in disclosure with the weight of the interest in privacy. (Modesto City School District, supra, PERB Decision No. 479; Los Rios Community College District, supra, PERB Decision No. 670; Detroit Edison Company v. NLRB (1979) 440 U.S. 301, 314-315 [100 LRRM 2728] [testing results with psychological information].)

As to the question of presumptive relevance, the Department argues that Local 39 has failed to meet its burden because, other than for Thompson's possible use in an extra-contractual proceeding (EEOC), any showing of a use for the report in contract negotiations or grievance processing is lacking. The Department notes that no grievance was ever filed and that Allan had failed to even request a meeting to discuss her concerns with the Department. To the contrary, I find that an adequate showing has been made. As Local 39 points out, the issues in the Plant Shop relate to workplace safety as well as freedom from a hostile work environment. Although I find nothing in the MOU that would support a grievance as to either

subject, that point is not essential. Both matters are negotiable subjects. (Healdsburg Union High School District (1984) PERB Decision No. 375.) An explanation of this principle is found in ASARCO, Inc. (1985) 276 NLRB 1367 [120 LRRM 1181]. There, the NLRB, in a summary affirmance, upheld the administrative law judge's finding that the employer, a mining company, unlawfully refused to produce the company's internal investigation report of a workplace fatality and photographs of the accident scene, and refused to allow a union expert access to the site. Despite the apparent inability of the union to file a grievance on the matter, the administrative law judge found that the matter related to the bargaining subject of safety and the union had a right to "fully investigate" the matter "with an eye toward preventing recurrences, in the interest of employees." (Id. at p. 1368.) I also take guidance from Westinghouse Electric Corp., supra, 239 NLRB 106. There the labor board found presumptively relevant detailed statistical data on the ethnicity and sex of the work force because it was necessary and relevant to the union's monitoring of the anti-discrimination provisions of the negotiated agreement. Here the MOU does contain anti-discrimination provisions, even if violations thereof may only be prosecuted as complaints.[4] That was the purpose for which Allan sought the information. Though no meeting with management had occurred, Allan had already demanded a plan of corrective action in her September 30, 2002, letter to Ellicock. The evidence does not demonstrate that the sole purpose for the request was to obtain information for use in an extra-contractual forum.

As to the question of balancing the employer's asserted need for confidentiality, the Department raises the interest in the confidentiality of Hogan's report, expressed in several of its legally recognized aspects. The Department begins with a constitutional privacy argument

[4] The MOU also addresses safety, though not presently in terms of freedom from harassment or threats.

premised on the right of Stout to non-disclosure of negative information construed as "personnel records." As noted by the California Supreme Court recently:

> Legally recognized privacy interests are generally of two classes: (1) interests in precluding the dissemination or misuse of sensitive and confidential information ("informational privacy"); and (2) interests in making intimate personal decisions or conducting personal activities without observation, intrusion, or interference ("autonomy privacy"). [Hill v. National Collegiate Athletic Assn. (1994) 7 Cal.4th 1, 35 [26 Cal.Rptr.2d 834].]

The report here implicates Stout's right to "informational privacy." An invasion of the right of privacy based on dissemination of such information must involve matters as to which the individual has a reasonable expectation of privacy under the circumstances. The invasion of that privacy interest must also be "serious." (People ex rel. Lockyer v. Superior Court (Pfingst) (2000) 83 Cal.App.4th 387, 399 [99 Cal.Rptr.2d 646], citing Hill v. National Collegiate Athletic Assn., supra, 7 Cal.4th 1, 35-37.)

The same constitutional premise is embedded in the Department's second argument based on the CPRA. The Department contends that the exemption precluding disclosure of personnel files under section 6254(c)[5] constitutes an absolute defense in this case. PERB, as well as NLRB, precedent is otherwise. In Trustees of the State of California (2004) PERB Decision No. 1591-H, PERB recently rejected the claim that CPRA provisions stand alone as a defense to a request for information under another of PERB's collective bargaining statutes, stating, "[t]he exemptions from disclosure provided by the [CPRA] cannot be used to deny an information request that is otherwise required by [Higher Education Employer-Employee Relations Act]." Similarly, in United States Postal Service (1991) 305 NLRB 997 [139 LRRM 1073] (U.S. Postal Service), the NLRB affirmed the administrative law judge's rejection of the

[5] Section 6254(c) requires production of:

> Personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy.

employer's absolute defense based on its compliance with terms of the federal Freedom of Information Act (FOIA) (5 U.S.C., sec. 552 et seq.). The information requested included materials gathered in an investigation by an inspection arm of the postal service. The NLRB noted that the FOIA is a statute regulating the rights of the public-at-large to information in government files and that any defenses contained by virtue of that statute do not apply to rights created under the National Labor Relations Act (NLRA) (29 U.S.C., sec. 141 et seq.). (U.S. Postal Service, supra, 305 NLRB at pp. 1004-1005.)

Nevertheless, both the constitutional and the CPRA-personnel-files defenses involve the same constitutional privacy interest that PERB must consider in the balancing process. U.S. Postal Service, supra, 305 NLRB 997, acknowledged that it was appropriate to consider the FOIA as a source of policy in balancing the interests of the parties. (Id. at pp. 1004-1005.) Because the CPRA is modeled after the FOIA, guidance from this case is appropriate. (Black Panther Party v. Kehoe (1974) 42 Cal.App.3d 645, 652 [117 Cal.Rptr. 106].)

There has been some litigation on the question of the confidentiality of personnel files in the traditional courts. Suffice it to say that these cases engage in the same type of balancing test. (See, e.g., Braun v. City of Taft (1984) 154 Cal.App.3d 332 [201 Cal.Rptr. 654].) On the side of disclosure, it is important to bear in mind that there are well-recognized rights of access to personnel information when an employee's conduct affects others. (See, e.g., Pitchess v. Superior Court (1974) 11 Cal.3d 531 [113 Cal.Rptr. 897] [access to police files for purposes of identifying complaints against a law enforcement officer where relevant to a defendant's guilt or innocence].) In addition, personnel files by their very nature contain some information that cannot be deemed confidential. For example, in Globe-Union, Inc. (1977) 233 NLRB 1458, 1461 [97 LRRM 1221], the NLRB rejected a defense of confidentiality involving personnel files containing private information such as marital discord and reasons for discharge, noting

that the asserted privacy interest did not outweigh the union's legitimate need for accurate wage data. (Id. at p. 1461.) As to the fear of unchecked dissemination, the NLRB indicated that unions could be trusted to be discreet with respect to their inspection of files. Still, despite the fact that the cases must be read as holding that an employee's expectation of privacy does not extend to everything in his or her personnel file,[6] such files do contain a wealth of information as to which the individual has a reasonable expectation of privacy. (See Teamsters Local 856 v. Priceless LLC (2004) 112 Cal.App.4th 1500, 1515 [5 Cal.Rptr.3d 847]; Los Rios Community College District, supra, PERB Decision No. 670 [social security numbers].)

In Teamsters Local 856 v. Priceless LLC, supra, 112 Cal.App.4th 1500, cited by the Department, unions sought injunctive relief to prevent several cities and a newspaper from disclosing the names and salaries of certain represented employees. The court held that because the salaries were contained in personnel files the employees had a reasonable expectation of privacy as to that information. However, in balancing the public's right to know, the court held that it was proper to allow disclosure of the salaries, so long as the names were redacted. (Id. at pp. 1520-1523.) Teamsters Local 856 illustrates a preference for disclosure where editing can eliminate the major problems as to privacy.[7]

The first obstacle for the Department is that the CPRA speaks in terms of personnel files. (See, e.g., Braun v. City of Taft (1984) 154 Cal.App.3d 332 [discussion of term

[6] See New York Times Co. v. Superior Court (1997) 52 Cal.App.4th 97, 100, 103 [60 Cal.Rptr.2d 410] ("A public servant may not avoid [a legal duty to disclose] by placing into a personnel file what would otherwise be unrestricted information."); see also Willits v. Superior Court (Health Dimensions) (1993) 20 Cal.App.4th 90 [24 Cal.Rptr.2d 348] (same in relation to assertion of medical peer review privilege).

[7] Partial limitations on disclosure are always favored over outright denials. (Board of Trustees v. Superior Court (Barkett) (1981) 119 Cal.App.3d 516, 526 [174 Cal.Rptr. 160]; Valley Bank of Nevada v. Superior Court (1975) 15 Cal.3d 652, 658 [125 Cal.Rptr. 553]; see also California State University, supra, PERB Decision No. 211-H [portions of personnel file only].)

"personnel files"].) Here, there is no evidence that a copy of the report was ever placed in Stout's physical personnel file. Nonetheless, the Department's argument seems to be that the report constitutes "personnel records" in a broader sense. (See Department of the Air Force v. Rose (1976) 425 U.S. 352, 370-377 [96 S.Ct. 1592, 48 L.Ed.2d 11] [construing similar language of FOIA, particularly the term "similar files"].) Assuming this premise, I address the matter by finding that the subject matter of the Hogan report would not be one as to which Stout would have a reasonable expectation of privacy. If there is any part as to which he would, it would be reasonably subject to redaction.

First, Stout's conduct vis'-a-vis' other employees is not of a confidential nature. It consists of observations of witnesses. This is the information Local 39 sought primarily. What Stout allegedly did to others is a matter of serious concern to those affected, and to Local 39 as well. Second, since the Department was likely aware through Allan's September 30 letter to Ellicock that some of the same bargaining unit employees interviewed by Hogan had already confided in the union, there is no privacy right implicated by the disclosure of what those persons told the Department's investigator. And while a privacy concern may be elevated where non-bargaining unit employees, such as other supervisors and management employees, are interviewed, any expectation of privacy on their part would be speculative on this record. Matters as to which Hogan inquired would presumably be ones Department employees would be expected to provide in the course of their general duties.[8] (See Pennsylvania Power Company (1991) 301 NLRB 1104, 1107 [136 LRRM 1225] [content of informants' statements, though not the identities, subject to disclosure].)

[8] The record contains nothing indicating that the employer granted anonymity as to these employees.

The only zone of privacy conceivable here concerns the relationship between the Department and Stout. If Stout responded to an interview on condition of confidentiality, he would likely be entitled to an expectation of privacy. (Cf. Pennsylvania Power Company, supra, 301 NLRB 1104 [employer wishes to encourage employees to be candid in revealing transgressions in the workplace].) However, there is nothing in the record that such a conditional promise was given to Stout. Stout's zone might also include any specific disciplinary action taken against him. Here, however, it appears the Department had only begun to investigate a basis for discipline. But these issues need not be decided for the purposes of this case. It is sufficient that the entire report does not fit under the umbrella of Stout's zone of privacy.[9] Especially where the report may contain confirmation of the serious allegations of misconduct its relevance cannot be understated. To the extent potentially adverse information may be embarrassing to Stout such a concern cannot support his claim of privacy. Also this is not a case where compelled disclosure of information is intended for dissemination to the general public. (Cf. Teamsters Local 856 v. Priceless LLC, supra, 112 Cal.App.4th 1500, 1515 [discussion of the right of privacy in personnel files arises in the context of CPRA, a "public's-right-to-know" statute].) The information targeted concerns a limited aspect of Stout's employment with the Department where there was risk of harm to

[9] The Department also relies on Payton v. City of Santa Clara (1982) 132 Cal.App.3d 152, which held that posting of the reasons for an employee's dismissal in an employee lunchroom stated a prima facie violation of the employee's state constitutional right to privacy, sufficient to withstand a demurrer at the pleading stage. However, the court noted that at trial the defendant could present any affirmative defenses justifying the posting. (Id. at p. 155.) I do not find Payton to be persuasive because it does not discuss what countervailing interests may exist. None appear to exist based on the facts recited. The opinion's reasoning is sparse, and understandably so, given its procedural posture.

others.[10] (See Globe-Union, Inc., supra, 233 NLRB 1458, 1461.) I note that even under the FOIA and CPRA where risk of wider dissemination argues much more strongly in favor of protection, the invasion of privacy must be "clearly unwarranted" to command nondisclosure. (Department of the Air Force v. Rose (1976) 425 U.S. 352, 378-379, fn. 16.) Even assuming some expectation of privacy exists as to Stout or anyone else interviewed, I find on this record that it cannot be said that such an invasion would be either "serious" or "clearly unwarranted." Therefore, I find that any interest in confidentiality is outweighed by the interest in disclosure for purposes of Local 39's right to represent employees.

Lastly, the Department argues that the report is confidential as attorney-client communication and/or privileged as attorney work-product. As to these questions, I believe that such common law rights would constitute an absolute defense. These are not simply policies expressed by the Legislature as to which PERB is free to attempt to achieve an accommodation. (Cf., e.g., Pacific Legal Foundation v. Brown (1981) 29 Cal.3d 168 [172 Cal.Rptr. 487]; San Mateo City School Dist. v. Public Employment Relations Bd. (1983) 33 Cal.3d 850 [191 Cal.Rptr. 800]; Fresno Unified School Dist. v. National Education Assn. (1981) 125 Cal.App.3d 259 [177 Cal.Rptr. 888].)

I find that the attorney-client communication right to confidentiality to be inapplicable because Hogan cannot be deemed the "client." Rather he was an employee assigned to investigate a matter that had the potential to result in litigation. The same argument was rejected in ASARCO, Inc., supra, 276 NLRB 1367. (See also 2,022 Ranch v. Superior Court (2004) 113 Cal.App.4th 1377, 1394 [7 Cal.Rptr.3d 197] [in-house attorneys hired to investigate possible legal claims].)

[10] This is not a case where production of a personnel file will result in access to a host of other irrelevant information, such as family information, social security numbers, prior disciplinary action, test scores, medical history, and the like.

The work-product privilege, recognized in Hickman v. Taylor (1947) 329 U.S. 495 [91 L.Ed. 451, 67 S.Ct. 385], is defined as a "qualified privilege for certain material prepared by an attorney 'acting for his client in anticipation of litigation.'" (Id. at p. 508.)[11] In ASARCO, Inc., supra, 276 NLRB 1367, the NLRB rejected the work-product privilege defense because, although the report there was purportedly prepared in anticipation of litigation (no litigation was pending), it was not prepared "by an attorney or with an attorney's assistance." Also rejected was the argument that disclosure would have had a harmful impact on the future candor of the company's reporting processes. (Id. at p. 1370.)[12]

Accordingly, I find that the Department's affirmative defenses based on confidentiality are without merit. Thus, by failing and refusing to provide Local 39 with a copy of the investigative report, I find that the Department denied the union necessary and relevant information, and thereby violated section 3519(c) of the Act. By the same conduct, the Department interfered with bargaining unit employees' right to participate in the activities of an employee organization of their own choosing in violation of section 3519(a) of the Act. Further this conduct denied Local 39 its right to represent employees in their employment relations with their employer in violation of section 3519(b).

REMEDY

Pursuant to section 3514.5(c), the Board

> . . . shall have the power to issue a decision and order directing an offending party to cease and desist from the unfair practice and to take such affirmative action, including but not limited to

[11] The attorney-client privilege is broader than the work-product privilege to the extent that even where no litigation is "anticipated" the former privilege applies. (Roberts v. City of Palmdale (1993) 5 Cal.4th 363, 371 [20 Cal.Rptr.2d 330].)

[12] See also Hobbs v. Municipal Court (1991) 233 Cal.App.3d 670, 692 [284 Cal.Rptr. 655] ("[T]o the extent that witnesses' statements and reports of witness interviews reflect merely what the witnesses said they are not work product.")

> the reinstatement of employees with or without back pay, as will effectuate the policies of this chapter.

It has been found that the Department breached its obligation to provide information necessary and relevant to Local 39's representational responsibilities, specifically, a copy of the Hogan investigative report. Accordingly, the Department is ordered, upon request by Local 39, to provide the above-referenced information upon request.

It has also been found that the Department interfered with the right of employees to participate in an employee organization of their own choosing and the right of Local 39 to represent employees in the bargaining unit it exclusively represents. The appropriate remedy is to cease and desist from the conduct found to violate the Act in this case.

It is also appropriate that the Department be required to post a notice incorporating the terms of this order. The Notice should be signed by an authorized agent of the Department indicating that it will comply with the terms thereof. The Notice shall not be reduced in size. Posting of such notice will provide employees with notice that the Department has acted in an unlawful manner and is being required to cease and desist from this activity and that it will comply with the order. It effectuates the purposes of the Dills Act that employees be informed of the resolution of the controversy and will announce the Department's readiness to comply with the ordered remedy. (See Placerville Union School District (1978) PERB Decision No. 69.)

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, and pursuant to the Ralph C. Dills Act (Dills Act), Government Code section 3514.5, it is hereby ordered that the State of California (Department of Veterans Affairs) (Department) and its representatives shall:

A. CEASE AND DESIST FROM:

1. Refusing to provide Stationary Engineers Union Local 39 (Local 39) with information necessary and relevant to its duties as exclusive representative;

2. By said conduct, interfering with bargaining unit members' right to participate in the activities of an employee organization of their own choosing;

3. By said conduct, denying Local 39 its right to represent employees in their employment relations with the Department.

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

1. Upon request, provide a copy of the investigative report prepared by Peter Hogan concerning allegations of misconduct involving Nathan Stout at the Veterans Home in Yountville.

2. Within ten (10) workdays of the service of a final decision in this matter, post at all work locations where notices to employees customarily are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the Department, indicating that the Department will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) 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. Upon issuance of a final decision, make written notification of the actions taken to comply with the Order to the San Francisco Regional Director of the Public Employment Relations Board (PERB or Board) in accord with the director's instructions.

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

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95814-4174
FAX: (916) 327-7960

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

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing. (Cal. Code of Regs., tit. 8, secs. 32135(a) and 32130.) A document is also considered "filed" when received by facsimile transmission before the close of business on the last day for filing together with a Facsimile Transmission Cover Sheet which meets the requirements of PERB Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code of Regs., tit. 8, sec. 32135(b), (c) and (d); see also Cal. Code of Regs., tit. 8, secs. 32090 and 32130.)

Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. (See Cal. Code of Regs., tit. 8, secs. 32300, 32305, 32140, and 32135(c).)

Donn Ginoza
Administrative Law Judge