STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 1000, Charging Party, v. STATE OF CALIFORNIA (DEPARTMENT OF CORRECTIONS AND REHABILITATION), Respondent.	Case No. LA-CE-761-S PERB Decision No. 2926-S October 22, 2024

Appearances: Daniel Luna, Attorney, for Service Employees International Union Local 1000; Frolan R. Aguiling, Sandra L. Lusich, Linda M. Kelly, and Shirley C. Ogata, Attorneys, for State of California (Department of Corrections and Rehabilitation).

Before Krantz, Paulson, and Nazarian, Members.

DECISION

KRANTZ, Member: This case is before the Public Employment Relations Board (PERB or Board) on an appeal by Charging Party Service Employees International Union Local 1000 (SEIU) from a dismissal order by an administrative law judge (ALJ). The ALJ found that the collective bargaining agreement (CBA) between SEIU and Respondent State of California (Department of Corrections and Rehabilitation) (CDCR) allows arbitration over SEIU's claims that CDCR interfered with and retaliated against activity protected under the Ralph C. Dills Act (Dills Act).[1] The ALJ therefore deferred all allegations to arbitration and dismissed the case.

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

Having considered the ALJ's order, the record, and the parties' arguments, we do not sustain SEIU's appeal. For the reasons explained below, we defer the Dills Act interference and retaliation claims to arbitration, and we dismiss the complaint and underlying charge.

BACKGROUND

I. The Parties' CBA

SEIU and CDCR agree that, at all relevant times, they were bound by a CBA covering multiple state employee bargaining units. Unit 15, which includes Correctional Supervising Cooks (CSCs) and other food service employees, is one of the covered bargaining units.

Section 5.5 of the CBA, entitled "Reprisals," provides as follows:

> "The State and the Union shall be prohibited from imposing or threatening to impose reprisals by discriminating or threatening to discriminate against employees, or otherwise interfering with, restraining, or coercing employees because of the exercise of their rights under the Ralph C. Dills Act or any right given by this Contract. The principles of agency shall be liberally construed."

Section 6.2(A) of the CBA defines a grievance as "a dispute of one or more employees, or a dispute between the State and the Union, involving the interpretation, application, or enforcement of the express terms of this Contract." Section 6.11 establishes the Union's right to arbitrate unresolved grievances.

Section 12.11.15(D) of the CBA specifies as follows:

> "The CDCR, shall provide Unit 15 employees working in the department's programs who are required to wear uniforms and accessories with an annual uniform allowance of five hundred dollars ($500) per fiscal year. Employees in eligible classifications shall receive the employee's annual uniform

replacement allowance by September 1 of each fiscal year or no later than sixty (60) calendar days after the passage of the annual State budget.

“1. The uniform for Correctional Supervising Cook/Cook Specialist I/II (CF), Baker I/II, and Butcher II and Food Service Technician I and II shall consist of the following items:

“a. Shirt, tan, with department patch over the left breast pocket.

“b. Button down shirts will be tucked into pants.

“c. Trousers, dark brown.

“d. Shoes - must be brown/black, leather uppers only, plain toe conservatively designed. No buckles and only moderate designs on or in leather. Leather must be of smooth texture. Heels not to exceed one and one-half (1½) inches in height. Soles must be slip and oil resistant. Military style shoes are acceptable. No cowboy boots or steel toed shoes or boots.

“e. Jumpsuit, long/short sleeve solid brown in accordance with department specifications.

“f. Tan smock with a one and three-quarter (1 ¾) inch CDCR patch over left breast pocket.

“2. The following items are mandatory accessories:

“a. One and three-quarter (1¾) inch CDCR patch on solid brown or brown and tan cap, solid brown beanie, or boonie style hat with the department identification and classification (CSC, Cook Specialist I/II, Baker I/II, Butcher II and Food Service Technician I and II rocker).

“b. One and three-quarter (1¾) inch CDCR patch above the left breast pocket with the department identification

“c. Belt, brown/black

"d. One and three-quarter (1¾) inch CDCR patch on the left breast on a dark brown color uniform style jacket or coat.

"e. Key ring holder

"f. Whistle

"g. Name tag

"h. Flashlight – mini mag light type not to exceed six (6) inches

"3. The following items are non-mandatory accessories:

"a. Alarm holder

"b. American flag patch

"c. Hash marks denoting years of service (on long sleeve shirt or jumpsuit only)

"d. Hairnets

"e. CDCR shoulder patches"

II. SEIU's Charge

SEIU filed this case in October 2023. The charge alleged that in April 2023, SEIU provided CSCs with hats that were akin to their usual ones but with added language on the back reading: "SEIU Local 1000" and "Respect Us, Protect Us, Pay Us." The charge further alleged that CSCs wore the SEIU-provided hats without any feedback from management until late August 2023. At that point, according to the charge, CDCR disallowed the SEIU-provided hats and threatened employees with writeups for noncompliance. The charge alleged that SEIU then raised the issue with management, but CDCR proceeded to reiterate its prohibition and issue a counseling memorandum to Lorenzo Macias, a CSC who wore an SEIU-provided hat.

After CDCR declined to respond substantively to SEIU's charge, PERB's Office of the General Counsel (OGC) issued a complaint containing the following allegations:

"**INTERFERENCE**

"3. Beginning August 30, 2023, Respondent prohibited Charging Party's bargaining unit members from wearing hats that contained Charging Party's name and bargaining campaign slogan, '*Respect Us, Protect Us, and Pay Us*,' in the workplace.

"4. By the acts and conduct described in paragraph 3, Respondent interfered with employee rights guaranteed by the Ralph C. Dills Act in violation of Government Code section 3519(a).

"5. This conduct also denied Charging Party its right to represent employees in violation of Government Code section 3519(b).

"**RETALIATION**

"6. Lorenzo Macias (Macias) is a State employee within the meaning of Government Code section 3513(c).

"7. On or about August 30, 2023 and October 19, 2023, Macias exercised rights guaranteed by the Ralph C. Dills Act by wearing a hat which contained Charging Party's name and bargaining campaign slogan, '*Respect Us, Protect Us, and Pay Us*,' in the workplace.

"8. On or about October 19, 2023, Respondent took adverse action against Macias by issuing Macias a counseling memorandum for wearing his hat in the workplace.

"9. Respondent took the actions described in paragraph 8 because of the employee's activities described in paragraph 7, and thus violated Government Code section 3519(a).

"10. This conduct also denied Charging Party its right to represent employees in violation of Government Code section 3519(b)."

CDCR answered the complaint, denying its substantive allegations and asserting multiple affirmative defenses, including deferral to arbitration. CDCR then filed a document entitled "Notice of Respondent's Election to Defer Charge to Grievance and Arbitration and Motion to Dismiss Charge and Complaint." The ALJ properly disregarded the document's purported "election to defer" and instead viewed the filing solely as a motion to defer to arbitration.[2]

The ALJ granted CDCR's deferral motion and dismissed SEIU's charge on that basis, leading to this appeal.[3]

DISCUSSION

In resolving pre-hearing dismissal motions, ALJs must apply the same principles that OGC applies in determining which charge allegations (if any) warrant dismissal. (*Cal Fire Local 2881 (Tobin)* (2018) PERB Decision No. 2580-S, p. 2.) And where a party appeals an ALJ's dismissal, we apply the same principles in our de novo review. As a result, we assume SEIU's factual allegations are true, and we view these

[2] A party has the right to ask OGC to defer to arbitration pursuant to PERB Regulation 32620(b)(5)-(6). (PERB Regulations are codified at Cal. Code Regs., tit. 8, § 31001 et seq.) Irrespective of whether a party earlier asked OGC for deferral, it can plead deferral as an affirmative defense in its answer to a complaint and file a deferral motion pursuant to Regulation 32190(a). But no party has a right, at any stage of PERB proceedings, to unilaterally "elect" deferral.

[3] Under each labor relations statute we administer, decisions granting deferral are appealable as of right, whereas decisions denying deferral are interlocutory and thus appealable only when a Board agent issuing such an order certifies it to the Board. (*State of California (Department of Corrections and Rehabilitation)* (2024) PERB Order No. Ad-516-S, p. 4.) SEIU's appeal was therefore procedurally proper without the need for certification.

allegations in the light most favorable to SEIU. (*City and County of San Francisco* (2023) PERB Decision No. 2846-M, p. 8.)

Here, the appeal turns entirely on applying PERB's deferral jurisprudence, including multiple important doctrinal adjustments the Board has made since first stating the pre-arbitration and post-arbitration deferral tests. Accordingly, we explain the modern version of PERB's deferral doctrine and apply it to the record before us.

I. PERB's Pre-Arbitration and Post-Arbitration Deferral Tests

Each labor relations statute we administer either explicitly or implicitly states a preference for parties to resolve unfair practice issues through contractual arbitration, if arbitration under the operative contractual provisions is adequate to fully and fairly resolve the claims that would otherwise proceed through our process. (*County of Santa Clara* (2021) PERB Order No. Ad-485-M, pp. 16-17 (*Santa Clara*); see § 3514.5(a)(2).) Nonetheless, deferral to arbitration is an affirmative defense, meaning that a party seeking deferral has the burden to timely plead the defense. (*Claremont Unified School District* (2014) PERB Decision No. 2357, p. 17 (*Claremont*).)

Beginning soon after PERB's creation, the Board adopted deferral tests articulated by the National Labor Relations Board (NLRB). (See, e.g., *Dry Creek Joint Elementary School District* (1980) PERB Order No. Ad-81a, pp. 4-5 (*Dry Creek*).) Doing so was appropriate given the similarities between the laws we administer and federal law governing private sector labor relations. (*San Diego Teachers Assn. v. Superior Court* (1979) 24 Cal.3d 1, 12.)

However, private sector precedent is at most persuasive. (*Operating Engineers Local Union No. 3, AFL-CIO (Wagner et al.)* (2021) PERB Decision No. 2782-M, p. 9,

fn. 10; *Santa Clara*, *supra*, PERB Order No. Ad-485, p. 8, fn. 7.) Even when PERB precedent expressly borrows wording and/or principles from private sector precedent, that "does not mean we necessarily follow subsequent developments in NLRB precedent." (*Regents of the University of California* (2023) PERB Decision No. 2880-H, p. 9, fn. 6; *El Camino Healthcare District, et al.* (2023) PERB Decision No. 2868-M, p. 26, fn. 18 [judicial appeal pending on other grounds]; *Napa Valley Community College District* (2018) PERB Decision No. 2563, p. 13.) Indeed, as PERB has shifted how it interprets multiple elements of the pre-arbitration and post-arbitration deferral tests over time, such shifts have not necessarily matched the NLRB's shifts.[4]

One shift in PERB precedent is important to understand at the outset, as it impacts multiple deferral principles. While we have long phrased the required elements of the deferral defense differently depending on whether the parties have already completed arbitration, recent precedent clarifies that we cohesively interpret the pre-arbitration and post-arbitration deferral tests with reference to one another, so that the critical legal principles are consistent in each context. (*Santa Clara*, *supra*, PERB Order No. Ad-485-M, p. 18, fn. 12; see also *id*. at p. 22, fn. 17 [if PERB defers at the pre-arbitration stage, charging party may still argue at the post-arbitration stage that PERB's assumptions as to how the arbitrator would approach the case did not pan out].) The explanation below further illustrates how the two tests work together to effectuate the policies and purposes of the acts we administer.

[4] For example, PERB neither followed the NLRB's shift in *Babcock and Wilcox Constr. Co., Inc.* (2014) 361 NLRB 1127, nor its subsequent shift in *United Parcel Service, Inc.* (2019) 369 NLRB No. 1. The doctrinal shifts that PERB has, in fact, made are described throughout this decision.

A. Pre-Arbitration Deferral

When PERB considers deferral before the arbitration process is complete (including, as here, where the charging party union has not yet filed a grievance), the party seeking deferral has the burden to establish that: (1) the dispute arises within a stable collective bargaining relationship; (2) the respondent is willing to waive procedural defenses and to arbitrate the merits of the dispute; (3) the contract and its meaning lie at the center of the dispute; and (4) no deferral exception applies.[5] (*County of Orange* (2022) PERB Order No. Ad-496-M, p. 5 (*Orange*).)

The most critical element of the pre-arbitration deferral test is often whether the contract and its meaning lie at the center of the dispute. (*Orange*, *supra*, PERB Order No. Ad-496-M, p. 5.) For this element, the party seeking deferral must establish two conditions. First, the alleged unfair practice must be arguably prohibited by the parties' agreement. (*Santa Clara*, *supra*, PERB Order No. Ad-485-M, p. 8.) Thus, "it is not sufficient for the agreement to merely cover or discuss the matter. The conduct alleged to be an unfair practice must be prohibited." (*Ibid*., citation omitted.)

Second, beginning with *Santa Clara*, *supra*, PERB Order No. Ad-485-M, we have required that "resolution of the contractual issue must necessarily resolve the merits of the unfair practice allegation." (*Id*. at p. 8, citation omitted.) Thus, "[i]f resolution of the alleged unfair practice requires application of statutory legal standards, and there is no guarantee that an arbitrator will look beyond the contract and consider statutory

[5] Dills Act section 3514(a)(2) sets forth a futility exception, while other exceptions flow from the fact that deferral is a discretionary doctrine. For instance, even if all deferral elements are satisfied, PERB will not defer claims alleging interference with or retaliation for filing a PERB charge or participating in PERB processes. (*Trustees of the California State University (East Bay)* (2014) PERB Decision No. 2391-H, p. 39.)

principles, deferral is not appropriate." (*Ibid*., internal quotation marks and citations omitted.) This condition is satisfied "where the parties incorporate the statutory legal standard into their collective bargaining agreement" or both parties "ask the arbitrator to resolve the statutory unfair practice issue." (*Id.* at p. 8, fn. 6.) Notably, "this clarification ensures that our pre-arbitration deferral standard is consistent with our post-arbitration deferral standard, which requires that the arbitrator actually decide the alleged statutory violation." (*Id*. at p. 18.) Indeed, it would make little sense to defer pre-arbitration if there was a likelihood of reaching the opposite conclusion post-arbitration.

Because PERB will not defer where it is futile to do so, the relevant statutory standards that the arbitrator must apply include those related to both liability and remedy. (*Oxnard Union High School District* (2022) PERB Decision No. 2803, pp. 55-56 [deferral improper where contract required grievant to show employer violated an "express term" in an "arbitrary, capricious or discriminatory manner," which deviated from PERB standards]; *Santa Ana Unified School District* (2013) PERB Decision No. 2332, pp. 25-26 [deferral inappropriate because contract limited arbitrator from providing full make-whole remedy and because contract limited arbitrator from fully considering the issues at stake]; *Pleasanton Joint School District* (1986) PERB Decision No. 594, pp. 2-6 [deferral inappropriate where contract limited arbitrator to finding violation of "express terms," thereby preventing arbitrator from considering full breadth of issues at stake in unilateral change case].)

If a respondent establishes all four elements needed to prevail in a pre-arbitration deferral motion, then PERB follows one of two procedures, depending on which public sector labor relations statute covers the parties. Under the statutes referenced in PERB

Regulation 32620(b)(5)—including the Dills Act—a successful deferral motion leads PERB to dismiss the unfair practice charge. In contrast, under the labor relations statutes referenced in PERB Regulation 32620(b)(6), PERB merely places the charge in abeyance. (*Orange*, *supra*, PERB Order No. Ad-496-M, p. 5.) However, this is a distinction without a difference. To explain why, we first describe PERB procedure in those instances in which deferral leads to abeyance, and we then compare the procedures that apply when deferral leads to dismissal.

After PERB defers a charge to arbitration and places it in abeyance pursuant to Regulation 32620(b)(6), the case normally remains in abeyance until arbitration is complete. At that point, PERB dismisses the charge unless the charging party can disprove one or more elements of the post-arbitration deferral test discussed *post*. If the charging party believes one of these circumstances exists, it normally asks PERB to take its charge out of abeyance and amends it to include all needed allegations about the arbitration process and/or arbitration decision. (*Trustees of the California State University (Long Beach)* (2011) PERB Decision No. 2201-H, pp. 3-6.)

A slightly different procedure is available under the statutes covered by PERB Regulation 32620(b)(5). Under those laws, pre-arbitration deferral leads PERB to dismiss the unfair practice charge, meaning there is no opportunity to file an amended charge. Instead, the charging party can file a new charge that alleges the original violation(s) as well as the circumstances preventing PERB from continuing to defer.[6]

[6] The statutory tolling doctrine permits a charging party to timely file such allegations within six months of when it knew or should have known of the deficiency in the arbitration process or the arbitrator's decision. (*Los Angeles Unified School District* (2014) PERB Decision No. 2359, p. 10; *Trustees of the California State University (Long Beach)*, *supra*, PERB Decision No. 2201-H, p. 6.)

Therefore, under each PERB-administered statute, after PERB issues a pre-arbitration deferral order, the charging party has a later opportunity to ask PERB to revisit that conclusion post-arbitration.

B. Post-Arbitration Deferral

When PERB considers deferral after the parties have completed arbitration and received the arbitrator's final decision, we normally will exercise our discretionary authority to defer to a final arbitration decision and dismiss the related unfair practice claim(s), if: (1) the unfair practice issues were presented to and considered by the arbitrator; (2) the arbitral proceeding was fair and regular; (3) the party asserting deferral agrees to be bound by the arbitrator's decision; and (4) the arbitration was not clearly repugnant to the purposes and policies of the statute. (*Orange*, *supra*, PERB Order No. Ad-496-M, p. 8.)

Regarding the third element, a party manifests an intent not to be bound by the arbitrator's decision, thereby undercutting its claimed agreement to be bound, if it successfully sues to vacate or alter the decision. (*State of California (Department of Corrections and Rehabilitation)*, *supra*, PERB Order No. Ad-516-S, p. 5.)

As to the fourth element, "repugnancy" is a term of art that does not match the normal English definition of the word. (*Orange*, *supra*, PERB Order No. Ad-496-M, p. 8.) A traditional repugnancy assessment arises where the arbitrator has considered and resolved the unfair practice issues in a fair and regular proceeding, meaning that the sole question before the Board is whether the content of the arbitrator's decision or remedy is "palpably wrong" or "not susceptible to an interpretation" consistent with the statutes we administer. (*Ibid*.) We do not reach such a conclusion merely because we

would have decided the facts differently or disagree with the arbitrator's resolution of "legal issues as yet undecided by the Board." (*Ramona Unified School District* (1985) PERB Decision No. 517, p. 15 (*Ramona*).) Nor do we find repugnancy merely because we would have interpreted the parties' contract differently. (*Oakland Unified School District* (1985) PERB Decision No. 538, pp. 3-4.) But an arbitral decision is repugnant if its remedy does not fully effectuate the purposes of the operative labor relations statute. (*Ramona*, *supra*, pp. 15-16; *Dry Creek*, *supra*, PERB Order No. Ad-81a, pp. 7-10.)

We sometimes use the term "repugnancy" to refer to a circumstance in which the charging party contends that the first or second element of the post-arbitration deferral test is not satisfied. (*Orange*, *supra*, PERB Order No. Ad-496-M, pp. 8-9.) In such circumstances, the charging party need not show that the arbitrator's decision is palpably wrong or not susceptible to an interpretation consistent with the statute; instead, it must show either that the arbitration process was unfair or that the arbitrator failed to consider and decide the unfair practice issues.

C. Deferral Motions in Cases with Interrelated Claims

When a charge or complaint alleges multiple claims that are factually or legally interrelated, then the following additional deferral principles apply.[7] PERB must first determine whether such interrelated claims are "independent" or "derivative," following the principle that a claim is independent of another if it can potentially prevail while the other does not. (*Santa Clara*, *supra*, PERB Order No. Ad-485-M, p. 9.) For interrelated claims that are independent of one another, the party seeking deferral must separately

[7] In *Santa Clara*, *supra*, PERB Order No. Ad-485-M, we noted that "factually or legally interrelated" was an understandable and easily applied version of the phrase "closely related." (*Id*. at p. 11.)

show that each claim satisfies the applicable deferral test, or else PERB refrains from deferring any of the interrelated claims. (*Id*. at pp. 10-12.) In contrast, if a claim is derivative of another, the party seeking deferral need not make a separate showing that the derivative claim meets the applicable deferral test. (*Id*. at p. 10.)

In our discussion at pages 16-18, *post*, we note how this approach to interrelated claims reflects significant evolution from past decisions that the Board has overruled. We also explain that, for a 15-year period beginning in 1987, the Board treated deferral as jurisdictional rather than discretionary based on the Board's holding in *Lake Elsinore School District* (1987) PERB Decision No. 646 (*Lake Elsinore*), which the Board reversed in 2002. These changes, together with others noted throughout this decision, require extra diligence in checking whether principles previously enunciated remain the most current statement of PERB precedent.

II. CDCR's Deferral Motion

The ALJ granted CDCR's motion to defer the complaint's interference and retaliation claims, which are interrelated both factually and legally. CDCR's motion implicates the pre-arbitration deferral standard, as there is no arbitration decision to which we could defer. SEIU concedes the first, second, and fourth elements of the pre-arbitration deferral standard. SEIU's position is more nuanced with respect to the third element—whether the contract and its meaning lie at the center of the dispute. We explain.

Based on the unique confluence of CBA sections 5.5 and 12.11.15(D), SEIU concedes that the CBA and its meaning lie at the center of its dispute over whether CDCR interfered with employee rights in violation of Dills Act section 3519(a). We

express no opinion as to that concession or regarding whether the contract would lie at the center of potential future interference disputes involving different issues, but we accept the concession for purposes of our analysis.[8]

SEIU rests its appeal on a single argument, claiming that the CBA does not allow arbitration over interference with the union's own rights in violation of section 3519(b), and for that reason we cannot defer any of the claims. SEIU points out that section 5.5 of the CBA bars CDCR from "interfering with, restraining, or coercing employees because of the exercise of their rights under the Ralph C. Dills Act," thereby explicitly referencing the interference standard set forth in section 3519(a) but not the analogous prohibition against denying SEIU its rights set forth in section 3519(b).

Thus, we must assess whether the section 3519(b) claim involves any standards or facts that could make its outcome or remedy materially diverge from the section 3519(a) claim. Notably, a section 3519(b) claim may, but need not, be derivative of a section 3519(a) claim. (See, e.g., *County of San Joaquin* (2021) PERB Decision No. 2761-M, pp. 20-22 [finding interference with union's right to be independent claim].) If and only if the section 3519(b) claim will necessarily involve the same standards applied to the same facts as the section 3519(a) claim, and therefore have the same outcome (and materially the same potential remedies), then we can safely defer both claims.

Although there are past decisions in which the Board considered deferral in the context of a contractual provision akin to CBA section 5.5 and based on claims under

[8] SEIU's appeal does not mention the complaint's retaliation claim. We treat that as a concession of any argument that the retaliation claim provides a basis for not deferring, while expressing no opinion on that concession.

Dills Act sections 3519(a) and 3519(b), both parties properly refrained from citing those overruled decisions in their briefs on appeal. The ALJ, too, properly refrained from relying on such decisions. Part A below explains that the parties and the ALJ were correct, as those decisions no longer have precedential value on deferral issues. Then, Part B applies current Board precedent to the present circumstances, concluding that SEIU's section 3519(b) claim involves the same statutory standards, the same facts, and effectively the same remedies as the section 3519(a) claim, allowing us to defer both claims.[9]

A. Prior Deferral Decisions Regarding Section 3519(a) and Section 3519(b)

In *State of California (California Department of Forestry and Fire Protection)* (1989) PERB Decision No. 734-S (*Department of Forestry*), OGC found that the charging party's section 3519(b) claim was not independent of a deferable claim under section 3519(a), and on that basis OGC deferred and dismissed both claims. In a summary order, the Board reversed as to the section 3519(b) claim only. (*Id*. at pp. 1-2.) In its brief order, the Board cited *Lake Elsinore*, *supra*, PERB Decision No. 646 to underpin its holding that deferral was proper only as to the claim the Board believed met

[9] In a literal sense, there can never be an advance "guarantee" that an arbitrator will "look beyond the contract and consider statutory principles" as required since *Santa Clara*, *supra*, PERB Order No. Ad-485-M, p. 6. Here, for instance, only time will tell for sure if an arbitrator will apply the governing statutory standards regarding interference, employer rules on insignia and messages in the workplace, and contractual waiver. However, if the arbitrator fails to do so, SEIU is free to request that PERB cease deferring to arbitration, following the procedures described *ante* at pages 10-11. PERB will normally grant such a request if the arbitrator has not considered and resolved the unfair practice issues, has misunderstood statutory standards explained in Board precedent, or has failed to order a fully effective remedy for any violation found. (See *ante* at pp. 9-13.)

the deferral test—the section 3519(a) claim. The Board then followed a comparable approach in multiple subsequent decisions. (See, e.g., *State of California (Department of Parks and Recreation)* (1990) PERB Decision No. 810-S; *State of California (Department of Corrections)* (1992) PERB Order No. Ad-231-S, pp. 8-10; and *State of California (Department of Parks and Recreation)* (1993) PERB Decision No. 1026-S.)[10]

The deferral analysis in the above decisions is no longer citable today.[11] This is true, first, because the Board eventually reversed *Lake Elsinore* in *State of California (Department of Food and Agriculture)* (2002) PERB Decision No. 1473-S, pp. 5-13. Moreover, the deferral analysis in the above cases does not comply with current Board precedent in analyzing whether the section 3519(a) claim was deferable, and if so, whether the section 3519(b) claim was independent of the section 3519(a) claim. In *State of California (Department of Corrections)* (1995) PERB Decision No. 1100-S, the Board explicitly overruled "*Department of Forestry*[, *supra*, PERB Decision No. 734-S] and its progeny to the extent that they have established a bifurcated deferral standard" and found it proper to defer to arbitration claims arising under both section 3519(a) and

[10] In *State of California (Office of Emergency Services)* (1995) PERB Decision No. 1122-S, the Board deferred an employee's section 3519(a) claim, relying on *Lake Elsinore*, *supra*, PERB Decision No. 646 and applying a version of PERB's deferral doctrine that was undeveloped in multiple other respects. For example, the Board deferred to arbitration even though the charging party's exclusive representative would not arbitrate his claims. Shortly thereafter, in *State of California (Department of Parks and Recreation)* (1995) PERB Decision No. 1125-S, the Board recognized that deferral is normally improper if individual employees wish to arbitrate but their union controls that decision and declines to arbitrate. (*Id*. at pp. 8-9.)

[11] In the dismissal order in this case, the ALJ properly cited *State of California (Department of Parks and Recreation)*, *supra*, PERB Decision No. 1026-S for its discussion of insignia, while properly declining to follow its deferral discussion.

section 3519(b), if they involve the same conduct and one of the two claims is deferable. (*State of California (Department of Corrections)*, *supra*, PERB Decision No. 1100-S, pp. 14-16.) While this moved a step closer to our current approach by ending the period of bifurcated deferral in which interrelated claims would be litigated in multiple fora, the Board continued to rely on *Lake Elsinore*, and its approach still did not comply with current Board precedent in analyzing whether the section 3519(a) claim was deferable and whether the section 3519(b) claim was independent in the sense that it could have a materially different outcome or remedy.

In its 2002 decision in *State of California (Department of Food and Agriculture)*, *supra*, PERB Decision No. 1473-S, the Board overruled *Lake Elsinore* and its progeny, finding that the deferral doctrine is discretionary rather than jurisdictional. (*Id*. at pp. 5-13.) While this decision invalidated a significant premise for the prior 15 years of deferral precedent, it did not undertake a deferral analysis of the unilateral change case before it, instead remanding for analysis by OGC. (*Id*. at p. 14.)

Since 2002, the Board has continued to refrain from bifurcating interrelated claims. (*Santa Clara*, *supra*, PERB Order No. Ad-485-M, p. 9; *Claremont*, *supra*, PERB Decision No. 2357, p. 17, fn. 14; *State of California (Department of Mental Health)* (2003) PERB Decision No. 1567-S, pp. 6-9; *State of California (Department of Parks and Recreation)* (2003) PERB Decision No. 1566-S, pp. 8-11.) But *Santa Clara*, *supra*, PERB Order No. Ad-485-M was the first decision fully explaining how to assess whether a claim is independent or derivative of another, deferable claim, and what consequences flow from each finding. (*Id*. at pp. 9-12.)

As noted at pages 9-10, above, *Santa Clara*, *supra*, PERB Order No. Ad-485-M also added to PERB's approach for deciding whether the contract and its meaning lie at the center of a dispute. *Santa Clara* maintained one aspect of the Board's longstanding approach, cautioning that: "it is not sufficient for the agreement to merely cover or discuss the matter. The conduct alleged to be an unfair practice must be prohibited." (*Id*. at p. 8.) But *Santa Clara* supplemented this caution by noting that "resolution of the contractual issue must necessarily resolve the merits of the unfair practice allegation," meaning that if "resolution of the alleged unfair practice requires application of statutory legal standards, and there is no guarantee that an arbitrator will look beyond the contract and consider statutory principles, deferral is not appropriate." (*Ibid*., internal quotation marks and citations omitted.)

With these principles in mind and accepting SEIU's concession that section 5.5 of the CBA allows arbitration of the section 3519(a) claim, we proceed to analyze whether the section 3519(b) claim involves the same facts, legal standards, and potential remedies as the section 3519(a) claim, which would allow us to defer both claims.

B. SEIU's Claim Under Dills Act Section 3519(b)

Two claims are independent of one another if their outcomes can diverge. (*Santa Clara*, *supra*, PERB Order No. Ad-485-M, p. 9.) Here, SEIU's interference claims under section 3519(a) and section 3519(b) will have the same outcome because the facts are the same, the potential remedies are materially the same, and the arbitrator will necessarily apply the below statutory standards in resolving both claims. (*State of California (Department of Corrections and Rehabilitation)* (2012) PERB

Decision No. 2282-S, p. 16 [interference standards comparable under section 3519(a) and section 3519(b)].)

To establish a prima facie interference case under either section 3519(a) or section 3519(b), a charging party union must show that an employer's conduct tends to or does result in some harm to protected union and/or employee rights. (*Regents of the University of California*, *supra*, PERB Decision No. 2880-H, p. 7.) The union need not establish that the employer acted because of an unlawful motive. (*Ibid*.) If the union establishes a prima facie case, the burden shifts to the employer. (*Ibid*.) The degree of harm dictates the employer's burden. (*Ibid*.) If the harm is "inherently destructive" of protected rights, the employer must show that the interference results from circumstances beyond its control and that no alternative course of action was available. (*Id*. at pp. 7-8.) For conduct that is not inherently destructive, the respondent may attempt to justify its actions based on operational necessity. (*Id*. at p. 8.) In such cases, PERB balances the asserted business need against the tendency to harm protected rights; if the tendency to harm outweighs the necessity, PERB finds a violation. (*Ibid*.) Within the category of actions or rules that are not inherently destructive, the stronger the tendency to harm, the greater is the respondent's burden to show its business need was important and that it narrowly tailored its actions or rules to attain that purpose while limiting harm to protected rights as much as possible. (*Ibid*.)

Additional standards apply to allegations that an employer interfered with the right to display union insignia or other protected messages in the workplace. First, an employer rule is unlawful if, on either a facial or as-applied basis, the employer singles out protected conduct or speech, as compared to non-protected activities or speech.

(*Regents of the University of California*, *supra*, PERB Decision No. 2880-H, p. 13.) Second, a facially neutral, consistently applied rule may still be unlawful if the charging party shows that the employer adopted it in retaliation for protected activity. (*Ibid*.)

Third, even as to a rule that is non-discriminatory and non-retaliatory, PERB recognizes that displaying union insignia or other protected messages in the workplace is generally "far less disruptive" than solicitation and distribution, and for that reason there is a rebuttable presumption against restricting such display. (*Regents of the University of California*, *supra*, PERB Decision No. 2880-H, pp. 8-9; *City of Sacramento* (2020) PERB Decision No. 2702-M, p. 9.) An employer may rebut this presumption only if it can establish "special circumstances" that justify the restriction. (*City of Sacramento*, *supra*, p. 9.) PERB considers such questions on a case-by-case basis, requiring the employer to make a "concrete, fact-based evidentiary showing" of a special circumstance. (*Id*. at p. 10.) Relevant factors include whether an insignia or message is likely to negatively affect operations, such as by posing a safety risk, disrupting employee discipline, distracting from work demanding great concentration, or damaging employer property. (*Regents of the University of California*, *supra*, PERB Decision No. 2880-H, p. 10.) Also important is the specific context in which the employer enacted or enforced the prohibition, the locations involved, industry practice, and the parties' past practice. (*Ibid*.) Thus, a history of insignia or messages in the workplace without resulting incidents can undercut an employer's argument. (*Ibid*.) General, speculative, isolated, or conclusory evidence of potential disruption to an employer's operations does not amount to special circumstances. (*Ibid*.) Moreover, an employer may not rely on a concern to establish special circumstances if the record

demonstrates that the employer has asserted it as a pretext for limiting protected activity. (*Id*. at pp. 10-11.)[12]

The arbitrator will necessarily apply one final standard as well. A union can contractually waive employees' statutory right to display protected insignia and messages in the workplace, but to be effective, such a contractual waiver must be clear and unmistakable. (*Regents of the University of California (Irvine)* (2018) PERB Decision No. 2593-H, p. 10; *Regents of the University of California* (2012) PERB Decision No. 2300-H, p. 27.) Normally, imprecise phrasing does not satisfy the clear and unmistakable standard. (*Regents of the University of California (Irvine)*, *supra*, PERB Decision No. 2593-H, pp. 10-11 [contractual provision allowing employer to adopt "reasonable" rules did not waive statutory access rights].) Moreover, a waiver of employees' statutory rights, even if clear and unmistakable, is unenforceable if it seriously impairs employees' right to communicate about union matters. (*Omnitrans*

[12] Precedent explains how these principles, as well as related ones relevant to disputes about solicitation and distribution, apply in specialized areas such as trial courts and hospitals. (See, e.g., *Superior Court v. Public Employment Relations Bd.* (2018) 30 Cal.App.5th 158, 178-197 [where courthouse included break areas hidden from the public but did not include areas where employees were hidden from the public while working, court-employer could lawfully prohibit employees from wearing insignia; however, rule prohibiting employees from distributing literature in "working areas" was unlawfully overbroad in that it could be interpreted to include break areas where the public would not be able to see distributed literature]; *Regents of the University of California* (2018) PERB Decision No. 2616-H, pp. 11, 15-20 [in acute care hospital, limit on non-business solicitation and distribution is presumptively valid if non-discriminatory and limited to immediate patient care areas, but limit on displaying insignia and messages in immediate patient care areas enjoys no presumptive validity and must instead be supported by special circumstances].)

(2009) PERB Decision No. 2030-M, p. 21; accord *Regents of the University of California (Irvine)*, *supra*, PERB Decision No. 2593-H, p. 11, fn. 9.)

As noted above, these standards apply equally to SEIU's sections 3519(a) and 3519(b) interference claims. And at least in this case, the facts of the two claims are the same. When we addressed an unlawful insignia ban in *County of Sacramento* (2014) PERB Decision No. 2393-M, we found that the ban equally interfered with employee and union rights, noting that such rights "are inseparable in this factual setting." (*Id*. at p. 33; see also *City of Sacramento*, *supra*, PERB Decision No. 2702-M, p. 15 [policy interfered equally with employee and union rights]; accord *Regents of the University of California*, *supra*, PERB Decision No. 2616-H, p. 21, fn. 14 [declining to find denial of union's rights where the complaint did not allege such a claim, the ALJ therefore declined to find such a violation, and the union took no exception to that finding].) Moreover, in the absence of other claims—such as a unilateral change claim that could require a potential order to bargain—the remedy for violating section 3519(b) would be the same as the remedy for violating section 3519(a). (*County of Sacramento*, *supra*, PERB Decision No. 2393-M, p. 34; cf. *City of Sacramento*, *supra*, PERB Decision No. 2702-M, pp. 15-16 [ordering remedies for both interference and unilateral change].)

In sum, assuming the facts in the charge to be true, the claim on which SEIU rests its argument (interference with its own rights) will have the same outcome as the claim SEIU concedes is arbitrable under CBA section 5.5 (interference with employee rights). We therefore exercise our discretion to defer both claims to arbitration.

ORDER

Charging Party's appeal dated July 12, 2024 is DENIED. The unfair practice charge and complaint in PERB Case No. LA-CE-761-S are deferred to arbitration and DISMISSED.

Members Paulson and Nazarian joined in this Decision.