BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No. **1609228**
THE GEO GROUP, INC., dba GOLDEN STATE ANNEX **Employer**	**DECISION AFTER RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Appeals Board or Board), acting pursuant to authority vested in it by the California Labor Code, issues the following Decision After Reconsideration in the above-entitled matter.

JURISDICTION

Overview

This matter arises from the appeal of workplace safety citations issued by the Division of Occupational Safety and Health (the Division) to The Geo Group, Inc. (Employer). Employer is a private owner and operator of prisons and detention facilities, including "Golden State Annex" in McFarland, California. Individuals held at the Golden State Annex are generally immigrants awaiting removal proceedings initiated by Immigration and Customs Enforcement (ICE), the federal law enforcement agency under the Department of Homeland Security (DHS).

After Employer initiated its appeal of the citations issued by the Division, third-party entities Worksafe and California Collaborative for Immigrant Justice (CCIJ), filed a motion for party status on behalf of certain current and former detainee-workers (Third-Party Applicants, or TPAs) at Golden State Annex. Due to concerns of retaliation, the Third-Party Applicants seek party status without disclosing their names or other specific identifying information. On August 30, 2023, Administrative Law Judge Rheeah Yoo Avelar issued an Order denying the Third-Party Applicant's (second amended) request for party status.

In separate but overlapping petitions for reconsideration, the Third-Party Applicants and the Division challenge the Order. The primary issue here is whether the Third-Party Applicants, who are unidentified current and former detainee workers, may qualify for party status as "affected employees" under section 347, subdivision (c).[1] In addressing this primary issue, however, the Board must also decide several procedural and substantive sub-issues, as described below. As explained below, we reverse the Order and remand the matter to ALJ Avelar for further proceedings.

[1] Unless otherwise noted, all section references are to California Code of Regulations, title 8.

Procedural Summary

On June 15, 2022, the Division commenced an inspection of Employer's McFarland facility. On December 15, 2022, the Division issued Employer two citations. In these citations, the Division alleged the following violations: Citation 1, Items 1-5, alleged one Regulatory citation and four General citations, for various safety order violations, including section 14300.40, subdivision (a) [failure to provide documents]; section 3216 [inadequately illuminated exit signage]; section 4650, subdivision (e) [improper compressed gas storage]; section 5162, subdivision (c) [lack of unobstructed access to eyewash]; and section 5194, subdivision (e) [inadequate communications regarding handling of hazardous materials]. Citation 2, Item 1, alleged a Serious and Willful violation of section 5199 [failure to establish, implement and maintain effective written procedures to reduce employee risk of exposure to aerosol transmissible disease]. Citation 2 alleged 16 separate failures in violation of section 5199, with the Division proposing a penalty of $101,250.

Employer timely appealed the citations, and the matter was assigned to ALJ Avelar.

Third-Party Applicants first moved for third-party status on April 4, 2023. On April 11, 2023, ALJ Avelar denied that motion on the grounds that Third-Party Applicants failed to identify their clients.

On April 11, 2023, Third-Party Applicants filed an amended motion for third-party status. Employer opposed, arguing that Third-Party Applicants did not represent employees, but rather, detainees who volunteered in a training program. On May 10, 2023, ALJ Avelar denied the amended motion, on the grounds that Third-Party Applicants failed to demonstrate they were affected by or exposed to any of the cited hazards.

On May 30, 2023, Third-Party Applicants submitted a new motion for third-party status. Employer opposed, and the parties submitted further briefing. On August 8, 2023, ALJ Avelar held a hearing on that motion. At the hearing, Third-Party Applicants argued that they included individual detainee workers who made safety complaints and, on that basis, wished to remain unidentified by name.

In an August 30, 2023 Order (the Order), ALJ Avelar denied the third motion. The Order concluded that the Third-Party Applicants could not obtain third-party status, because they represented "inmates" within the meaning of Labor Code section 6304.4, and therefore "shall not be considered an employee" for purposes of Appeals Board proceedings.[2]

Third-Party Applicants and the Division sought the Board's review of ALJ Avelar's August 30, 2023 Order. (See TPA 1; DOSH1.)[3] Both petitions, in essence, argue that the TPAs are civil detainees, and not "inmates" within the meaning of Labor Code section 6304.4.

On November 14, 2023, the Board issued an Order Requesting Further Briefing from the

[2] Labor Code section 6304.4 provides, "A prisoner engaged in correctional industry, as defined by the Department of Corrections, shall not be considered an employee for purposes of the provisions relating to appeal proceedings set forth in Chapter 7 (commencing with Section 6600)."

[3] Due to the extensive briefing in this matter, there are many submissions with similar titles. For clarity, references herein will take the form of "ER[numeral]," "DOSH[numeral]," or "TPA[numeral]," as set forth in the attached Index.

parties (i.e., Employer and the Division) as well as the TPAs. (First Briefing Order, p. 1.) Employer, the Division, and the TPAs filed briefs. Additionally, the American Civil Liberties Union, and two of its California affiliates (collectively, the ACLU) jointly sought leave to file an *amicus* brief, which Employer opposed.

On June 21, 2024, the Board issued a Second Order Requesting Further Briefing (Second Briefing Order), soliciting more detailed responses on certain issues from the Employer, the Division, and TPAs. As set forth in the Second Briefing Order, the briefing was not to exceed 12 pages, and that no replies would be permitted. Employer, the Division, and Third-Party Applicants all timely filed their responses. However, on August 2, 2024, Employer filed a motion to strike Third-Party Applicants' brief. While that brief was properly limited to 12 pages, it was single-spaced, and as a result, approximately twice as long as the 12 pages authorized by the Briefing Order. On that basis, Employer moved to strike or, in the alternative, permission to file a reply.

For reasons set forth below, we (i) grant the ACLU's request for leave to file its *amicus* brief, (ii) deny Employer's motion to strike the TPAs' Response to Second Briefing Order or Request to Submit Reply; and (iii) reverse the ALJ's Order denying party status to the TPAs.

ISSUES

1) Should the Board grant the ACLU leave to file its amicus brief?
2) Are either of the Petitions for Reconsideration untimely?
3) Should the Board grant Employer's motion to strike the TPAs' Response to Second Briefing Order or Request to Submit Reply, permit Employer to file a reply, or neither?
4) Should the Board Affirm or Reverse the ALJ's Order?
    a. What burden applies to a motion for party status, under section 354, subdivision (b)?
    b. May affected employee detainees obtain party status without identifying themselves?
    c. Are the TPAs "prisoners" under Labor Code sections 6304.2 and 6304.4?
    d. Are the TPAs "Affected Employees" within the meaning of section 354?

DECISION AFTER RECONSIDERATION

I. Should the Board grant the ACLU leave to file its amicus brief?

As a preliminary matter, the Board addresses the ACLU's request for leave to file a brief as *amicus curiae*, and Employer's opposition thereto. Section 393, subdivision (e), governs the filing of *amicus* briefs.

> A brief of an *amicus curiae* (*amicus*) may be filed only by leave of the Appeals Board. The brief shall be filed within the time allowed for the filing of the answer or brief of the party whose position the amicus will support unless the Board grants leave for filing at a later date specified by the order of the Appeals Board. Unless otherwise ordered, an amicus may not file a responding brief.

(§ 393, subd. (e).) Apart from section 393, Board regulations and precedent contain no limitation on the Board's discretion to accept or reject such a brief. Moreover, the Board has consistently exercised that discretion in favor of accepting *amicus* briefs, and is unaware of any instance where it rejected a timely request to file an *amicus* brief.

Here, the ACLU timely requested leave to file an *amicus* brief that generally supports the TPAs' and Division's petitions. The ACLU argues that its brief should be accepted and considered because the ACLU is "deeply involved in protecting the rights of detained immigrants and detained immigrant workers." (ACLU Amicus, at p. v-vi.) The ACLU alleges that it has it has a direct interest in the issues in this appeal, having "litigated numerous cases involving immigration detention nationwide, including in California and at Golden State Annex" regarding the rights of such detainees both as immigrants and as workers. (*Id*., p. vi.) The ACLU asserts that its brief "offers insights not available from the Parties or Third-Party Applicants" that will aid the Board in considering the issues in this case. (*Id*., pp. vi-viii.)

Employer opposed and moved to strike the ACLU's brief. (See ER3.) Employers argues that the ACLU brief should be rejected for several reasons. Employer argues that the ACLU "does not have standing to submit any briefing to the Board" and "has no interest in the outcome of this matter[.]" (ER3, pp. 2-3.) Employer asserts that the ACLU's brief is "superfluous," that it provides no needed or requested help or insight to the Appeals Board" and that the ACLU "has no factual information or special insight or authority on the legal issues that the Appeals Board required to be briefed with specific citations to legal authority." (*Ibid*.)

The Board need not take a position on Employer's assessment of the ACLU's brief. Moreover, contrary to Employer's argument, *amicus curiae* do not require "standing" to submit a brief, nor are they required to have a particular interest in the matter. As noted, the only necessary conditions for an *amicus* brief are (i) the submitting party must request leave, and (ii) the brief must be timely, i.e., "within the time allowed for the filing of the answer or brief of the party whose position the amicus will support." (§ 393, subd. (e).) Both conditions are met here. Exercising its broad discretion under section 393, subdivision (e), the Board **grants** the ACLU's request for leave to file an *amicus* brief.

II. Are either of the Petitions for Reconsideration untimely?

A petition for reconsideration must be filed within 30 days of the order being challenged, plus five days for domestic service via mail. (Lab. Code, § 6614, subd. (a); § 348, subd. (c).) Here, ALJ Avelar's Order was served on August 30, 2023. (Order, p. 1.) Thus, any petition for reconsideration was due on or before October 4, 2023. The TPAs' Petition was filed on September 29, 2023, and the Division's Petition was filed on October 4, 2023. (*See* TPA1, p. 1; DOSH1, p. 14.)

Nevertheless, Employer argues that both petitions for reconsideration are untimely. (ER1, pp. 1-3; ER2 at pp. 1-2.) As Employer notes, both petitions concerned the third motion for party status, while the prior two motions were not timely appealed. (ER1, pp. 2-3.) Specifically, the TPAs' first motion for party status was denied on April 11, 2023, and the second motion was denied on May 10, 2023. (*Ibid*.) Employer argues that, by failing to seek timely reconsideration of the first two denials, the TPAs waived any right to challenge the third and final Order at issue here.

(*Ibid*.) According to Employer, the challenges in both petitions were either (i) waived as to the issue of third-party status generally, as the 30-day period began to run when ALJ Avelar issued her first denial of the TPA's motion for third-party status, or (ii) waived as to all issues except those decided for the first time in ALJ Avelar's Order. (ER1, pp. 1-3.) Employer specifically argues that the TPAs should only be permitted to challenge the Order's finding that TPAs are prisoners within the meaning of Labor Code section 6304.4, and that all other issues have been waived. (ER2, pp. 1-2.)

Employer's position is not supported by applicable authority. A petition for reconsideration must be made within 30 days of "any **final** order or decision." (Lab. Code, § 6614, subd. (a) [emphasis added].) No such final order or decision has issued in this case; therefore, the 30-day period to file a petition for reconsideration has not yet arisen, much less expired. (*Ibid*.) Instead, the petitions challenge an "interlocutory" order. (*Fedex Ground*, Cal/OSHA App. 13-1220, Decision After Reconsideration (Sept. 17, 2014).) The Board may, in certain circumstances such as those present here, exercise its *discretion* to reconsider an interlocutory order. (*Ibid*.) However, there is no authority suggesting interlocutory petitions are subject to a 30-day deadline running from the date of that interlocutory order.

A different result is not required by section 390, which requires any petition for reconsideration within 30 days of "an order or decision[.]" (§ 390, subd. (a) ["party aggrieved by an order or decision may, within 30 days of service of such order or decision, petition the Appeals Board for reconsideration"].) To construe this text as applying to interlocutory orders would immediately result in a proliferation of interlocutory petitions, as parties would risk waiving any issues they fail to challenge. In other words, interlocutory petitions would become *mandatory* for parties to preserve issues. However, interlocutory reconsideration is never mandatory, nor a matter of right. Rather, interlocutory review is a matter of the Board's discretion, which it exercises "based on 'general principles' that are 'followed by the courts' that allow for interlocutory review." (*Fedex Ground*, *supra*, Cal/OSHA App. 13-1220, citing *Muse Trucking Company*, Cal/OSHA App. 03-4535, Denial of Petition for Reconsideration (Dec. 24, 2004.).)

Accordingly, the Board finds that both petitions were timely.

III. Should the Board Grant Employer's Motion to Strike the TPAs' Response to Second Briefing Order Or Request to Submit Reply?

On June 21, 2024, the Board issued a Second Briefing Order with instructions that the briefing was not to exceed 12 pages, and that no replies would be permitted. (Second Briefing Order, p. 3.) The Board did not specify any other formatting rules or restrictions. However, except for captions, headings, headers, footnotes, footers and block quotations, Board regulations require briefs to be "double-spaced or one-and-one-half-spaced." (§ 355.5, subd. (a)(6).)

On July 19, 2024, the TPAs timely filed their responses. (TPA3.) On August 2, 2024, Employer filed a motion to strike the TPAs' brief, arguing that it was single-spaced and, as a result, approximately twice as long as the 12 pages authorized by the Second Briefing Order.[4] In the

[4] Employer also complains that the TPAs brief contained exhibits that were not part of the existing evidentiary record. (ER5, p. 1-2.) However, as the TPAs correctly noted, the Board's Second Briefing Order explicitly requested that the

alternative, Employer sought permission to file a reply. (*Id.,* p. 2.)

The TPAs submitted their response to Employer's Motion to Strike. (TPA4.) They denied that they submitted their brief in single spacing, but rather, 1.2 paragraph spacing, using the default setting in their word processing program. (TPA4, pp. 1-2.) The TPAs resubmitted the brief in 1.5 spacing, still within the 12-page limit. (TPA3.) While the Board expects compliance with the formatting rules of section 355.5, the Board is not compelled to strike documents based on minor deviations from such rules. The TPAs promptly addressed, and did not attempt to hide, the spacing issue raised by Employer. The TPAs gained no unfair advantage via noncompliant spacing. Accordingly, we **deny** Employer's Motion to Strike and deny Employer's alternative request to submit reply.

IV. Should the Board Affirm or Reverse the ALJ's Order?

As noted, our primary task in this matter to determine whether to affirm or reverse the ALJ's Order denying the TPAs' motion for party status. To do so, we must first address several sub-issues, as indicated below.

a. What burden applies to a motion for party status, under section 354, subdivision (b)?

The Board's regulations provide a mechanism for becoming a party to an appeal. Specifically, section 354 ("Party Status") provides:

> (b) An affected employee or authorized representative of an affected employee shall be made a party to a proceeding upon motion made in accordance with Section 371. When more than one affected employee or more than one authorized employee representative qualify for party status in a proceeding, each may be granted party status in accordance with Section 350.1. A motion for party status shall be heard by the Administrative Law Judge within 30 days of filing.

(§ 354, subd. (b).) Board regulations define "affected employee" as "an employee of a cited employer who is exposed to the alleged hazard described in the citation as a result of assigned duties." (§ 347, subd. (c).) Parsing these provisions, it appears that a motion for party status under section 371 must establish three elements: (1) the person must be an employee of the cited employer; (2) the employee must have been exposed to the alleged hazard described in the citation; and (3) that exposure must occur as a result of their assigned duties.

However, apart from those general requirements, Board precedent is generally silent on how such a motion should be evaluated: is a motion for party status subject to an evidentiary standard? Or can it be decided based under a liberal pleading standard, where party status can be granted or denied based solely on allegations? Answering this question requires us first to evaluate

parties address certain factual questions, essentially soliciting additional relevant evidence from the parties. (TPA4, p. 2; Second Briefing Order, pp. 2-3.)

Board regulations, precedent, and analogous authority, and second, to address Employer's due process rights.

Is a liberal pleading standard appropriate under Section 354?

According to the Division and the TPAs, motions for party status are universally evaluated on a liberal pleading standard. As the Division argues, "Third-party status is a form of statutory standing" and is "typically assessed based on the allegations made in a party's complaint." (DOSH3, pp. 6-7 [citing *Shappel Industries, Inc. v. Superior Court* (2005) 132 Cal.App.4th 1101, 1111].) Thus, an individual may satisfy the requirements of section 354 "by pleading that they are an employee who is exposed to a hazard alleged in the … citation." (*Ibid.*)[5] Similarly, the TPAs argue, a motion for party status is akin to a motion to intervene, "because it allows a nonparty to assert an interest in the case and ensures the interests of the nonparty are not prejudiced." (TPA3, p. 6.) They argue that California and federal authorities "unambiguously uphold that there is no evidentiary burden when a nonparty files a motion to intervene," and must be analyzed under a liberal pleading standard, with factual allegations accepted as true. (*Ibid*., citing *Franciscan Alliance, Inc. v Azar* (N.D. Texas 2019), 414 F.Supp.3d 928, 936 ["motions to intervene … are judged under the liberal pleading standard and all allegations are accepted as true."].)

Additionally, the TPAs argue, California procedural rules are intended to be construed consistent with their federal counterparts. (*Ziani Homeowner v. Brookfield Ziani* (2015) 243 Cal.App.4th 274, 282.) On that basis, California courts have also held that motions to intervene "should be liberally construed in favor of intervention." (*Lindelli v. Town of San Anselmo* (2006), 139 Cal.App.4th 1499, 1505.) Likewise, the TPAs argue, since section 354 and section 371 contain no explicit requirement to submit evidentiary support, such a requirement should not be read into those provisions; instead, the motions should be evaluated under a liberal pleading standard. (TPA3, pp. 7-8.)

Employer asserts that "[i]t is axiomatic that the moving party bears the burden to prove it is entitled to third party status." (ER4, p. 9.) However, Employer concedes that section 354 does not specify any particular burden of proof, and does not "clearly specify when the burden to prove "affected employees" must be met." (ER4, pp. 9, 10.) Nevertheless, Employer argues, other Board regulations can be read to *imply* an evidentiary burden at this stage. (ER4, p. 10.) For example, Employer argues, the fact that the Board may take "additional" evidence upon a petition for reconsideration "presumes that evidence already exists in the record to support the petition." (*Ibid*., citing section 390.1.) According to Employer, this authority compels the conclusion that evidence is required to obtain party status. (*Ibid*.)

Employer's construction of our regulations is not persuasive. Nothing in the text of section 354 explicitly imposes an evidentiary burden. Moreover, that we are empowered to solicit and receive additional evidence on a petition for reconsideration is unremarkable in this context.

[5] The Division also cites an Order Granting Party Status, entered by ALJ Christopher Jessup in *In the Matter of the Appeal of Lyft, Inc.*, Inspection No. 1594664. According to the Division, the ALJ reasoned that section 354 "does not explicitly require someone seeking party status to provide evidence that they are an employee . . . because the goal in granting party status is to allow participation for employees at all stages of the proceedings" and "[r]equiring proof without discovery would be unfair." (DOSH3, p. 7.) While the reasoning in ALJ Jessup's order may be sound or even persuasive, it is not binding on the Board in any respect.

Nothing in section 390.1 implies that the underlying motion was subject to an evidentiary standard. Indeed, we find that that the goal of section 354, subdivision (a), is to permit and encourage participation by affected employees at *all* stages of the proceeding. (See also *Baldwin Contracting Company, Inc.*, Cal/OSHA App. 97-2648, Decision After Reconsideration (Dec. 17, 2001); *Dey Laboratories, Inc.*, Cal/OSHA App. 93-2742, Decision After Reconsideration (Mar. 28, 1995).) To impose an evidentiary burden on affected employees before they gain party status, without any right to discovery or other means to obtain such evidence, would place an unnecessary hurdle on such participation.

We also note that the Board's federal counterpart, the Occupational Safety and Health Review Commission (OSHRC), does not appear to impose any evidentiary burden on those seeking party status. Under Commission Rule 20(a), an "affected employee" may "elect party status" merely by filing a "Notice of Election of Party Status" and serving that notice on the parties. (29 C.F.R. § 2200.20, subds. (a), (c).) Such an election may also be filed by former employees who were exposed or had access to the cited hazard. (29 C.F.R. § 2200.20, subd. (b).) According to OSHRC guidance, such a notice "need only provide the case name, docket number, the address of the affected employee or authorized employee representative electing party status, and a statement electing party status." (OSHRC Guide to Review Commission Procedures, § 3 ("Electing Party Status").) Thus, it appears that OSHRC does not impose any evidentiary requirement.

In short, we find that a liberal pleading standard for party status is consistent with Board regulations and precedent, analogous California authorities, federal OSHA guidance, and the overarching goal of encouraging participation of affected employees in Board proceedings. Accordingly, we hold that a motion for party status may be evaluated according to a liberal pleading standard, whereby the moving party must allege facts sufficient to show that (1) they are an employee of the cited employer; (2) they were exposed to the alleged hazard described in the citation; and (3) their exposure must occur as a result of their assigned duties. (§ 354, subd. (a).) To be clear, we emphasize that a grant of party status is not a determination as to any substantive legal issue. While *party status* may be granted without an evidentiary showing, the Division still bears the evidentiary burden of proving all *substantive* issues.

Would application of a liberal pleading standard violate Employer's due process rights?

Employer also asserts that, without an evidentiary burden, it would be denied its due process right to challenge a motion for party status. (ER4, pp. 1-3.) "[A]ll they have to do to obtain party status is to merely allege in a conclusory fashion that they represent "affected employees", without any evidence and without providing GEO any opportunity to challenge that assertion." (*Id*., p. 2.) As Employer concludes, "[t]hat cannot be the law because it would be grossly prejudicial to GEO's fundamental due process rights." (*Id*., p. 2.)[6]

We note that Employer cites no authority to support its due process arguments. On this basis alone the Board may reject Employer's due process concerns. (See, e.g., *Shimmick Construction Company, Inc.*, Cal /OSHA App. 1080515, Denial of Petition for Reconsideration

[6] Employer also argues that it would violate its due process rights not to require TPAs to disclose their identities. (See ER4, pp. 1-3.) We address Employer's due process concerns in that context below.

(Mar. 30, 2017); *Miller v. Dep't of Real Estate* (2022) 84 Cal.App.5th 141, 155 [failure to address due process factors is sufficient basis to reject due process argument].)

However, it is our responsibility to ensure that Board adjudicatory proceedings are fair, and that parties "are given a meaningful opportunity to present their case." (*Miller*, *supra*, 84 Cal.App.5th at 156 [quoting *Mathews v. Eldridge* (1976) 424 U.S. 319, 348-349].) The procedural safeguards necessary to do so "must be determined in the context of the . . . interest in freedom from arbitrary adjudicative procedures" and require "an assessment of what procedural protections are constitutionally required in light of the governmental and private interests at stake." (*Ryan v. Cal. Interscholastic Fed'n-San Diego Section* (2001) 94 Cal.App.4th 1048, 1069.)

Here, while Employer's arguments are underdeveloped, they nevertheless raise valid concerns. If there is no evidentiary burden for someone seeking party status, could anyone become a party merely by alleging, however implausibly, the three elements identified above? Is the Board obligated to take a take any moving party "at its word, unchallenged"? (ER4, p. 11.) What if their status as an "affected employee" is someone known to have never worked for the cited employer; must the ALJ still grant a well-pleaded motion under section 354? Can an employer move for reconsideration if it obtains evidence that the moving party was not an "affected employee"? (*See* ER4, pp. 1-2, 10-11; ER1, pp. 7-8.) If a motion for party status is subject only to a liberal pleading standard, there is a risk that party status could be obtained illegitimately, with limited opportunity for the employer to mount a meaningful challenge to it.

"'[D]ue process,' . . . is not a technical conception with a fixed content unrelated to time, place and circumstances." (*Mathews v. Eldridge* (1976) 424 U.S. 319.) It is a "flexible concept, as the characteristic of elasticity is required in order to tailor the process to the particular need." (*Ryan, supra*, 94 Cal.App.4th at 1072.) Thus, "not every situation requires a formal hearing accompanied by the full rights of confrontation and cross-examination." (*Id*. [citing *Saleeby v. State Bar* (1985) 39 Cal. 3d 547, 565].) "The primary purpose of procedural due process is to provide affected parties with the right to be heard at a meaningful time and in a meaningful manner." (*Barri v. Workers' Comp. Appeals Bd*. (2018) 28 Cal.App.5th 428, 465.) The process due in any situation depends on a weighing of the private and governmental interests involved. (*People v. Ramirez* (1979) 25 Cal.3d 260, 269 (Ramirez).)

To that end, California courts consider four factors when analyzing procedural due process issues. The first three factors are derived from analogous federal authority, and include: (1) "the private interest that will be affected by the official action"; (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards"; and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." (*Miller*, *supra*, 84 Cal. App.5th at 154-55 [quoting *Today's Fresh Start, Inc. v. Los Angeles County* (2013) 57 Cal.4th 197, 212-213].) California courts also consider a fourth factor, namely, the "dignitary interest in informing individuals of the nature, grounds, and consequences of the action and in enabling them to present their side of the story before a responsible government official." (*Id*.)

As to the **first** factor, Employer's "private interest" here would seem to be the ability to mount an evidentiary challenge to claims of party status. More specifically, Employer has an

interest in ensuring that it does not have to proceed to hearing defending or litigating against multiple additional parties who may have no genuine claim to being "affected employees." As Employer puts it, without evidence establishing "affected employee" status, Employer is deprived "of its right to fundamental fairness and due process . . . because [Employer] would be completely precluded from opposing the validity of [the] motion." (ER1, p. 7.) Employer would have no ability "to have notice of and challenge with evidence whether such anonymous person is an affected employee." (ER4, p. 11; see also ER4, pp. 1-3.)

Additionally, the Board's regulations provide every "party" with a certain bundle of rights, including the right to "call and examine witnesses; to introduce exhibits; to question opposing witnesses on any matter relevant to the issues even though that matter was not covered in the direct examinations; to impeach any witness regardless of which party first called the witness to testify; and to rebut any opposing evidence." (§ 376.1, subd. (b).) Parties also have a right to issue discovery and file motions. (*Ibid*.) While Employer does not make this argument, there are numerous ways a party might use those rights to disrupt, delay or otherwise complicate appeal proceedings. The scope of rights that correspond to party status supports Employer's interest in being able to challenge party status.

The impact on Employer's interest should not be overstated, however. Employer's right to challenge the citation, whether on procedural or substantive grounds, is not otherwise impacted here. Under any view, Employer still retains the general right to challenge party status, e.g., on the grounds that the allegations set forth in the motion are legally or factually insufficient. Moreover, apart from the ability to challenge party status on evidentiary grounds, Employer does not articulate any interest that is not protected by existing procedural safeguards. Board regulations already enable ALJs to "regulate the course of a hearing," including the actions and participation of parties. (§ 350.1, subd. (a) ["Authority of Administrative Law Judges"].) To be sure, an ALJ may not arbitrarily deny a party their rights to participate in a matter. (§ 376.1 [outlining the rights of parties].) However, ALJs maintain authority to control the course of the hearing to prevent disruption, sanction misconduct, and otherwise "take other action" that they deem appropriate. (See § 350.1, subd. (a); § 372.7.) Thus, any risk of delay, disruption, or needless additional complexity is mitigated by existing procedural safeguards. Employer has not identified, and the Board has not independently found, any other limitation or impact on Employer's ability to present its "side of the story" on any substantive issues in dispute. (See *Today's Fresh Start, Inc.*, *supra*, 57 Cal.4th at 213-214.) On balance, the Board finds that this first factor does not support mandating an evidentiary burden for obtaining party status.

The **second** factor concerns "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards." (*Miller*, *supra*, 84 Cal. App.5th at 154-55.) Here, the risk would be an erroneous determination of party status. While it is impossible to quantify, such a risk seems low; to erroneously obtain party status, one would need, at a minimum, to allege sufficient facts to establish that they are "affected employees," i.e., exposed to the cited hazard as a result of their job duties. Since party status is not a substantive determination, we have not identified any incentive for a party to misrepresent facts for that purpose, such that employers would face a significant risk of an erroneous determination of party status.

The probable value of *additional* procedural safeguards is also quite low. As noted, the Board already has existing safeguards that enable ALJs to control their hearing, including the ability to control the actions and participation of *all* parties. (§ 350.1, subd. (a) ["Authority of Administrative Law Judges"].) Thus, there are already procedures to prevent an erroneously added party from causing significant disruption, delay, or complication. Short of turning a motion for party status into substantive evidentiary dispute, we are aware of no additional procedures that might offer additional protections for Employer's interest here. Thus, we find that the second factor also weighs against finding a due process violation here.

The **third** factor—"the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail"—also supports the rejection of Employer's due process claims. The Board has little interest in transforming every motion for party status into a substantive evidentiary hearing—with all the fiscal and administrative burdens that such a hearing would entail for the Board and the parties—solely to determine whether the moving party is an "affected employee." Moreover, the Board has a separate interest: enabling affected employees to participate in appeals with as few unnecessary obstacles as possible. (See DOSH2, pp. 8-9 [citing *Baldwin Contracting Company, Inc.*, Cal/OSHA App. 97-2648, Decision After Reconsideration (Dec. 17, 2001); *Dey Laboratories, Inc.*, Cal/OSHA App. 93-2742, Decision After Reconsideration (Mar. 28, 1995)].) The Board's interest, in that regard, is promoted by permitting streamlined procedures for obtaining party status, and it is undermined by imposing an evidentiary requirement, without the benefit of discovery or subpoena procedures, for affected employees to obtain party status.

The **fourth** factor—the "dignitary interest in informing individuals of the nature, grounds, and consequences of the action and in enabling them to present their side of the story before a responsible government official"—also does not support Employer's position. As the Supreme Court has noted, "dignitary interests play a role only when the rights of natural persons are at stake" and are inapplicable to due process rights "asserted by an entity rather than an individual." (*Today's Fresh Start, Inc.*, *supra*, 57 Cal.4th at 213-214.) Thus, the fourth factor also does not support a finding that Employer's due process rights are denied by applying a liberal pleading standard to motion for party status.

In short, under the four-factor analysis above, Employer has not established due process concerns that would mandate imposing an evidentiary burden, or other additional procedures, on section 354 motions for party status.

b. May affected employee detainees obtain party status without identifying themselves?

The TPAs, the Division, and the ACLU all argue that identification of specific workers should not be a prerequisite to party status, and especially not when they are complainants. (See TPA1, p. 5 ["Complainant-Detainees who are both complainants and affected employees do not need to reveal their identities as alleged by the Employer."].) Thus, TPAs seek to prevent disclosure of "anything that would reveal, or tend to reveal, the identity of the person who submitted the complaint through their distinguishing or recognizable characteristics." (TPA2, p. 6 [citing *Sunview Vineyards of California*, Cal/OSHA App. 1153101, Decision after Reconsideration (Jun. 30, 2021)].) Employer responds that permitting this would constitute a

denial of its due process rights to challenge a motion for party status, as discussed above, and would require Employer to proceed to a hearing against unidentified parties. (See ER1, p. 7; ER4, pp. 4-5, 11.)

This issue presents two separate questions. First: may the Board shield the identity of the TPAs from the public? Second, may the Board shield the identity of the TPAs from the Employer? As explained below, we answer both questions affirmatively.

May the board shield the identity of the TPAs from the public?

Generally, Board proceedings are open to the public. (Govt. Code, § 11425.20.) Under the Administrative Procedure Act (APA), hearings must be open to the public, but the presiding officer may issue protective orders to satisfy other legal requirements or otherwise to ensure a fair hearing. (Govt. Code, § 11425.20.) As the Law Revision comments state, "[c]losure of a hearing should be done only to the extent necessary under this section, taking into account the substantial public interest in open proceedings." (Gov. Code § 11425.20 & Cal. Law Revision Comm'n.) The comments are a reliable guide to legislative intent. (*California Youth Authority v. State Personnel Bd.* (2002) 104 Cal.App.4th 575, 588-591.)

California courts have noted that allowing a party to proceed anonymously or under a pseudonym may inhibit the public's right of access guaranteed by the First Amendment and under common law. (*Department of Fair Employment & Housing v. Superior Court* (2022) 82 Cal.App.5th 105, 110-111 ("*DFEH*").) Despite this, courts permit plaintiffs to sue under fictitious names in certain narrow circumstances, including to protect the privacy of a party. (*Doe v. Superior Court* (2016) 3 Cal. App. 5th 915, 919; *Doe v. Lincoln Unified School Dist.* (2010) 188 Cal.App.4th 758, 759; *see also Doe v. Scalia* (M.D. Pa. 2021) 530 F. Supp. 3d 506 [permitting plaintiffs suing federal OSHA to use pseudonyms].) Generally, California courts will grant a request for anonymity only if there is an overriding interest that is "likely be prejudiced without use of a pseudonym, and that it is not feasible to protect the interest with less impact on the constitutional right of access." (DFEH, *supra*, 82 Cal. App. 5th at 111.) In analyzing this issue, California courts have looked to federal cases for guidance. (*Id*. [citing *Does I thru XXIII v. Advanced Textile Corp.* (9th Cir. 2000) 214 F.3d 1058 ("*Does I thru XXIII*"); *Doe v. Lincoln Unified School Dist.*, *supra*, 188 Cal.App.4th at 759.)

In *Does I thru XXIII*, a group of garment workers alleging serious retaliation concerns were permitted to proceed pseudonymously during the class certification stage of the case. The court found that a party may preserve his or her anonymity in judicial proceedings in the special circumstances when the party's need for anonymity outweighs prejudice to the opposing party and the public's interest in knowing the party's identity. (*Does I thru XXIII*, *supra*, 214 F.3d at 1067-69.) The court considered several situations that courts have found to justify a party's need to remain anonymous: (1) when the identification creates a risk of retaliatory physical or mental harm; (2) when anonymity is necessary to preserve privacy in a matter of sensitive and highly personal nature; and (3) when the anonymous party is compelled to admit an intention to engage in illegal conduct, thereby risking criminal prosecution. (*Ibid*.)

This matter involves the first situation, namely, where "identification creates a risk of retaliatory physical or mental harm." (*Does I thru XXIII*, *supra*, 214 F.3d at 1067-69.) When a

party seeks to remain anonymous due to fears of retaliation, three factors must be analyzed: (1) the severity of the threatened harm; (2) the reasonableness of the anonymous party's fears; and (3) the anonymous party's vulnerability to such retaliation. (*Id*., at 1068; *DFEH*, *supra*, 82 Cal. App. 5th at 112.)

The Board has received extensive briefing regarding the severity of threatened retaliation if the TPAs' identities are disclosed. According to the TPAs, they reside "in a company town that is surrounded by bars, chain link fences and barbed wire." (TPA3, pp. 1-2.) They can only obtain basic necessities, including the ability to communicate with families and legal representatives, at the commissary. (*Ibid*.) To obtain funds for this, they must work for Employer's "Voluntary Work Program" (VWP). (*Ibid*.) However, they can be fired from the VWP, leaving them unable to afford any essential goods, unable to call their families or their legal counsel in deportation proceedings. (*Ibid*.) Moreover, "there is also the coercive threat of further punishment" for alleged misconduct; such punishment may include "loss of commissary entirely, loss of phone privileges, loss of library privileges, loss of the little recreation time provided, and further restraint in solitary confinement." (*Ibid*.) According to the TPAs and the ACLU, these are not mere theoretical concerns.

> Employer . . . has a history of retaliating against detainees who have voiced any kind of complaint. For example, when detainees . . . filed complaints and engaged in peaceful hunger and labor strikes, among many other actions, [Employer] revoked their ability to make any calls, including to their legal counsel, attempted to monitor their phone and computer use, and threatened to withhold their commissary access if the strike continued.

(TPA2, pp. 6-8.) Moreover, the TPAs allege, Employer controls each detainee's "detention file," which includes detainees' alleged disciplinary violations and other behavioral reports. (TPA3, p. 2.) By controlling the content of such files, and sharing them with ICE, Employer can impact the information available in detainee's deportation proceedings. (*Id.*, p. 3.)

In its *amicus* brief, the ACLU describes the risks of retaliation faced by immigration detainees in general, noting the various sources that "have widely documented retaliation against immigrant detainees who raise complaints regarding their treatment in custody." (ACLU Amicus, p. 7 [citing reports from the DHS Office for Civil Rights and Civil Liberties, members of the United States Congress, and media reports].) They cite reported retaliation against detainees who complain of working and detention conditions, including "solitary confinement, confiscation of medical equipment, denial of access to legal representatives, sexually abusive pat-downs, and extreme verbal abuse and intimidation." (*Id*., pp. 7-8.) The ACLU also cites federal decisions regarding retaliation at other facilities operated by Employer where detainees refuse work assignments. (*See* ACLU Amicus, p. 8; *Novoa v. GEO Grp., Inc*. (C.D. Cal. Jan. 25, 2022) 2022 U.S. Dist. LEXIS 25045, at *59 ["[D]espite GEO's representations that its policy is not to send detainees to segregation for refusal to clean, Plaintiffs point to segregation records showing that at least some detainees were placed in administrative segregation for refusing to clean"].) Regarding the Golden State Annex, the ACLU's brief states that "GEO staff members have reportedly retaliated against detainees' attempts to filed grievances by limiting communication with attorneys, withholding medical attention, bringing unfounded disciplinary charges resulting in solitary confinement, and restricting telephone calls to family." (*Id*., p. 8.)

According to the TPAs, retaliation has already occurred. The TPAs who had filed workplace complaints (including some whose identities were already disclosed to Employer) "were subject to disciplinary write-ups by Employer for minor or falsified infractions." (TPA3, p. 5.) One TPA was subjected to "an invasive search" resulting in the confiscation of "personal and essential items—none of which were contraband." (*Ibid*.) Another TPA, after making an unlawful wage complaint, was wrongfully accused of trying to escape and placed in solitary confinement. (*Ibid*.) According to the TPAs, a representative of Employer told that TPA to "Stop doing what you're doing and this will go away." (*Id*., pp. 5-6.) The TPAs also allege that these threats persist beyond the TPAs actual detention. While the threats are less specific and tangible, the TPAs allege that those who are no longer detained "still suffer a grave risk of retaliation if their names and identities are disclosed now," especially as they "have ongoing deportation proceedings that make them particularly susceptible to serious retaliatory harm by Employer." (TPA3, pp. 3-4.)

We find the allegations above establish, under the first factor, a sufficiently "severe" threat of retaliation, and under the second factor, the TPAs' unique vulnerability to such retaliation. (*Does I thru XXIII*, *supra*, 214 F.3d at 1067-69; *DFEH*, *supra*, 82 Cal.App.5th at 112.) This leaves only the third factor, i.e., the reasonableness of the alleged fear of retaliation.

Employer describes the TPAs' allegations as vague and unsupported, and "denies that anyone at its facility is or would be subject to retaliation." (ER4, pp. 5-7.) Employer argues that TPAs "have not provided any specific evidence or detailed explanation to support their claim of anticipated retaliation by GEO." (ER4, pp. 3-4.) Employer also distinguishes the situation of the TPAs from those of the garment workers in *Does I thru XXIII*, whom Employer describes as having "an objectively reasonable fear of extraordinary and severe retaliation" but with "limited legal rights and protections in the Mariana Islands and China." (*Id*., p. 4.) In contrast, Employer argues, the TPAs here "are detainees who are or at some point were at GEO's facility and who are subject to California law and regulations, as well as federal law and oversight, with substantial legal rights and protections." (*Ibid*.) Employer also denies that it has any "ability or decision-making authority to deport detainees at the facility or compel anyone to participate in any work program." (*Ibid*.)

However, at this stage, the Board need not determine whether TPAs are actually being subjected to the above-described retaliation. The issue of whether Employer retaliates against complainants generally, or against the specific individual TPAs seeking party status, is not before the board. The Board need only consider the reasonableness of TPAs' fear of retaliation. Based on the above-referenced federal court decisions, and reports from federal agencies, media, and advocacy groups, we easily conclude that immigration detainees have a reasonable fear of retaliation for making complaints about their confinement or working conditions.

Accordingly, we find that the TPAs' need for anonymity outweighs the public's interest in knowing their identity as parties to Board proceedings. On this basis, we conclude that we have authority to permit TPAs to participate without their names being disclosed publicly.

Are the TPAs required to disclose their identity to Employer to obtain party status?

While the Board may shield TPAs' identities from the public, there may still be "significant constitutional concerns" implicated by permitting their participation without disclosing their identity to the appellant. (*DFEH*, *supra*, 82 Cal.App.5th at 110, citing *Alvarado v. Superior*

Court (2000) 23 Cal.4th 1121, 1132 [testimony from an anonymous witness unknown to a criminal defendant violates right of confrontation and due process].) As a general rule, parties are entitled to know the identity of opposing parties. (*Ibid*., citing *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal.4th 1178, 1226.) For concerns of retaliation to justify proceeding anonymously, those concerns must outweigh the potential prejudice to the opposing party. (*Does I thru XXIII, supra,* 214 F.3d at 1067-69.)

As noted above, the Board has already concluded that the TPAs have a reasonable fear of severe retaliation for making complaints to Employer, and that they are particularly vulnerable to retaliation. (*See Does I thru XXIII*, *supra*, 214 F.3d at 1069.) However, Employer asserts that permitting TPAs to proceed without identifying themselves "would wholly deprive GEO of due process, since there would be no means for GEO to have notice of and challenge with evidence whether such anonymous person is an affected employee." (ER4, p. 11.) Stated differently, permitting the TPAs to proceed anonymously would prejudice Employer's ability to challenge a motion for party status, and would require Employer to proceed through all or most of a hearing, without identifying them by name. The Board must determine whether this potential prejudice outweighs the TPAs' fears of retaliation. (*Does I thru XXIII*, *supra*, 214 F.3d at 1069.)

We conclude that the potential prejudice to Employer does not outweigh the TPAs' fears of retaliation. The significance of being unable to challenge someone's status an "employee," solely for purposes of party status, is at best uncertain. Employer's greatest risk here is an erroneous or unjustified determination of party status that potentially enables a party to disrupt, delay, or otherwise complicate the appeal proceedings. While that risk is not wholly insignificant, it is far from the extreme set of risks faced by the TPAs described above. More importantly, permitting the TPAs to obtain party status anonymously does not subject Employer at risk of any *substantive* determination impacting its challenge to the citation at issue. If an employee gains party status, that is not a substantive determination of "employee" or "affected employee" status, nor is it a determination of any employee's exposure to any cited safety hazard.

Second, as the TPAs appear to concede, there is a limit to the TPAs' anonymity: individual witnesses must be identified before they testify. (See § 372 [requiring disclosure of witness names, but not complainants]; TPA3, p. 9 [if TPAs' testimony is required, they may be asked to disclose their identities, but not whether they are complainants]. *See also* Lab. Code, § 6309, subd. (c) [name of a complainant "shall be kept confidential by the division, unless that person requests otherwise"]; *Sunview Vineyards of California*, Cal/OSHA App. 1153101, Decision after Reconsideration (Jun. 30, 2021) [same].) Thus, if an anonymous individual is erroneously made a party, they still may not testify anonymously.[7]

Finally, as noted, if a newly added party is disruptive or dilatory, the ALJ has authority to address that and control their participation in the proceedings. (*See* § 350.1.)

[7] We note that this is consistent with the Ninth Circuit statement in *Does I thru XXII*: disclosure of an individual's identity may eventually become necessary so that Employer "may refute individualized accusations," but until that point, "defendants suffer no prejudice by not knowing the names of plaintiffs." (*Does I thru XXIII*, *supra*, 214 F.3d at 1072.)

Ultimately, we conclude that the risk of retaliation faced by the TPAs outweighs the risk of prejudice faced by Employer.[8]

c. Are the Third-Party Applicants "prisoners" under Labor Code sections 6304.2 and 6304.4?

The Board has concluded that party status may be established under a liberal pleading standard without evidence, and that the TPAs have alleged a sufficient basis for proceeding anonymously. However, before concluding that TPAs may be granted party status, the Board must determine whether TPAs are excluded from Board proceedings as "prisoners."

Under Labor Code section 6304.2, any "state prisoner engaged in correctional industry . . . shall be deemed to be an 'employee'." (Lab. Code, § 6304.2.) However, state prisoners "shall not be considered an employee for purposes of the provisions relating to appeal proceedings set forth in Chapter 7 (commencing with Section 6600)." (Lab. Code, § 6304.4.) Here, following these statutes, ALJ Avelar found that the TPAs were prisoners or "inmates in custody at Employer's detention facility," and therefore precluded from participating in Board proceedings. (Order, p. 5.)

We disagree. As the Division and the TPAs argue, detainees at Golden State Annex are "in custody of U.S. Immigration and Customs Enforcement ("ICE")" and are "civil immigration detainees," and not "prisoners" within the meaning of Labor Code section 6304.4. ((TPA1, pp. 8-11; TPA2, pp. 1-3; DOSH2, pp. 3-4.) The Division and TPAs cite ample persuasive authority for this distinction. For example, the Supreme Court has long held that immigration detainees are civil detainees, and the nature of their detention is not punitive or correctional, but civil and preventive. (*Zadvydas v. Davis* (2001) 533 U.S. 678, 690.) It does not matter that an immigrant is detained for an alleged violation of immigration law; "[w]hen the Government detains a person for the violation of an immigration law, the person is a civil detainee, even if he has a prior criminal conviction." (*Castillo v. Barr* (C.D. Cal. 2020) 449 F. Supp. 3d 915, 919.) Because their confinement is not punitive, civil immigration detainees are entitled to "more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish." (*Sharp v. Weston* (9th Cir. 2000) 233 F.3d 1166, 1172–73.); *In re Robinson* (2017) 19 Cal. App. 5th 247, 256 ("Robinson, a civil detainee, is not governed by title 15 of the California Code of Regulations.").) As opposed to criminal detention, civil detention is "non-punitive." As the TPAs note, ICE's civil detention policy specifies that such detention is "non-punitive" in distinction from criminal detainees and prisoners. (*Id*., pp. 8-9.)

In contrast to civil immigration detention, Labor Code sections 6304.2 and 6304.4 apply to "prisoners" in the California criminal justice system, who are engaged in "correctional industry" under the jurisdiction of the Secretary of the California Department of Corrections and

[8] This conclusion comports with the multi-factor due process analysis above. As noted, the impact on Employer in permitting anonymous party status in this case is limited; Employer still retains the general right to challenge party status, and all rights to challenge the citations on substantive and procedural grounds. The risk of an erroneous determination of party status, while impossible to quantify, is likely quite low, and existing procedures continue to protect Employer's right to a fair trial. And, finally, the Board has strong interests in maintaining efficient hearing operations while enabling affected employees to participate in appeals with as few unnecessary obstacles as possible. Thus, all four factors support the conclusion that Employer's is not being denied due process by permitting affected employees to participate anonymously.

Rehabilitation (CDCR). (DOSH2, pp. 3-4.) Unlike civil detainees, prisoners are *required* to work while imprisoned, and their work is governed by CDCR regulations. (Pen. Code, § 2700; Cal. Code Regs., tit. 15, § 3040, subd. (a).) While CDCR regulations do not define "correctional industry," they define "incarcerated person" as "a person under the jurisdiction of the Secretary and not paroled." (*Id*., citing Cal. Code Regs., tit. 15, § 3000.) Similarly, the Government Code defines "prisoner" as "an inmate of a prison, jail, or penal or correctional facility." (Gov't Code, § 844.) Nothing in the definition of "incarcerated person" would encompass federal civil immigration detainees.

The California legislature also recognizes civil immigration detainees as being distinct from prisoners. For example, in Government Code section 12532, the legislature describes "detention facilities in which noncitizens are being housed or detained for purposes of civil immigration proceedings in California." (Gov't. Code, § 12532, subd. (a); see also Civ. Code, § 1670.9.) There is no reference to "correctional", "prisoner", "inmate" "incarcerated" or other terms found in statutes and regulations pertaining to California prisoners.

California courts have also distinguished between prisoners, who are subject to the CDCR regulations (i.e., title 15), and civil detainees, who are "not governed by title 15." (TPA2, at p. 2 [quoting *In re Robinson*, *supra*, 19 Cal.App.5th at 256]. See also *Teter v. City of Newport Beach* (2003) 30 Cal. 4th 446, 452 [discussing distinction between "prisoner" and "detainee"].)

Finally, the plain text of Labor Code sections 6304.2 and 6304.4 applies only to *state* prisoners, i.e., individuals imprisoned at California state correctional facilities.[9] Thus, even if we were to accept the characterization of TPAs as "prisoners," they cannot be accurately described as "state prisoners" under Labor Code sections 6304.2 and 6304.4, as they are not imprisoned in any California Department of Corrections facility. When the Legislature has wished to expand the scope of a provision beyond "state prisoners," it has taken care to do so. (*See*, *e.g.*, Lab. Code, § 3351, subd. (e) [defining "employee" to include "[a]ll persons incarcerated in a state penal or correctional institution while engaged in assigned work or employment"]; Pen. Code, § 4017 [all "persons confined in the county jail, industrial farm, road camp, or city jail," while engaging in fire suppression work, are "employees" for purposes of workers' compensation claims].) But when a statute only refers to state prison inmates, courts will not expand its scope even to cover individuals incarcerated elsewhere, even in California county jails. (*See Ruelas v. County of Alameda* (N.D. Cal. 2021) 519 F. Supp. 3d 636, 653 [to the extent "the Labor Code addresses inmates, it only discusses state prison inmates."].) Thus, even if the TPAs are "prisoners" while at a facility that ICE itself describes as "civil" detention center, they are not "state prisoners." (TPA2, pp. 1-2; ACLU Amicus, p. 3.)

Employer's arguments to the contrary are not persuasive. Notwithstanding the above authority, Employer argues that "detainees at the facility in question are "prisoners" under California law." First, Employer argues that applicable regulations define "prisoner" as "a person

[9] Labor Code section 6304.4 refers to prisoners engaged in correctional industry, "as defined by the Department of Corrections." The Department of Corrections and Rehabilitation, in turn, defines "prisoner" as a "person in custody of the Secretary [of the Department of Corrections and Rehabilitation] and not paroled." (Cal. Code Regs., tit. 15, § 3000.)

in custody of the Secretary and not paroled. Prisoner and inmate are synonymous terms." (ER2, p. 2, citing Cal. Code Regs., tit. 15 ("CDCR Regulations"), § 3000].)[10]

> The term "prisoner" and "inmate" are independent and collectively synonymous with the term "detainee." That is because, in each instance, the individual's identified are being detained and are "***in custody***", against their will, at a facility and are not free to leave.

(ER2, p. 2 [emphasis in original].) Thus, whether a person is "in custody" under the Penal Code or Civil Code is irrelevant; regardless of the reason or terminology used, what matters for Employer is that such persons are "in custody." (*Ibid*.)

Second, Employer addresses the actual text of the Labor Code, which provides, a "prisoner engaged in correctional industry, as defined by the Department of Corrections, shall not be considered an employee for purposes of the provisions relating to [Appeals Board] proceedings[.]" (Lab. Code, § 6304.4.) Employer construes this language broadly.

> The term "correctional facility" is never mentioned in Code §6304.4. The relevant term within Code §6304.4 is "correctional industry", a term that is not defined within the Cal. Lab. Code nor is it defined within the California Department of Corrections and Rehabilitation [hereinafter "CDCR"]. The term "correctional industry" is much broader than just "correctional facilities." CDCR by its own structure is comprised not only of correctional facilities, but of administrative, training and communication facilities throughout the state of California.

(ER2, p. 3.)

We disagree with Employer's construction of these statutory and regulatory provisions. As noted, Labor Code section 6304.4 excludes from Board proceedings only those "prisoners" who are "engaged in correctional industry, as defined by the Department of Corrections." Reviewing the laws and regulations governing the Department of Corrections, there appears to be no specific definition of the term "correctional industry" or the phrase "engaged in correctional industry." However, the CDCR Regulations governing the California Prison Industry Authority (CAPIA), only provide for employment of "Incarcerated individuals" who are "committed to the custody of the California Department of Corrections and Rehabilitation." (Cal. Code Regs., tit. 15, § 8004.) To qualify to perform work for the California Department of Corrections, such incarcerated persons must satisfy the requirements in section 8004.1, which includes conditions that are inapplicable to civil detainees. (*See* Cal. Code Regs., tit. 15, § 8004.1 (specifically describing incarceration by, and work assignments from, the California Department of Corrections).) The

[10] All parties cited this definition of "prisoner" and "inmate." However, the CDCR Regulations were amended effective October 1, 2024; "prisoner" and "inmate" were both eliminated, and replaced with the single term "incarcerated person," which is defined as "a person under the jurisdiction of the Secretary and not paroled." (CDCR Regulations, § 3000.)

Board could not locate a single provision in the California Department of Corrections regulations that is broad enough to cover federal civil immigration detention facilities in any respect.

Employer argues that equating "prisoner" with "civil detainee" comports with the definition of the term used by federal authorities, including federal OSHA and federal courts construing federal laws. (ER2, pp. 2-3.) We examine Employer's cited authorities to explain why we disagree.

Employer refers to federal OSHA's instructional document, entitled Enforcement Procedures and Scheduling for Occupational Exposure to Workplace Violence. (ER2, p. 2 [citing OSHA Directive No. CPL-02-01-058].) The category of "correctional facilities," according to that OSHA Directive, "includes prisons, detention centers, and jails." (OSHA Directive No. CPL-02-01-058, p. 5.) Employer appears to suggest that prisons and detention centers are therefore the same in general, under federal law. (See ER2, p.2.) We are puzzled by this argument. It is not in dispute that prisons and detention centers share the trait of increased exposure to workplace violence, and it is not surprising. That fact might be a useful to federal OSHA in its enforcement guidance. However, it has no bearing on how the California legislature characterizes prisoners and civil detainees.

Employer also cites and discusses several federal decisions. (ER2, pp. 2-3.) For example, Employer cites *Ndambi v. CoreCivic, Inc.*, 990 F.3d 369, 371 (4th Cir. 2021), a collective action in which civil immigration detainees alleged violations of the Fair Labor Standards Act (FLSA). There, the Fourth Circuit found that prison inmates are not covered by the FLSA "because the custodial context differs substantially from the traditional free labor market." (*Id*. at 371-72.)

> The FLSA was enacted to protect workers who operate within the traditional employment paradigm. Persons in custodial detention—such as appellants—are not in an employer-employee relationship but in a detainer-detainee relationship that falls outside that paradigm. There are many crucial differences between these two relationships. In the latter relationship, individuals are under the control and supervision of the detention facility, which is simply not comparable to the free labor situation of true employment. Those in custodial detention, unlike workers in a free labor market, certainly are not free to walk off the job site and look for other work.

(*Id*. at 372 [citations and quotes omitted].) The Fourth Circuit then rejected the distinction between criminal and civil detention, noting that every circuit to consider the issue "has concluded that the FLSA's protections do not extend to the custodial context generally." (*Id*. at 373-74.)

However, *Ndambi*, is inapposite. It is a federal court decision construing the scope of a specific federal law. (*Ndambi*, *supra*, 990 F.3d 369, 371.) It does not address any California law, much less the specific question of whether Labor Code section 6304.2's reference to "state prisoner engaged in correctional industry" extends to civil immigration detainees. (Lab. Code, § 6304.2.) It merely concludes that civil detainees are excluded from the definition of "employee" under the FLSA, not that prisoners are *never* employees under any provision of state or federal law. (*Ndambi*, *supra*, at 372-73.)

Similarly, Employer cites to *Ruelas v. Cnty. of Alameda* (9th Cir. 2022) 51 F.4th 1187, 1188. In *Ruelas*, a federal district court considered the rights of "pretrial detainees, detainees facing deportation, or federal detainees confined in Alameda County's Santa Rita Jail." (51 F.4th 1187, 1188.) The district court found those individuals were covered by the minimum wage and overtime protections of the Labor Code, because the California Penal Code did not provide a basis for excluding them. (*Ibid*.)

Again, however, *Ruelas* is a federal decision and does not reach any conclusion regarding the scope of Labor Code section 6404.4. It merely certified a *question* for the California Supreme Court: "Do non-convicted incarcerated individuals performing services in county jails for a for-profit company to supply meals within the county jails and related custody facilities have a claim for minimum wages and overtime under Section 1194 of the California Labor Code in the absence of any local ordinance prescribing or prohibiting the payment of wages for these individuals?" (*Ruelas*, *supra*, 51 F.4th at 1187.) Notably, the Supreme Court addressed that question in April 2024, in a decision that does not address any question of *civil* detainees whatsoever. (*Ruelas v. Cnty. of Alameda* (2024) 15 Cal. 5th 968.)

In short, despite tangential support for the *general* claim that civil detention is similar to imprisonment, there is no support for Employer's claim that civil detainees are prisoners within the meaning of Labor Code section 6304.4. Accordingly, we conclude that TPAs are civil detainees, and therefore are not excluded from participating in Board proceedings.

d. Are the Third-Party Applicants "Affected Employees" within the meaning of section 354?

Finally, the Board must determine whether the TPAs are excluded from the definition of "affected employees." As noted, a motion for party status requires that the moving party be an "affected employee." (§ 354, subd. (a).) Section 347, subdivision (c), defines "affected employee" as "an employee of a cited employer who is exposed to the alleged hazard described in the citation as a result of assigned duties." The Board has held that an employee that was not exposed to the hazard at issue in a citation is not an "affected employee" for the sake of party status. (*See Rudolph & Sletten, Inc*., Cal/OSHA App. 99-1291, Denial of Petition for Reconsideration (Jan. 16, 2001).)

Employer challenges the TPAs' status as "affected employees" on several grounds. First, Employer argues, the TPAs produced *insufficient evidence* they were exposed to any hazard at issue. (ER2, p. 4.) Second, Employer argues, TPAs must be identified by name to be "affected employees." (ER2, pp. 5-6.) Third, Employer argues, the citations at issue are "for an alleged written policy deficiency," to which TPAs cannot establish exposure. (ER2, pp. 4-5.) Fourth, Employer argues, TPAs do not explain "how and under what circumstances anyone . . . was actually exposed while performing [work] activities." (*Id*, p. 5.) Fifth, Employer argues, detainees at Golden State Annex were never "assigned duties" so they could not be exposed to any hazard "as a result of assigned duties." (ER2, p. 6 [citing § 354].) As the first and second of these issues have already been addressed above, this discussion only addresses the third, fourth, and fifth arguments here.

As its third argument, Employer asserts that TPAs cannot show exposure to a hazard when the citation concerns "a written policy deficiency." (ER2, p. 5.) Employer cites no authority for

the proposition that there can be no "exposure" to a citation based on a written policy deficiency. To the contrary, proof of "exposure" is explicitly part of the Division's burden, even in the context of a citation based on an alleged failure to establish, maintain, or implement an injury and illness prevention plan. (See *Hamilton Iron Works*, Cal/OSHA App. 21-1497263, Decision After Reconsideration (June 12, 2024) ["we conclude that employees were exposed to hazards as a result of the written IIPP deficiencies under either exposure standard"].) Employer's claim that employees cannot establish "exposure" in this context is inconsistent with Board precedent.

As its fourth argument, Employer asserts that TPAs must allege (or "show") exposure to a hazard that occurred while the TPAs performed their work duties. (ER2, p. 5.) The TPAs have done this. Specifically, the TPAs have alleged that they are complainant employee detainees who worked at the Golden State Annex "as 'housing porters' without the protection of an effective [aerosol transmissible diseases] program." (DOSH2, p. 6; TPA2, pp. 3-4.) As they allege, Employer was cited for lacking specific control measures, work practice controls, cleaning and decontamination procedures, and personal protective equipment. (TPA2, p. 4.) The TPAs allege that "in the course of their [housing porter] work duties, congregated with positive and symptomatic co-workers without appropriate distancing, personal protective equipment, and hygiene or cleaning protocols." (*Ibid*.) The TPAs allege that these allegations establish exposure to COVID-19 "because it was reasonably predictable that during the course of their normal work duties, employees would be in danger of contracting COVID-19 for failure of following basic controls like distancing, PPE, and more." (*Ibid*.) These allegations establish that Employer's fourth argument is unpersuasive.

Finally, as to its fifth argument, Employer asserts that VWP work is undertaken according to "schedules that the detainee participant themselves determine." (ER2, p. 6.) The following is how Employer presents this argument:

> For example, there may be an eight [8] hour need in the cafeteria for job title "A" on a Tuesday. The detainee participant may volunteer to work a designated three [3] hours. However, the detainee may work ten [10] minutes out of the three [3] that they signed up for and then go back to their block/cell unit without completing their volunteered schedule. The detainee receives no disciplinary or negative action. Thus, the third prong regarding demonstrating someone is an "affected employees" – that the represented employee was exposed to the alleged hazard described in a citation "as a result of [their] assigned duties" does not even exist in the VWP because participants: [i] choose to volunteer to a posted task, [ii] on the day they choose, [iii] for the time they choose within the posting, and [iv] the volunteer detainee does not even have to comply for the time they voluntarily signed up for. There is no "assigned duties".

(ER2, p. 6.) We find numerous concerns with the reasoning of this argument, which is not supported by any cited authority. Employer seems to argue that the phrase "assigned duties"[11]

[11] As noted, "affected Employee" is defined as "an employee of a cited employer who is exposed to the alleged hazard described in the citation as a result of assigned duties." (§ 347, subd. (c).)

implies *extremely passive* and *extremely involuntary* receipt of duties. Therefore, Employer's argument continues, "assigned duties" necessarily excludes the following: (i) any situation where the worker chooses their own shift (as the detainees do here), and (ii) any situation where the worker is not punished for leaving early (as the detainees may here, even though they are "leaving" to their block/cell unit).

The Board rejects Employer's narrow reading of the regulation. There is nothing extraordinary about employees in California being able to choose their own work shift or being able to leave work early without punishment. Endorsing Employer's contrary reading of the regulation would eliminate a huge percentage of California workers from the scope of "affected employee."

Accordingly, the Board finds that the TPAs have sufficiently alleged they are "affected employees."

DECISION

For the reasons stated, the ALJ's Order is reversed. The matter is remanded to ALJ Avelar, who shall enter an Order granting party status to Third-Party Applicants, pursuant to section 354.

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

/s/ Ed Lowry, Chair
/s/ Judith S. Freyman, Board Member
/s/ Marvin Kropke, Board Member

FILED ON: 01/10/2025

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Set forth below are the titles of the relevant briefing and documents submitted in this matter, along with the abbreviations used in the memorandum.

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p10/04/23	Petition for Reconsideration from Division of Safety and Health	DOSH1
10/27/23	Employer's Response In Opposition to Petitions for Reconsideration Filed by Third-Party Petitioners Worksafe and California Collaborative for Immigrant Justice and Division of Safety and Health	ER1
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