STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SACRAMENTO AREA FIRE FIGHTERS, IAFF LOCAL 522, Charging Party, v. COUNTY OF SACRAMENTO, Respondent.	Case No. SA-CE-787-M PERB Decision No. 2393-M October 16, 2014

Appearances: Mastagni, Holstedt, Amick, Miller & Johnsen by Jeffrey R. A. Edwards, Attorney, for Sacramento Area Firefighters, IAFF Local 522; Timothy D. Weinland, Deputy County Counsel, for County of Sacramento.

Before Martinez, Chair; Huguenin and Winslow, Members.

DECISION

MARTINEZ, Chair: This case is before the Public Employment Relations Board (PERB or Board) on exceptions by the Sacramento Area Firefighters, IAFF Local 522 (Local 522) to a proposed decision by a PERB administrative law judge (ALJ). The complaint and underlying unfair practice charge allege that on October 27, 2011, the County of Sacramento (County) committed an unfair practice when it implemented a blanket "No Union Logo" policy[1] prohibiting bargaining unit employees from wearing clothing with union insignia while on duty. By this conduct, as alleged in the complaint, the County

[1] The Office of the General Counsel described the policy at issue in this case as the "No Union Logo" policy in the unfair practice complaint. The policy is referred to as such in the proposed decision. For ease of reference and continuity, we retain the same nomenclature in this decision.

interfered with employee rights guaranteed by the Meyers-Milias Brown Act (MMBA)[2] in violation of sections 3506[3] and 3506.5, subdivision (a);[4] and denied Local 522 its right to represent employees in violation of sections 3503[5] and 3506.5, subdivision (b).[6]

The proposed decision concludes that bargaining unit employees do not enjoy a guaranteed right to wear t-shirts and caps required to be worn as part of a public safety firefighter uniform that bear the union logo. Finding that the County did not commit an unfair practice when it unilaterally implemented the "No Union Logo" policy, the ALJ dismissed the unfair practice complaint and underlying charge.

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[2] The MMBA is codified at Government Code section 3500 et seq. Undesignated section references are to the Government Code. Section 3509, subdivision (b), provides: "A complaint alleging any violation of this chapter or of any rules and regulations adopted by a public agency pursuant to Section 3507 or 3507.5 shall be processed as an unfair practice charge by the board."

[3] Section 3506 provides: "Public agencies and employee organizations shall not interfere with, intimidate, restrain, coerce or discriminate against public employees because of their exercise of their rights under Section 3502." Section 3502 provides: "Except as otherwise provided by the Legislature, public employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations."

[4] Section 3506.5, subdivision (a), provides that a public agency shall not: "Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter." PERB Regulation 32603, subdivision (a), makes it an unfair practice for an employer to interfere with guaranteed employee rights. (PERB Regs. are codified at Cal. Code Regs., tit. 8, sec. 31001, et seq.)

[5] Section 3503 provides: "Recognized employee organizations shall have the right to represent their members in their employment relations with public agencies. . . ."

[6] Section 3506.5, subdivision (b), provides that a public agency shall not: "Deny to employee organizations the rights guaranteed to them by this chapter." PERB Regulation 32603, subdivision (b), makes it an unfair practice for an employer to deny employee organization guaranteed rights.

The Board has reviewed the record in its entirety in consideration of the issues raised by Local 522's statement of exceptions and the County's response thereto. Based on our review, the Board hereby reverses the proposed decision and concludes that the County interfered with guaranteed employees' rights by implementing a blanket "No Union Logo" policy and, by the same conduct, concurrently denied Local 522 its guaranteed representational rights.

PROCEDURAL HISTORY

On April 20, 2012, Local 522 filed the unfair practice charge. On May 7, 2012, the County filed a position statement responding to the charge. PERB's Office of the General Counsel issued the unfair practice complaint on July 26, 2013. On August 1, 2013, the County filed its answer. An informal settlement conference was conducted on September 6, 2013, and a formal hearing was held on November 25, 2013. On January 30, 2014, the case was submitted for decision after receipt of post-hearing briefs. The proposed decision was issued on March 5, 2014.

Local 522 timely filed a statement of exceptions to the proposed decision on March 25, 2014. The County timely filed a response on April 9, 2014. On April 22, 2014, the Appeals Office notified the parties that the filings were complete.

FACTUAL SUMMARY[7]

Within the County, there is the Aircraft Rescue & Firefighting Division (ARFF). Local 522 is the exclusive representative of the ARFF bargaining unit, Unit 30. It is comprised

[7] No exceptions were taken to the findings of fact in the proposed decision. The Factual Summary in this decision is taken from the ALJ's findings of fact, and supplemented from the record evidence where necessary to provide further factual context for this decision.

of 32 Fire Fighters and Fire Captains[8] (collectively, firefighters or ARFF firefighters) who serve the following airports within the Sacramento County Airport System (SCAS): Sacramento Metropolitan International Airport (Airport), Mather Field Airport (Mather) and City Executive Airport (Executive). Fire stations are located at the Airport and Mather, but not at Executive. ARFF provides specialized emergency response and structural fire protection services to businesses, employees and travelers at these airport facilities.

Lance McCasland (McCasland) began employment with the County in 1994, serving as Fire Operations Supervisor, Assistant Chief of Fire Rescue and Fire Chief. Since November 2010, he has held the position of Airport Deputy Director of Operations and Public Safety. Jeff Metzinger (Metzinger) has held the position of ARFF Fire Chief since January 2012. Prior to that, he worked for 28 years in the Sacramento Metropolitan Fire Department (Metro Fire Department) until his retirement from that fire department in 2011. While at the Metro Fire Department, he held positions as Fire Fighter, Fire Captain, Battalion Chief, Training Chief and Assistant Chief.

Local 522 has represented the ARFF firefighters since 2007. Steve Loza (Loza) was hired by the County to fill a Fire Fighter position in 2003 and was promoted to a Fire Captain position in 2009. He is primarily responsible for Engine 98, located at the Airport fire station. He served as the Local 522 Unit Representative from 2007 until April 2012, when he became the District Director. Robert Repar (Repar) was hired by the County to fill a Fire Fighter position in 1994 and promoted to fill a Fire Captain position in 2010. He has served as the Local 522 Unit Representative since January 2013.

[8] Fire Captains are first-line supervisors. They are responsible for a particular apparatus and engine crew, daily duties and emergencies.

Two municipal fire departments with bargaining units long represented by Local 522 also respond to calls for firefighting assistance at the Airport. Sacramento City Fire Department (City Fire Department) has a mutual aid agreement with the Airport. Michael Feyh (Feyh) was hired by the City Fire Department to fill a Fire Fighter position in 1994 and was promoted to a Fire Captain position in June 2013.

The other municipal fire department serving the Airport is the Metro Fire Department. Local 522 President Brian Rice (Rice) was first employed in a Fire Fighter position with the American River Fire Protection District. He then worked for the Metro Fire Department for 27 years before retiring. He served as a Fire Fighter, Fire Engineer and Fire Captain before promoting out of the bargaining unit to Battalion Chief in 2008 and then to Assistant Chief and Deputy Chief of Operations in 2010. Rice had previously served as the Local 522 president from 2002 to 2008. And, before that, he was on the Local 522 Executive Board from 1990-2002 and, when he was with the American River Fire Protection District, he was the Local 522 Unit Representative.

Contract Language

The County and Local 522 entered into a memorandum of understanding (Agreement) effective 2006 through 2011, which was extended by Addendum #3 through June 30, 2013. Article XII establishes a uniform allowance for Fire Fighters and Fire Captains covering clothing, boots and jackets. Effective June 24, 2007, the reimbursement for uniform allowance was discontinued. Instead, Fire Fighters receive a uniform allowance payment of $28.85 biweekly included in their regular paycheck subject to taxation; Fire Captains receive a uniform allowance payment of $30.77 biweekly, payable twice a year in January and July.[9]

[9] Loza testified that employees receive a $70 allowance per pay period.

The County bears the initial cost of additional required uniform clothing for both Fire Fighters and Fire Captains.

Uniform Policy

County Standard Operating Procedure (SOP) 100-01 contains the operative rules and regulations regarding uniform specifications and wear for ARFF personnel. The Class A uniform is for dress or formal wear. It is required for all Chief Officers[10] but optional for Fire Fighters and Fire Captains. The Class A uniform is to be worn when representing ARFF at public events, or when attending funerals, parades and other social functions as representatives of SCAS.

The Class B uniform is for daily wear, and must be worn when reporting for duty and at roll call. It consists of the following items of clothing:

- Shirt[11]
- Pants
- Jacket
- T-Shirt
- Cap[12]
- Station Safety Boots
- Belt
- Buckle
- Tie

The Class B uniform[13] t-shirt has the SCAS logo on the front left breast and identifies SCAS and ARFF on the back. It is worn under the long-sleeved, button-down Class B uniform

[10] Chief Officers are those at the level of Battalion Chief and above.

[11] The Class B uniform shirt costs $95.

[12] The Class B uniform cap costs $35.

[13] The Class B uniform job shirt and Class B uniform sweatshirt are optional.

shirt. The Class B uniform t-shirt may be worn without the Class B uniform shirt in the station, during daily in-house training sessions and during outside training drills when performing physical activity. Although it is unacceptable under the Class B Uniform "Wearing Policy" in SOP 100-01 to wear the Class B uniform t-shirt without the Class B uniform shirt on emergency calls or in public during non-emergency situations, i.e., station tours, fire inspections, public education functions, non-physical training and in business and retail establishments, Metzinger acknowledged that the Class B uniform t-shirt is worn without the Class B uniform shirt in the summer months when it is hot and during duty hours in the fire station.[14] He also acknowledged that when responding to an emergency at the Airport, firefighters wear what they have on.[15]

Physical fitness apparel consists of a t-shirt or sweatshirt and shorts[16] or sweat pants. Physical fitness apparel is worn during exercise and cool-down. The minimum required sleepwear consists of a t-shirt and an outer garment bottom worn over and covering an undergarment bottom.

History of Representation

In 2003, Stationary Engineers Local 39, International Union of Operating Engineers, AFL-CIO (Local 39) represented the ARFF firefighters in a bargaining unit with many other occupation types, including custodial, maintenance and sanitation. Loza testified that ARFF

[14] Metzinger testified: "A lot of work is kind of like blue collar work. There's station maintenance, equipment and stuff, and a T-shirt is probably the appropriate shirt for most of that work."

[15] Metzinger testified: "If they're out on the drill ground training, particularly, and they need a quick response, they'll wear what they're wearing. They'll wear T-shirts."

[16] Shorts are referred to in the formal hearing transcript as sweat shorts, workout shorts and gym shorts.

firefighters petitioned to decertify out of Local 39[17] and to recertify or affiliate with Local 522 because Local 522 is a firefighters-only union. Local 39 objected and invoked Article XX of the AFL-CIO constitution to impose a two-year bar to decertification.

The ARFF firefighters ultimately were successful in attaining their own unit and decertified Local 39. They formed their own non-AFL-CIO organization, Sacramento County Aircraft Rescue Firefighters Association (SCARFA), presumably after the two-year bar expired. The County recognized SCARFA in 2006, the same year in which the County labor contract with Local 39 expired. In November 2006, SCARFA and the County reached a tentative agreement (TA) on a five-year contract that provided equity increases. SCARFA agreed with the County's request to wait until January 15, 2007, to present the TA to the County Board of Supervisors because of the holidays and unavailability of County personnel.

Having learned that the County's local rules allowed a unit modification petition to be filed during a window period from January to February 2007, ARFF firefighters filed a petition seeking to be represented by Local 522. Subsequent to that, the County filed an unfair practice charge with PERB. After an informal settlement conference, the County withdrew the charge and the County Board of Supervisors approved the TA, which formed the current Agreement. Sometime in 2007, Local 522 became the exclusive representative and a party to the Agreement.

Union Logo on Uniform

Local 522 provides t-shirts, sweatshirts, shorts, sweatpants, caps and other gear bearing the union logo. On the Local 522 t-shirt, the union logo is on the left front breast and it

[17] We understand that, by this petition, the ARFF firefighters intended to achieve a severance of the firefighter classifications from the larger bargaining unit.

contains the name, Sacramento Area Firefighters Local 522, within an emblem consisting of a fire helmet and crossed axes.

Local 522 provides gear as a convenience to its members. Because Local 522 provides the gear at cost, members benefit from the cost savings. Local 522 also appears to take pride in the fact that the gear is close to 100 percent made in the United States of America.

Local 522 has been the exclusive representative for the City Fire Department firefighters during Feyh's 19 years of service. During that time, the City Fire Department has approved multiple logos, including the Local 522 logo, on t-shirts, sweatshirts, sweatpants, shorts and caps. The City Fire Department's uniform policy specifically permits the wearing of apparel bearing the Local 522 logo as part of its Class B uniform. Feyh testified that, to his knowledge, the wearing of uniform apparel bearing the union insignia by firefighters in the City Fire Department has caused no operational problems, no confusion in response to emergencies, no complaints from the public, no morale or discipline problems and no confusion in the chain of command. McCasland confirmed that City Fire Department firefighters respond to emergencies at the Airport wearing Class B uniform t-shirts bearing the Local 522 logo.

The Metro Fire Department's uniform policy permits the wearing of apparel bearing the Local 522 logo as part of its Class B uniform. Rice testified that during his time in management he influenced operational policy in the areas of training, labor relations and budget.[18] Regarding the Metro Fire Department's uniform policy, Rice testified as follows:

> Q In your experience in Operations, is there any operational problem with firefighters or captains wearing this T-shirt as part of their class B uniform?

[18] Rice testified further that the Local 522 logo was designed in 1991 and approved by the American River Fire Protection District for use on its Class B uniform t-shirt and cap.

A In the course of my entire career and then finishing my career as a chief officer, I never had a problem with members of the department wearing this uniform shirt.

Q Did it create any confusion in responding to emergency calls?

A No.

Q Did it create confusion with the public?

A No.

Q Can you think of any reason why it would impair the operations of a fire department?

A No.

Metzinger confirmed that the Metro Fire Department Class B uniform t-shirt and cap bear the Local 522 logo and that Metro Fire Department personnel in the positions of Fire Fighter and Fire Captain wear caps bearing the Local 522 logo as part of the Class B uniform. On the Metro and City Fire Departments' Class B uniform t-shirt, the union logo is on the left front breast, as described above, and the jurisdiction is on the back.

After Local 522 began representing the ARFF firefighters in 2007, Loza and McCasland agreed that it might not be prudent to wear apparel bearing the Local 522 logo because it could offend or be perceived as antagonistic to management. According to Loza, as time wore on, t-shirts, caps and sweatshirts bearing the Local 522 logo started to be worn in public and at the fire station. The practice was never approved or disapproved, and it caused no impact other than on occasion, the wearer was told to remove the clothing in question. As Loza testified:

> From time to time, Union logos were worn, in the public's eye and in the firehouse, and it was never an approved policy, but it was never a disapproved policy. It was more of a –There was times you could do it and there would be no impact, and there was times that you could do it and then there would be impact, i.e., someone saying, "You shouldn't be wearing that or you need to take that off, you need to change."

The City and Metro Fire Department firefighters wear pink t-shirts bearing the union logo as part of their Class B uniform during the month of October to support breast cancer awareness. Sometime before October 2011, the ARFF firefighters obtained management approval to do the same. This has been the practice among ARFF firefighters for the last three years.

The "No Union Logo" Policy

On October 20, 2011, Battalion Chief[19] John Conneally (Conneally) sent a message by e-mail to Loza and two other Fire Captains, copying six other individuals, entitled "522 Hats." The message states in pertinent part:

> Gentlemen ..... at no time is a Local 522 hat to be worn while on duty.

On October 27, 2011, Conneally re-sent the October 20, 2011, message by e-mail to the same individuals on the "to" and "cc" lines, along with a new message, which states in pertinent part:

> Reminder #2
>
> Please adhere to the uniform policy. The wearing of hats, T-shirts and sweatshirts with the union logo while on duty is ***not approved***.

[19] The Battalion Chief is a first-line manager.

Reference Rules and Regulations SOP 100-05[20] Uniform Specification and Wearing.

- T shirts see section E.
- Cap see section H.

Captains please ensure your staff comply. There is no need to go there with me on what occurs on other shifts ..... I have been personally directed to ensure that this policy is strictly enforced at all times.

(Italics, bold, underline and additional periods in the original.) Conneally forwarded the message string to Repar one minute after it was sent to the original recipients. The message sent to Repar contained no italicized, bold or underlined text. This set of e-mail messages comprises the "No Union Logo" policy referred to herein.

The above messages were e-mailed following a conversation about union logos between Loza and Conneally, which was precipitated by a firefighter wearing a cap bearing the Local 522 logo at an administrative meeting or ceremony. Loza was told to reprimand any firefighter seen wearing apparel with union insignia, instruct that such apparel is not to be worn while on duty and direct that the apparel in question be removed.

One of the first issues Metzinger faced after he became the Fire Chief in early 2012 was the Local 522 logo issue. He and McCasland discussed "altering this document [the SOP] and refining it and correcting it and bringing it up to date." Their goal was to clarify the language

[20] As the County's post-hearing brief concedes, SOP 100-05 was not the operative policy during the relevant time period. SOP 100-01, discussed *ante*, was the operative policy. McCasland signed both policies, but SOP 100-01 was created by Conneally on June 3, 2010, whereas SOP 100-05 was created by Conneally on October 19, 2009. One of the main differences between the two is that the current policy does not require that logos on t-shirts, optional job shirts and sweatshirts, and caps comply with the SCAS Brand Guidelines, as the prior policy did. And, unlike the prior policy, the current policy does not require that the physical fitness apparel contain the SCAS logo. (Ordinarily it might be presumed that a policy numbered 100-05 would be more recent than a policy numbered 100-01. That does not appear to be the case.)

including approving the use of the Local 522 logo on sweatpants and shorts. Conneally was directed to revise the SOP and enlisted Loza to work with him on this project. The proposed changes included changing the color of the caps from blue to black to conform to area standards, removing the prohibition on the rigid toe cap and removing the reference to SCAS Brand Guidelines. The process of revising and updating the SOP was brought to a standstill pending resolution of this case.

The ARFF bargaining unit employees do not seek to wear the Local 522 logo on the Class A uniform or on most of the Class B uniform. They seek to wear the union logo on the Class B uniform t-shirt, cap and sweatshirt as well as on the sweatpants and shorts. These are items that are worn at the fire station, mainly outside of public view. The public may see these items on occasion, i.e., on emergency calls.[21] According to Loza, when ARFF firefighters are in public, they are wearing the Class B uniform shirt over the Class B uniform t-shirt 90 percent of the time; if there were a union logo on the t-shirt, it would not be seen.

The ARFF firefighters want to wear apparel bearing the Local 522 logo for the following reasons, as testified to by Loza:

> Well, first and foremost, I mean, we've fought long and hard to become members of this organization, and we're proud of it, and we want to show our solidarity and our affiliation to it. That's the main reason. Secondly, it's the industry norm. I mean, fire departments all across the nation, all up and down California, even in our region, they all are able to wear their Union-affiliated logos on their class-B duty shirts.

[21] Firefighters work 24-hour shifts from 8:00 a.m. until 8:00 a.m. the next day. The normal duty day begins at 8:00 a.m. with roll call. The normal duty day ends at 5:00 p.m. After 5:00 p.m., they are required to remain at the fire station and be ready to respond to emergencies on a standby basis, but are otherwise allowed to do as they please, i.e., work out in their physical fitness apparel or, presumably, change into their sleepwear at the appropriate time.

> And there's a cost savings to them. Quite frankly, the Union produces these shirts as a benefit to us, and sweatpants and sweat shorts and hats that we can go down and buy at no profit, at cost, market. Right now, when we have to purchase T-shirts and hats, they're expensive. The County hats we purchase, they're 35 dollars. At the Union hall, they're ten. I mean, that's an added benefit. But, you know, it all boils down to, like, we want to show our solidarity with our Union brothers and sisters, and that's what we're after here.

Rice echoed that sentiment:

> Q Is it important to 522 to communicate that message?
>
> A Absolutely. I'm very proud – I've always been a proud member of the Union. That means something different to everybody, but I'm always proud to see our logo, and I've seen it on every rank, from a fire chief to a firefighter, over the course of my career.
>
> [¶ ...¶]
>
> . . . What we're talking about today in 2013, it's like a 20-year-old debate. It is industry standard. If you look across the United States, you will see pictures – I don't care where they work, New York City, the United States Forest Service, CALFIRE, Los Angeles, San Diego, El Paso, Dallas. It is common practice that firefighters wear T-shirts, and you will see IAFF logos here in Sacramento.

McCasland testified that the basis for only allowing the two Airport logos on the Class B uniform t-shirt is to comply with the SCAS Brand Guidelines.

THE PROPOSED DECSION

The ALJ acknowledged that the Board's decision in *State of California (Department of Parks and Recreation)* (1993) PERB Decision No. 1026-S (*Parks*) established the general rule that wearing union buttons or pins is a protected employee right absent special circumstances. The ALJ never reached the special circumstances defense, concluding that the *Parks* analysis does not apply to the facts of this case. According to the proposed decision, under existing

precedent, bargaining unit employees do not enjoy a statutorily guaranteed right to add the union logo to t-shirts and caps required to be worn as part of a public safety firefighter uniform. Therefore, as the proposed decision states, Local 522 failed to meet its burden of proving that the County unlawfully interfered with employee rights guaranteed by the MMBA; and, according to the proposed decision, the derivative denial of Local 522's right to represent bargaining unit employees necessarily fails as well. The ALJ dismissed the complaint and underlying unfair practice charge.

The ALJ also considered the County's argument that Local 522 waived its rights to wear uniform apparel bearing the Local 522 logo by agreeing to the management rights and uniform allowance articles in the Agreement. The proposed decision rejects that defense, concluding that the County did not meet its burden of demonstrating a clear, unmistakable and intentional relinquishment of Local 522's rights in the contract language.[22]

LOCAL 522'S EXCEPTIONS

Local 522 contends that the ALJ erred by drawing two unnecessary distinctions between the facts here and the facts in *Parks, supra*, PERB Decision No. 1026-S, and other precedential decisions. According to Local 522, there is no basis for distinguishing between wearing union buttons and pins, on the one hand, and wearing apparel bearing union insignia, on the other, in concluding that the former is a protected right, and the latter is not. There is also no basis, according to Local 522, for finding the statutorily guaranteed right to wear union insignia to be inapplicable to employees required to wear a public safety firefighter uniform.

[22] The County did not except to the waiver analysis or the conclusion reached on the waiver issue in the proposed decision. Exceptions not specifically urged are waived. (PERB Reg. 32300, subd. (c).)

Local 522 asserts that the firefighters have a statutorily guaranteed right, under longstanding precedent, to wear the union logo on the Class B uniform t-shirt, cap and sweatshirt as well as on the sweatpants and shorts. And, there are no special circumstances warranting the restrictions placed on that right under the County's "No Union Logo" policy.

THE COUNTY'S RESPONSE

The County's argument is succinctly stated in the main heading of the County's response: "The wearing of union logos is not a protected right." The County contends that while the firefighters have a statutorily guaranteed right to wear union buttons or pins, they have no statutorily guaranteed right to wear uniform apparel bearing the Local 522 logo. Because there is no guaranteed right, the County claims it does not have the burden to prove special circumstances justifying the implementation of the "No Union Logo" policy.

The County argues that the proposed decision is clearly correct and that the Board would have to make new law in order to find a statutorily protected right to wear a union logo on apparel required to be worn as part of a public safety firefighter uniform.

DISCUSSION[23]

As explained below, we hold that absent special circumstances, the firefighters have a statutorily protected right to wear Class B uniform apparel bearing the Local 522 logo, while on duty. Through this form of expression, they are able to demonstrate, in a visible and positive manner, their union solidarity and pride. There has been no showing of special

[23] Local 522's request for oral argument is denied. The Board historically denies requests for oral argument when an adequate record has been prepared, the parties had ample opportunity to present briefs and have availed themselves of that opportunity, and the issues before the Board are sufficiently clear to make oral argument unnecessary. *(Antelope Valley Health Care District* (2006) PERB Decision No. 1816-M; *Monterey County Office of Education* (1991) PERB Decision No. 913.)

circumstances by the County that would warrant the restrictions on this statutorily-protected right under the "No Union Logo" policy. Accordingly, the "No Union Logo" policy is, on its face, unlawful. Such a policy interferes with firefighters in the exercise of their right to participate in the activities of an employee organization of their own choosing for the purpose of representation on all matters of employer-employee relations.

Retroactivity

The County contends that existing precedent draws a line at union buttons and pins. The County further contends that, because no prior Board decision[24] has established that employees have the right to wear clothing bearing union insignia while at work, no such right exists. According to the County, the Board would be creating new precedent if it were to find that ARFF firefighters have the right to wear Class B uniform apparel bearing the union logo while on duty.

By this argument, we understand the County to say that any new precedent created by the Board should not be applied retroactively to find the County in violation of the MMBA in this case. Implicit in the County's argument is that every time the Board applies general

[24] Local 522 and the County argue over the significance of *Calaveras County Water District* (2009) PERB Decision No. 2039-M (*Calaveras*), a discrimination/retaliation case in which the charging party alleged that she was terminated for engaging in protected activity. On appeal, the Board affirmed the partial dismissal of the charge for failure to establish the nexus element of a retaliation claim. Regarding the protected activity element, the Board stated that the charge alleged facts demonstrating four separate instances of protected activity including the following: "she participated in informational picketing, signed pro-union petitions and dressed in union insignia at work." The County correctly asserts that the Board did not specifically address the issue whether wearing union t-shirts and union insignia is a protected right pursuant to *Parks, supra*, PERB Decision No. 1026-S, nor did it address the precise issue in this case whether such a right extends to public safety officers. The language of the decision, however, seems to convey a tacit recognition on the part of the Board that the holding in *Parks* is not limited to union buttons and pins. Regardless, the debate over *Calaveras* is mooted by this decision, which does not rely on *Calaveras* for support.

principles of law to a different set of facts, it is creating new precedent that breaks with the past. If that were true, every decision issued by the Board would be guilty of that offense. To the contrary, a Board decision is necessarily limited to the facts presented. That does not mean, however, that each successive decision involving the same issue but different facts represents a departure from precedent rather than, simply, an application of the general law to a different set of facts.

Moreover, the County's argument runs counter to time-honored, basic notions in our legal tradition about the effect to be given judicial, or in this case, quasi-judicial, decisions. The general rule is that judicial decisions are given retroactive effect. (*Camper v. Workers' Compensation Appeals Board* (1992) 3 Cal.4th 679, 688; *County of Sacramento v. Superior Court* (2009) 180 Cal.App.4th 943, 953.) "Indeed, a legal system based on precedent has a built-in presumption of retroactivity." (*Id.* at p. 953, quoting *People v. Guerra* (1984) 37 Cal.3d 385, 399, internal citations omitted.) Judicial decisions are given retroactive effect "even if they represent a clear change in the law." (*Bearden v. U.S. Borax, Inc.* (2006) 138 Cal.App.4th 429, 442, quoting *Godinez v. Schwarzenegger* (2005) 132 Cal.App.4th 73, 91.)[25]

If a decision does not establish a new rule of law, the general rule that judicial decisions are to be given retroactive effect applies without exception. (*County of Sacramento v. Superior Court, supra,* 180 Cal.App.4th 943, 953.) "In that event the decision simply becomes

[25] Where there has been a change in law, an exception may be made to the rule of retroactivity if fairness and public policy considerations are so compelling that, on balance, they outweigh considerations underlying the general rule. (*Bearden v. U.S. Borax, Inc., supra,* 138 Cal.App.4th 429, 442.) Such considerations include the parties' reasonable reliance on the former rule, the nature of the change as procedural or substantive, retroactivity's effect on the administration of justice and the purposes to be served by the new rule. (*Camper v. Workers' Compensation Appeals Board, supra,* 3 Cal.4th 679, 688; *Lazarin v. Superior Court* (2010) 188 Cal.App.4th 1560, 1581.)

part of the body of case law of this state, and under ordinary principles of stare decisis applies in all cases not yet final." (*Id.* at p. 953, quoting *People v. Guerra* (1984) 37 Cal.3d 385, 399.)

The California Supreme Court set forth the standard to be used to determine whether a judicial decision sets forth a new rule of law:

> The United States Supreme Court has recently attempted to define the decisions involving a "clear break with the past" (*Desist v. United States* (1964) 394 U.S. 244, 248 [22 L.Ed.2d 248, 254, 89 S.Ct. 1030]) that raise an issue of retroactivity. According to *United States v. Johnson* (1982) 457 U.S. 537 [73 L.Ed.2d 202, 102 S.Ct. 2579], "[such] a break has been recognized only when a decision explicitly overrules a past precedent of this Court [citations], or disapproves a practice this Court has arguably sanctioned in prior cases [citations], or overturns a longstanding and widespread practice to which this Court has not spoken, but which a near-unanimous body of lower court authority has expressly approved." (457 U.S. 537 at p. 551, [73 L.Ed.2d at p. 215, 102 S.Ct. at p. 2588].)

(*Donaldson v. Superior Court* (1983) 35 Cal.3d 24, 37.)

Under the rule of retroactivity, the Board's decision herein does not change a settled rule. It neither overturns prior precedent, nor overturns a longstanding and widespread practice expressly approved in prior precedent. It merely decides a legal question by elucidating and applying prior precedent.

Contrary to the County's argument, the right to wear union buttons or pins and the right to wear clothing bearing the union insignia at work are not two separate species of rights. They involve the same statutorily-protected, fundamental right. By recognizing that this right applies equally to cases where the union logo is on a uniform or other apparel as it does to cases where the union logo is on a pin or button, this decision does not establish a new rule and, therefore, does not raise the question whether an exception to the rule of retroactivity should be made. Accordingly, "[n]o reason appears not to apply today's decision to this case"

or to any other case before PERB involving the same issue that is not yet final. (*Brennan v. Tremco* (2001) 25 Cal.4th 310, 318; see also *Donaldson v. Superior Court, supra,* 35 Cal.3d 24, 37; *Lazarin v. Superior Court, supra,* 188 Cal.App.4th 1560, 1582.)

Turning back to the issue in this case, the existence of the fundamental right to wear union insignia at work does not turn on whether the union insignia is imprinted on a button or pin, or on an article of clothing. It also does not turn on whether the article of clothing that bears the union insignia is part of a public safety firefighter uniform required to be worn while on duty. As such, the rule of law set forth in *Parks, supra*, PERB Decision No. 1026-S, is applicable here.

The right to wear union insignia at work is not absolute. It is subject to a narrow exception. If the employer demonstrates "special circumstances" warranting restrictions on this right, then a violation will not be found. Here, however, the County made no attempt to demonstrate special circumstances, putting all their eggs in the protected rights basket. Therefore, we hold that the County's "No Union Logo" policy constitutes interference with the firefighters' statutorily-protected right to wear Class B uniform apparel bearing the Local 522 logo while on duty.[26]

[26] While the County has approved the wearing of sweatpants and shorts bearing the Local 522 logo, it has presumably done so as a matter of management prerogative and not in recognition of the firefighters' statutorily protected right. Therefore, in this decision, we make no distinction between the wearing of the union logo on the Class B uniform t-shirt, cap and sweatshirt, which the County has not approved, and the sweatpants and shorts, which it has. Although the t-shirt, cap and sweatshirt are part of the Class B uniform, and the sweatpants and shorts are not, the firefighters' intention with regard to both categories is the same, i.e., to exercise the right to wear apparel bearing the Local 522 logo primarily while working (and working out or winding down from work after 5:00 p.m.) amongst themselves at the fire station for the purpose of demonstrating union solidarity and pride.

The Applicable Law: *Parks*[27]

In *Parks*, the State of California Department of Parks and Recreation prohibited maintenance service personnel from wearing union buttons on their uniforms. The Board began its analysis in *Parks* by observing that in cases alleging an (a) violation, a violation will be found when the employer's acts interfere with the exercise of protected rights and the employer is unable to justify its actions by proving operational necessity, citing *Carlsbad Unified School District* (1979) PERB Decision No. 89 (*Carlsbad*). The Board then adopted the private sector standard set forth in *Republic Aviation Corp. v. NLRB* (1945) 324 U.S. 793 (*Republic Aviation*):[28]

> We concur with the ALJ that the wearing of union buttons is a protected right, absent special circumstances. However, in affirming the ALJ's proposed decision, we disagree with the State's contention that in finding a protected right, we have concluded that it is a per se violation for an employer to limit or prohibit the wearing of buttons. The right to wear buttons is not unlimited and is subject to reasonable regulation. If special circumstances exist, then the employer may well be within its rights to limit or prohibit the wearing of buttons by employees. In private sector cases, this view has been supported.

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[27] *Parks, supra*, PERB Decision No. 1026-S, was decided under the Ralph C. Dills Act (State Employer-Employee Relations) (Dills Act). (The Dills Act is codified at sec. 3512 et seq.) The rule in *Parks* does not, however, turn on language unique to the Dills Act. The holding was based on general principles of the law of interference and on private sector cases. The rule in *Parks* was applied to a case decided under the Educational Employment Relations Act (EERA) in *East Whittier School District* (2004) PERB Decision No. 1727 (*East Whittier*). (EERA is codified at sec. 3540 et seq.) As the Board in *East Whittier* stated: "The rule set forth in Parks was not created out of whole cloth, but rather necessitated by the statutory language of the statutes administered by PERB and by national public policy." The rule in *Parks* applies equally to cases decided under the MMBA as it does to cases decided under the other labor relations statutes administered by PERB.

[28] When interpreting the MMBA, it is appropriate to take guidance from cases interpreting the National Labor Relations Act (NLRA) and California labor relations statutes with parallel provisions. (*Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608; the NRLA is codified at 29 U.S.C. section 141 et seq.)

The Board in *Parks* made clear that once the charging party establishes that the employer has placed limitations on or prohibited the exercise of an employee's protected right to wear union insignia at work, the burden shifts to the employer to demonstrate special circumstances. As the Board stated, "Since the State banned the wearing of all union buttons, it is incumbent upon the State to demonstrate special circumstances for such a prohibition."

As the Board stated in *East Whittier*, the rule announced in *Parks* "is nothing more than a carbon copy of the *Republic Aviation* standard" decided under the NLRA. The United States Supreme Court cited with approval the National Labor Relations Board's (NLRB) conclusion that: "[T]he right of employees to wear union insignia at work has long been recognized as a reasonable and legitimate form of union activity, and the respondent's curtailment of that right is clearly violative of the Act." (*Republic Aviation, supra*, at p. 793, fn. 7.) *Republic Aviation* was decided in 1945. PERB has long recognized *Republic Aviation* as well-settled law.

As the Supreme Court has stated, the right of employees to self-organize and bargain collectively established under the NLRA "necessarily encompasses the right effectively to communicate with one another regarding self-organization at the jobsite." (*Beth Israel Hosp. v. NLRB* (1978) 437 U.S. 483, 491.) The practice of wearing union insignia furthers that right. (*NLRB v. Autodie Int'l, Inc.* (6th Cir. 1999) 169 F.3d 378, 383.)

In the federal sector, the Federal Labor Relations Authority (FLRA) has also concluded that wearing a union button demonstrates employee support for the labor union, showing pride and affiliation. Therefore, absent special circumstances, wearing union insignia is protected. (*U.S. Dept. of Justice v. FLRA* (5th Cir. 1992) 955 F.2d 998.)

The Board in *Parks, supra,* PERB Decision No. 1026-S, articulated the factors to be considered in determining whether the employer's justification for the prohibition of or limitation on wearing union insignia at work constitutes special circumstances. The Board stated:

> Courts have reviewed the circumstances in which buttons are worn, the nature and physical appearance of pins or buttons, the nature of the employer's activities and the need for production, safety and discipline. (Justice v. FLRA [*supra*, 955 F.2d 998].) In cases where special circumstances have created an operational necessity which justified a prohibition, there has been evidence that wearing union buttons or insignia has disrupted the employer's operations or maintenance of safety or discipline.
>
> Special circumstances justifying a prohibition of union buttons or insignia existed where: (1) the buttons could jeopardize employee's safety (Andrews Wire Corporation (1971) 189 NLRB 108; (2) damaged machinery or products (Campbell Soup Company [(1966)] 159 NLRB 74[,] enforced in part, enforcement denied in part on other grounds, (5th Cir. 1967) 380 F.2d 372; (3) exacerbate employee dissension (United Aircraft Corp. (1961) 134 NLRB 1632; (4) cause distraction from work demanding great concentration (Fabri-Tek, Inc. v. NLRB (8th Cir. 1965) 352 F.2d 577; (5) disrupt the uniformity, discipline, or appearance of neutrality among para-military law enforcement employees (Justice v. FLRA); or (5) [sic] damage the image to the public by the employees coming into contact with the public in the absence of a protected purpose (Harrah's Club and Burger King Corp. v. NLRB (6th Cir. 1984) 725 F.2d 1053[)].[29]

(*Parks*, *supra,* proposed decision at pp. 18-19, internal parallel citations omitted.)

[29] In subsequent 6th Circuit cases, the 6th Circuit has distanced itself from the holding in the *Burger King Corporation* case that mere employee contact with the public permits an employer to restrict union insignia. (See *NLRB v. St. Francis Healthcare Centre* (6th Cir. 2000) 212 F.3d 945, 958-960; see also *P.S.K. Supermarkets, Inc.* (2007) 349 NLRB 34 [exposure of customers to union buttons, standing alone, does not constitute special circumstances].)

In responding to the employer's argument that an operational necessity is created by its desire to keep employee uniforms politically neutral and thereby avoid antagonizing any members of the public who might be offended by a union button, the Board in *Parks* held:

> This is not a persuasive argument. The legislature has, by statute, determined that employees have a right to be represented by employee organizations. This includes the right of employees to show their allegiance to, and solidarity with, other members and the organization. Furthermore, the legislature has determined that collective bargaining is a reasonable method of resolving disputes and will promote the improvement of employer/employee relations within the State of California. The fact that some members of the public may find that offensive is not sufficient justification to deny employees their rights.

(*Parks, supra*, proposed decision at pp. 20-21.) This is no less true under the MMBA. As declared in section 3500, the purpose of the MMBA is to promote full communication between public employers and employees by providing a method of resolving disputes over terms and conditions of employment. Another of the MMBA's purposes is to provide a uniform basis for recognizing the right of public employees to join organizations of their own choice and be represented by those organizations in their employment relationships with public agencies.

The special circumstances exception is narrow. A policy that curtails an employee's right to wear union insignia at work is "presumptively invalid." (*Goodyear Tire and Rubber Co.* (2011) 357 NLRB No. 38.) "General, speculative, isolated or [conclusory] evidence of potential disruption to an employer's operations does not amount to special circumstances." (*Ibid.*)

Interference with a Protected Right – the (a) Violation

The right of employees to wear union insignia at work is a time-honored, legitimate form of union activity. It derives from employees' fundamental right to communicate with one another regarding self-organization at the jobsite. Here, the ARFF firefighters wish to wear

Class B uniform and other (physical fitness and sleepwear) apparel bearing the Local 522 logo to express to one another solidarity and pride in their affiliation with their exclusive representative. Firefighters in the Metro and City Fire Departments wear the Local 522 logo on their t-shirts and caps. Firefighters across the nation wear apparel bearing the insignia of firefighter-only unions. The ARFF firefighters are proud of their success in achieving a firefighters-only bargaining unit for themselves and wish to express that pride through the wearing of union insignia in the same way that the firefighters from local municipal fire departments, responding to emergencies at the Airport alongside the ARFF firefighters, do. In prohibiting the wearing of union insignia while on duty, the County's "No Union Logo" policy is, on its face, presumptively invalid and violative of the MMBA.

The County does not dispute that there is a statutorily-protected right to wear union insignia but contends that it extends only to buttons and pins. The County offers no logical argument why a protected right to wear union insignia transforms into an unprotected right because the insignia appears on clothing rather than on an object that is attached to clothing. This distinction is not material to the question involved here.[30] (See, e.g., *Guard Publishing Company v. NLRB* (D.C. Cir. 2009) 571 F.3d 53 [prohibition on wearing at work union armband by employee in position requiring interaction with the public]; *World Color USA Corp.* (2014) 360 NLRB No. 37 [prohibition on wearing at work union baseball caps]; *Goodyear Tire and Rubber Company, supra,* 357 NLRB No. 38 [prohibition on wearing at

[30] The County takes issue with Local 522's reliance on two NLRB cases cited for the proposition that the right to wear union insignia extends beyond buttons and pins, contending that neither decision contains an analysis of the law or discussion of the issue. While we agree with the County's observations about the analytical usefulness of *Devilbliss Company* (1953) 102 NLRB 1317 and *Overnite Transportation Company* (1981) 254 NLRB 132, there are ample other NLRB decisions supporting Local 522's proposition, which contain more explicit legal analyses, as seen in the parenthetical following this footnote in the main text.

work union t-shirts making reference to returning retirees as SCABs]; *Allstate Power Vac., Inc.* (2009) 354 NLRB No. 111 [prohibition on wearing at work union decals on hardhats and t-shirts that do not mock or adversely portray the employer's product]; *Great Plains Coca-Cola Bottling Company* (1993) 311 NLRB 509 [prohibition on wearing at work union jacket].)[31] As the NLRB held in the *Great Plains Coca-Cola Bottling Company* decision, the NLRB "treats an article of clothing the same as a button," citing *Mack's Supermarkets, Inc.* (1988) 288 NLRB 1082, a case involving, in part, a prohibition on the wearing of union caps inside and outside of the employer's stores.

Likewise, the fact that an employer maintains a dress code or uniform policy does not in and of itself justify a prohibition on wearing union insignia. (See *World Color USA Corp., supra,* 360 NLRB No. 37 [mere maintenance of overbroad hat policy construed to prohibit statutorily-protected activity found to violate the NLRA independent of enforcement of policy, citing *Guardsmark LLC v. NLRB* (D.C. Cir. 2007) 475 F.3d 369, 375]; *Great Plains Coca-Cola Bottling Company, supra,* 311 NLRB 509 [employee told by supervisor that union jacket unacceptable and only Coca-Cola jackets allowed to be worn.) In *World Color USA Corp.*, the employer argued that the union cap would interfere with the company's public image. The NLRB found that the company failed to show that the union caps would detract from its employee presentation desires or objectives, stating that "[a]n employer cannot avoid the

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[31] See also, 1 Higgins, The Developing Labor Law (5th ed. 2006) chapter 6.II.B.1.e, page 117:

> In *Republic Aviation* the Supreme Court upheld, as a protected right, the right of employees to wear union buttons while at work. This general rule also encompasses the right to wear other emblems, such as badges and t-shirts, demonstrating union support.

(Fn. omitted.)

'special circumstances' test simply by requiring its employees to wear uniforms or other designated clothing, thereby precluding the wearing of clothing bearing union insignia." (*World Color USA Corp., supra,* 360 NLRB No. 37.)

Here, the County argues that the firefighters are required to wear a public safety uniform, which is distinct from other types of work apparel. The County offers no logical argument why a protected right to wear union insignia transforms into an unprotected right because the insignia appears on apparel worn by a firefighter rather than on apparel worn by those employed in other classifications or occupations. On the specific protected right involved here, the right to wear union insignia, the law does not divide employees into protected and unprotected categories by occupation, nor should it. Under the *Carlsbad, supra,* PERB Decision No. 89, burden shifting framework, special circumstances relating to an employee's classification or occupation may warrant a prohibition or limitation on the right to wear union insignia at work upon a concrete, fact-based evidentiary showing. Absent such a showing, the statutorily-protected right to wear union insignia is absolute.

The County contends that one of the cases relied on by Local 522 on this point[32] supports the County's position, not that of Local 522. The County is correct that the court in

[32] Another case relied on by Local 522 is *Sheriff of Worcester Cnty. v. Labor Relations Comm'n* (2004) 60 Mass. App. Ct. 632, 805 N.E.2d 46. While we agree with the County that this case is not binding precedent and involves union pins rather than union apparel, the court's discussion is nonetheless of note. As Local 522 points out, Massachusetts' labor relations statute is similar to the MMBA in providing employees with the right to form, join or assist any employee organization for the purpose of collective bargaining. The court states:

> We agree with the sheriff that "the need for discipline, uniformity and an absolutely impartial appearance exists at the Jail." People with violent tendencies live at the jail. A paramilitary organization and command structure are essential for the safety of inmates and correction officers alike. But the long period before April 22, 1997, during which the sheriff had no policy prohibiting pins, and

U.S. Dep't of Justice, I.N.S., Border Patrol, El Paso, Tex. v. Fed. Labor Relations Auth. (5th Cir. 1992) 955 F.2d 998 held that border patrol agents required to wear a prescribed Immigration and Naturalization Service (INS) uniform had no statutorily-protected right to wear a union lapel pin. This decision, however, does not stand for the proposition proffered by the County that firefighters who are required to wear a public safety uniform do not enjoy the right, absent special circumstances, to wear union insignia. The court employed the same test used in private sector cases, stating that "the employee has the right to wear a union pin on his uniform absent special circumstances." (*Id.* at p. 1004.) In describing the type of special circumstances found to justify a prohibition on the exercise of the right to wear union insignia, the court said that "[i]n cases where special circumstances were found to exist, there is evidence linking the wearing of union insignia to a disruption of the employer's operation's [sic] and maintenance of safety and discipline." (*Ibid.*) The court then concluded that the employer had proven the presence of special circumstances warranting the restriction on the employees' right to wear union insignia.[33]

> the fact that his April 22 edict appears to have fallen with particular force on union pins, supports the commission's conclusion that no special circumstances connected to the jail's mission, command structure, need for discipline or other functional requirement justified the sheriff's unilateral prohibition of the union buttons employees presumptively were entitled to wear. See *Boise Cascade Corp.*, 300 N.L.R.B. 80, 84 (1990) (evidence that pins were worn for six months without incident was "most important point" in determining absence of special circumstances).

(*Sheriff of Worcester Cnty. v. Labor Relations Comm'n, supra,* 60 Mass. App. Ct. 632, 643, 805 N.E.2d 46, 54.)

[33] The proposed decision cites to another FLRA case involving the INS, *I.N.S. v. Fed. Labor Relations Auth.* (9th Cir. 1988) 855 F.2d 1454, which determined, under the operative statutory language, that INS inspectors required to wear an official INS uniform do not have a statutorily-protected right to wear union insignia regardless of special circumstances. This case

Having concluded that Local 522 has met its burden of proof, the burden shifts to the County under *Carlsbad, supra,* PERB Decision No. 89, to prove its affirmative defense of operational necessity, i.e., special circumstances. The County has not met its burden, nor did the County attempt to meet its burden. Instead, the County rested its case on the mistaken belief that the basic right to wear union insignia as an expression of union solidarity and pride

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is an outlier and commands no persuasive value in any analysis on the issue presented. As the 5th Circuit explained:

> We cannot immediately accept the conclusion the Ninth Circuit reached because in assessing management's right to require unadorned uniforms, it simply assumed that management's statutory right to require a uniform supersedes the employee's statutory right to assist labor unions by wearing a pin. Nothing in the Statute, however, subordinates the rights granted to employees under section 7102 to the rights granted management under section 7106(b)(1). Since section 7106(b) does not explicitly supersede other rights granted under the chapter, the FLRA's conclusion that management's statutory right to prescribe a uniform does not automatically include the right to prohibit union pins is reasonable and entitled to deference.

(*U.S. Dep't of Justice, I.N.S., Border Patrol, El Paso, Tex. v. Fed. Labor Relations Auth. supra,* 955 F.2d 998, 1003.) The 9th Circuit's decision was also called into doubt by the FLRA itself, the federal agency charged with the responsibility for enforcement, in a case involving INS border patrol agents required to wear INS uniforms. As stated:

> We respectfully disagree with the [9th Circuit] court's assessment of the rights granted by section 7102 of the Statute and our use of the special circumstances balancing test. However, in view of the court's decision, we take this opportunity to more fully explicate the statutory basis for allowing employees here to wear a union lapel pin.

(*U.S. Dep't of Justice Immigration & Naturalization Serv. United States Border Patrol San Diego Sector San Diego, California (Respondent) & Am. Fed'n of Gov't Employees Local 1613 Nat'l Border Patrol Council (Charging Party),* (Nov. 30, 1990) 38 F.L.R.A. 701, 712.) The decision went on to explicate the statutory basis for its conclusion that "use of the special circumstances standard, of course assumes that employees covered by the statute have a basic right to wear union insignia." (*Id.* at p. 718.)

does not belong to firefighters required to wear public safety uniforms. The County introduced no evidence supporting the existence of special circumstances warranting the "No Union Logo" policy.[34] The hearing record supports the opposite conclusion, i.e., that no special circumstances exist.

Firefighters from neighboring municipal fire departments wear t-shirts bearing the Local 522 logo, and respond to emergencies at the Airport wearing the Class B uniform t-shirt without the uniform shirt. By their example, we discern no evidence that would support an argument by the County that special circumstances exist to deprive ARFF bargaining unit employees the right to wear uniform apparel bearing the union logo while on duty. Rice confirmed that as a manager in the Metro Fire Department he encountered no problems with firefighters under his command wearing the uniform t-shirt bearing the Local 522 logo. When asked at the formal hearing whether such practice caused operational problems, confusion in responding to calls, confusion with the public or impairment of operations, he responded in the negative to each question.

After Local 522 became the exclusive representative of the ARFF firefighters, the Class B uniform t-shirt, cap and sweatshirt bearing the Local 522 logo started to be worn in public and at the fire station. This practice caused no impact other than the wearer of the

[34] Although the County introduced no evidence at the formal hearing of special circumstances warranting the "No Union Logo" policy, McCasland was asked on direct examination the following question: "[W]hat is the basis for only allowing the Airport logos on the T-shirts?" He replied that it was "to comply with the Airport's policy for branding." SOP 100-01, however, removed the requirement that logos on Class B uniform t-shirts, job shirts and sweatshirts, and caps comply with the SCAS Brand Guidelines. More to the point, the Brand Guidelines apply only to SCAS logos. Moreover, as stated above, an employer cannot avoid the "special circumstances" test by imposing requirements that may be construed to preclude the wearing of clothing bearing union insignia. (See *World Color USA Corp., supra,* 360 NLRB No. 37.)

apparel occasionally being told to take it off. Also, every October is National Breast Cancer Awareness month. In support thereof, the firefighters in the Metro and City Fire Departments wear pink uniform t-shirts bearing the Local 522 logo. The ARFF firefighters have been allowed to do the same for the last three years. It is presumed from the County's approval of such practice that the wearing of the t-shirt bearing the Local 522 logo during the month of October has caused no problems notwithstanding its pink color or union insignia. It is also presumed from the County's approval of the Local 522 logo on sweatpants and shorts that such practice similarly has posed no problems.

The firefighters seek the right to wear the Class B uniform t-shirt, cap and sweatshirt, and sweatpants and shorts *primarily* for wear at the station and outside of public view. When in public, firefighters are wearing their Class B uniform t-shirt under their Class B uniform shirt 90 percent of the time. It is evident from the uneventful wearing of uniform apparel bearing the Local 522 logo by the firefighters at Metro and City Fire Departments, the uneventful wearing of uniform apparel bearing the Local 522 logo by firefighters from all fire departments during the October Breast Cancer Awareness observance, and the uneventful wearing of uniform and other apparel bearing the Local 522 logo by the ARFF bargaining unit employees prior to implementation of the "No Union Logo" policy that the "No Union Logo" policy is not grounded in a fact-based rationale that meets the special circumstances standard.

There is not one scintilla of evidence in the hearing record that wearing Class B uniform and other (physical fitness and sleepwear) apparel bearing the Local 522 logo would detract from the firefighters' professional appearance, interfere with the command structure under which the firefighters operate, disrupt their operational mission or objectives, intrude on any managerial prerogative including the need to maintain discipline and assure safety at the

jobsite or otherwise cause any problems or difficulties for the County in providing rescue and firefighting services at the airport facilities served by ARFF.[35] The failure of the County to mount a defense of its "No Union Logo" policy based on special circumstances is likely best explained by the absence of any conceivable special circumstances on which to base such a defense. In any event, the County failed to meet its burden of proving special circumstances. Therefore, under the test set forth in *Parks, supra,* PERB Decision No. 1026-S, in the absence of special circumstances, we conclude that the firefighters have a statutorily-protected right to wear the Class B uniform t-shirt, cap and sweatshirt bearing the Local 522 logo while on duty. This right also applies to physical fitness and sleepwear apparel, including sweatpants and shorts, bearing the Local 522 logo worn during off-duty standby.

Denial of the Right to Represent – the (b) Violation

The Board has found a section (b) violation where the employer's conduct interfered with, or tended to interfere with, the exclusive representative's ability and right to represent bargaining unit employees. (*San Francisco Unified School District* (1978) PERB Decision No. 75; *Santa Monica Community College District* (1979) PERB Decision No. 103.) The

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[35] As mentioned above, the County did not argue special circumstances let alone the following point, but it bears mention that public exposure to the Local 522 logo on Class B uniform apparel at the Airport would not alone constitute special circumstances warranting the "No Union Logo" policy. See footnote 30, *ante*. As the D.C. Circuit court stated:

> The claim that Kangail's appearance implicates a special circumstance simply because he interacts with the public is contrary to the NLRB's longstanding rule that "customer exposure to union insignia alone is not a special circumstance allowing an employer to prohibit display of union insignia by employees."

(*Guard Publishing Company v. NLRB, supra,* 571 F.3d 53, 61, quoting *Flamingo Hilton-Laughlin* (1999) 330 NLRB 287, 292.)

potential representational right that is implicated where an employer, absent special circumstances, has implemented a ban on wearing the union logo at work is the right of the exclusive representative to communicate with its members at the work sites. The source of this right is found in the right of access. In the past, the Board has held that harm to employees' protected rights *alone* does not form the basis for an independent violation of the exclusive representative's right to represent (*State of California (Franchise Tax Board)* (1992) PERB Decision No. 954-S). The Board in *Franchise Tax Board* stated that "[a] showing of theoretical impact is insufficient." (*Id.* at p. 4) We view the issue differently.

The harm to employees' protected rights and the harm to employee organizations' protected rights are inseparable in this factual setting.[36] The County's "No Union Logo" policy is a policy whose target *is* Local 522. After all, Local 522's insignia *is* the insignia that is banned under the policy. Local 522 has just as much an interest in having its logo worn as the bargaining unit employees have in wearing it. By prohibiting bargaining unit employees from expressing their pride through the wearing of union insignia, Local 522 is being deprived an important organizational tool. Through the wearing of union insignia, a union fosters solidarity amongst its members and communicates a message of support. A ban on union logos does not present theoretical harm to the employee organization. It presents an existential harm that goes to the heart of a union's main organizational objective --- building a strong, unified base. And, communicating that unity and strength to the employer is equally as important. Accordingly, we conclude that the County interfered with protected employees'

[36] Our conclusion that evidence establishing an "a" violation concurrently establishes a "b" violation is limited to cases involving policies prohibiting or placing limitations on the wearing of union insignia at work absent special circumstances. In other types of interference cases, establishing an "a" violation may not necessarily be sufficient to establish a "b" violation. It will depend on whether the harm to the employee organization's representational rights is as direct as it is in this setting.

rights and, by the same conduct, concurrently denied Local 522 its right to represent bargaining unit employees when the County unilaterally implemented the "No Union Logo" policy.

ORDER

Based on the foregoing findings of fact, conclusions of law, and the entire record in this case, it is found that the County of Sacramento (County) violated the Meyers-Milias-Brown Act (MMBA), Government Code section 3500 et seq. when it unilaterally implemented a blanket "No Union Logo" policy prohibiting bargaining unit employees from wearing clothing bearing the Sacramento Area Firefighters, IAFF Local 522 (Local 522) logo while on duty.

Therefore, pursuant to MMBA section 3509, subdivision (b), it is hereby ORDERED that the County, its administrators and representatives shall:

A. CEASE AND DESIST FROM:

1. Interfering with protected employee rights by prohibiting firefighters in the Aircraft Rescue & Firefighting Division Unit 30 from wearing the Class B uniform t-shirt, cap and sweatshirt bearing Local 522 logo while on duty; and by prohibiting them from wearing physical fitness and sleepwear apparel, including sweatpants and shorts, bearing the Local 522 logo during off-duty standby.

2. Denying Local 522 the right to represent bargaining unit employees by prohibiting firefighters in the Aircraft Rescue & Firefighting Division Unit 30 from wearing the Class B uniform t-shirt, cap and sweatshirt bearing the Local 522 logo while on duty; and by prohibiting them from wearing physical fitness and sleepwear apparel, including sweatpants and shorts, bearing the Local 522 logo during off-duty standby.

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

1. Rescind the "No Union Logo" policy as memorialized in Battalion Chief John Conneally's e-mail messages of October 20 and 27, 2011.

2. Within ten (10) workdays following the date this decision is no longer subject to appeal, post at all locations where notices are customarily posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the County, indicating that it will comply with the terms of this Order. Such posting shall be maintained for a period of 30 consecutive workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material. In addition to the physical posting requirement, the Notice shall be posted by electronic message, intranet, internet site and any other electronic means customarily used by the County to regularly communicate with its employees in the bargaining unit represented by Local 522.

3. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of the Public Employment Relations Board, or the General Counsel's designee. The County shall provide reports, in writing, as directed by the General Counsel or his/her designee. All reports regarding compliance with this Order shall be concurrently served on Local 522.

Members Huguenin and Winslow joined in this Decision.

APPENDIX

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

After a hearing in Unfair Practice Case No. SA-CE-787-M, *Sacramento Area Fire Fighters, IAFF Local 522 v. County of Sacramento*, in which all parties had the right to participate, it has been found that the County of Sacramento violated the Meyers-Milias-Brown Act (MMBA), Government Code section 3500 et seq.

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

A. CEASE AND DESIST FROM:

1. Interfering with protected employee rights by prohibiting firefighters in the Aircraft Rescue & Firefighting Division Unit 30 from wearing the Class B uniform t-shirt, cap and sweatshirt bearing the Sacramento Area Firefighters, IAFF Local 522 (Local 522) logo while on duty; and by prohibiting them from wearing physical fitness and sleepwear apparel, including sweatpants and shorts, bearing the Local 522 logo during off-duty standby.

2. Denying Local 522 the right to represent bargaining unit employees by prohibiting firefighters in the Aircraft Rescue & Firefighting Division Unit 30 from wearing the Class B uniform t-shirt, cap and sweatshirt bearing the Local 522 logo while on duty; and by prohibiting them from wearing physical fitness and sleepwear apparel, including sweatpants and shorts, bearing the Local 522 logo during off-duty standby.

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

Rescind the "No Union Logo" policy as memorialized in Battalion Chief John Conneally's e-mail messages of October 20 and 27, 2011.

Dated: _____ COUNTY OF SACRAMENTO

By: _____
Authorized Agent

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