STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 521, Charging Party, v. FRESNO COUNTY SUPERIOR COURT, Respondent.	Case No. SA-CE-14-C PERB Decision No. 2517-C February 27, 2017

Appearances: Weinberg, Roger & Rosenfeld by Sean D. Graham, Attorney, for Service Employees International Union Local 521; Wiley, Price & Radulovich by Joseph E. Wiley, Attorney, for Fresno County Superior Court.

Before Winslow, Banks and Gregersen, Members.

DECISION

BANKS, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Fresno County Superior Court (Court) and cross-exceptions by Service Employees International Union Local 521 (SEIU) to the proposed decision (attached) of a PERB administrative law judge (ALJ). The complaint challenged the lawfulness of two personnel rules adopted by the Court in 2009 to regulate employee dress and appearance and the solicitation and distribution of literature. The ALJ concluded that the Court's personnel rules violated the Trial Court Employment Protection and Governance Act (Trial Court Act)[1] and PERB Regulations[2] by: (1) prohibiting employees from wearing union regalia anywhere in the courthouse; (2) restricting employees and their representative from

[1] The Trial Court Act is codified at Government Code section 71600 et seq. Unless otherwise indicated all statutory references are to the Government Code.

[2] PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

distributing literature during nonworking time in nonworking areas; and (3) banning the display of union writings and images in all work areas visible to the public.[3] In addition to a cease-and-desist order and posting requirement, the proposed remedy ordered the Court to rescind Personnel Rule section 11.1 to the extent it categorically bans wearing or displaying union writings, images or regalia in all work areas and to rescind Personnel Rule section 17.3 to the extent it prohibits distribution of union literature in nonworking areas.[4]

The Court takes exception to several findings of fact and conclusions of law, and to the proposed remedy, including the ALJ's conclusion that PERB has jurisdiction to order a remedy which limits how a trial court judge may control his or her courtroom. The Court also excepts to the ALJ's ruling granting SEIU's post-hearing motion to amend the complaint. SEIU generally urges the Board to adopt the ALJ's factual findings and legal conclusions, including the above findings of liability, but cross-excepts to the ALJ's findings and conclusions that the Court's restrictions on workplace solicitation were lawful. SEIU also cross-excepts to the proposed remedy as inadequate in various respects.

The Board has reviewed the proposed decision, the parties' exceptions, cross-exceptions, responses and supporting briefs, and the entire record in light of applicable law. Based on this review, we conclude that the ALJ's findings of fact are adequately supported by the record and, except where noted below, his conclusions of law are well-reasoned and in

[3] Specifically, the ALJ concluded that the Court's rules violated Trial Court Act sections 71631 and 71635.1 and constituted an unfair practice under Trial Court Act section 71639.1, subdivision (c), and PERB Regulation 32606, subdivision (a). By this conduct, the ALJ concluded that the Court had also denied SEIU the right to represent employees in violation of section 71633 and constituted an unfair practice under section 71639.1, subdivision (c), and PERB Regulation 32606, subdivision (b).

[4] Although the proposed decision issued on July 25, 2014, approximately seven months after publication of the Board's decision in *City of Sacramento* (2013) PERB Decision No. 2351-M, which supplemented the Board's traditional paper notice posting requirement with electronic notice (see *Id*. at pp. 44-45), the proposed remedy made no reference to electronic posting.

accordance with applicable law.[5] We therefore adopt the proposed decision as the decision of the Board itself as modified and supplemented by the discussion below.

BACKGROUND

The ALJ's factual findings are supported by the record and we recite here only those facts necessary to provide context for the discussion below of the parties' exceptions and cross-exceptions.

The Court has approximately 550 employees at 11 facilities. SEIU is the exclusive representative of Court employees who work in various areas of the Court, including customer service windows, workstations behind customer service windows, offices near judges' chambers, separate offices and in the courtrooms. These work areas are visible to the public in varying degrees, and some SEIU-represented employees rotate from public to nonpublic work areas during their shifts. Although SEIU-represented employees include some employees who serve as mediators in child custody or other disputes, SEIU does not represent the Court's bench officers who are responsible for hearing and deciding the various civil, family law, probate, juvenile dependency, juvenile delinquency, criminal, traffic, and specialty matters before the Court.

Until December 1, 2009, the Court had no written policies prohibiting clothing or the display of union writings, images or regalia, nor written policies prohibiting solicitation and/or the distribution literature during nonworking time. Some SEIU-represented employees routinely wore or displayed union writings, images and/or regalia on clothing, buttons, pins, coffee mugs,

[5] On page 22 of the proposed decision, the first sentence under Point No. 2 "Solicitation" contains a typographical error. The sentence appears as: "In *State of California (Employment Development Department)* (2001) PERB Decision No. 1365a-S *(EDD)*, PERB concluded that an employer could restrict solicitation during nonworking time." However, consistent with the holding of that case, the sentence should indicate that an employer may restrict solicitation during *working* time. Although no party has excepted to this part of the proposed decision and the intended meaning is, arguably, clear from the surrounding context, we correct the editing oversight to avoid confusion regarding Board precedent. (*Morgan Hill Unified School District* (1985) PERB Decision No. 554, pp. 21-22, fn. 13; *Fresno Unified School District* (1982) PERB Decision No. 208, pp. 23-24.)

lanyards, and other items in the courthouse without incident. Until December 1, 2009, SEIU staff and employee representatives routinely distributed literature at employee workstations before work, during meal breaks and after work without incident.

After giving notice and meeting on four occasions and exchanging proposals with SEIU representatives without agreement, on December 1, 2009, the Court unilaterally imposed Personnel Rule sections 1.11 and 17.3. Section 1.11, which governs Court employee dress and appearance, expressly prohibits certain items or categories of clothing, including: "Clothing and/or adornments with writings or images, including but not limited to pins, lanyards, or any other accessories" with the exception of Court-approved clothing and/or adornments bearing the Court logo. Violation of the rule will result in, at minimum, employees being required to use their own time to change the inappropriate item, and at maximum, disciplinary action.

Unless otherwise indicated, Personnel Rule section 17.3 applies to employee solicitation and distribution of literature anywhere on Court property. Section 17.3.1 prohibits Court employees from soliciting "during *working hours* for any purpose unless pre-approved by the CEO" and from distributing literature "during *working time* for any purpose." (Emphases added.) It also prohibits distribution of literature "at any time for any purpose in working areas" as well as the "display [of] writing or images that are not published by the Court in work areas that are visible to the public."

The term "working time" is defined in Personnel Rule section 17.3.2 as follows:

> Working time includes the working time of both the employee doing the soliciting and distributing and the employee to whom the soliciting or distributing is being directed. Working time does not include break periods, meal periods, or any other specified periods during the workday when employees are properly not engaged in performing their work tasks.

The terms "working areas" and "working hours" are not defined.

After adoption of Personnel Rule sections 11.1 and 17.3, SEIU-represented employees ceased wearing or displaying union writings, images or regalia at work, and SEIU staff and employee representatives also ceased distributing literature at employee workstations before work, during meal breaks and/or after work. Instead, they attempted to distribute literature to employees as they entered the Courthouse, which proved less effective for various reasons, including the difficulty in identifying which employees were SEIU-represented.

THE PROPOSED DECISION

After rejecting the Court's jurisdictional arguments, the ALJ considered four issues: (1) Whether the Court could lawfully prohibit employees from wearing union regalia at all times in the courthouse; (2) Whether the Court could lawfully prohibit SEIU and employees from soliciting other employees during working time; (3) Whether the Court could lawfully prohibit SEIU and employees from distributing literature to other employees during working time and in working areas of the courthouse; and (4) Whether the Court could lawfully prohibit employees from displaying any union writings or images in all work areas of the courthouse visible to the public.[6]

The ALJ concluded that the prohibition against wearing union regalia at all times was an overly broad restriction on protected rights and therefore unlawful. The ALJ reasoned that the Court's need to project an image of impartiality and neutrality is a special circumstance that could justify restrictions on union regalia in courtrooms while the court is in session or in a room where a mediation is being conducted, but that the Court cannot categorically prohibit employees from displaying any writings or images relating to union activities in work areas that are visible to the public and may only do so on a case-by-case basis upon a showing of special

[6] In considering the lawfulness of the Court's distribution policy, the ALJ granted SEIU's motion to amend the complaint to separate the solicitation and distribution allegations in the complaint and to allege that the Court's distribution restrictions "during working time for any purpose," and "at any time for any purpose in working areas" interfered with employee and organizational rights guaranteed by the Trial Court Act.

circumstances. The ALJ found that, "[t]he Court did not present sufficient evidence to establish that the mere presence of union regalia, such as a quarter-sized lapel pin, in areas of the courthouse outside the courtrooms/mediation rooms would impair its ability to administer justice." In fact, the ALJ observed that "the opposite is likely true since [SEIU] established that prior to 2009, employees wore union regalia throughout the workday in various areas of the courthouse without incident." (Proposed decision, p. 21.)

The ALJ also concluded that the Court could lawfully prohibit SEIU and employees from soliciting other employees during "working hours" for any purpose without the approval of the Court Executive Officer (CEO), because, according to the proposed decision, PERB and National Labor Relations Board (NLRB) decisional law has long held that, "Working time is for work." (Proposed decision, p. 22.) Although the Court's solicitation rule uses the undefined term "working hours," the ALJ found that it was reasonably intended to incorporate the definition of "working time" found in a separate section of the rule.[7]

The ALJ concluded that the Court could also lawfully prohibit the distribution of literature during working time and in working areas but that, as written, the Court's policy was overly broad in that its definition of "working areas" would reasonably include empty jury rooms and other mixed-use areas that may convert to nonworking areas when not in official use. The proposed decision noted instances in which employees had worn purple SEIU shirts while attending bargaining-related meetings held in a jury assembly room. (Reporter's Transcript (R.T.), Vol. I, pp. 187-188 [Kathleen Artis (Artis)].)

Finally, reasoning that the right to wear clothing with union logos or insignias was no different from the right to display such images in the workplace, the ALJ concluded that the

[7] As discussed below, SEIU cross-excepts to this interpretation of the Court's rule regarding solicitation, arguing that the Court's poor draftsmanship should not permit it to escape liability for the latent ambiguity in the use of a separate and undefined term "working hours."

Court's categorical rule against displaying writings or images in all areas of the courthouse visible to the public was overly broad and therefore unlawfully interfered with protected employee and organizational rights. (Proposed decision, pp. 25-26.) As with his discussion of the Court's dress code, the ALJ found that the Court had not shown that its proffered need to maintain an image of impartiality or neutrality constituted a special circumstance justifying the Court's categorical ban on displaying union writings or images in work areas visible to the public. (Proposed decision, p. 25.)

THE COURT'S EXCEPTIONS

The Court takes exception to several findings of fact, conclusions of law, and the proposed remedy, including the ALJ's conclusion that PERB has jurisdiction to order a remedy which affects how a trial court judge controls his or her courtroom. The Court also excepts to the ALJ's ruling granting SEIU's post-hearing motion to amend the complaint.

SEIU'S CROSS-EXCEPTIONS

SEIU argues that the ALJ erred in concluding that "working hours" is synonymous with "working time" because the sentence defining "working time" appears immediately after the sentence prohibiting solicitation during "working hours." SEIU argues that because the Court's Personnel Manual chose a different term but did not expressly define "working hours" the most reasonable reading of section 17.3.1 is that the Court intended to draw a distinction between "working hours" and "working time," and that "working hours" was intended to encompass the entire workday or all hours when the Court is operating, regardless of whether employees are on duty. SEIU argues that employees should not bear the burden of the Court's poor draftsmanship, since they must do so at the risk of discipline for violating the rule.

Alternatively, SEIU argues that, even if the phrase "working hours" is read to mean "working time" as defined in section 17.3.2, the Court's solicitation is still void for vagueness

because, while it excludes "break periods, meal periods or any other specified periods during the workday when employees are properly not engaged in their work tasks," it never specifies what other periods during the workday were intended to be excluded from the definition of "working time."

SEIU argues that the ALJ erred in his analysis of the Court's distribution policy for the same reasons. It argues that the Court failed to prove that a presumption of legality should attach to its prohibition of union regalia at any place within the courthouse, including the courtrooms and mediation rooms, and that the ALJ did not rule that the Court's restriction on regalia was lawful as applied to any space in the Court, despite the Court's attempt to read such a ruling into the proposed decision.

SEIU also argues that the proposed order, including the notice posting provisions, should be updated to conform to current PERB precedent, including the Board's electronic posting requirement announced in *City of Sacramento, supra,* PERB Decision No. 2351-M.

DISCUSSION

Jurisdiction

The Court argues that the separation of powers doctrine embodied in the California Constitution and Code of Civil Procedure prohibits PERB from ordering any remedy that would impair the manner in which a trial court judge controls his or her courtroom.[8] We disagree. The Legislature directed that complaints alleging any violation of the Trial Court Act

[8] Article III, section 3, of the California Constitution provides: "The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution."

Code of Civil Procedure section 128, subdivision (a)(5), similarly recognizes the power of a trial court to "control in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it, in every matter pertaining thereto."

or of any local rules and regulations adopted by a trial court be investigated as an unfair practice charge and that PERB apply and interpret unfair labor practices consistent with existing judicial interpretations of the Meyers-Milias-Brown Act (MMBA),[9] where the language of the two statutes are the same or substantially similar. (Trial Court Act, §§ 71639.1, subd. (c), 71639.3; *Coachella Valley Mosquito and Vector Control Dist. v. California Public Employment Relations Bd.* (2005) 35 Cal.4th 1072, 1090.) PERB's adjudication of unfair practice allegations under the Trial Court Act no more violates the constitutional separation of powers doctrine nor invades the province of Superior Court judges to control their courtrooms than does the agency's determination that it may adjudicate in the first instance unfair practice disputes between government attorneys and public agencies without intruding into the province of the judicial branch to regulate the practice of law. (*County of San Bernardino (Office of the Public Defender)* (2015) PERB Decision No. 2423-M, pp. 32-34; *Santa Clara County Counsel Attys. Assn. v. Woodside* (1994) 7 Cal.4th 525, 549–553.)

As noted in the proposed decision, the California Constitution also prohibits PERB from declaring one of our statutes unenforceable, or refusing to enforce it, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional. (Cal. Const., art. III, § 3.5.) Because the Court has cited no appellate authority determining that the Trial Court Act or PERB's exclusive initial jurisdiction thereunder to adjudicate and remedy unfair labor practice allegations is unconstitutional, the ALJ appropriately considered the merits of this dispute and, after finding liability, appropriately ordered a remedy in accordance with our legislative grant of authority and PERB precedent.

We next consider the Court's exceptions to the scope of issues considered by the ALJ.

[9] The MMBA is codified at section 3500 et seq.

Amendment to the Complaint and Relation Back

As noted previously, the Court's Personnel Rule section 17.3 prohibits distribution of literature during working time for any purpose. It also prohibits distribution of literature at any time for any purpose in working areas. Paragraph 3 of the complaint alleged that on or about October 21, 2009, the Court implemented two new personnel rules. It then described Personnel Rule section 1.11 as prohibiting clothing or adornments with writing or images and Personnel Rule section 17.3, as prohibiting solicitation or distribution of literature during working hours for any purpose. Although the complaint referenced the prohibition on distribution of literature during working hours for any purpose, it omitted any reference to that part of the Personnel Rule prohibiting distribution of literature "at any time for any purpose *in working areas*." (Emphasis added.)

On July 20, 2011, after the record was closed and briefs had been filed, SEIU moved to amend language in paragraph 3 of the complaint alleging that the Court had unlawfully prohibited employees from soliciting or distributing literature during working hours for any purpose unless pre-approved by the Court, to allege, as a separate and additional unfair practice, that section 17.3 of the Court's personnel rules unlawfully prohibited employees from distributing literature during working time for any purpose, and at any time for any purpose *in working areas*. In the alternative, SEIU requested that its separate allegation pertaining to the distribution of literature "in working areas" be considered as an unalleged violation.

The ALJ granted SEIU's motion to amend the complaint after concluding that the proposed amendment was closely related to allegations of the initial charge, that it related back to material in the charge and complaint and was therefore timely, and that both parties had presented evidence and argument on the issue before the ALJ. (Proposed decision, p. 4.)

The Court opposed SEIU's motion and now excepts to both the ALJ's ruling to permit the amendment and the ALJ's finding of liability on this theory. The Court complains that the amendment added a new legal theory that "departed quite sharply" from the theory alleged in the complaint, by alleging that the Court's otherwise lawful restriction on distribution of literature *in working areas* was somehow unlawful in this particular case. We agree with the Court that the ALJ improperly granted SEIU's motion to amend the complaint, as the motion was untimely under PERB Regulation 32648. However, as explained below, we nonetheless conclude that the ALJ's consideration of this issue was appropriate under the Board's criteria for consideration of unalleged violations.

PERB Regulation 32648 governs amendments to a complaint during a hearing. The regulation provides as follows:

> During hearing, the charging party may move to amend the complaint by amending the charge in writing, or by oral motion on the record. If the Board agent determines that amendment of the charge and complaint is appropriate, the Board agent shall permit an amendment. In determining the appropriateness of the amendment, the Board agent shall consider, among other factors, the possibility of prejudice to the respondent.

(PERB Reg. 32648.)

The ALJ correctly noted that the standard for deciding a proposed amendment to a complaint during a hearing is whether it would result in undue prejudice to other parties. (*Riverside Unified School District* (1985) PERB Decision No. 553, pp. 6-7; *Monterey Peninsula Unified School District* (2014) PERB Decision No. 2381, pp. 37-38; *San Diego Unified School District* (1991) PERB Decision No. 885, pp. 62-63.) If a motion to amend the complaint during a hearing is granted, PERB Regulations also provide the respondent with an opportunity to amend its answer to respond to the new allegations in the amended complaint. (PERB Reg. 32649.) Thus, absent a showing of undue prejudice, a timely amendment closely related

to the allegations in a pending complaint should be allowed in order to serve the principles of economy and finality. (*Cloverdale Unified School District* (1991) PERB Decision No. 911, pp. 23-24; *Inglewood Unified School District* (1990) PERB Decision No. 792, pp. 6-7; *Riverside, supra,* at pp. 4-8.)[10]

The ALJ also correctly observed that, allegations in an amended unfair practice charge or complaint that clarify existing allegations or that add a new legal theory based on the same general set of facts as those previously alleged are said to "relate back" to the date of the original pleading for statute of limitations purposes. (*Office & Professional Employees International Union, Local 29, AFL-CIO & CLC (Fowles)* (2012) PERB Decision No. 2236-M, p. 8; *City of Escondido* (2013) PERB Decision No. 2311-M, pp. 6-7; *Gonzales Union High School District* (1984) PERB Decision No. 410, pp. 18-20.) Thus, assuming the amendment was proper under PERB Regulation 32648, the newly-added allegation concerning the Court's distribution policy was also timely.

However, by its own terms, PERB Regulation 32648 only governs proposed amendments to a complaint made "[d]uring [a] hearing." As noted in the proposed decision, SEIU moved to amend the complaint on July 20, 2011, after the evidentiary record was closed, and opening and reply briefs had already been submitted. (Proposed decision, p. 2.) Although the amendment related back to the allegations in the complaint and was timely for statute of limitations purposes, the motion to amend was not "timely" for the purposes of PERB's Regulation governing amendment of a complaint during a hearing and the undue prejudice standard of Regulation 32648 and PERB decisional law therefore does not apply. Rather, after the record has closed and briefs have been submitted, matters not included in the complaint

[10] An amendment to the complaint is also proper when it reflects the evidence produced at hearing and the theory of law upon which the allegation turns was not affected by the amendment. (*Cloverdale, supra,* at pp. 23-24; *Monterey Peninsula, supra,* at pp. 37-38; *San Diego, supra,* at pp. 62-63.)

may only be considered by meeting the stricter standard for consideration of unalleged violations. (*Tahoe-Truckee Unified School District* (1988) PERB Decision No. 668 (*Tahoe-Truckee),* p. 6.) Unlike the more lenient standards under PERB Regulations 32648 amending a complaint during a hearing, the criteria for considering unalleged matters effectively *presumes* prejudice, unless the charging party can show otherwise by meeting each of the criteria set forth in *Tahoe-Truckee* and similar cases. (*Tahoe-Truckee, supra,* at pp. 5-10; *County of Riverside* (2006) PERB Decision No. 1825-M, p. 10.) We therefore turn to SEIU's motion, in the alternative, to consider whether its allegation that the Court's distribution policy is overly restrictive satisfies the requirements for PERB's unalleged violations doctrine.

Consideration of the Court's Distribution Ban in Working Areas as an Unalleged Violation

Under the Board's unalleged violations doctrine, we may consider allegations not included in the charge or complaint when: (1) the respondent has had adequate notice and opportunity to defend against the unalleged matter; (2) the unalleged conduct is intimately related to the subject matter of the complaint and is part of the same course of conduct; (3) the matter has been fully litigated; (4) the parties have had the opportunity to examine and be cross-examined on the issue; and (5) the unalleged conduct occurred within the same limitations period as those matters alleged in the complaint. (*State of California (Department of Social Services)* (2009) PERB Decision No. 2072-S, pp. 3-4; *Santa Clara Unified School District* (1979) PERB Decision No. 104, pp. 18-19; *County of Riverside* (2010) PERB Decision No. 2097-M.) The evidence justifying application of the unalleged violations doctrine should be expressly stated, so that all parties are aware of the basis for finding that an unalleged violation can be heard without unfairness. (*Fresno County Superior Court* (2008) PERB Decision No. 1942-C, pp. 14-15, 17; see also *Tahoe-Truckee, supra,* PERB Decision No. 668, pp. 5-10.)

1. The Court had adequate notice and opportunity to defend itself.

The notice requirement for PERB's unalleged violations doctrine may be satisfied by a number of circumstances, including when the charging party identifies the issue in its opening statement and argues the issue in its post-hearing briefing. (*Los Angeles County Superior Court* (2008) PERB Decision No. 1979-C, p. 11.) So long as a respondent is informed of the substance of the charge and afforded the basic, appropriate elements of procedural due process, it cannot complain of a variance between administrative pleadings and proof. (*Stearns v. Fair Employment Practice Com.* (1971) 6 Cal.3d 205, 213; see also PERB Reg. 32645 and *County of Riverside, supra,* PERB Decision No. 2097-M, pp. 6-9; see also *Pergament United Sales, Inc. v. NLRB* (2d Cir. 1990) 920 F.2d 130, 135, enforcing (1989) 296 NLRB 333.)

Counsel for SEIU began her opening statement by saying, "The complaint spells out our allegations clearly." (R.T., Vol. I, p. 17.) However, she then discussed various matters ostensibly encompassed by the complaint, including an allegation that the Court's personnel rules permit "[n]o distribution of literature *in working areas* on working time." (R.T., Vol. I, p. 18, emphasis added.) Counsel for SEIU also asserted in her opening statement that SEIU would provide testimony demonstrating that, as a result of the blanket ban on distribution of literature in working areas, SEIU's stewards have found it "very difficult" to distribute information to the organization's members. (R.T., Vol. I, pp. 18-19.)

SEIU's opening brief before the ALJ similarly argued that, while meeting and conferring over the Court's changes to its personnel rules, SEIU's Worksite Organizer Kevin Smith (Smith) advised the Court of a separate case in which a PERB ALJ had reasoned that "courts cannot restrict members from distributing union literature in working areas as long as it is on their own time and does not interfere with court operations." (SEIU Opening Brief,

p. 5.)[11] SEIU's opening brief argued that the Court's distribution restrictions were fatally overbroad because "No definition is provided [for] 'working areas,'" and because, according to various SEIU witnesses, the Court's representatives had asserted during negotiations that SEIU "stewards would not be allowed to distribute literature on court property whether or not it was on work time or non[-]work time." (SEIU Opening Brief, pp. 14-15.) SEIU's opening brief also argued that the Court's distribution rule failed to account for the fact that some areas of the courthouse where employees perform work may, at certain times, cease to be working areas for purposes of both solicitation and distribution. (*Id*. at p. 16.) According to SEIU's opening brief, the Court "cannot lawfully deem its jury rooms, jury assembly rooms, 'dark' courtrooms, employee cubicles and employee desks to be 'working areas' at all times of day" because before work, during lunch periods, and after work, "those spaces are converted to 'nonwork areas' for distribution and solicitation purposes.'" (*Id.* at pp. 16-17, 18.)

Because SEIU's opening statement and its briefing before the ALJ clearly and repeatedly allege that the Court's rule banning distribution of literature "at any time for any purpose in working areas" is "overbroad," the Court had adequate notice of the issue.

2. <u>The unalleged conduct is intimately related to the subject matter of the complaint and is part of the same course of conduct</u>.

Even though they may involve different theories of liability, for purposes of the unalleged violations doctrine, unalleged matters are intimately related to matters included in the charge or complaint when they stem from the same incident or course of conduct. (*County of Riverside, supra,* PERB Decision No. 2097-M, p. 8; *Los Angeles County Superior Court,*

[11] The ALJ took official notice of the proposed decision in PERB Unfair Practice Case No. SF-CE-8-C (*SEIU Local 1021 v. Sonoma County Superior Court*) which issued on October 17, 2008. Because no exceptions were filed, the proposed decision in that case resulted in PERB Decision No. HO-U-950-C, which was binding on the parties to that case but not precedential. PERB may take official notice of matters within its own files and records. (*Antelope Valley Community College District* (1979) PERB Decision No. 97, p. 23; see also *Santa Clara County Superior Court* (2014) PERB Decision No. 2394-C, p. 16.)

supra, PERB Decision No. 1979-C, p. 12; *Nish Noroian Farms v. Agricultural Labor Relations Bd.* (1984) 35 Cal.3d 726, 736.) Here, the Court's personnel rule governing the distribution of literature was the subject of the complaint. Paragraph 3 referenced Personnel Rule section 17.3's prohibition against employees "soliciting or distributing literature during working hours 'for any purpose unless pre-approved by the [Court].'" (Emphasis omitted.) As noted in the proposed decision, the "working time" and "working area" components of section 17.3.1 are closely intertwined and stem from the same course of conduct alleged in the complaint, i.e., the Court's adoption of written personnel rules on or about December 1, 2009. This criterion of the unalleged violations doctrine is therefore satisfied.

3. The issue was fully litigated.

For the purpose of the unalleged violations doctrine, a matter has been fully litigated when both parties have presented evidence on the issue. (*County of Riverside, supra*, PERB Decision No. 2097-M, p. 8.) SEIU Exhibit C consists of a letter, dated October 5, 2009, in which Senior Human Resources Analyst Chelsea Phebus (Phebus) responded to various concerns about the Court's proposed rules raised by SEIU during the meet and confer process. Point No. 5 in Phebus' letter summarized SEIU's position regarding the proposed solicitation and distribution policy as follows: "Again our Legal opinion is that the Courts cannot restrict our members from distributing Union literature in working areas as long as it is on their own time and that it does not interfere with court operations." Phebus' letter then reiterated the Court's disagreement with SEIU's position on several issues, including the proposed distribution policy, and advised SEIU that negotiations had reached impasse and that no further changes would be made to the personnel rules. (*Ibid*.; see also R.T., Vol. II, p. 120.)

The record also includes extensive testimony from both SEIU and Court witnesses on the Court's prohibition against distributing literature "at any time for any purpose in working

areas." Smith testified on direct examination and in rebuttal that, even before adoption of the new rules, he had instructed SEIU stewards not to distribute literature on working time, and that he had no reason to believe that SEIU's stewards had ever done so. (R.T., Vol. I, pp. 30-31; see also Vol. II, p. 166.) According to Smith, "the bigger concern with" the Court's new personnel rules was the language prohibiting SEIU's stewards from distributing literature at "any time for any purpose in working areas." (R.T., Vol. I, pp. 33-34, 41-42.)

One problem with the distribution rule, according to Smith, is the ambiguity in the term "working area." Various SEIU witnesses testified, and the Court's Assistant Court Executive Officer Sharon Morton (Morton) confirmed, that several "working areas" in the Court, including unused courtrooms and jury rooms, are routinely used by employees for their lunches and breaks. (R.T., Vol. II, pp. 96-97, 103, 104-106, 114 [Morton].) Morton testified that her own office includes a conference room with a refrigerator, sink and cupboards, which is used as an employee breakroom "if nobody is using it for a meeting." (Vol. II, p. 99.) Senior Child Custody Recommending Counselor and SEIU Steward Dawn Keller (Keller) also gave undisputed testimony about a mixed-use room in the Sisk Courthouse that serves as both a file room and a break room, depending upon an employee's schedule and the time of day. (R.T., Vol. I, pp. 63-64; see also pp. 162-163 [Artis].) Smith and other SEIU witnesses also testified that during the meet-and-confer process, the Court's representatives had indicated that the phrase "working areas" includes the entire courthouse, and that SEIU stewards "would not be allowed to distribute literature on Court property whether it was on work time or non[-]work time," an interpretation which the Court denies. (R.T., Vol. II, p. 172; see also pp. 170-171 and Vol. I, pp. 34, 39 [Smith]; Vol. II, pp. 174-176 [Doreen Perkins (Perkins)].)[12]

[12] The parties dispute whether, during negotiations, the Court took the position that the term "working areas," as used in Personnel Rule section 17.3.1, was intended to encompass the entire courthouse. There is no dispute, however, that the Court intended to ban distribution of

A related problem with the Court's distribution rule, according to Smith, was that, even assuming SEIU had asked for and obtained permission from the Court's CEO to distribute literature "during working time," there remained ambiguity about whether stewards would separately violate that part of the rule banning distribution of literature "at any time for any purpose in working areas." Indeed the express wording of this section, suggested that no exceptions would be allowed "at any time" or "for any purpose" *in any working areas*. (R.T., Vol. I, p. 34 [Smith].)

Keller gave extensive testimony about, among other things, her efforts to inform bargaining unit members about negotiations in 2007 by distributing literature and other materials in her office, in other mediators' offices, and in the family support unit in the lower level of the Fresno County Plaza Building. (R.T., Vol. I, p. 68.) Although Keller generally made her rounds before work, during her lunchtime or after work, sometimes other employees were at their workstations when she was distributing SEIU materials. (*Ibid*.) Keller testified that when distributing literature in working areas, she would typically place the material on an employee's chair or desk face-down. (R.T., Vol. I, pp. 69, 71.) Judicial Assistant Level II Kathleen Artis (Artis) gave similar testimony regarding her distribution of union materials before and after work in the main courthouse. (R.T., Vol. I, pp. 116-119, 142, 165-167; see also Vol. I, pp. 30 and Vol. II, p. 166 [Smith]; Vol. II, pp. 182-183 [Perkins identifying other SEIU stewards following same procedure].) Areas where Smith, Keller, Artis and other SEIU representatives distributed literature before December 1, 2009 fall within the undisputed definition of "working areas" which were subject to the Court's ban on distributing literature after December 1, 2009. (R.T., Vol. II, p. 167 [Smith]; see also R.T., Vol. II, pp. 115-117

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literature in all areas of the courthouse visible to the public, including areas where employees may take their meal or rest breaks. (See R.T., Vol. II, pp. 115-117 [Morton confirming that "working areas" includes areas where employees take breaks, if visible to the public], but cf. Vol. II, pp. 93, 120 [Morton denying that "working areas" includes the entire courthouse].)

[Morton confirming Court's interpretation that "working areas" includes areas visible to the public].)

The Court also elicited extensive testimony regarding distribution of materials in working areas. Counsel for the Court cross-examined Artis about her distribution of SEIU literature after working hours but in work areas. (R.T., Vol. I, p. 142.) The Court also cross-examined Perkins about her practice of distributing literature before and after work in the offices where other court reporters work. (R.T., Vol. II, pp. 17-18.) During cross-examination of Perkins, counsel for the Court read into the record the language of the Court's rule prohibiting distribution of literature "at any time for any purpose in working areas." (R.T., Vol. II, p. 19.) In response, Perkins testified that her understanding of the rule was that, by expressly prohibiting distribution of literature "at any time in any working area," the Court intended to prohibit distribution of literature, even before or after work or during breaks in working areas. (*Id*. at p. 20.) After questioning Perkins as to her understanding of the temporal restrictions in the Court's rule, i.e., during working time, counsel for the Court turned to questions "about location, work areas," and specifically about distributing literature in mixed-use areas, such as file rooms, jury assembly rooms, conference rooms or other "working areas" where employees also take their breaks. (*Id*. at pp. 21-22.) Perkins was also asked to confirm her understanding that, as a result of the Court's change in personnel rules, she was not allowed to distribute "anything in the courthouse." (*Id*. at p. 23.)

On re-direct, Perkins reiterated her previous testimony that, during the meet and confer process leading up to the Court's adoption of the new rules, the Court's negotiators had stated that the term working areas was not intended to designate "such and such rooms" but "basically it was the courthouse" or "the entire courthouse." (R.T., Vol. II, pp. 34, 36-37, 39.) Not content to let the matter rest, counsel for the Court then conducted re-cross examination of

Perkins on the same topic (*id*. at pp. 42-43, 45-47), before calling Morton as the Court's own witness, who was asked to recall the negotiations with SEIU "about what were work areas and what were not work areas for purposes of the distribution of literature." (*Id*. at p. 63.) Morton then testified at length as to her understanding of the term "working areas" and how it had been explained to SEIU during the meet and confer process over the Court's personnel rules. (*Id*. at pp. 64, 65-66.)

Given the considerable documentary and testimonial evidence on the meaning of "working areas," the parties' pre-implementation discussions of the ban on distributing literature in "working areas," the long-standing practice of SEIU representatives before December 1, 2009 of distributing literature in areas that would become subject to the prohibition, and the Court's recognition of several mixed-use areas throughout the courthouse where employees routinely take meal or rest breaks, the fully litigated requirement of PERB's unalleged violations doctrine has been satisfied.

4. The parties had the opportunity to examine and cross-examine witnesses on the issue.

As noted above, Smith testified that, aside from the Court's ban on distributing literature during working time, "the bigger concern with" the Court's new personnel rules was the language prohibiting SEIU's stewards from distributing literature "at any time for any purpose *in working areas*." (R.T., Vol. I, pp. 33-34, 41-42, emphasis added.) Various SEIU witnesses also gave extensive testimony on their efforts before December 1, 2009 to distribute literature and other materials in working areas before work, during lunchtime and after work. They also testified that sometimes employees were at their workstations when such materials were distributed but that they did not attempt to engage them in conversation or otherwise divert them from their official duties. Counsel for the Court had full opportunity to cross-examine these witnesses on this issue. (R.T., Vol. I, pp. 97-101.)

Both sides also presented extensive witness testimony on the parties' pre-implementation discussions regarding the meaning of "working areas" as it affected the Court's proposed solicitation and distribution rule. SEIU also presented documentary evidence regarding these discussions and demonstrating the parties' disagreement over the lawfulness of the Court banning distribution of literature "at any time for any purpose in working areas." (Charging Party Ex. C.) Because both sides had full opportunity to examine and cross-examine witnesses on the Court's ban on distributing literature "at any time for any purpose in working areas," this requirement of PERB's unalleged violations doctrine has also been met.

5. The unalleged conduct occurred within the limitations period applicable for matters alleged in the complaint.

Because they involve the same conduct, the inclusion of one theory in a complaint reflects a determination by the Office of the General Counsel that other theories arising from the same factual allegations are also timely. (*County of Riverside, supra,* PERB Decision No. 2097-M, p. 8, fn. 5; *Los Angeles Unified School District* (2014) PERB Decision No. 2359, p. 15.) Because the conduct at issue, the Court's ban on distributing literature "at any time for any purpose in working areas" was part of the same personnel rules identified in the complaint as unlawful, the matter is timely and has satisfied all of the other criteria under *Tahoe-Truckee, supra,* PERB Decision No. 668, and similar authority. Accordingly, we address the merits of this allegation below.

Restrictions on Clothing and Displays with Union Messages or Insignia

Under the PERB-administered statutes, the organizational right of access to the workplace is presumed and the burden is on the employer to establish that its regulation is reasonable and necessary under the circumstances to prevent disruption of operations. (*Regents of the University of California* (2012) PERB Decision No. 2300-H, p. 20, fn. 8.) Similarly, PERB has long held that wearing union clothing, buttons or pins in the workplace is protected,

absent special circumstances (*State of California (Department of Parks and Recreation)* (1993) PERB Decision No. 1026-S), a rule we recently affirmed in *County of Sacramento* (2014) PERB Decision No. 2393-M; see also *East Whittier School District* (2004) PERB Decision No. 1727 (*East Whittier*).)

Analogizing to federal cases involving patient-care areas in hospitals, the Court argues that, because of the nature of its operations, its ban on the display of writings or union insignia is entitled to a presumption of legality.[13] According to the Court, the ALJ should have treated all areas of the courthouse that are visible to the public as the equivalent of patient care areas, because they function as part of the Court's constitutional mandate to provide both the appearance and the fact of impartiality and neutrality to all litigants who appear before it.[14] Citing the standard adopted by PERB in *East Whittier, supra*, PERB Decision No. 1727, the Court also argues that it was not required to demonstrate the presence of union regalia would impair or actually had impaired its ability to administer justice by, for example, introducing evidence of complaints from the public. Rather "the Court was simply required to demonstrate that it is reasonable to conclude that regalia, including but not limited to Union regalia, could damage the Court's image of impartiality and neutrality," and that, "a significant amount of evidence" supports such a finding. Under the Court's interpretation, any speech regarding an actual or potential controversy before the Court must be limited to non-public areas to guard against the possibility that a member of the public might see and potentially attribute the views

[13] To the extent the Court makes this same argument with respect to its rules restricting solicitation and the distribution of literature, we find it equally unpersuasive for the same reasons discussed herein.

[14] During its opening statement, counsel for the Court argued to the contrary that one cannot compare a trial court to any other institution, including a school district, a city or county, a retail employer or a hospital. (R.T., Vol. I, p. 21.)

expressed on a button, t-shirt or other item displaying union regalia to the Court. We disagree with these arguments.

In *East Whittier, supra*, PERB Decision No. 1727, the Board majority rejected a categorical rule that special circumstances are inherent to all instructional settings and instead concluded that "the right to wear union buttons attaches in instructional settings as it does elsewhere." (*Id*. at p. 11.) It considered and rejected the contention that a public school district's educational mission would be impaired by undue distraction or disruption if teachers were permitted to wear buttons supporting their bargaining demands in the classroom. The Board majority observed that bargaining-related buttons were potentially one more distraction for students in the classroom but not the kind of distraction that has been recognized as a special circumstance or consideration justifying a ban on displaying union buttons or bargaining demands in the classroom. (*Id*. at pp. 11-12.)

In the present case, some Court employees represented by SEIU have regular contact with the public as part of their duties, while others do not. The record contains little evidence as to particular job classifications and according to Morton's more general testimony, a Court employee's duties and thus the degree of public visibility could change throughout the day. (R.T., Vol. II, pp. 64-65, 83-92.) In any event, the unstated assumption underlying the Court's argument is that the public views *every* employee of the Court, from judges to janitors, as somehow responsible for deciding cases before the Court.[15]

Under *East Whittier*, "the trier of fact must examine the button in its given context to determine whether an objectively reasonable person would find it unduly distracting or disruptive." (*East Whittier, supra,* PERB Decision No. 1727, p. 13.) Similarly, the test for the appearance of impropriety in judicial proceedings is whether a person aware of the facts might

[15] SEIU does not represent the judicial officers who actually hear and decide cases.

reasonably entertain a doubt that the judge would be able to act with integrity, impartiality, and competence. (Code Civ. Proc., § 170.1, subd. (a)(6)(A)((iii); CA ST J ETHICS Canon 2.) An objectively reasonable person would not assume that a Superior Court judge assigned to a case consults with other Court employees on matters before the judge, that a judge necessarily shares the views expressed by other Court employees, or even that a judge is susceptible to pressure from other Court employees who may support an organization or cause which is a potential or actual litigant before the Court. Keller testified that male parties to family mediation sometimes assert that she is biased against them simply because she is female but, as SEIU points out, absent more specific evidence of bias, the Court has no constitutional or other mandate to accommodate such unreasonable concerns.

While the Court is correct that *East Whittier* does not require it to show actual harm, it must at least establish some facts that would make a finding of special circumstances objectively reasonable under the circumstances. As in *East Whittier*, an objectively reasonable person viewing buttons or other regalia worn by Court employees and expressing support for the exclusive representative and/or its bargaining demands would not be attributed to the Superior Court judge assigned to the case. (*East Whittier, supra*, PERB Decision No. 1727, p. 16.)

The proposed decision notes, "[p]rivate-sector cases have concluded that, depending upon the situation, the need to project a certain image may permit an employer to ban union regalia" in areas where employees will have contact with the public. (Proposed decision, p. 18, citing *NLRB v. Harrah's Club* (9th Cir. 1964) 337 F.2d 177, fn. 1 (*Harrah's*).) According to the ALJ, "the Court's need to project an image of impartiality and neutrality is a special circumstance that *could* justify restrictions on union regalia during the actual use of certain locations of the courthouse[,] especially the actual courtrooms and the rooms where mediations

are conducted." (Proposed decision, p. 19, emphasis added.) However, the Court put on insufficient evidence to support a finding of special circumstances and it cannot categorically ban all display of union logos or regalia. Moreover, the Court's history of having no such policy or/and of its lax or non-existent enforcement of any unwritten and apparently unpublicized policy militates strongly against any assertion of special circumstances requiring such a policy now.

For several reasons, *Harrah's, supra,* 337 F.2d 177 and similar cases cited by the Court offer little guidance here. In *Harrah's*, the employer had a long-standing policy prohibiting employees who come into contact with the public from displaying any form of jewelry or other personal adornment on their uniforms, including badges, pins, and buttons showing religious, political or social affiliations. Management consistently and strictly enforced this rule for many years through daily, pre-shift inspections of employees until some employees challenged the rule by wearing union buttons while in public areas. (*Id.* at pp. 177-178.) A major concern for the employer in *Harrah's* was uniformity in appearance to distinguish its employees from the public. While Court employees must dress in a "professional, business-like manner," unlike the employees in *Harrah's*, they are not required to wear identical uniforms. Aside from stock clerks, who wear a standardized uniform, only those Court employees who choose to purchase an optional polo shirt with the court's insignia wear anything approaching a uniform. (R.T., Vol. II, pp. 132-133.) The record also gives no indication that the Court is dependent upon uniformity in appearance of its employees for brand name recognition. (cf. *Burger King Corp. v. NLRB* (6th Cir. 1984) 725 F.2d 1053, 1055.)

The Court's policy against clothing and/or adornments with writing or images is also unlike the facts of *Harrah's*, in that there, the employer's policy was long-standing and consistently enforced over many years. Here, no such policy – written or unwritten – previously

existed and employees testified that, *without incident*, before December 1, 2009 they had routinely worn or displayed items in the workplace that would have violated such a policy, if it had existed at the time.

For the above reasons, we agree with the ALJ that the Court's rules prohibiting employees from wearing union regalia anywhere in the courthouse and the display of union writings and images in all work areas visible to the public were overly broad and interfered with protected rights under the Trial Court Act.

Whether the Court's Restrictions on Distributing Literature Are Overly Broad

As discussed in the proposed decision, the Court's rule governing the distribution of literature is potentially unlawful either with respect to "working time" or with respect to "working areas." First, the sentence prohibiting distribution of literature "during working time for any purpose" is potentially overbroad in that employees do not "clock out" for rest periods. That is, they are paid during their breaks but are not assigned any duties and therefore may be free to distribute literature. However, section 17.3.2 of the Personnel Rule expressly defines "working time" to exclude "break periods, meal periods, or any other specified periods during the workday when employees are properly not engaged in performing their work tasks." Because the rule itself excludes break periods, there can be no claim that the rule impermissibly infringes on employee break time.

SEIU therefore argues that the "working time" prohibition is overly broad because the rule recognizes that "any other specified periods during the workday when employees are properly not engaged in performing their work tasks" are not subject to the prohibition but, aside from lunches or breaks, fails to specify what any of these other periods are. We disagree.

Personnel Rule section 17.3.2 prohibits distribution on "working time," which is defined, in relevant part, as "the working time of both the employee doing the … distributing

and the employee to whom the … [literature] is being directed." As discussed in the proposed decision, PERB and NLRB precedents recognize that "Working time is for work" and an employer rule that relies on that term, without further specification, is in facial compliance with the law. An employer rule that identifies some, but not all exceptions to the term "working time" is not per se unlawful and there was no evidence that this portion of the rule was enforced in an overly broad manner. We therefore find no liability for the Court's prohibition against distribution of literature during "working time," as that term is defined in the Courts' rules. We next consider the Court's prohibition on distributing literature in "working areas."

Personnel Rule section 17.3 governs the distribution of literature "on court property." It provides, in relevant part, that "Employees of the Court may not distribute literature at any time for any purpose in working areas" but includes no identification or definition of "working areas." The Court contends that no further identification or definition is needed and that the prohibition, as stated, is lawful as determined by various authorities. SEIU contends that because of the ALJ's finding that some working areas are also used by employees for breaks, the Court's rule is vague and unlawfully overbroad because employees would reasonably interpret the rule as banning distribution of literature in all "working areas," regardless of whether they are being used for official Court business or for employee breaks. According to SEIU, this latent ambiguity in the Court's distribution rule should be construed against its drafter and employees should not be expected to divine the Court's any undisclosed exception to the ban, when the consequences for wrongly interpreting the rule include loss of pay and discipline. There is also a factual dispute over whether the Court's bargaining representatives told SEIU during negotiations over the proposed rule changes that "non[-]public areas would be considered work stations" for the purposes of solicitation and/or the distribution of literature. (R.T., Vol. II, p. 171.)

The ALJ agreed with SEIU that the rule, as stated, is ambiguous and overly broad in its potential to discourage employees from engaging in protected activity in mixed-use areas during their non-duty time. The Court excepts to this reasoning and to the ALJ's conclusion that its restriction on distributing literature in "working areas" is overly broad because the rule does not take into consideration that, during regularly-scheduled meal breaks or other times when not in use for official Court business, certain working areas of the courthouse convert into nonworking areas. We agree with the ALJ.

In *County of Riverside* (2012) PERB Decision No. 2233-M, a case involving primarily union access rights and, derivatively, employee rights to participate in union activities, we noted the presumptive right of access to California's public facilities by union agents, subject to reasonable regulation. To constitute a "reasonable" regulation of this statutory-protected right, we held that the employer must show that the particular regulation is both: (1) necessary for efficient operations and/or for the health and safety of employees or others; and (2) *narrowly drawn to avoid overbroad, unnecessary interference with the exercise of statutory rights*. (*Id*. at p. 7.) In *Los Angeles Community College District* (2014) PERB Decision No. 2404 (*Los Angeles CCD*), we affirmed the same principle by holding that rules directly affecting *employee* rights must also be narrowly drawn to avoid overbroad, unnecessary inference, including the likelihood that latent ambiguity would chill the exercise of protected activity. (*Id*. at p. 6.)

The requirement that restrictions on protected rights be narrowly drawn follows logically from the PERB and private-sector case law that, absent a showing of special circumstances, the display of union logos, insignia, or non-disruptive messages on clothing or adornments, including buttons, pins, and lanyards, is protected. (*County of Sacramento*, *supra*,

PERB Decision No. 2393-M, p. 20; *Beth Israel Hosp. v. NLRB* (1978) 437 U.S. 483, 495 (*Beth Israel Hosp.*).)

From these and other cases too numerous to cite, it is clear that employees have the statutorily protected right to communicate with each other at the worksite concerning their terms and conditions of employment during nonwork time in nonwork areas. (See, e.g., *Richmond Unified School District/Simi Valley Unified School District* (1979) PERB Decision No. 99, pp. 10, 15.) Employees must be given leeway in the exercise of this right, which may be restricted by the employer only when it has demonstrated that the restriction is necessary to maintain order, production or discipline. (*Long Beach Unified School District* (1980) PERB Decision No. 130, pp. 7-8; *Eastex, Inc. v. NLRB* (1978) 437 U.S. 556, 574.) In circumstances in which employees in a work setting not accessible to the public take their meal or rest breaks in their work area at the same time, the work area is considered a nonwork area during that nonwork time. (*State of California (Employment Development Department)* (2001) PERB Decision No. 1365a-S (*EDD*), p. 9; *G.H. Bass & Co.* (1981) 258 NLRB 140, 143 (*G.H. Bass*).) During such non-duty time, solicitation and the distribution of literature as well as other nondisruptive concerted activities in so-called mixed-use areas, are statutorily protected. (*G.H. Bass, supra,* at p. 143.)

Here, the record includes undisputed evidence of employees in various departments of the Court taking meal or rest breaks in unused courtrooms and jury rooms as well as at their cubicles, desks or other employee workstations, and even in a file room. Because the Court's categorical ban on distributing literature in such mixed-use areas is reasonably susceptible to an interpretation that unlawfully restricts protected activity during employees' non-duty time, we find it overly broad and in violation of the Trial Court Act. (*G.H. Bass, supra,* 258 NLRB

140, 143; see also *Petaluma City Elementary School District/Joint Union High School District* (2016) PERB Decision No. 2485 (*Petaluma*), p. 46.)

The Court attempts to distinguish *G.H. Bass* by arguing that the employer's policy in that case, which was substantively identical to that found in the Court's rule, was facially lawful insofar as it prohibited distribution at any time in working areas and was only unlawful *as applied*, because the employer enforced the prohibition during meal breaks when production stopped and the shop floor converted into a non-working area. The Court argues that, because here there is no evidence in the record that the Court intended to or did in fact limit distribution of literature in work areas at times when they converted to non-work areas, the ALJ erred in finding the Court's policy unlawful. We disagree.

In *G.H. Bass*, the NLRB adopted an ALJ's finding that during the daily, half-hour meal break, "all machines are required to shut down, work stops, and employees punch out, and go off the clock" to take their breaks at their work stations. (*G.H. Bass, supra,* 258 NLRB 140, 144.) Under these circumstances, the ALJ found and the NLRB agreed, that "such areas at lunchtime are in essence lunchrooms or nonworking areas where absent special or unusual circumstances employees are afforded the protection of the Act to distribute literature." (*Ibid*.) Accordingly, the employer was found to have "unlawfully overextended its no-distribution rule to encompass nonworking time in nonworking areas," and thereby interfered with employee rights in violation of section 8(a)(1) of the National Labor Relations Act (NLRA).[16] (*G.H. Bass, supra*, at p. 145.) The employer's enforcement of its no distribution rule, through its reprimand of an employee who had distributed union literature during lunchtime, was not discussed as an interference violation under NLRA section 8(a)(1). Rather, the reprimand was considered and found to constitute an independent violation of NLRA section 8(a)(3), the analog to a

[16] The NLRA is codified at 29 U.S.C. section 151 et seq.

discrimination or retaliation allegation under the PERB-administered statutes. (NLRA, § 158(a)(3).) Because the employer's reprimand in *G.H. Bass* removed any uncertainty as to how it interpreted and applied its policy, there was no need for the NLRB to discuss whether, under the circumstances, the employer's promulgation and maintenance of the rule were sufficient by themselves to *also* interfere with protected employee rights.

However, the absence of that issue in *G.H. Bass* does not mean, as the Court suggests, that PERB has never found an employer policy unlawful when its ambiguity would reasonably tend to chill the exercise of protected rights. Under the decades-old *Carlsbad* standard, a prima facie interference violation is established if the employer's conduct, including its promulgation or maintenance of a rule, *tends to* or does result in harm to employee rights. (*Carlsbad Unified School District* (1979) PERB Decision No. 89 (*Carlsbad*), pp. 10-11; *County of Riverside* (2010) PERB Decision No. 2119-M, pp. 16-23; *Jurupa Unified School District* (2012) PERB Decision No. 2283 (*Jurupa*), p. 29.) Moreover, "[i]n the area of employer rules and directives, PERB does not look favorably on broad, vague directives that might chill lawful speech or other protected conduct." (*Los Angeles CCD, supra,* PERB Decision No. 2404, p. 6, citing *EDD, supra,* PERB Decision No. 1365a-S, p. 10.) Even absent enforcement, the promulgation or maintenance of an employer rule may interfere with protected rights because its ambiguity creates the reasonable possibility of a broad interpretation in the future that would produce a chilling effect on protected activity. (*Santee Elementary School District* (2006) PERB Decision No. 1822, p. 11; *Los Angeles County Federation of Labor v. County of Los Angeles* (1984) 160 Cal.App.3d 905, 908-909.)

The Court's other exceptions largely repeat arguments from its briefs before the ALJ. According to the Court, SEIU's argument that the term "working areas" is overbroad is essentially an allegation that the Court's *application* of its policy reaches areas that are not

legally "working areas" and that the ALJ's finding of liability on this point also depends upon an as applied rather than a facial analysis of the Personnel Rule. The Court argues that the ALJ's consideration of this allegation was improper because no *as applied* theory was alleged in the complaint and thus, the Court had no notice that its enforcement of the policy was at issue until after briefing was completed and SEIU moved to amend the complaint.

However, the evidence that was presented at hearing and the issue that was decided by the ALJ did not concern the Court's *enforcement* of its no distribution policy. Rather, the ALJ considered the Court's policy, including its latent ambiguity, with respect to undisputed testimony regarding numerous mixed-use areas throughout the Court. (R.T., Vol. I, pp. 63-64; see also pp. 162-163 [Artis]; R.T., Vol. II, pp. 96-97, 103, 104-106, 114.) No evidence was necessary or considered in how the Court enforced this policy. Rather, the ALJ reasoned that, without further specification, the Court's prohibition against distribution of literature "at any time for any purpose in working areas" is problematic. The fact that the Court has not taken any adverse action against employees for distributing literature in an empty jury room or other mixed-use areas during non-working time would surely defeat an allegation of discrimination, but it is not dispositive of an interference allegation, which requires no showing that employees subjectively felt threatened or intimidated or were actually discouraged from participating in protected activity (*Petaluma, supra,* PERB Decision No. 2485, p. 42; *Hartnell Community College District* (2015) PERB Decision No. 2452, p. 58, fn. 23.)

The Court also relies heavily on *In re Marriage of Carlsson* (2008) 163 Cal.App.4th 281, 290-291 for the proposition that the trial of a case should not only be fair in fact, but also in appearance. We take no issue with this statement of the law, but we are not persuaded by the Court's argument that its application here conflicts in any way with the exercise of employee rights guaranteed by the Trial Court Act. *Carlsson* concerns a trial court judge who abruptly and

improperly terminated a trial before all parties had had an opportunity to put on evidence. The case nowhere discusses the obligations, if any, of court employees who do not preside over trials or decide cases, to refrain from engaging in what would otherwise be protected conduct under the California and federal labor relations statutes.

The Court also argues that litigants have an absolute constitutional right to the appearance and fact of impartiality and neutrality in the handling of their matters before a court and that it is "eminently reasonable" to conclude that "the party litigating against the Union would objectively and reasonably believe that Court staff displaying writings and images in support of the Union would not be impartial and neutral."

Again, however, the standards for judicial disqualification only extend to situations in which a reasonable person would entertain doubts concerning *the judge's* impartiality. (*In re Wagner* (2005) 127 Cal.App.4th 138; *Briggs v. Superior Court* (2001) 87 Cal.App.4th 312.) Under this standard, there must exist the probability of actual bias on the part of *the judge or decisionmaker* that is too high to be constitutionally tolerable. (U.S. Const. Amend. 14; Cal. Civ. Proc. Code, § 170.1, subd. (a)(6)(A)(iii); *People v. Peyton* (2014) 229 Cal.App.4th 1063.) As a general matter, collective bargaining related speech displayed by employees on buttons or other paraphernalia is "clearly not attributable" to the employer (*East Whittier, supra*, PERB Decision No. 1727, p. 16) and the Court offers no evidence or cogent argument that a reasonable person appearing before the Court would entertain doubts about *a judge's* impartiality because of the apparel, adornments, or visible union affiliations of the Court's *non-judicial* staff. Even the Court's marriage and family counselors, who conduct Court-mandated mediations, are not *decisionmakers* in any meaningful sense. While there is ample authority governing the standards for disqualification and recusal of judges, the Court has cited to no constitutional,

statutory or appellate authority applying these or any other standards to court employees who have no decision-making authority over the cases that come before the court.

The Court's reliance on *NLRB v. Windemuller Electric, Inc.* (6th Cir. 1994) 34 F.3d 384 (*Windemuller*) is also inapposite to both the facts and the law in this case. In *Windemuller*, the employer "scrupulously honored the presumptive right of the employees to wear union insignia on their own clothing," but ordered them to remove union stickers from their company-issued hardhats. (*Id.* at p. 394.) Unremarkably, a federal appellate court concluded that employees had no right to use the employer's personal property to display their union affiliation. The case is factually distinguishable because, unlike the employer in *Windemuller*, the Court's rule does not permit the display of union or other insignia by employees on their own clothing or personal items or in any other medium in any area of the courthouse visible to the public.

The Court apparently acknowledges this factual dissimilarity and instead relies on *Windemuller* for its citation to other federal court opinions holding that a labor union has no right to make use of an employer's real property for the purpose of communicating union messages, as long as the employees are not "beyond the reach of reasonable union efforts to communicate with them" by means that do not trespass upon the employer's property rights. (*Windemuller, supra*, 34 F.3d 384, 394; see also *Lechmere, Inc. v. NLRB* (1992) 502 U.S. 527, 532 and *NLRB v. Babcock & Wilcox Co.* (1956) 351 U.S. 105, 113.) However, PERB has previously considered and rejected the *Lechmere* and *Babcock* line of cases as inapplicable to California public-sector labor relations whose language regarding union access to the workplace is significantly different from the federal statutory and decisional authority. Unlike the NLRA, under the PERB-administered statutes, the right of access is presumed and the burden is on the employer to establish that its regulation is reasonable and necessary to prevent disruption of operations. (*County of Riverside, supra,* PERB Decision No. 2233-M, p. 7; *Regents of the University of*

California, supra, PERB Decision No. 2300-H, p. 20, fn. 8, citing *The Regents of the University of California, University of California at Los Angeles Medical Center* (1983) PERB Decision No. 329-H.) Additionally, the NLRA generally confers rights only on employees, not on unions or their nonemployee organizers. (*Lechmere, supra*, at p. 532; cf. *Babcock, supra*, at p. 113 [recognizing limited exception to property rights of private-sector employers insofar as the employees' "right of self-organization depends in some measure on [their] ability ... to learn the advantages of self-organization from others"].)

In *County of Riverside, supra*, PERB Decision No. 2233-M, we explained that the respective property rights of the employer and the union's need for access to employees are different in private and public-sector labor relations because of "the inherent and substantial distinction between the property interest of the private employer which drives access policy under the NLRA and the public nature of facilities operated in the public interest by employers subject to our statutes." (*Id.* at p. 7, fn. omitted; see also *Omnitrans* (2009) PERB Decision No. 2030-M [identifying but reserving the question].)

The Court's reliance on *Berner v. Delahanty* (1st Cir. 1997) 129 F.3d 20, a First Amendment case, is likewise unpersuasive. Although the decision contains dicta about a judge's responsibility to ensure "[the] courthouse is a place in which rational reflection and disinterested judgment will not be disrupted," the particular restriction at issue in that case, a trial court judge's ban on wearing political buttons in his courtroom, was confined to the courtroom itself and was not applied to all areas of the courthouse visible to the public. (*Id*. at pp.26-27, citations and internal quotations omitted.)

The ALJ similarly reasoned that the Court's need to project an image of impartiality and neutrality is a special circumstance that *could* justify restrictions on union regalia in courtrooms *while the court is in session* or in a room *where a mediation is being conducted*,

but that the Court cannot categorically prohibit employees from displaying any writings or images relating to union activities *in all work areas*, simply because they are visible to the public without showing, on a case-by-case basis, the existence of the special circumstances justifying the scope and purpose of the restriction. The ALJ's reasoning here is fully in accord with PERB precedent. (*County of Sacramento, supra*, PERB Decision No. 2393-M, p. 20; *EDD, supra*, PERB Decision No. 1365a-S, p. 7; see also *Beth Israel Hosp., supra,* 437 U.S. 483, 495.)

Additionally, because the language used in a judicial decision must be understood in the light of the facts and the issue then before the court, an opinion is not authority for a proposition not therein considered. (*Hartwell Corp. v. Superior Court* (2002) 27 Cal.4th 256, 281.) The appellate court in *Berner v. Delahanty* relied on the fact that an attorney is an officer of the court to uphold the trial judge's ban on "lawyers … wearing political paraphernalia in the courtroom" or "participants in the judicial process" taking sides in extraneous political debates while in the courtroom. (*Berner v. Delahanty, supra,* 129 F.3d 20, 27.) Even if these and other passages in from *Berner v. Delahanty* did not clearly indicate that the restriction in that case applied *only* in the courtroom and not throughout the entire courthouse, the case would still provide little, if any guidance here, because it concerns only the First Amendment implications of attorneys, *as officers of the court*, wearing political pins or buttons *while in court*, and not the rights of court employees under a collective bargaining statute to display union affiliations anywhere in the courthouse visible to the public.

The Court's Ban on Solicitation During Working Hours

An employer may lawfully prohibit solicitation during work time, so long as it does so without discrimination. (*EDD, supra*, PERB Decision No. 1365a-S, p. 8; *Petaluma, supra,*

PERB Decision No. 2485, pp. 49-50.)[17] Absent special circumstances, an employer cannot prohibit solicitation in non-working areas, including breakrooms or cafeterias, even though such areas may be accessible to the public as well. (*Beth Israel Hosp., supra,* 437 U.S. 483, 495.)

The proposed decision concluded that the Court's rule on solicitation was lawful on its face because it prohibited solicitation during "working hours" but did not include the more problematic language regarding "working areas" found in the Court's rule governing distribution of literature. Unlike the term "working time," which is defined elsewhere in the Court's rules to exclude meal and rest breaks or other non-duty periods, the term "working hours" is left undefined. SEIU argues that employees should not bear the burden of the Court's poor draftsmanship, since they must do so at the risk of discipline for violating the rule. We agree with SEIU and disagree with the ALJ.

The private-sector cases discussed in the proposed decision observe that "Working time is for work," and that an employer may therefore prohibit solicitation during "working time." (Proposed decision, p. 22, citing *Peyton Packing Co., Inc.* (1943) 49 NLRB 828, 843; see also *Republic Aviation Corp. v. NLRB* (1945) 324 U.S. 793, 801-803.) By contrast, employer rules which prohibit solicitation during "working hours," which would include lunch and meal breaks, unduly restrict employees' right to engage in protected activities, since the employer has no cognizable interest in prohibiting nondisruptive contact between employees and their organizations during their duty-free periods. (S*an Ramon Valley Unified School District* (1982) PERB Decision No. 230, pp. 11-12.) An employer rule that prohibits solicitation or distribution during working hours, but makes no mention of duty-free times during "working hours," such

[17] Although there was undisputed testimony that the Court has enforced its non-solicitation policy in a disparate manner, by allowing two, non-union organizations of employees to solicit on Court property (R.T., Vol. II, pp. 75-76), this issue was neither alleged nor argued and we therefore decline to consider it. (PERB Reg. 32300, subd. (c); *Bellflower Unified School District* (2015) PERB Decision No. 2455, p. 3, fn. 4; *Brawley Union High School District* (1982) PERB Decision No. 266, p. 11.)

as meal or rest periods, when employees may solicit one another or distribute literature, may reasonably be interpreted as authoring no such activities during those duty-free periods of the day. (*Petaluma, supra*, PERB Decision No. 2485, p. 46.)

Such is the case here. Had the Court stuck with its definition of "working time," its rule banning solicitation would merely re-state the PERB and private-sector decisional law. Instead, it chose to introduce a separate and undefined term "working hours," which our precedents recognize as ambiguous and overly broad. (*San Ramon, supra*, PERB Decision No. 230, pp. 11-12.) We therefore decline to adopt that portion of the proposed decision finding no liability for the Court's rule banning solicitation during "working hours" and hold instead that the rule is overly broad and therefore interferes with rights protected by the Trial Court Act.

CONCLUSION

For the foregoing reasons and based on the entire record, we adopt the ALJ's conclusions that the Court violated the Trial Court Act and PERB Regulations by: prohibiting employees from wearing union regalia anywhere in the courthouse; restricting employees and their representative from distributing literature during nonworking time in nonworking areas; and banning the display of union writings and images in all work areas visible to the public. Unlike the ALJ, we conclude that the Court's rule governing solicitation also interfered with protected rights by prohibiting solicitation during "working hours" without further specification that non-duty periods may occur within "working hours" during which employees may engage in nondisruptive solicitation.

ORDER

Based on the foregoing findings of fact and conclusions of law and the entire record in this case, it is found that the Fresno County Superior Court (Court) violated the Trial Court Employment Protection and Governance Act (Trial Court Act), Government Code

section 71600 et seq. and Public Employment Relations Board (PERB) Regulations (Cal. Code Regs., tit. 8, § 31001 et seq.) by adopting personnel rules which: (1) prohibit employees from wearing union regalia anywhere on Court property; (2) prohibit employees from displaying union writings and images in all work areas of the Court visible to the public; (3) prohibit employees and the authorized agents of their representative from distributing literature in nonworking areas of the Court during nonworking time; and (4) prohibit solicitation among employees during "working hours" without regard to meal and rest breaks or other non-duty periods. This conduct interfered with protected rights of the Court's employees in violation of the Trial Court Act sections 71631 and 71635.1 and constituted unfair practices under the Trial Court Act section 71639.1, subdivision (c), and PERB Regulation 32606, subdivision (a). The Court's conduct likewise interfered with the right of Service Employees International Union Local 521 (SEIU) to represent the Court's employees in their employment relations in violation of Trial Court Act section 71633, which also constituted an unfair practice under the Trial Court Act section 71639.1, subdivision (c), and PERB Regulation 32606, subdivision (b).

Pursuant to section 71639.1 of the Government Code, it hereby is ORDERED that the Court and its representatives shall:

A. CEASE AND DESIST FROM:

1. Interfering with employees' right to communicate with each other in the work place.

2. Denying SEIU the right to represents its employees.

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

1. Rescind those portions of sections 1.11 and 17.3 of the Personnel Manual to the extent they: (1) categorically prohibit employees from wearing union regalia in the courthouse; (2) prohibit the distribution of union literature during nonworking time in

nonworking areas; (3) categorically ban the display of union writings and images in all work areas visible to the public; and (4) prohibit solicitation among employees during "working hours" without regard to meal and rest breaks or other non-duty periods.

2. Within ten (10) workdays of the service of a final decision in this matter, post at all work locations where notices to employees of the Court are customarily posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the Court, indicating that it will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. In addition to physical posting of paper notices, the Notice shall be posted by electronic message, intranet, internet site, and other electronic means customarily used by the Court to communicate with its employees in the bargaining unit represented by SEIU. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material.

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

Members Winslow and Gregersen 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-14-C, *Service Employees International Union Local 521 v. Fresno County Superior Court*, in which all parties had the right to participate, it has been found that the Fresno County Superior Court (Court) violated the Trial Court Employment Protection and Governance Act (Trial Court Act), Government Code sections 71631 and 71635.1, 71633 and 71639.1, subdivision (c), and PERB Regulations 32606, subdivision (a), and 32606, subdivision (b), by adopting personnel rules which: (1) prohibit employees from wearing union regalia anywhere on Court property; (2) prohibit employees from displaying union writings and images in all work areas of the Court visible to the public; (3) prohibit employees and their representative, Service Employees International Union Local 521 (SEIU) from distributing literature in nonworking areas of the Court during nonworking time; and (4) prohibit solicitation among employees during "working hours" without regard to meal and rest breaks or other non-duty periods.

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 employees' right to communicate with each other in the work place.

2. Denying SEIU the right to represents its employees.

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

Rescind sections 1.11 and 17.3 of the Personnel Manual to the extent they: (1) categorically prohibit employees from wearing union regalia in the courthouse; (2) prohibit the distribution of union literature during nonworking time in nonworking areas; (3) categorically ban the display of union writings and images in all work areas visible to the public; and (4) prohibit solicitation among employees during "working hours" without regard to meal and rest breaks or other non-duty periods.

Dated: _____ FRESNO COUNTY SUPERIOR COURT

By: _____
Authorized Agent

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

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 521, Charging Party, v. FRESNO COUNTY SUPERIOR COURT, Respondent.	UNFAIR PRACTICE CASE NO. SA-CE-14-C PROPOSED DECISION (07/25/2014)

Appearances: Kerianne R. Steele, Attorney, Weinberg, Roger & Rosenfeld, for Service Employees International Union Local 521; Wiley Price & Radulovich, by Joseph E. Wiley and Richard M. Shiohira, Attorneys, for Fresno County Superior Court.

Before Shawn P. Cloughesy, Chief Administrative Law Judge.

PROCEDURAL HISTORY

This case alleges that a trial court interfered with its employees' rights in violation of the Trial Court Employment Protection and Governance Act[1] (Trial Court Act) by implementing two new personnel rules prohibiting employees from: wearing clothing affiliating them with their exclusive representative; soliciting during work hours unless pre-approved by the trial court; distributing union literature during work hours at any time; and displaying union writings or images in work areas visible to the public. The trial court denies any violation of the Trial Court Act or PERB Regulations.[2]

[1] The Trial Court Act is codified at Government Code section 71600 et seq. Unless otherwise indicated all statutory references are to the Government Code.

[2] PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

On March 30, 2010, the Service Employees International Union, Local 521 (Local 521) filed an unfair practice charge (charge) against the Fresno County Superior Court (Court). On May 24, 2010, the Office of the General Counsel of the Public Employment Relations Board (PERB or Board) issued a complaint that on October 21, 2009, the Court interfered with Local 521 represented employees' rights by implementing Section 1.11 of the Personnel Manual, which prohibited employees represented by Local 521 from wearing clothing and/or adornments with its writing or images, and Section 17.3 of the Personnel Manual, which prohibited employees represented by Local 521 from soliciting or distributing literature during work hours for any purpose unless pre-approved by the Court and from displaying writings or images not published by the Court in work areas visible to the public in violation of Trial Court Act sections 71631, 71633, and 71635.1, and PERB Regulation 32606(a) and (b).

On June 11, 2010, the Court answered the complaint, denying any violation of the Trial Court Act or PERB Regulations and asserting an affirmative defense that the "doctrine of Separation of Powers" precluded PERB from exercising jurisdiction over what occurs in a courtroom.

On July 20, 2010, an informal conference was held, but the matter was not resolved. Formal hearing was held on March 8 and 9, 2011. Extensions were granted for submission of the post-hearing briefs. The reply briefs were submitted by June 3, 2011.

Motion to Amend Complaint

On July 20, 2011, after the submission of reply briefs, Local 521 moved to amend paragraph 3 of the complaint to read as follows:

> On or about October 21, 2009, Respondent implemented two new personnel rules in its Personnel Manual. Section 1.11 of the Personnel Manual prohibited employees represented by Charging Party from wearing any "[c]lothing and/or

> adornments with writings or images, including, but not limited to, pins, lanyards, or any other accessories (except for Court-approved clothing and adornments bearing the Court logo…)." Personnel Manual Section 17.3 prohibited employees represented by Charging Party from soliciting ~~or distributing literature~~ during working hours "for any purpose unless pre-approved by the [Respondent]." *Further this policy prohibited employees represented by Charging Party from distributing literature during working time for any purpose, and at any time for any purpose in working areas.* Further this policy prohibited employees represented by Charging Party from "displaying writings or images that are not published by the Court in work areas that are visible to the public."

(Proposed deletions are reflected by strikeout and additions reflected by italics.)

In the alternative, Local 521 requested that the addition as to the distribution policy be considered as an unalleged violation. The Court opposes the motion.

The Board articulated the standard for addressing a motion to amend a PERB complaint in *Riverside Unified School District* (1985) PERB Decision No. 553. There, the Board found:

> Absent undue prejudice to the opposing party, where a timely amendment is closely related to the allegations in the pending complaint, the amendments should be allowed. However, where a timely amendment has only a tenuous relation to the pending complaint or is wholly unrelated, prejudice is more likely because the respondent would have to defend against an unanticipated claim.

A charging party must also allege facts showing that the proposed amendment is timely filed; i.e., that the alleged unfair practice occurred no more than six months prior to the filing of the charge. (*Los Angeles Unified School District* (2007) PERB Decision No. 1929; *City of Santa Barbara* (2004) PERB Decision No. 1628-M.) The statute of limitations for new allegations contained in an amendment begins to run based on the filing date of the amendment, unless the new allegations relate back to the original allegations in the initial charge. (*County of Santa Barbara* (2012) PERB Decision No. 2279-M.) An amendment

relates back to the initial charge when it clarifies facts originally alleged in the initial charge or adds a new legal theory based on facts originally alleged in the initial charge. (*Ibid*.)

The allegation in the amended complaint that Section 17.3 unlawfully prohibits the distribution of union literature in working areas is closely related to the initial charge. Local 521's charge alleges the Court interfered with Local 521's rights under the Trial Court Act by implementing Section 17.3, which places restrictions on when and where union literature may be distributed. Because the amendment so closely relates to the initial charge, it is timely. Furthermore, amending the complaint would not cause the Court any undue prejudice. The "working time" and "work area" components of Section 17.3.1 are closely intertwined, and both parties presented evidence at the hearing regarding these issues and argued these issues in their closing briefs.

Based on the above, Local 521's motion to amend the complaint is granted.

FINDINGS OF FACT

The Court is a "trial court" within the meaning of Trial Court Act section 71601(k) and PERB Regulation 32033(a). It employs 550 people at 11 facilities. The Court's bench officers are responsible for hearing a number of different types of matters, including civil, family law, probate, juvenile dependency, juvenile delinquency, criminal, traffic, and specialty matters. The Court hears cases involving prominent entities in the community, such as the City of Fresno, the Fresno Unified School District, and California State University Fresno.

The Court's mission, in part, is to "serve the community and enhance public trust and confidence in the administration of justice through: The impartial and timely resolution of disputes." The Court has also adopted the Code of Ethics for the Court Employees of

California (Code of Ethics),[3] which states, "Exemplary conduct by court employees inspires public confidence and trust in the courts, and conveys the values of impartiality, equity, and fairness that bring integrity to the court's work." To further this general principle, Tenet One of the Code of Ethics requires Court employees to "Provide impartial and evenhanded treatment of all persons." The guidelines for Tenet One explain that, "While every court employee has the right to freedom of association and political expression, he or she does not have the right to take sides in a legal dispute . . . or give the appearance of partiality on any issue that is likely to come before the court. The procedural integrity of the court must be protected at all times."

Local 521 is the "exclusive representative" of the Court Employees Unit (Unit 6) and the Court Professionals Unit (Unit 15) within the meaning of PERB Regulation 32033(b). The employees in classifications represented by Local 521 include: Office Assistants, Judicial Assistants, Account Clerks, Court Reporters, and Marriage and Family Counselors. These employees work in a variety of areas throughout the Court's facilities, including customer service windows, workstations behind the customer service windows, offices near the judge's chambers, individual offices, and in the courtrooms. These work areas are visible to the public to varying degrees.

Kathleen Artis (Artis) is a Judicial Assistant assigned to a courtroom with a judge on the fifth floor of the Sisk Courthouse. She has served as a union steward. Artis testified that she spends 60 percent of her time in the courtroom and the remainder of her time at a cubicle

[3] The parties stipulated that the Code of Ethics was drafted by employees of the administrative office of the courts, which is the administrative branch of the judicial council. The judicial council then authorized/approved the Code of Ethics and sent them to the trial courts, which were free to adopt or not adopt them. The Court adopted the Code of Ethics and made it part of its personnel plan.

in an open area adjacent to the judge's chambers. Artis's workstation in the courtroom is immediately visible to members of the public. Her second workstation is in an area not immediately accessible to the public. However, it has limited visibility to the public when parties and litigants pass by on their way to the judge's chambers for settlement conferences or other business with the judge.

In addition to being assigned to a specific judge, Judicial Assistants can also be assigned to work at a public customer service window, such as in the Clerk's Office, or at a modular workstation behind the customer service window. Both the customer service window and the modular workstations are openly visible to members of the public. Judicial Assistants are asked to float between different assignments to cover for each other. For example, a Judicial Assistant assigned to the customer service window may be asked to go to a courtroom to fill in for a Judicial Assistant who is temporarily absent.

Doreen Perkins (Perkins) is a court reporter who works in a courtroom on the fifth floor of the Main Courthouse. She is also the chapter president and a steward. Perkins testified that she spends 80 percent of her workday in the courtroom and the remaining time in her office, which is directly adjacent to judge's chambers. Perkins' desk in the courtroom is in complete view of the public. However, like Artis, her office is in an area not immediately accessible to the public. Members of the public may view her office when they pass by on their way to judges' chambers for settlement conferences or other business with the judge.

Dawn Keller (Keller) is a Senior Child Custody Recommending Counselor and works on the first floor of the Sisk Courthouse. Her job duties include mediating child custody disputes and making recommendations to the court in the event the parties cannot reach

agreement. Keller and the other mediators each have their own offices where they conduct their mediations.

Office Assistants work in every administrative department of the Court. They usually have an assigned desk in the Clerk's Office where they perform administrative tasks. They are also asked to deliver files throughout the courthouse, which requires them to pass through areas accessible to the general public.

Account Clerks work in an office in the basement of the Main Courthouse in an office generally away from the general public. However, they are sometimes required to leave their office and go to other parts of the courthouse to assist Judicial Assistants at public windows with their cash registers or to count out money in their drawers.

Although employees generally take their lunch around the noon hour, they do not have designated break times and take breaks based on the ebb and flow of work. Evidence was introduced as to the available break rooms in the Main Courthouse and the Sisk Courthouse. Not every floor of the Main Courthouse has a break room, and it is not unusual for employees to take breaks at their desks or in empty jury rooms rather than use a break room. Every floor of the Sisk Courthouse has a break room. However, even in the Sisk Courthouse, employees may take their breaks in an empty jury room due to size and space limitations of the break rooms.

In early 2009, the Court proposed to amend its personnel rules and offered to meet and confer with Local 521 over the proposed changes. At issue in this case are Section 1.11 (Dress and Appearance) and Section 17.3 (Solicitation and Distribution Policy) of the Personnel manual. Section 1.11 provides:

1.11 Dress and Appearance

Court employees must dress in a professional, business-like manner, and each employee's appearance and clothing must not constitute a safety hazard.

Employees may not wear any of the following:

- Any type of color of jean pants;
- Shoes with a strap between the toes;
- Slippers;
- Tennis shoes;
- Casual sandals;
- Clothing and/or adornments with writings or images, including but not limited to pins, lanyard, or any other accessories (except for Court-approved clothing and/or adornments bearing the Court logo);

The CEO may waive the policy prohibiting jeans for certain workdays such as moving days or training days.

Employees with questions regarding the appropriateness of business attire should request clarification from their supervisor or manager. Violation of these policies will result in, at minimum, the employee utilizing their own time to change the inappropriate item, and at maximum, lead to disciplinary action.

Section 17.3 provides in pertinent part:

17.3 Solicitation and Distribution Policy

To avoid disruption of court operations, the following rules shall apply to solicitations and distributions of literature on court property:

17.3.1 Court Employees

Employees of the Court may not solicit during working hours for any purpose unless pre-approved by the CEO. Working time is defined in the following section.

> Employees of the Court may not distribute literature during working time for any purpose. Working time is defined in the following section.
>
> Employees of the Court may not distribute literature at any time for any purpose in working areas.
>
> Employees of the Court may not display writing or images that are not published by the Court in work areas that are visible to the public.

17.3.2 Working Time

> Working time includes the working time of both the employee doing the soliciting and distributing and the employee to whom the soliciting and distributing is being directed. Working time does not include break periods, meal periods, or any other specified periods during the workday when employees are properly not engaged in their work tasks.

Local 521 demanded to bargain over the amended personnel rules, and the parties met and conferred over the proposed changes on March 19, 2009; March 26, 2009; May 5, 2009; and September 16, 2009. The parties were unable to reach agreement on all of the amendments, including Sections 1.11 and 17.3. On December 1, 2009, the Court implemented its new personnel rules, including the disputed provisions.

Sharon Morton (Morton), the Assistant Court Executive Officer, testified that the Court sought to amend the personnel rules to include Sections 1.11 and 17.3 in order to further its mission and guard against the perception of bias toward one party over another. She also testified that the Court already had unwritten rules in place similar to Sections 1.11 and 17.3. However, because they were unwritten, the Court was having trouble enforcing them and wanted to memorialize them in the personnel rules. Morton stated that she was not aware of any employee being disciplined for violating the unwritten policies.

Kevin Smith (Smith), a Local 521 Internal Worksite Organizer, and Perkins were present at the negotiation sessions with the Court. Smith testified that Local 521 objected to Section 1.11 because, historically, union members had been permitted to wear adornments identifying associations or groups they were involved in. Local 521 objected to Section 17.3 because, historically, union members had passed out literature to its members with the understanding that they could not do so during working hours and that they could not interrupt working employees when distributing literature. Smith himself would distribute literature to union members he encountered in public areas of the courthouse, such as the lobby or cafeteria. Local 521 also objected to the component of Section 17.3 that required approval from the Court's CEO prior to solicitation because oftentimes meetings came up last-minute (such as those concerning bargaining updates), and if the CEO did not approve, then the union could not communicate with its members.

Keller's, Artis', and Perkins' testimony regarding the distribution of literature prior to Section 17.3 corroborated Smith's testimony. This literature tended to concern upcoming meetings or bargaining updates. Keller testified that in the past she distributed literature early in the morning or during her lunch break. When she did so, she would place the literature face-down on the employee's chair or desk. She also distributed items adorned with the union's logo, such as travel mugs.

Artis testified that she would distribute literature at the end of her shift, around 5:00 p.m. or 5:30 p.m. She would place the literature face down at a workstation or slide it under a door to a private office if the door was closed. Typically, there was no one at his or her workstation as Artis was distributing literature. She testified that at no time did Court

management direct her to stop distributing literature in this manner or that it was interfering with employees' work.

Perkins testified that she would distribute literature before work at approximately 7:30 a.m., after work at approximately 5:30 p.m., and during her lunch break by placing items face-down at employees' work stations or sliding them under closed doors. If an employee happened to be at his or her workstation while she was distributing literature, she did not engage them in conversation. Perkins also testified that at no time did Court management direct her to stop distributing literature in the manner she was doing or tell her that it was interfering with employees' work.

Smith and Perkins testified that during negotiations the Court's position regarding Section 17.3, "working areas" meant the entire courthouse. This was contrary to the prior practice and severely limited the union's ability to distribute information to its members. Morton testified that at no time during negotiations did the Court tell Local 521 that "working areas" meant the entire courthouse. Rather, she informed Local 521 that nonworking areas for purposes of Section 17.3 included break rooms and bulletin boards.

Smith testified that after Section 17.3 was implemented, he distributed literature by standing outside the public entrance and passing out materials to those he thought were Local 521 members. However, Smith testified he believed this method to be ineffective because not all employees entered through the public entrance and he had no way of identifying all Local 521 members from memory. Perkins similarly testified that distributing literature to members entering the courthouse through the public entrance is ineffective because she does not immediately recognize all Local 521 members, as not all Local 521 members entered through

the public entrance, and many employees are in a hurry to get to work, making it difficult to distribute literature to them.

Morton testified that since Section 17.3 went into effect, the Court denied solicitation requests promoting blood drives, Pampered Chef kitchen utensils, and a church camp. However, it approved requests to advertise the employee recognition committee and trainings put on by the California Clerks Association, which is an organization available to every employee of the court that provides various trainings on court procedures.

In addition to distributing literature, Local 521 communicates with its members through bulletin boards. Perkins testified that there are SEIU bulletin boards throughout the Main Courthouse. Some are in hallways in areas not immediately accessible to the public. However, members of the public, such as attorneys, jurors, and witnesses, walk by them. There are also bulletin boards in the break rooms in the Main Courthouse.

Perkins, Artis, and Keller testified that prior to the implementation of Section 1.11, there were no restrictions on items that displayed logos or adornments supporting outside organizations. Keller testified that she had a travel mug adorned with the SEIU logo on her desk since around 2007 and that the mug was on her desk during mediations with parents. She stated that no supervisors or management ever commented on her mug. After Section 1.11 was implemented, she stopped bringing it to work because she feared it violated the new rule. The SEIU mug has since been replaced with two mugs, one with a Salvation Army logo and another with a Foster Friends[4] logo. Keller's office also includes a miniature bell with a Salvation Army logo. Court management has not commented on either of the new mugs or the bell.

[4] Foster Friends is a nonprofit foster care agency.

Artis testified that prior to Section 1.11, she wore a lanyard around her neck in the courtroom bearing the SEIU logo. She would also attach various pins to the lanyard, including SEIU pins and pins sold by the Sheriff's Department commemorating fallen deputies. The pins are roughly the size of a quarter. She also wore a pen around her neck in the courtroom adorned with an SEIU logo. At her workstation near the judge's chambers she had an SEIU travel mug along with a ceramic SEIU mug filled with SEIU pens. She also adorned the cloth partition in her cubicle with SEIU regalia, such as pins. She testified that she saw others adorn their partitions similarly and that this was common practice. Prior to 2009, she could not recall any Court management personnel telling her to remove any of the aforementioned items. However, with the implementation of Section 1.11, she removed all of them for fear of discipline.

Perkins testified that prior to December 2009 she had various SEIU lanyards and pins displayed on the bulletin board in her office, and she saw other employees display SEIU-related pins around their workstations. She also kept a ceramic SEIU mug in her office. In the courtroom she had an SEIU weeble attached to her stapler and an SEIU antennae ball attached to her pen. She has also worn various pins around the courthouse, including the courtroom, which had messages like, "Justice for Court Employees" and "Campaign for Quality of Life." She also wore a steward pin on her lapel while in the courthouse and the pin sold by the Sheriff's Department honoring fallen deputies. Perkins also testified to several occasions when SEIU members changed into SEIU t-shirts to attend meetings related to negotiations. Some of these t-shirts were subsequently displayed on employees' coat racks in their offices.

Since December 2009, Perkins does not display SEIU-related items. However, she continues to wear pins commemorating fallen deputies and pins from the California Court

Reporters Association. She also has a California Court Reporters Association mug that she keeps in her office and a California Court Reporters Association memo holder that she keeps in her office and in the courtroom.

Resolution of Disputed Facts

There is a dispute regarding what the Court said to Local 521 during bargaining regarding the definition of "working areas" in Section 17.3.1. Local 521 contends that the Court stated "working areas" meant the entire courthouse. The Court contends it stated "working areas" did not mean the entire courthouse and explicitly excluded break rooms and bulletin boards. Based on the record, it is more likely than not that the Court did not state "working areas" meant the entire courthouse. Such an interpretation of Section 17.3.1 would be redundant given its prohibition against distributing literature during "working time." However, it seems clear that given the limited number of areas that are not considered "working areas," Local 521 could easily interpret Section 17.3.1 as essentially prohibiting distribution and solicitation in the entire courthouse.

There is also a dispute regarding the Court's distribution, solicitation, and dress and appearance policies prior to December 1, 2009. Local 521's witnesses testified that prior to the implementation of Section 1.11, there were no restrictions on the display of logos or other adornments and that prior to the implementation of Section 17.3, there were limited restrictions on solicitation and distribution that prohibited those activities during working time and in a manner that interfered with employees' work. Morton testified that prior to the implementation of Sections 1.11 and 17.3, there were unwritten rules in place substantially similar to both of those rules. Based on the record, it is more likely than not that prior to December 1, 2009, there were no unwritten rules similar to Sections 1.11 and 17.3. Morton's

testimony about the existence of the unwritten rules similar to Sections 1.11 and 17.3 was not substantiated by the evidence and was directly controverted by the testimony of Local 521's witnesses. It is unlikely that Perkins, Keller, and Artis would all openly flaunt the Court's rules for a sustained duration of time or that Smith would advise them to do so. It is also unlikely that if there were in fact unwritten rules, the Court would not take any action to discipline employees who were openly and notoriously violating those rules. Accordingly, it is concluded that prior to December 1, 2009, there were no unwritten rules in place similar to Sections 1.11 and 17.3. Assuming any rules were in place, they certainly were not as restrictive as Sections 1.11 and 17.3.

ISSUES

1. May the Court prohibit employees from wearing any union regalia at all times?

2. May the Court prohibit employees from soliciting other employees during working time?

3. May the Court prohibit employees from distributing literature to other employees during working time and in working areas?

4. May the Court prohibit employees from displaying any writings or images relating to union activities in work areas that are visible to the public?

CONCLUSIONS OF LAW

PERB's Jurisdiction

The Trial Court Act authorizes PERB to investigate unfair practice charges or alleged violations of the Act, and take any action and make any determinations that PERB deems necessary to effectuate the policies and procedures of the Act. (Trial Court Act § 71639.1,

subd. (b).) Accordingly, PERB has jurisdiction over the allegations in the instant complaint and the authority to render a decision on the merits.

The Court argues that the Separation of Powers doctrine embodied in Article III, section 3 of the California Constitution prohibits PERB from making a determination in this manner because doing so could defeat or materially impair the inherent functions of the Judicial Branch. In other words, if PERB were to exercise its legislatively mandated jurisdiction to enforce the Trial Court Act in a manner adverse to the Court, such enforcement would be unconstitutional.

Article III, section 3.5 of the California Constitution prohibits an administrative agency from declaring a statute unconstitutional. PERB has held that absent antecedent precedent, it is not within its authority to refuse to enforce a statute, even if it believes the statute to be unconstitutional. (*Ventura Unified School District* (1989) PERB Decision No. 757; *San Ramon Valley Unified School District* (1989) PERB Decision No. 751.) Here, there is no appellate authority addressing the issue of whether the Trial Court Act, in whole or in part, is unconstitutional and unenforceable. Accordingly, the Court's argument regarding PERB's jurisdiction over this matter cannot be entertained, and the matter will be decided on the merits.

Interference

The test for whether a respondent has interfered with the rights of employees under the Meyers-Milias-Brown Act (MMBA)[5] does not require that unlawful motive be established, only that at least slight harm to employee rights results from the conduct. The courts have described the standard as follows:

> All [a charging party] must prove to establish an interference violation of section 3506 is: (1) That employees were engaged in

[5] The MMBA is codified at Government Code section 3500 et seq.

> protected activity; (2) that the employer engaged in conduct which tends to interfere with, restrain or coerce employees in the exercise of those activities, and (3) that employer's conduct was not justified by legitimate business reasons. (*Public Employees Association of Tulare County, Inc. v. Board of Supervisors of Tulare County* (1985) 167 Cal.App.3d 797, 807.)

When interpreting the Trial Court Act, it is appropriate to take guidance from cases interpreting the MMBA and other California labor relations statutes with parallel provisions. (Government Code section 71639.3; *Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608.)

1. Union Regalia

In *State of California (Department of Parks and Recreation)* (1993) PERB Decision No. 1026-S (*Parks*), the Board established the general rule that wearing union buttons or pins is a protected employee right absent special circumstances. The right is not unlimited, and is subject to reasonable regulation. (*Ibid.*) If special circumstances exist, the employer may limit or prohibit this activity. (*Ibid.*) In setting forth the rule in *Parks*, the Board relied on well-established private sector precedent. (*See Republic Aviation Corp. v. NLRB* (1945) 324 U.S. 793; *Pay'N Save Corp. v. NLRB* (9th Cir. 1981) 641 F.2d 697 (*Pay'N Save*); *NLRB v. Harrah's Club* (9th Cir. 1964) 337 F.2d 177 (*Harrah's Club*).) Applying the rule in *Parks*, the Board held that special circumstances did not support the employer's prohibition on wearing union buttons because park maintenance employees did not interact with the public; the pin design did not create a health or safety issue; and no disruptive effect on the public or employees was shown.

In *East Whittier School District* (2004) PERB Decision No. 1727 (*East Whittier*), the Board concluded that whether "special circumstances" exist will depend on an objective examination of the button at issue and a balancing of interests. It noted that in private sector

cases, the NLRB has recognized employee dissension, safety, property damage, distraction, and public image as constituting "special circumstances." (*Ibid.*) It also noted that there are buttons that would always meet the special circumstances test, such as buttons that contain profanity, incite violence, or disparage specific individuals. (*Ibid.*) The burden to demonstrate special circumstances is not a heavy one; the employer need only demonstrate that a special circumstance exists. (*Ibid.*) In determining whether special circumstances exist, the trier of fact should consider both PERB precedent and private sector cases under the NLRA. (*Ibid.*)

In applying the balancing test in *East Whittier,* the Board concluded that special circumstances did not exist to ban teachers from wearing buttons in the classroom that stated, "It's Double Digit Time!" which was a reference to their demand to increase salaries by at least ten percent. (*East Whittier*, *supra*, PERB Decision no. 1727.) Although the school district argued that the buttons were a distraction, it did not show that classwork required a high degree of concentration, students were susceptible to distraction, and/or that buttons publicizing bargaining demands were more distracting than other clothing or activity in the classroom. (*Ibid.*)

Here, the Court asserts that the need to maintain an image of impartiality and neutrality is a special circumstance. Private sector cases have concluded that, depending on the situation, the need to project a certain image may permit an employer to ban union regalia. In *Harrah's Club*, *supra*, 337 F.2d at 177 fn. 1, the employer ran a showroom on par with the "finest theater-restaurants in the world" and maintained a rule prohibiting employees from wearing any jewelry or personal adornments on their uniform. The prohibition only applied to employees coming into contact with the public and did not prevent the wearing of union buttons on nonworking time or in places not open to the public. (*Id.* at 180.) The court of

appeals found the prohibition appropriate given its limited scope and the nature of the employer's business. (*Ibid.*; *see also Davison-Paxon Company v. NLRB* (5th Cir. 1972), 462 F.2d 364 [the court of appeals upheld the employer's ban on employees wearing a "gaudy" yellow union button the size of a Kennedy half-dollar on the selling floor of an upscale department store.])

In *Pay'n Save, supra*, 641 F.2d at 699, the court of appeals reached a different result after balancing employee and employer interests. There, the employer was engaged in retailing goods to the public. (*Ibid.*) During a union organizing campaign, it prohibited employees from wearing yellow and black lapel buttons measuring 1 1/4 inch in diameter on their bright orange company jackets. (*Ibid.*) The employer justified the prohibition by asserting a legitimate concern about the image projected to the public. (*Id.* at 701.) The court of appeals found the prohibition unlawful because the strong employee interests of wearing union buttons during the organizing campaign outweighed the employer's relatively weak interest in maintaining a certain image since the bright orange company jackets did not project the type of refined image that justified prohibitions of union regalia in other cases. (*Id.* at 701.; *see also Nordstrom, Inc.* (1982) 264 NLRB 698 [employer could not forbid wearing of "tasteful and inconspicuous" union insignia by department store salespersons].)

Here, the Court's need to project an image of impartiality and neutrality is a special circumstance that could justify restrictions on union regalia during the actual use of certain locations of the courthouse; especially the actual courtrooms and the rooms where mediations are conducted. However, Section 1.11 is a categorical prohibition that effectively bans *all* union regalia at *all* times and in *all* areas of the courthouse with no exceptions. This type of

restriction is necessarily unlawful because it does not allow any room for the objective case-by-case balancing required by *East Whittier*.

The Court argues that its categorical prohibition of union regalia should be afforded a presumption of validity similar to the prohibition on union regalia in immediate patient care areas of hospitals. In *Beth Israel Hospital v. NLRB* (1978) 437 U.S. 483, 495 (*Beth Israel*), the United States Supreme Court noted that a hospital's primary function is patient care and that a tranquil atmosphere is essential to carrying out that function. In order to provide this atmosphere, a hospital may absolutely prohibit solicitation and distribution activities in immediate patient care areas, such as operating rooms, patients' rooms, and patients' lounges. (*Id.* at 506.) However, the Court held that the hospital in that case could not prohibit solicitation and distribution in the cafeteria, even though patients and visitors had access to that area of the hospital, because it was a natural gathering place for employees and functioned more like an employee-service area than a patient-care area. (*Id.* at 506-507.)

In *George J. London Memorial Hospital* (1978) 238 NLRB 704, 708, the NLRB applied the rule in *Beth Israel* to the display of union regalia and held that a ban on such regalia in immediate patient care areas is presumptively valid. However, the NLRB found the hospital's rule unlawfully broad because it prohibited the wearing of insignia other than "of a professional nature" absolutely and because the prohibition was not restricted to patient care areas. (*Ibid.*)

Here, the Court's need to project an image of impartiality and neutrality would be the most robust during the time that a courtroom or mediation room was being used to adjudicate or resolve complaint/claims filed with the court. To use the hospital as an analogy, the courtrooms are akin to patient care areas, and a presumption of validity could attach to a

categorical prohibition on union regalia in the courtroom while the court is in session or a mediation room while a mediator was assisting parties to resolve a complaint/claim. However, even if such a presumption were to attach to the courtroom, Section 1.11 is still unlawful because it is overbroad. Its categorical prohibition is not limited to the courtroom or mediation rooms, but extends to the entire courthouse without exception.

The Court argues that a categorical prohibition is necessary because members of the public have access to many areas of the courthouse and because employees move around the courthouse during the course of the workday between public and non-public areas. The Court seems to assert that any member of the public simply viewing union regalia anywhere in the courthouse will impair the Court's ability to maintain a neutral and impartial image. However, as with the cafeteria in *Beth Israel*, the determinative factor is not whether members of the public may view the union regalia, but the impact of the regalia on the Court's ability to further its mission. Although members of the public may view union regalia on employees in passing through filing windows or on their way to judge's chambers, these areas of the courthouse are administrative in function and not immediately engaged in the administration of justice. The Court did not present sufficient evidence to establish that the mere presence of union regalia, such as a quarter-sized lapel pin, in areas of the courthouse outside the courtrooms/mediation rooms would impair its ability to administer justice. In fact, the opposite is likely true since Local 521 established that prior to 2009, employees wore union regalia throughout the workday in various areas of the courthouse without incident. There was no showing of any adverse consequences to Court operations during this time period.

The Court has not met its burden to establish special circumstances justifying a categorical ban on union regalia in the entire courthouse. Even assuming a presumption of

validity attaches to such a ban in the courtroom/mediation room while these rooms were being used for adjudication/resolution purposes, the presumption would not extend to the entire courthouse. Therefore, Section 1.11 is unlawfully interferes with employee rights because its blanket restriction on union regalia does not provide any room for the objective case-by-case balancing of interests required by PERB and NLRB case law.

2. Solicitation

In *State of California (Employment Development Department)* (2001) PERB Decision No. 1365a-S (*EDD*), PERB concluded that an employer could restrict solicitation during nonworking time. It pointed to language in the NLRB's decision in *Peyton Packing Company* (1943) 49 NLRB 828, 843, which stated in part "Working time is for work. It is therefore the province of an employer to promulgate and enforce a rule prohibiting union solicitation during working hours." (*Ibid.*) The Board also cited to NLRB case law that held nonworking time can be interpreted to mean time when both the soliciting employee and the employee being solicited are not working. (*Ibid.*)

Here, Section 17.3.1 prohibits solicitation during working hours for any purpose without the approval of the CEO and refers to Section 17.3.2 for a definition of "working time." Section 17.3.2 defines working time to exclude "breaks periods, meal periods, or any other specified periods during the workday when employees are properly not engaged in performing their work tasks." It also defines "working time" to include the working time of the soliciting employee and the employee being solicited.

Local 521 argues that Section 17.3.1 is overbroad because "working hours" is undefined and could be read to mean the operating hours of the Court, which would exclude employees from engaging in solicitation activities during the entire workday regardless of

whether they are on duty or not. Such a solicitation policy would be unlawful. (*See G.C. Murphy Co.* (1968) 171 NLRB 370, *enforced*, (D.C. Cir. 1969) 422 F.2d 685.) However, a reasonable interpretation of Section 17.3.1 leads to the conclusion that "working hours" is meant to be synonymous with "working time," since the sentence defining "working time" immediately follows the sentence prohibiting solicitation during "working hours." Accordingly, Section 17.3.1 contains a lawful restriction on solicitation during employees' working time and does not interfere with employee rights.

3. Distribution of Literature

In *Long Beach Unified School District* (1980) PERB Decision No. 130, the Board affirmed the principle that an employer may not prohibit the distribution of literature to nonworking employees in nonworking areas absent special circumstances that make the restriction necessary to maintain production or discipline. In *Rio Hondo Community College District* (1982) PERB Decision No. 260, the Board cited *NLRB v. Thor Power Tool Company* (1965) 351 F.2d 584, 585, for the principle that employees engaged in protected conduct must be given some leeway for impulsive behavior that must be balanced against the employer's right to maintain order.

Here, Section 17.3.1 uses the same definition of "working time" for the distribution of literature as it does for solicitation. Accordingly, for the same reasons its prohibition of solicitation during working time is valid, so is its prohibition on the distribution of literature during working time. However, Section 17.3.1's prohibition on the distribution of literature in "working areas" is problematic because it does not take into consideration that some working areas of the courthouse convert to nonworking areas when not used for Court business.

In *G.H. Bass & Company* (1981) 258 NLRB 140, 141 (*G.H. Bass*), an employee of a manufacturing plant distributed literature to employees at their works stations during their lunch break. Employees took their lunches at their workstations because there was insufficient room in the cafeteria to accommodate all of the employees during the lunch period. (*Id.* at 141, fn. 5.) The NLRB found that under these circumstances the employees' working area essentially became a lunchroom during the lunch period because all machines were required to be shut down and employees punched out during that period. (*Id.* at 146.) The NLRB also found that the employer did not meet its burden to establish that the distribution interfered with production or caused problems with litter. (*Ibid.*)

Here, Section 17.3.1 lacks a definition of "working areas," but Morton testified that "working areas" did not include public areas of the courthouse or employee break rooms. Break rooms are not readily accessible to all Court employees, and many employees take their breaks in empty jury rooms or at their desks, a practice of which the Court is aware. Like *G.H. Bass*, these working areas can be considered nonworking areas for the period of time when employees use them for their breaks or lunches, and the distribution of literature would be appropriate during these times. However, for distribution to be appropriate, *all* of the employees in that area must be on nonworking time.

Section 17.3.1, as interpreted by the Court, is unlawfully overbroad because it does not account for the fact that some working areas, such as jury rooms, temporarily transform into nonworking areas by virtue of employee usage. The Court did not present sufficient evidence to show that the distribution of literature in these areas during nonworking time would disrupt the Court's functions such as to constitute a special circumstance justifying the restriction. In fact, Local 521's witnesses testified that for years prior to 2009 they distributed literature in

nonpublic working areas of the courthouse without the Court telling them that their activities were interfering with the Court's operations. Accordingly, Section 17.3.1 is invalid in so far as it lacks a definition of "working area" that permits employees to distribute literature in all nonworking areas during nonworking time and constitutes an unlawful interference with employee rights.

4. Display of Union Writings or Images

The analysis for determining whether the Court may restrict the display of writings or images is identical to that for restrictions on union regalia. (*See Parks, supra*, PERB Decision No. 1026-S.) Here, Section 17.3.1 prohibits without exception the display of all writings or images not published by the Court in work areas that are visible to the public. The Court asserts the restriction on writing and images is necessary to maintain its image of impartiality and neutrality.

As discussed above, the need to maintain an image of impartiality and neutrality may constitute a special circumstance warranting restrictions on the display of union writings or images in work areas visible to the public. However, like Section 1.11, Section 17.3.1 is problematic because it creates a categorical restriction on *all* union writings and images without any room for the objective case-by-case balancing of interests required by PERB case law. For example, it is unclear how the display of a union coffee mug or quarter-sized pin in a court reporter's private office, while nominally visible to the public, would detrimentally affect the Court's image of impartiality and neutrality.

The Court, relying on *NLRB v. Windemuller Electric, Inc.* (6th Cir. 1994) 34 F.3d 384 (*Windemuller*), argues that it may prohibit the display of union images and writings because its property rights trump employees' organizational rights. In *Windemuller*, the employer

prohibited employees from affixing union stickers to company-owned hardhats because the hardhats were company property. (*Id.* at 388.) The court of appeals upheld the employer's conduct, stating, "[E]mployees who are union supporters have no right to make use of an employer's personal property for the purpose of communicating union messages, *as long as the employees can make effective use of their own property for that purpose*." (*Ibid.*) (Emphasis added.) By its own terms, *Windemuller* is distinguishable from the instant matter because the Court does not permit employees to use their own property to communicate union messages. Section 1.11 explicitly prohibits employees from donning any union regalia at all times in all areas of the courthouse.

Accordingly, the prohibition in Section 17.3.1 against the display of all union writings and images in work areas visible to the public is overbroad and unlawfully interferes with employee rights.

REMEDY

Pursuant to section 71639.1(b), PERB under section 3541.3(i) is empowered to:

> [T]ake any action and make any determinations in respect of these charges or alleged violations as the board deems necessary to effectuate the policies of this chapter.

It has been found that the Court violated Trial Court Act by interfering with its employees' rights when it implemented a written policy which: (1) banned employees from wearing union regalia in the courthouse; (2) restricted the distribution of union literature in a manner that prevented employees from distributing literature during nonworking time in nonworking areas; and (3) banned employees from displaying union writings and images in all work areas visible to the public. This conduct violated Government Code sections 71631 and 71635.1 and constituted an unfair practice under Government Code section 71639.1(c) and

PERB Regulation 32606(a). By this conduct, the Court also denied Local 521 the right to represent employees in violation of Government Code section 71633 and constituted an unfair practice under Government Code 71639.1(c) and PERB Regulation 32606(b). Accordingly, it is appropriate to order the Court to cease and desist from such unlawful conduct. (*Rio Hondo Community College District* (1983) PERB Decision No. 292.)

While the traditional remedy in an interference case is an order to cease and desist from the specified unlawful interference, PERB has ordered affirmative remedies in such cases when appropriate, such as when an employer's policy interfered with employees' rights. (*Rio Hondo Community College District* (1983) PERB Decision No. 292.) Therefore, it is appropriate to order the Court to rescind those portions of its personnel rules which interfered with employees' right.

It is the ordinary remedy in PERB cases that the party found to have committed an unfair practice be ordered to post notice incorporating the terms of the order. Such an order ordinarily is granted to provide employees with a notice signed by an authorized agent that the offending party has acted unlawfully, is being required to cease and desist from its unlawful activity, and will comply with the order. Thus, it is appropriate to order the Court to post a notice incorporating the terms of the order herein at its buildings, offices, and other facilities where notices to bargaining unit employees are customarily posted. Posting of such notice effectuates the purposes of the Trial Court Act that employees be informed of the resolution of this matter and of the Court's readiness to comply with the ordered remedy. (*Placerville Union School District* (1978) PERB Decision No. 69.)

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, it is found that the Fresno County Superior Court (Court) violated the Trial Court Employment Protection and Governance Act (Trial Court Act), Government Code sections 71631, 71633, and 71635.1. The Court violated the Trial Court Act by interfering with its employees' rights when it implemented a written policy which: (1) banned employees from wearing union regalia in the courthouse; (2) restricted the distribution of union literature in a manner that prevented employees from distributing literature during nonworking time in nonworking areas; and (3) banned employees from displaying union writings and images in all work areas visible to the public. All other allegations in the unfair practice charge filed by SEIU Local 521 (Local 521) are dismissed.

Pursuant to section 71639.1 of the Government Code, it hereby is ORDERED that the Court and its representatives shall:

A. CEASE AND DESIST FROM:

1. Interfering with employees' right to communicate with each other in the work place.

2. Denying Local 521 the right to represents its employees.

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

1. Rescind those portions of Sections 1.11 and 17.3 of the Personnel Manual to the extent they: (1) categorically prohibit employees from wearing union regalia in the courthouse; (2) prohibit the distribution of union literature during nonworking time in nonworking areas; and (3) categorically ban the display of union writings and images in all work areas visible to the public.

2. Within ten (10) workdays of the service of a final decision in this matter, post at all work locations where notices to employees in the Court customarily are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the Court, indicating that it will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material.

3. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of the Public Employment Relations Board (PERB or Board), or the General Counsel's designee. Respondent 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 521.

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

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
(916) 322-8231
FAX: (916) 327-7960
E-FILE: PERBe-file.Appeals@perb.ca.gov

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

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet or received by electronic mail before the close of business, which meets the requirements of PERB Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 32090, 32091 and 32130.)

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