DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA NURSES ASSOCIATION, Charging Party, v. REGENTS OF THE UNIVERSITY OF CALIFORNIA, Respondent.	Case No. LA-CE-1256-H PERB Decision No. 2616-H December 21, 2018

Appearances: Carol A. Igoe, Attorney, for the California Nurses Association; Daniel P. Rawlins, Labor Relations Manager, for the Regents of the University of California.

Before Banks, Winslow, and Krantz, Members.

DECISION

WINSLOW, Member: In this case we are called upon to decide whether public hospital employers and employees are governed by our longstanding rule regarding employer prohibitions on the display of union insignia. Under that rule, an employer must show "special circumstances" if it wishes to prohibit employees from displaying union insignia, including buttons or stickers, as part of a non-discriminatory ban against non-business insignia.

The complaint in this case alleged that the Regents of the University of California (University) violated the Higher Education Employer-Employee Relations Act (HEERA)[1] by prohibiting employees at hospitals operated by UC San Diego Health (UCSDH) from wearing a sticker distributed by their exclusive representative, California Nurses Association (CNA). The sticker read: "UCSD Management NEEDS TO LISTEN TO NURSES." The

[1] HEERA is codified at Government Code section 3560 et seq. Unless otherwise specified, all statutory references herein are to the Government Code.

administrative law judge (ALJ) found that as it applied to non-patient care areas, the prohibition of the sticker was presumptively invalid and the University failed to prove it was justified by special circumstances. As it applied to immediate patient care areas, however, the ALJ found the prohibition was presumptively *valid*, and concluded it was lawful.[2]

In exceptions to the proposed decision, CNA argues that we should reject a presumption of validity for restrictions on union insignia and buttons in patient care areas,[3] and that the University failed to meet its burden of proving special circumstances justifying the prohibition. The University urges us to dismiss the exceptions on the grounds that they would not alter the result of the proposed decision; it otherwise offers no substantive response to the exceptions.

As explained below, we conclude that no presumption of validity applies to the University's prohibition of the "LISTEN TO NURSES" sticker, in patient care areas or elsewhere. Our case law regarding the right of employees to wear union buttons and insignia recognizes that employers' interest in regulating potentially dangerous or disruptive messages is adequately protected by allowing the employer to demonstrate that "special circumstances" justify restricting the right to wear union buttons or insignia as part of a non-discriminatory rule against non-business insignia. (*County of Sacramento* (2014) PERB Decision No. 2393-M, p. 20.) We further conclude, after assessing the evidence, that the University did

[2] No exceptions have been filed concerning the complaint's other allegations, which the ALJ dismissed, viz., that the University: (1) directed employees to remove the sticker while they were attending another employee's disciplinary hearing; and (2) directed employees to remove a sticker bearing the message "We ♥ Nurses #Solidarity." In the absence of exceptions, these allegations are not before us, and the ALJ's treatment of those allegations is binding only on the parties. (PERB Regs. 32215, 32300, subd. (c) [PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.].)

[3] For brevity, we use the terms "immediate patient care areas" and "patient care areas" interchangeably.

not prove special circumstances justifying the prohibition in any areas of UCSDH, patient care *or* non-patient care, and the prohibition of the sticker therefore violated HEERA.

FINDINGS OF FACT

The University is a higher education employer within the meaning of HEERA section 3562, subdivision (g). CNA is an exclusive representative within the meaning of HEERA section 3562, subdivision (i), representing the University's registered nurse employees unit, known as the NX unit.

Background

UCSDH serves the San Diego region and has two primary physical locations: the Hillcrest Medical Center, a hospital with several associated buildings, and the La Jolla Campus, which includes the Jacobs Medical Center hospital and five ancillary buildings. Nurses work at each of these sites.

UCSDH has adopted Medical Center Policy (MCP) 216.6, providing a code of conduct for physicians and staff, including nurses. As revised on October 17, 2013, MCP 216.6 defines "Disruptive Behavior," in part, as: "Inappropriately criticizing health care professionals and UCSDH staff in front of patients and/or their families, visitors, or other staff."

In 2010, UCSDH worked for and attained Magnet certification, which is awarded to hospitals that meet high standards in patient care and patient satisfaction. The initial review for certification takes one year to complete, and certification is renewed every four years. UCSDH's Magnet designation was recertified in 2014. Also around this time, Medicare reimbursement rules were changed, with a greater emphasis on patient satisfaction.

As part of the effort to improve patient care and satisfaction, UCSDH requires nurse managers to do daily rounds to talk with patients, inquire about their care, and if possible, fix

problems immediately. Nurse managers also seek out nurses during rounds to share patients' positive comments.

UCSDH Employee Relations Manager Kimberlee Eskierka (Eskierka) testified that the University has a very friendly working relationship with CNA, which began with the arrival of UCSDH Chief Nursing Officer (CNO) Margarita Baggett (Baggett) around 2008 or 2009. CNA Labor Representative Terry Bunting (Bunting) disagreed somewhat with Eskierka's assessment. She testified that while CNA often seeks to cooperate and resolve issues, the relationship can be contentious at times.

History of Union Insignia at the University

Since 2000, and continuing at least through 2014, CNA has distributed buttons and stickers to bargaining unit members about once or twice a year, most often during bargaining campaigns. Messages on those buttons and stickers have included: "I'll Strike for My Patients and My Profession"; "To Protect and Serve Our Patients"; "Some Cuts Don't Heal"; "For Our Patients and Our Profession 9,000 UC RNs Will Be Heard"[4]; and "I Don't Want To Strike But I Will." Witnesses for CNA testified without contradiction that these stickers and buttons were worn in patient care areas and non-patient care areas; that UCSDH management had never ordered nurses to remove them; and that they were not aware of any complaints by patients or family members, or reports of disruption to hospital operations.[5]

[4] This sticker was used in multiple bargaining campaigns and was updated each time to reflect increases in the number of unit members.

[5] CNA's brief to the Board includes a suggestion that we take notice of internet search results for news stories related to the parties' disputes about patient care. We need not decide whether it would be appropriate to take administrative notice of this type of material, or to do so at this stage of a case, because the evidence CNA urges us to notice has no probative value on the issues raised by the exceptions. On that basis, we exercise our discretion to decline to take official notice. (See *Regents of the University of California, University of California at*

On one occasion, nurses wore a sticker concerning a local issue at a single facility. In 2012, a nurse at UC San Francisco (UCSF) was fired. CNA claimed the dismissal was unjustified, and distributed stickers to UCSF nurses with a photo of the fired nurse and the words "We Support Our Colleague!" No nurses were ordered to remove the sticker.

Around June of 2015, the exclusive representative of two other University bargaining units with members at UCSDH organized a campaign protesting the actions of a UCSDH manager. As part of this campaign, the union distributed a sticker with a message criticizing the manager by name. Claiming the sticker was offensive and disruptive, UCSDH ordered employees to remove it.

The Present Dispute

On August 24, 2015,[6] UCSDH issued a notice of intent to dismiss Michael Jackson (Jackson), a nurse in the Hillcrest emergency department, who was also a CNA representative and a member of its professional practice committee, statewide bargaining council, and bargaining team, and of the executive board of CNA's affiliate, National Nurses United.

On August 27, to support Jackson, Bunting began handing out stickers to nurses as they arrived at work. The stickers read, "UCSD Management NEEDS TO LISTEN TO NURSES." Nurses wore the stickers during their work time, including in patient care areas.

Beverly Kress (Kress), UCSDH Director of Nursing for Emergency Services, learned about the stickers later that day, in a phone call from Bernadette Cale (Cale), one of her subordinates. Cale reported that nurses were wearing an "offensive" sticker and described the

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Los Angeles Medical Center (1983) PERB Decision No. 329-H, pp. 3-4, fn. 4 (*UCLA Medical Center*).)

[6] Hereafter all dates refer to 2015, unless otherwise noted.

slogan. Cale told Kress that the assistant nurse managers were upset because they were trying hard to have a good relationship with staff and believed the sticker was not true.

Kress was concerned that the sticker's message might cause patients to lose confidence in UCSDH. She testified that many patients entered the emergency department badly in need of medical services, some in critical condition, and they might assume that some sort of labor dispute was taking place and become concerned that nurses were more focused on the dispute than on their job duties. Kress believed the sticker was contrary to the code of conduct because it criticized health care professionals and staff in front of patients.

Kress called Eskierka for advice. No direction was immediately given, but Kress was informed there were discussions about the sticker in UCSDH's labor relations office.

On August 28, the sticker was discussed during the weekly nurse executive meeting, which is attended by CNO Baggett and all the nursing directors. All agreed that the stickers should not be allowed in patient care areas, because they did not want patients to be negatively affected by the message and lose confidence in their care.

On August 29, Director of Labor Relations Michael Gonzalez (Gonzalez) called Eskierka, advising her that staff wearing the stickers were "impacting unit operations." He reported that CNO Baggett had contacted him about the stickers and expressed the concerns of nursing management. Gonzalez asked Eskierka to draft an e-mail providing guidance for nursing managers.

Eskierka reviewed the sticker and concluded that it violated the "Disruptive Behavior" provisions of MCP 216.6. On August 29, she sent an e-mail to nursing managers and CNO Baggett, stating, as relevant here:

> Following are the actions to take if you see an employee wearing the "UCSD Management Needs to Listen to Nurses[]" stickers

> while on work time. The employee can wear the sticker during off the clock time (e.g. break time or lunch time).
>
> 1. If a manager sees an employee wearing a sticker or button with a political or offensive message (general messages like, "CNA Unite" are allowed), the employee should be ordered to remove the sticker from his/her uniform. Have another manager/supervisor as a witness, and talk to employees individually if you have multiple employees wearing stickers.
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> 2. If the employee refuses to remove the sticker, tell him/her that s/he is refusing to follow a lawful order. If the employee continues to refuse, ask him/her if s/he will be refusing to follow other lawful orders today. Remind the employee that the failure to follow your lawful orders may result in discipline.

Eskierka testified that all nurses work in patient care areas, thus the direction was applicable only to nurses wearing the sticker in patient care areas.

Kress reviewed the e-mail and passed it on to her leadership team. She told her team to ask nurses working in the emergency department to remove the sticker because management found it offensive.

On August 29, Cassandra Prewitt (Prewitt), a house supervisor who supervises charge nurses at Hillcrest, saw Bunting passing out stickers near the elevator but did not know what the stickers were about. Prewitt discussed the stickers during her morning meeting with the charge nurses.

Prewitt later spoke with Eskierka, Cale, and her own supervisor, who provided more information about the stickers and UCSDH's policy. Prewitt understood the policy to be that nurses were not allowed to wear the stickers in patient care areas, but they could wear them on breaks and in the break room. Prewitt told the charge nurses that nurses could wear the stickers on their breaks and in the break room, but not in patient care areas.

Later on August 29, Bunting began receiving reports that nurses had been asked to remove the sticker. She went to Hillcrest to investigate and spoke with Prewitt, who told her that the nurses needed to remove the stickers because it was a violation of policy.

On September 3, CNA distributed another sticker in support of Jackson with the slogan "We ♥ Nurses #Solidarity." Nurses wore the sticker in patient care areas largely without objection by UCSDH management. There was evidence that one nurse was asked to remove the sticker by her supervisor, but was told a few hours later that the sticker was permitted.

DISCUSSION

If Granted, CNA's Exceptions Would Change the Result

Before addressing CNA's exceptions, we consider the University's argument that the exceptions should be dismissed because they would not change the outcome of the case. We recently reaffirmed that "'[a]bsent good cause, the Board will dismiss as without merit any initial exceptions filed by a prevailing party unless the Board's ruling on the exceptions would change the outcome of the ALJ decision.'" (*Oak Valley Hospital District* (2018) PERB Decision No. 2583-M, p. 5, quoting *Fremont Unified School District* (2003) PERB Decision No. 1528, p. 3.) Contrary to the University's argument, CNA's exceptions do not fall within this rule. CNA argues that the ALJ erred by finding the prohibition of the "LISTEN TO NURSES" sticker unlawful only to the extent it applied to non-patient care areas, and maintains that, for a number of reasons, the prohibition was unlawful as applied to patient care areas as well. Because the outcome of the ALJ's decision will change if we agree with CNA, we decline to dismiss the exceptions and turn to the merits.

The Prohibition Was Not Presumptively Valid

The Board has long held that employees have a right to wear union insignia and buttons at their workplace. (*County of Sacramento*, *supra*, PERB Decision No. 2393-M, pp. 21-22, citing *State of California (Department of Parks and Recreation)* (1993) PERB Decision No. 1026-S.) This right derives from employees' express statutory "right to participate in the activities of an employee organization of their own choosing for the purpose of representation on all matters of employer-employee relations." (*Id*. at pp. 16-17; see HEERA, § 3565.) "[T]he right of employees to self-organize and bargain collectively . . . 'necessarily encompasses the right effectively to communicate with one another regarding self-organization at the jobsite.'" (*County of Sacramento*, *supra*, at p. 22, quoting *Beth Israel Hosp. v. NLRB* (1978) 437 U.S. 483, 491 (*Beth Israel*).) Closely related is the right of employee organizations to communicate with employees at the work site through insignia worn by other employees; this right follows from the right of exclusive representatives to represent their members and from "the right of access." (*Id.* at p. 33.)

The right to wear union insignia serves several important purposes, including allowing employees to demonstrate "their union solidarity and pride." (*County of Sacramento*, *supra*, PERB Decision No. 2393-M, p. 16.) It also provides a conduit for employees and their organizations to send a message to the employer concerning workplace disputes. As the Board noted in *East Whittier School District* (2004) PERB Decision No. 1727 (*East Whittier*), permitting this type of concerted activity redounds to the employer's benefit by allowing it to assess "the relative importance of their employees' concerns at the workplace," thereby fostering the statutory purpose of improving employer-employee relations. (*Id.* at pp. 10-11.)

In general, restrictions on the right to wear union insignia and other articles (such as buttons, pins, or stickers) displaying a message regarding working conditions are presumptively invalid; such restrictions pass muster only if the employer proves "special circumstances" justifying the restriction. (*County of Sacramento*, *supra*, PERB Decision No. 2393-M, p. 20; accord *Fresno County Superior Court v. PERB* (Dec. 14, 2018, F075363) __ Cal.App.5th __ [2018 WL 6583386, pp. 7, 11] (*Fresno*)[7].) The special circumstances test, adopted from *Republic Aviation Corp. v. NLRB* (1945) 324 U.S. 793, seeks to balance the statutory rights of employees to "freely voice their perspectives" and the duties of employers to provide important public services. (*East Whittier*, *supra*, PERB Decision No. 1727, pp. 9-10.) This test also takes into account differences in types of workplaces (*id.* at p. 10 ["what constitutes a 'special circumstance' depends on the setting, and 'special circumstances' recognized in industrial settings may not be applicable in a classroom"]) and in the insignia themselves (*id.* at p. 13 ["where it is alleged that a button is distracting or disruptive, an objective examination of the button should take place"]).[8]

[7] As relevant to this case, *Fresno* agreed with the Board's case-by-case approach, in which an employer's application of a general insignia ban to union insignia is presumptively invalid, and the employer may rebut the presumption by introducing competent evidence showing sufficient "special circumstances." (*Fresno*, *supra*, __ Cal.App.5th __ [2018 WL 6583386, pp. 7, 8].) *Fresno* held that the Board erred, however, by finding that a trial court's need to appear impartial did not constitute sufficient special circumstances to overcome the presumption of invalidity. (*Id*. at p. 11.)

As of the date of our decision in this case, *Fresno* is not final. (Cal. Rules of Court, rules 8.264(b), 8.500.) Nevertheless, the outcome of this case does not turn on whether *Fresno* becomes final, and we cite *Fresno* to demonstrate that it is consistent with the longstanding PERB precedent on which we rely.

[8] Accord *Fresno*, *supra*, __ Cal.App.5th __ [2018 WL 6583386, p. 7] ["This analysis is done through a case-by-case approach that considers the particulars of the employer's operations, including how employees interact with the public"]; *id.* at p. 10 [facts to be considered are "the proven purpose of the space, the risk of harm to that purpose, and the

Taking guidance from National Labor Relations Board (NLRB) case law, however, the ALJ concluded that in this case the presumption of invalidity should give way to a presumption of *validity*, at least as to the University's prohibition of the "LISTEN TO NURSES" sticker in patient care areas. CNA argues that we should reject the private sector presumption of validity. We agree.[9]

This is a question of first impression for us. The ALJ correctly observed that PERB has adopted a presumption of validity concerning restrictions on solicitation and literature distribution in immediate patient care areas. (See *County of Riverside*, *supra*, PERB Decision No. 2233-M, p. 9.) That presumption comes to us from the private sector as well. (*UCLA Medical Center*, *supra*, PERB Decision No. 329-H pp. 6-7, citing, inter alia, *Beth Israel*, *supra*, 437 U.S. 483.)

But our decision to adopt the private sector's presumption concerning prohibitions on solicitation and distribution in patient care areas does not bind us to follow the NLRB's

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evidence demonstrating contested areas fell, or did not fall, within those spaces where harm would exist from union activities"].

[9] We also note that an employer may not single out union insignia for special restriction while allowing other non-business insignia. (*State of California (Department of Parks and Recreation)* (1983) PERB Decision No. 328-S, p. 12.) In the instant case, the parties only introduced evidence of University practices regarding union insignia and did not introduce evidence of practices with respect to other non-business insignia.

Moreover, because we find below that the University's ban is invalid in its entirety, we need not parse the definition of "immediate patient care areas" (*see, e.g.*, *County of Riverside* (2012) PERB Decision No. 2233-M, p. 11 ["immediate patient care areas" does not include areas where the public is permitted]; *Rocky Mountain Hospital* (1988) 289 NLRB 1347, 1360 & fn. 28 [finding "immediate patient care areas" to include patient rooms, operating rooms, and treatment rooms, but not nursing stations]), or consider the University's argument that we should apply the definition of "patient care areas" in the parties' collective bargaining agreement. Nor must we resolve whether the prohibition properly exempted meal periods, rest breaks, and other nonworking times. (See *Petaluma City Elementary School District/Joint Union High School District* (2016) PERB Decision No. 2485, pp. 46-47.)

presumption concerning prohibitions on insignia in patient care areas. (*Napa Valley Community College District* (2018) PERB Decision No. 2563, p. 13.) Rather, our lodestar is whether the underlying reasoning of the private sector decisions is consistent with the language and policies of our statutes. (*Capistrano Unified School District* (2015) PERB Decision No. 2440, p. 35.) We therefore consider the reasoning underlying the NLRB's presumption.

Unfortunately, the NLRB's reasoning is less than robust. The first feint toward extending the presumption from the context of solicitation and distribution to the context of union insignia was by an ALJ in *London Memorial Hospital* (1978) 238 NLRB 704 (*London Memorial*). The ALJ considered testimony about the disruption particular buttons would cause to patients at a psychiatric hospital, but concluded that the testimony was unnecessary. He reasoned that the prohibition on those buttons "would be justified presumptively, since the Board has concluded that a rule proscribing union solicitation in patient-care areas is presumptively valid." (*Id.* at p. 708, citing *Beth Israel*, *supra*, 437 U.S. 483, 506.) He concluded that "[t]here is no basis for applying a different rule to the wearing of insignia which, in the circumstances, was but part of the [employees'] overall campaign to solicit support for the Union." (*Ibid.*) On exceptions, however, the NLRB disavowed that portion of the ALJ's decision. (*Id.* at p. 704, fn. 2 ["We find it unnecessary to decide whether, as stated by the Administrative Law Judge, a rule prohibiting the employees from wearing union buttons on Respondent's second floor would be 'justified presumptively' . . . , inasmuch as the rule in question was neither promulgated nor enforced in such a limited manner"].)

Next, in *Saint Vincent's Hospital* (1982) 265 NLRB 38 (*Saint Vincent's*), an ALJ determined that the employer's rule prohibiting union insignia, without restricting the prohibition to patient care areas, was unlawfully overbroad—citing the ALJ's decision in

London Memorial. (*Saint Vincent's*, *supra*, at p. 45.) On exceptions, the NLRB recognized the implication of the ALJ's finding—that a prohibition limited to patient care areas would be lawful—but demurred, concluding that the issue was not before it. (*Id.* at p. 41, fn. 22.)

Not until *Mesa Vista Hospital* (1986) 280 NLRB 298 (*Mesa Vista*) did the NLRB actually adopt the presumption of validity as to prohibitions on insignia in patient care areas. There, it stated: "A hospital's prohibition of the wearing of insignia, however, on working and even on nonworking time in immediate patient care areas is presumptively valid." (*Id.* at p. 299.) For this conclusion, the NLRB offered no analysis, only citations to *London Memorial, supra*, 238 NLRB 704, and *Saint Vincent's*, *supra*, 265 NLRB 38.

Subsequent NLRB cases reiterate this presumption of validity, but provide no further illumination. (See, e.g., *Healthbridge Mgmt., LLC* (2014) 360 NLRB 937, 938; *Casa San Miguel, Inc.* (1995) 320 NLRB 534, 540.) The NLRB has apparently never been called upon to reexamine the presumption.[10]

We therefore have only the reasoning of the ALJ in *London Memorial*, with which *Mesa Vista* presumably agreed. That reasoning, simply stated, extends a priori the presumption of validity concerning restrictions on solicitation and distribution to restrictions on union insignia. We disagree with that reasoning.

Primarily, the wearing or display of union insignia is not perfectly analogous to the solicitation of union membership and the distribution of union literature. Wearing a button, sticker, or other article with a message about an employee organization or about working

[10] This may be because the NLRB frequently finds that the presumption does not apply in a given case, either because the employer has not tailored its prohibition to immediate patient care areas (see, e.g., *Sacred Heart Med. Ctr.* (2006) 347 NLRB 531, 531 (*Sacred Heart*), enf. den. on other grounds (9th Cir. 2008) 526 F.3d 577), or because the employer has selectively prohibited some buttons or stickers but not others (see, e.g., *Saint John's Health Ctr.* (2011) 357 NLRB 2078, 2079 (*Saint John's*)).

conditions is far less disruptive to the working environment than face-to-face solicitation or literature distribution. The former may involve a scenario as innocuous as a single employee, working alone, wearing a button that merely identifies the employee organization to which he or she belongs. The latter, however, necessarily involves an interaction between two employees, one of whose purpose is—at least momentarily—not to perform work but either to request support for the union or to offer a leaflet or a flier. This conduct invites, and in some cases demands, a response by the employee who is the subject of the solicitation or distribution, and the response could in turn lead to further disruption.

The disruption that results from solicitation and distribution is already recognized in the well-settled rule that an employer may restrict those activities on work time and in working areas, so long as it does not "single out union activities for special restriction, or enforce general restrictions more strictly with respect to union activities." (*Regents of the University of California (Irvine)* (2018) PERB Decision No. 2593-M, p. 8.) In non-hospital settings, no analogous rule applies to the wearing of union insignia on work time and in work areas; those restrictions must always be justified by special circumstances. (*East Whittier*, *supra*, PERB Decision No. 1727, p. 11.) Thus, it is hardly clear why, in the patient care setting, a presumption in favor of prohibitions of distribution and solicitation *necessarily* also applies to prohibitions of union insignia and buttons carrying messages about workplace matters.

A presumption of validity also invites an unduly heavy-handed approach, requiring employers to promulgate a one-size-fits-all rule for all union insignia and buttons and all patient care areas. Some buttons and stickers are more controversial than others. On one end are those that simply identify the union (*County of Sacramento*, *supra*, PERB Decision No. 2393-M; *State of California (Department of Parks and Recreation)*, *supra*, PERB Decision

No. 1026-S) or demonstrate solidarity (as with the "We ♥ Nurses #Solidarity" button distributed at UCSDH—and not banned by the University). Other buttons might contain more controversial messages regarding a workplace dispute (*East Whittier*, *supra*, PERB Decision No. 1727 ["It's Double Digit Time," i.e., double-digit raises]), or even deliberately provocative ones (*Washington State Nurses Assn. v. NLRB* (9th Cir. 2008) 526 F.3d 577, 584 [buttons demanding "safe staffing" and referring to "medical errors"]). And of course, some insignia could be outright obscene or profane. The special circumstances test allows the employer—and ultimately PERB—to take into account these variations in content, as well as the specific context, locations involved, past practice, and patient reaction, if any. (*East Whittier*, *supra*, PERB Decision No. 1727, pp. 10, 13.)

In sum, we decline to follow the NLRB's presumption of validity as to restrictions on union insignia and buttons in patient care areas. We instead continue to follow our traditional rule, which balances employee rights with the varied interests of public agencies providing such important public services as education, law enforcement, and many others. That rule is that a public entity's ban on non-business insignia is presumptively invalid if applied against union insignia, but the employer may rebut this presumption by showing "special circumstances." (*County of Sacramento*, *supra*, PERB Decision No. 2393-M, p. 20; *East Whittier*, *supra*, PERB Decision No. 1727, p. 11; accord *Fresno*, *supra*, __ Cal.App.5th __ [2018 WL 6583386, pp. 7-8, 11].)

However, even if we were to adopt, as a general matter, the NLRB's presumption of validity, it would not apply in this case, because the University's prohibition was: (1) applied selectively to only certain union insignia (*Saint John's*, *supra*, 357 NLRB 2078, 2079; *Mt. Clemens Gen. Hosp.* (2001) 335 NLRB 48, 50, enf'd (6th Cir. 2003) 328 F.3d 837); and (2)

overbroad, i.e., not limited to immediate patient care areas (*Sacred Heart*, *supra*, 347 NLRB 531, 531, enf. den. on other grounds (9th Cir. 2008) 526 F.3d 577; *Mesa Vista*, *supra*, 280 NLRB 298, 299). The University permitted several buttons and stickers in the 15 years preceding this case, and it permitted the "We ♥ Nurses" sticker, which was introduced shortly after the "LISTEN TO NURSES" sticker was banned. There was evidence of only one other sticker prohibited by UCSDH. Moreover, the ALJ found that the prohibition was overbroad in that it was not confined to patient care areas, based on Eskierka's August 29 e-mail. That e-mail described the prohibition as applying during "work time," but in no way confined the prohibition to immediate patient care areas. The University did not file exceptions or cross-exceptions challenging the ALJ's conclusion, and we see no basis for disturbing it. Thus, even if we were to adopt a presumption of validity as a general matter, that presumption would not apply in the circumstances of this case.

Having rejected the presumption of validity, we turn to whether the University established special circumstances for its restriction of the "LISTEN TO NURSES" sticker.

UC Failed To Prove Special Circumstances

The ALJ concluded that the University did not prove special circumstances to justify a restriction on the "LISTEN TO NURSES" sticker in non-patient care areas. The University did not file exceptions or cross-exceptions or in any other way challenge that conclusion in response to CNA's exceptions.

Having failed to prove special circumstances justifying the ban in non-patient care areas, the University cannot attempt to prove that the ban was lawful in part. As the NLRB has explained, an overbroad restriction on the wearing of union insignia is "invalid for all purposes." (*Mesa Vista*, *supra*, 280 NLRB 298, 300; see also *Times Pub. Co.* (1977)

231 NLRB 207, 208 ["when an employer promulgates and maintains overly broad no-solicitation and no-distribution rules those rules are invalid for all purposes and not valid in part as they apply to a given area"].) Our own case law is in accord. Overbroad restrictions on protected activity are deemed unlawful in toto, not merely in part. (See, e.g., *Regents of the University of California (Irvine)*, *supra*, PERB Decision No. 2593-M, p. 13; *Los Angeles Community College District* (2014) PERB Decision No. 2404, p. 14; *State of California (Employment Development Department)* (2001) PERB Decision No. 1365a-S, pp. 10-11.)

Even if we were to consider the University's assertions of special circumstances, we would find that they fall short of overcoming the presumption of invalidity. In order to show special circumstances, an employer is not required to show "actual disruption" resulting from the wearing of the insignia in question, though such evidence, or the lack of it, is one relevant factor for PERB to consider. (*East Whittier*, *supra*, PERB Decision No. 1727, p. 13.) But "'[g]eneral, speculative, isolated or [conclusory] evidence of potential disruption to an employer's operations does not amount to special circumstances'" sufficient to rebut the presumption of invalidity. (*County of Sacramento*, *supra*, PERB Decision No. 2393-M, p. 24.)

The University claimed it was necessary to prohibit the "LISTEN TO NURSES" sticker to prevent nurses from being distracted from their duties by patient questions about the stickers. The University cites *Fabri-Tek, Inc. v. NLRB* (8th Cir. 1965) 352 F.2d 577, in which the court found special circumstances based on testimony that the employees' work—"manufacturing magnetic memory devices for the computer or digital equipment industry"—required great concentration, and that the employer had undertaken numerous steps to reduce or eliminate workplace distractions. Here, however, the University cites no testimony supporting its claim that nurses might be distracted by patient questions about the "LISTEN

TO NURSES" sticker. Nor, importantly, has the University made any attempt to demonstrate why this sticker was more likely to elicit distracting questions than the stickers and buttons that were permitted in the past.

The University also claimed the prohibition was necessary to prevent "employee dissension in the workplace." The University did present some hearsay evidence that some nurses did not want to wear the "LISTEN TO NURSES" sticker, but felt pressured to do so by their colleagues or by the CNA representative. But the fact that not all employees agree with the message of a button or sticker is not enough to establish employee dissension. *United Aircraft Corp.* (1961) 134 NLRB 1632, cited by the University, is distinguishable. In that case, there had been a nine-week strike marked by significant violence and threats of violence against non-strikers. In the aftermath of the strike, the union distributed a pin to those employees who had honored the picket line for the entire strike, and the employer banned the pin. Upholding the ban as justified by special circumstances, the NLRB found that the pin was likely to exacerbate the continuing animosity between strikers and non-strikers.

Here, by contrast, the University presented only vague hearsay evidence that some unspecified number of nurses did not want to wear the "LISTEN TO NURSES" sticker.[11] Even if this hearsay evidence was somehow sufficient to support a finding under PERB Regulation 32176,[12] it does not demonstrate a sufficient justification for banning the sticker. To find otherwise would allow an employer to veto the wearing of union insignia under the guise of shielding dissenting employees. Moreover, the University's evidence does not

[11] Some of this evidence, as in the case of Eskierka's testimony, was double hearsay.

[12] As relevant here, PERB Regulation 32176 provides: "Hearsay evidence is admissible but shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions."

demonstrate why the "LISTEN TO NURSES" sticker was more likely than other permitted stickers and buttons to cause employee dissension.

The University additionally claimed that the prohibition was necessary to present a "certain image" to patients and their families, as the criticism of "UCSD Management" might "cause alarm in the lay patient, family member, or visitor." The most specific testimony seeming to support a claim of adverse impact on patient care came from Kress, who testified that without appropriate context, "patients could perceive that there's some kind of labor dispute going on and maybe question whether the nurse is going to be focused really on caring for them and their family or if they're going to be focused on whatever labor dispute is going on within the department." Curiously, this testimony was contradicted by other University witnesses, who claimed that unlike the stickers and buttons previously worn during bargaining disputes, the "LISTEN TO NURSES" sticker was not appropriate because there was no bargaining dispute at the time—only the dispute involving Jackson's termination. Given the inconsistency in this testimony, we cannot conclude that the "LISTEN TO NURSES" sticker was disruptive to patients merely because they might discern that some kind of labor dispute was going on. (Cf. *Washington State Nurses Assn. v. NLRB*, *supra*, 526 F.3d 577, 584 [special circumstances not established where there was no evidence that buttons reading "RNs Demand Safe Staffing" and "Staffing Crisis—Medical Errors" caused "ill effects"].)

The University's claim concerning the sticker's effect on patient care is also called into doubt by the stickers it previously permitted. The University attempted to explain this change in course by presenting evidence that UCSDH began placing a greater emphasis on patient satisfaction to obtain Magnet certification and to comply with Medicare reimbursement rules. However, any argument in this regard loses its force when considered in light of undisputed

evidence of stickers and buttons worn in and after 2010, when UCSDH obtained Magnet certification.

Some of the University's witnesses also testified that UCSDH managers thought the "LISTEN TO NURSES" sticker was untrue and "offensive"; they believed management did listen to nurses and had made efforts to cultivate a collaborative relationship with CNA. We have stated that insignia "that contain profanity, incite violence, or which disparage specific individuals will always meet the special circumstances test." (*East Whittier*, *supra*, PERB Decision No. 1727, p. 13.) Without resolving whether this statement was too broad, we can at least conclude that the "LISTEN TO NURSES" sticker did not fall into any of these categories. Rather, it expressly advocated a general course of action: that UCSD Management should listen to nurses. Although it is possible to read the sticker as impliedly criticizing management for *not* listening, this is not the type of criticism that would lose statutory protection. When employee speech is claimed to have lost protection because it disparages or defames an individual, the respondent must prove that: (1) the speech was "demonstrably false"; and (2) "the employee knew the speech was false or acted with reckless disregard for whether it was false." (*Chula Vista Elementary School District* (2018) PERB Decision No. 2586, pp. 18-19.) The University made no attempt to prove that the message on the sticker was demonstrably false. It was, instead, a mild criticism that the nurse managers were "likely to encounter at least occasionally in the routine course of business." (*Pomona Unified School District* (2000) PERB Decision No. 1375, p. 16.)

Therefore, even if were we to consider the University's claims of special circumstances, we would reject each of them.[13]

Because the University failed to establish special circumstances justifying its prohibition of the "LISTEN TO NURSES" sticker, that prohibition in its entirety interfered with employee rights in violation of HEERA section 3571, subdivision (a).[14]

ORDER

Based on the foregoing findings of fact, conclusions of law, and the entire record in this case, it is found that the Regents of the University of California (University) violated the Higher Education Employer-Employee Relations Act (HEERA or Act), Government Code section 3571, subdivision (a), by prohibiting employees from wearing a sticker with the slogan "UCSD Management NEEDS TO LISTEN TO NURSES." All other allegations were dismissed. Therefore, pursuant to Government Code section 3563.3, it is hereby ORDERED that the University, its administrators and representatives shall:

A. CEASE AND DESIST FROM:

[13] We note that this case is readily distinguishable from *Fresno*, *supra*, which held that a trial court's appearance of impartiality between parties in performing the "unique governmental function" of "administering justice" was a sufficiently special circumstance to overcome the presumption of invalidity. (*Fresno*, *supra*, __ Cal.App.5th __ [2018 WL 6583386, pp. 11-12].) In a hospital setting—even one operated by a public entity such as the University—there is no unique governmental function requiring an appearance of impartiality, as demonstrated by the University's history of permitting CNA-distributed buttons and stickers.

[14] The complaint in this case did not plead a violation of HEERA section 3571, subdivision (b), for denial of CNA's rights under HEERA, and the ALJ, in finding a partial violation resulting from the prohibition of the "LISTEN TO NURSES" sticker in non-patient care areas, did not find a violation of that subdivision. CNA did not raise this issue in its exceptions, and we therefore do not find a violation of section 3571, subdivision (b).

Interfering with the protected rights of employees and California Nurses Association (CNA) by prohibiting employees from wearing stickers bearing union messages and insignia.

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

1. Within ten (10) workdays following the date this decision is no longer subject to appeal, post at all locations where notices are customarily posted, copies of the notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the University, 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 to communicate with clerical bargaining unit employees. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced, or covered with any other material.

2. Provide written notification of the actions taken to comply with this Order to the General Counsel of the Public Employment Relations Board, or the General Counsel's designee, as directed by the General Counsel or his/her designee. All reports regarding compliance with this Order shall be concurrently served on CNA.

Members Banks and Krantz 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. LA-CE-1256-H, *California Nurses Association v. Regents of the University of California*, in which all parties had the right to participate, it has been found that the Regents of the University of California violated the Higher Education Employer-Employee Relations Act (HEERA), Government Code section 3560 et seq.

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

CEASE AND DESIST FROM:

Interfering with the protected rights of employees and California Nurses Association by prohibiting employees from wearing stickers bearing union messages and insignia.

Dated: _____

REGENTS OF THE UNIVERSITY OF CALIFORNIA

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.