

STATE OF IOWA
BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD

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PUBLIC EMPLOYMENT
RELATIONS BOARD

AFSCME IOWA COUNCIL 61,)	
Complainant,)	
)	
and)	Case No. 8494
)	
STATE OF IOWA (DEPARTMENT OF)	
CORRECTIONS),)	
Respondent.)	
)	

DECISION ON APPEAL

This case is an appeal of a proposed decision and order issued by an administrative law judge of the Public Employment Relations Board (PERB or Board) concerning a prohibited practice complaint filed by AFSCME Iowa Council 61 (AFSCME) against the State of Iowa (Department of Corrections) (hereinafter the State) pursuant to Iowa Code section 20.11. The ALJ concluded that AFSCME established the State’s commission of a prohibited practice in violation of Iowa Code section 20.10(2)(a) and the State timely appealed to the Board pursuant to PERB rule 621—9.2.

Pursuant to PERB subrule 621—9.2(3), the Board has heard the case upon the record submitted before the ALJ. Attorneys for both parties, Jeffrey Edgar on behalf of the State, and Mark Hedberg on behalf of AFSCME, presented their oral arguments to the Board on July 1, 2014. Prior to oral arguments, the parties filed briefs outlining their respective positions.

In this appeal, the Board possesses all powers it would have possessed had it elected, pursuant to PERB rule 621—2.1(20), to preside at the

evidentiary hearing in place of the ALJ. Based upon its review of the record before the ALJ, and having considered the parties' oral arguments and briefs, we make the following findings of fact and conclusions of law.

FINDINGS OF FACT

The ALJ's findings of fact are fully supported by the record and we adopt them as our own. They are reproduced below.

The relevant facts are not genuinely in dispute.

Since 1977, AFSCME has been the PERB-certified bargaining representative for a number of bargaining units of employees of the State's executive branch, including a unit which is made up in part by employees staffing the correctional institutions operated by DOC.

Since its certification, AFSCME has frequently distributed pins or buttons to its members, which have been intended to promote employee solidarity and convey messages or sentiments concerning their State employment. Examples of pins distributed to and worn by AFSCME-represented employees include pins proclaiming "Workers Are Priority 1," "Give Us A Break!" and "Nobody's Safe," which were distributed and worn when staffing, break times and worker safety issues arose. AFSCME has also produced and distributed pins which contained no words yet were intended to convey a message, including two in the early 1990's which featured a red diagonal slash bisecting a photograph of Governor Terry E. Branstad's face. All of these pins were worn by AFSCME-represented employees at their worksites throughout the state, including employees at DOC

institutions, without challenge by the employer.¹

The relationship between AFSCME and the State has been contentious at times. Notable in this respect is a case arising out of the parties' inability to agree upon the terms of a collective bargaining agreement for 1991-1993. When the legislature voted to appropriate money to fund the resulting Iowa Code section 20.22 arbitrators' awards, which were favorable to bargaining units represented by AFSCME and other employee organizations, Gov. Branstad struck the appropriation by exercising an item veto. AFSCME and the other employee organizations brought suit to enforce the arbitration awards and the Iowa Supreme Court ultimately affirmed the Polk County District Court's determination that the awards were enforceable.² In response the State reduced staff, including AFSCME-represented employees, making monies available to fund the awards.

Litigation which involved AFSCME and Gov. Branstad's exercise of another item veto occurred again in 2011. Then-former Gov. Branstad had defeated incumbent Chester J. Culver in the November, 2010 general election for governor. Following the election, but prior to Branstad assuming office, Culver reached agreement with AFSCME on the terms of a collective bargaining

¹ The record does, however, reflect that other AFSCME-produced pins have been challenged by the State on at least two occasions. At one time represented employees wore an AFSCME-produced pin which read "When Will This Shit End? Election Day," which management directed the employees to remove. AFSCME leadership, believing the pin "pushed the boundaries," did not contest the ban. In 1998, AFSCME-represented employees at the University of Iowa Hospitals and Clinics' visitor dining room were ordered to remove an AFSCME-provided pin which commented on the employer's assignment of split shifts by asking "When Will The Shift End?" An arbitrator subsequently sustained AFSCME's grievance challenging the ban, concluding that it violated a provision of the parties' collective bargaining agreement permitting the wearing of "union pins" by employees.

² *AFSCME/Iowa Council 61 et al. v. State of Iowa and Gov. Terry E. Branstad*, 484 N.W.2d 490 (Iowa 1992).

agreement to be effective July 1, 2011 through June 30, 2013. Culver was subsequently criticized for having reached what was viewed by critics as an agreement favorable to AFSCME-represented employees in his final days in office, rather than having Branstad negotiate the agreement following his inauguration.

Gov. Branstad took office on January 14, 2011. In late June, the legislature passed S.F. 517, which appropriated funds for the operation of Iowa Workforce Development (IWD) field offices (where AFSCME-represented employees were employed), but with certain strings attached. On July 27 the Governor, without vetoing the appropriation, item vetoed certain sections of the bill which restricted the use of the appropriated funds. AFSCME's president, together with a number of state legislators, filed suit on August 24, challenging the item vetoes as unconstitutional.

AFSCME leadership viewed the veto of the section of the bill which prohibited a reduction in the number of IWD field offices as an expression of the administration's intent to do just that, which would eliminate or at least jeopardize the jobs of AFSCME-represented employees in the field offices. As had been the case in 1991, when Gov. Branstad vetoed the appropriation to fund the arbitration awards and then laid off AFSCME-represented employees in the wake of the Supreme Court's decision, AFSCME and at least some of the employees it represented were upset and unhappy with the Governor, who they perceived as having again exercised an illegal veto to the detriment of represented employees.

Believing that AFSCME-represented employees were entitled to express this feeling of displeasure and *déjà vu*, AFSCME President Danny Homan (a

named plaintiff in the 2011 litigation) designed and arranged for the production of a large number of pins (at times referred to as “buttons” by the parties and their witnesses) to be distributed to AFSCME members throughout the state. Slightly less than 2.25 inches in diameter, the round pins featured a black and white photograph of Gov. Branstad’s face, bisected by a red diagonal slash (the universal “No” symbol). In the red border surrounding the picture of the Governor, black type proclaiming “1991 OR 2011” appeared around the top of the pin, and “NOTHING HAS CHANGED” around the bottom. A small, white union printer’s “bug” appeared at the bottom of the photo. Two versions of the pin were produced, each with a different photograph of the Governor, but the pins were otherwise identical.³ Homan’s purpose in creating and distributing the pins was to express the wearer’s negative view of the Governor and his actions and the idea that what he had done in 1991 and 2011 was the same (*i.e.*, that “nothing has changed”) in the sense that in both instances the union had sued him due to what it viewed as his improper exercise of an item veto which detrimentally affected state employees.⁴ At some point not clearly identified by the record, but not later than December 6, 2011, a large quantity of these pins were distributed by AFSCME representatives to employees at multiple agencies statewide, some of whom began to wear them at their workplaces.

³ These pins were similar to the two distributed and worn in the early 1990’s which, while wordless, had also featured the universal “no” symbol superimposed over a photo of Gov. Branstad’s face. The first had been in response to Branstad’s veto of the appropriation to fund the arbitration awards, the second (identical except for the addition of a pink background) was a comment on the subsequent layoff of state employees and was referred to as the “pink slip Terry” pin.

⁴ The Supreme Court ultimately agreed that the Governor’s 2011 item vetoes of two portions of the bill had been unconstitutional. *Homan et al. v. Terry E. Branstad and State of Iowa*, 812 N.W.2d 623 (Iowa 2012).

Daniel Craig, warden of the Iowa Medical and Classification Center (IMMC) in Oakdale (a DOC correctional institution) became aware of the pin when two employees voiced objections to it being worn at the institution by others. Craig contacted DOC's central office to see if the pin was something he could prohibit. On or about December 13, 2011, DOC Human Resources Director Susie Pritchard sent an email to DOC managers statewide which described the pin and advised that "[s]taff are not allowed to wear this button while on duty and/or in uniform. Please request that staff remove the button and if they do not comply then proceed with a directive."

Craig had observed Correctional Officer Marty Hathaway, AFSCME's local president, wearing the pin. Hathaway was assigned to IMMC's "master control" and "admit desk," and was the institution's first point of contact with visiting members of the public. Hathaway had worn the pin for a week or so, and had distributed them to the approximately 330 members of his local. There is nothing in the record to indicate that any member of the public had commented or asked, much less complained, about the pin or the fact that Hathaway was wearing it. None of the offenders incarcerated at IMMC complained of the pin.

Following his receipt of Prichard's email, Craig directed Hathaway to take off the pin and to so inform the other union members wearing them at IMMC. Hathaway and the others complied, and subsequently filed a grievance alleging a violation of Article XII Section 4 (C) of the parties' collective bargaining agreement, which has appeared in the contract since at least the early 1990's and provides "[w]here pins are currently permitted, employees shall be allowed to wear up to

two (2) Union pins on their uniforms/smocks.”⁵

On December 16, 2011, Craig sent an email to all IMMC supervisors directing them to tell staff wearing the pins to remove them and advising supervisors to “give a directive to remove if needed.” Craig’s email cited and quoted portions of two DOC policies and a Department of Administrative Services rule, which he asserted would be violated by wearing the pin.⁶ Craig’s email characterized the pin as “disrespectful, inappropriate, and unprofessional and DOC does not recognize it as a union pin under Article XII, Section 4 of the

⁵ Another grievance was filed by an employee at the Iowa Correctional Institute for Women, another DOC institution, and there is testimony that yet another grievance was filed by an employee at the Iowa Veterans Home, a residential health care facility in Marshalltown operated under the auspices of the Commission of Veterans Affairs.

⁶ Cited portions of these policies and the DAS rule provide:

DOC policy AD-PR-11, § IV(E)(1):

Employees shall conduct themselves in a professional manner that creates and maintains respect for the IDOC and the individuals served.

DOC policy AD-PR-24, §§ IV(B)(2), (4) and (5):

2. Employees may not conduct personal lobbying activities on paid work time.

4. Staff may not engage in campaigning, lobbying, or political activity while on duty, on state property, or in uniform.

5. The employee’s rights to express their opinions on political matters will not be restrained on duty unless the display will materially interfere with the efficient performance of official duties, or the employee has substantial contact with the public and the level of trust and confidence associated with the employee’s position is perceived to be such that political expression in any form, while on duty, might influence the public.

DAS rule 11–65.1:

11–65.1(8A) Political activity of employees. All employees have the right to express their opinions as individuals on political issues and candidates. Such expressions may be either verbal or demonstrative in the form of pictures, buttons, stickers, badges, pins, or posters. Employees’ rights to express their opinions on political matters in this form or manner shall not be restrained while on duty unless:

65.1(1) It is a violation of the law; or

65.1(2) The display of such items would cause or constitute a real and present safety risk or would substantially and materially interfere with the efficient performance of official duties; or

65.1(3) The employee has substantial contact with the public and the level of trust and confidence associated with the employee’s position is perceived to be such that political expressions in any form, while on duty, might influence the public.

collective bargaining agreement between the State of Iowa and AFSCME Council 61.”

The record does not disclose what portions of the institution are visited by outsiders, nor does it reveal the number of public visitors to IMMC, the frequency of those visits, or the percentage of employees who encounter visitors. It is clear, however, that many parts of the institution are not accessible to the public and that not all employees at IMMC have contact with the public during their working hours.

AFSCME’s prohibited practice complaint was filed on February 23, 2012.

CONCLUSIONS OF LAW

AFSCME’s complaint alleged that the State’s prohibiting of bargaining unit members from wearing the “NOTHING HAS CHANGED” pin is a violation of Iowa Code sections 20.8(3) and 20.10(2)(a), (b), (c), (d) and (f). These sections provide,

20.8 Public employee rights.

Public employees shall have the right to:

...

3. Engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection insofar as any such activity is not prohibited by this chapter or any other law of the state.

...

20.10 Prohibited practices.

...

2. It shall be a prohibited practice for a public employer or the employer’s designated representative to:

a. Interfere with, restrain or coerce public employees in the exercise of rights granted by this chapter.

b. Dominate or interfere in the administration of any employee organization.

c. Encourage or discourage membership in any employee organization, committee or association by discrimination in hiring, tenure, or other terms or conditions of employment.

d. Discharge or discriminate against a public employee because the employee had filed an affidavit, petition or complaint or given any information or testimony under this chapter, or because the employee has formed, joined or chosen to be represented by any employee organization.

f. Deny the rights accompanying certification granted in this chapter.

In a prohibited practice proceeding, the complainant, in this case AFSCME, bears the burden to establish that the respondent, in this case, the State, committed a prohibited practice. *Int'l Ass'n of Prof'l Firefighters, Local 2607 & Cedar Rapids Airport Comm'n*, 2013 PERB 8637 at 10.

At hearing and in its briefs, AFSCME alleges the State committed prohibited practices by (1) violating Iowa Code section 20.8(3), (2) implementing a unilateral change in policy regarding the wearing of pins without giving AFSCME notice and the opportunity to bargain in violation of Iowa Code section 20.10(2)(a), (e) and (f) and (3) interfering, restraining or coercing employees in the exercise of their section 20.8(3) rights in violation of Iowa Code section 20.10(2)(a).⁷ We agree with the ALJ's analysis of two of these claims.

⁷ Although AFSCME's complaint also alleges violations of Iowa Code sections 20.10(2)(b), (c) and (d), AFSCME did not provide evidence or argument as to how the State violated these sections. We therefore conclude that AFSCME did not meet its burden to establish violations of these sections and dismiss these claims.

1. Violation of Iowa Code Section 20.8(3)

We agree with the ALJ's conclusions of law as to AFSCME's claim that the State's conduct was an independent violation of section 20.8(3) and adopt the following analysis of the ALJ as our own:

AFSCME's claim that the State "committed a prohibited practice within the meaning of Iowa Code section 20.8(3)" may be summarily rejected. Although section 20.8(3) is central to one of AFSCME's theories in this case, it is insufficient as an independent basis for prohibited practice relief. Prohibited practices are, by definition, limited to acts specified in some provision of section 20.10. *See, e.g., Koehn v. Indian Hills Comm. College*, 03 PERB 6414.

Therefore, because this claim does not allege any violation of section 20.10, it shall be dismissed.

2. Unilateral Change

We further agree with the ALJ's conclusions of law as to AFSCME's claim that the State's prohibiting of bargaining unit employees from wearing the pin is a unilateral change in a mandatory subject of bargaining in violation of Iowa Code sections 20.10(2)(a), (e) and (f). We therefore adopt the ALJ's analysis of this claim as our own:

It is well settled that an employer's implementation of a change in a mandatory subject of bargaining without fulfilling the applicable bargaining obligation constitutes a prohibited practice under sections 20.10(1) and 20.10(2)(a), (e) and (f). *See, e.g., Des Moines Ind. Comm. School Dist.*, 78 PERB 1122.

AFSCME emphasizes that the wearing of "union pins" is addressed in the parties' collective agreement and that a 1998 grievance arbitration award concluded that this contractual right could be restricted only if the pins used inappropriately provocative language or were harmful to retail customer relations or patient care. Because the pin in question fits within neither of those exceptions, AFSCME maintains, banning the wearing of the pin "resulted in a unilateral change in contract."

The issue of whether a particular matter is contained in the

collective bargaining agreement or not is a necessary consideration in determining the extent of the bargaining obligation the employer must fulfill before implementing a change in a mandatory topic. The prohibited practice question is not, however, simply whether the employer implemented a “unilateral change in contract,” as AFSCME seemingly argues. An employer’s implementation of a unilateral change in a permissive subject of bargaining, even if contained in the collective bargaining agreement, is not a prohibited practice. *See, e.g., Black Hawk Co., 08 PERB 7929.*

The wearing of pins by employees on the employer’s premises or while in uniform is not a matter within the scope of any of the mandatory subjects of bargaining specified in Iowa Code section 20.9. Because negotiating over the wearing of pins is not prohibited by statute or otherwise illegal, the matter is a permissive subject of bargaining. Consequently, even if the State’s banning of the pin involved here amounted to a change in the *status quo* concerning the wearing of pins in the workplace (or a violation of the collective agreement), the implementation of that change was not a prohibited practice because it was a change to a permissive, rather than mandatory, subject of bargaining.

As a matter of law, the State’s changed policy on the wearing of pins is not a unilateral change in a mandatory subject of bargaining and is not a violation of sections 20.10(2)(a) or (f). Therefore, this claim shall also be dismissed.

3. Interference, Restraint or Coercion of Public Employees in their Exercise of Section 20.8(3) Rights

AFSCME also claims that the State violated section 20.10(2)(a) by interfering, restraining or coercing employees in the exercise of their section 20.8(3) rights when it prohibited bargaining unit members from wearing the “NOTHING HAS CHANGED” pins. We disagree with the ALJ’s conclusions of law on this issue and conclude that special circumstances warrant the State’s prohibition of the pin in this case.

Section 20.10(2)(a) provides that “It shall be a prohibited practice for a public employer or the employer’s designated representative to: (a) Interfere with,

restrain or coerce public employees in the exercise of rights granted by this chapter.” Section 20.8 lists public employee rights. The wearing of union distributed adornments is not specifically listed as a public employee right but subsection (3) provides a general right for public employees to engage in union activity. It gives public employees the right to “[e]ngage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection insofar as any such activity is not prohibited by this chapter or any other law of the state.” Iowa Code § 20.8(3).

In interpreting section 20.8(3), the ALJ sought guidance from National Labor Relations Board (NLRB) cases interpreting a similar provision in the National Labor Relations Act (NLRA). The NLRA sets forth similar rights for private sector employees providing that

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to *engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection*, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

29 U.S.C. § 157 (emphasis added).

The NLRB interprets the right “to engage in other concerted activities for the purpose of . . . other mutual aid or protection” broadly.⁸ The NLRB interprets this section to include the right of employees to wear union insignia

⁸ See John E. Higgins, Jr. *The Developing Labor Law* (6th ed. 2012) at 83 (stating that the ambit of this section “is very broad.”) and at 210 (stating that this section has “been construed by the Board and the courts to extend the reach of the Act.”).

and other adornments distributed by a union in the workplace. A labor law treatise explains the background and guidelines the NLRB has established for this right:

In *Republic Aviation*,⁹ the Supreme Court upheld, as a protected activity, the right of employees to wear union buttons while at work. This general rule also encompasses the right to wear other emblems, such as badges and T-shirts, demonstrating union support. This right must be balanced against the right of the employer to manage its business in an orderly fashion. Striking that balance, the Board allows an employer to promulgate and enforce a rule prohibiting the wearing of union emblems only where the prohibition is necessary because of “special circumstances,” such as maintaining production and discipline, ensuring safety, preventing alienation of customers, adverse effects on patients in a health care institution, or where the message is inflammatory and offensive. Thus, for example, where friction and animosity exist between groups of employees because of a strike, prohibition of union insignias may prove to be a legitimate precaution against discord and violence.

...

The Act does not protect the wearing of badges or symbols that fail to express participation in union or other protected activity. Thus, an employer could lawfully prohibit department store employees from wearing flowers that were distributed by union representatives.¹⁰

John E. Higgins, Jr., *The Developing Labor Law* 121-26 (6th ed. 2012) (other internal citations omitted). The right to wear union insignia not only includes the right to display the union name or logo, but also includes the display of other expressions of solidarity, even if the adornment does not readily identify the union or obviously relate to a working condition.¹¹

⁹ *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945).

¹⁰ *Gimbel Bros. & Local 444, Retail Clerks Int'l Ass'n, et. al.*, 147 N.L.R.B. 62 (1964).

¹¹ See, e.g., *Mt. Clemens Gen. Hosp. v. NLRB*, 328 F.3d 837, 844-45 (2003) (stating that “[w]here employees wear pins or stickers ‘in an effort to encourage their coworkers to support

Special circumstances may warrant an employer's prohibition of union insignia. Special circumstances include an employer's need to "maintain[] production and discipline, ensur[e] safety, prevent[] alienation of customers, adverse effects on patients in a health care institution, or where the message is inflammatory and offensive." John E. Higgins, Jr., *The Developing Labor Law* 121-23 (6th ed. 2012) (internal citations omitted). Under the NLRB, the employer must establish the actual existence of special circumstances and speculative statements that the union adornment will cause potential disruption unsupported by evidence are insufficient to meet this burden. See, e.g., *Am. Fed. of Gov. Emp., AFL-CIO & Office and Prof'l Emp. Int'l Union, Local No. 2, AFL-CIO*, 278 NLRB 378, 385 (1986); *Boise Cascade Corp. & Local 900, United Paperworkers Int'l Union*, 300 NLRB 80, 82 (1990).

The Board previously applied the NLRB approach to union insignia in *AFSCME Local 751 & Davenport Community School District*, 02 PERB 6243. In that case the Board determined special circumstances warranted the school district's prohibition of cafeteria employees' wearing of a button that stated "THERE'S SOMETHING REALLY WRONG HERE!" *Davenport Cmty. Sch. Dist.*, 02 PERB 6243 at 12. The Board's finding of special circumstances was based

the Union's' position on a matter, it 'constitute[s] protected, concerted activity'" and finding that union issued buttons stating "No F.O.T." was protected activity as a way for employees to express their position of "no forced overtime" even though the button did not identify the union or clearly reference the dispute between the employees and management); *Caterpillar, Inc. & Int'l Union, United Auto., Aerospace and Agric. Implement Workers of Am. et. al.*, 1997 WL 33315977 at 6-7 (NLRB March 19, 1997) (finding buttons criticizing the company's CEO by displaying the CEO's name with a slash through it to be protected activity); *Caterpillar, Inc. & Int'l Union, United Auto., Aerospace and Agric. Implement Workers of Am.*, 1996 WL 713068 at 5-8 (NLRB Dec. 10, 1996) (finding that an employee's wearing of a button that stated "Happiness is waking up in the morning [and] finding [the CEO's] picture on a milk carton" was protected activity).

on the setting where the pin was worn and the ambiguous message of the pin rather than proof of actual disruption in services. The Board stated,

We think that the District has demonstrated “special circumstances” sufficient to justify banning the pin in order to prevent alienation of customers, where the pin was being worn in a food service setting in which employees came into contact with customers, including impressionable students, and where the pin displayed an ambiguous message that could reasonably be interpreted as a criticism of the product or service being sold.

The Union urges that the District should be required to prove that some type of material and substantial negative impact on or interference with its business actually resulted from the wearing of the pin. The Union noted that no evidence was presented of any customer commenting that the pin's message must mean the food was bad, or of any customer who actually did not purchase food because of the pin. We do not think that such a burden can be reasonably applied in a customer service setting such as this one.

In *NLRB v. Harrah's Club*, 337 F.2d 177, 57 LRRM 2198 (9th Cir. 1964), the court upheld the employer's prohibition of union pins and its enforcement of a rule prohibiting the wearing of any jewelry on employee uniforms. The court noted that the prohibition of the wearing of union pins in order to maintain an appealing appearance and public image where the employees came into contact with the public constituted a “special circumstance” as much as did considerations relating to employee efficiency and safety. The court said:

Respondent should not be required to wait until it receives complaints or suffers a decline in business to prove special circumstances. Businessmen are required to anticipate such occurrences and avoid them if they wish to remain in business. This is a valid exercise of business judgment, and it is not the province of the Board or of this court to substitute its judgment for that of management so long as the exercise is reasonable

Davenport Cmty. Sch. Dist., 02 PERB 6243 at 12-13 (quoting *NLRB v. Harrah's Club*, 337 F.2d 177, 180 (9th Cir. 1964)).

We believe this reasoning applies to the circumstances in this case, particularly because it involves a prison setting which requires a high level of control and consistency. The Fifth Circuit, in analyzing whether the Immigration and Naturalization Service (INS) could prohibit border patrol agents from wearing union insignia under the Federal Labor Relations Act (FLRA),¹² noted that INS's anti-adornment policy was entitled to deference because of the agency's law enforcement function and need to maintain "uniformity, esprit de corps and discipline." *U.S. Dep't of Justice, I.N.S., Border Patrol, El Paso, Texas v. FLRA*, 955 F.2d 998, 1004 (5th Cir. 1992). For these reasons, the Court concluded special circumstances existed. *Id.*

Due to the paramilitary structure of the Department of Corrections and its need to maintain a high degree of uniformity, discipline and safety within Iowa's prisons, we conclude the State does not need to provide actual evidence of disruption among employees or inmates or adverse effects on the public to establish special circumstances. The ALJ concluded the State failed to establish special circumstances because only a couple of employees had complained about the pins and did so through normal complaint procedures. However, we interpret this fact differently. We find the fact that employees had actually complained is sufficient evidence of workplace disruption in a prison setting to establish special circumstances. Just because employees chose to follow normal complaint procedures instead of instigating workplace arguments over the pin does not mean that workplace disruption did not exist. We do not

¹² The FLRA provides collective bargaining rights and protections for federal public sector employees. See 5 U.S.C. § 7101 - § 7135.

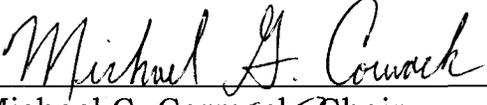
believe the State must wait until more complaints are made or inmate or employee safety is actually jeopardized to prove special circumstances. Due to the nature of the Department of Corrections' work and the unique needs in a prison setting, we conclude special circumstances warranted the State's prohibition of the pin in Department of Corrections' facilities.

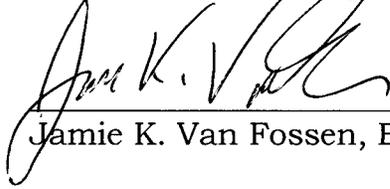
ORDER

For the reasons stated above, Complainant AFSCME's prohibited practice complaint is hereby DISMISSED.

Dated at Des Moines, Iowa this 31st day of October, 2014.

PUBLIC EMPLOYMENT RELATIONS BOARD

By: 
Michael G. Cormack, Chair


Jamie K. Van Fossen, Board Member

Cormack, Chair, concurs specially.

Niebuhr, Member, concurs in part and dissents in part.

Cormack, Chair, concurring specially.

I concur with the majority opinion and agree that special circumstances warrant the State's prohibition of the "NOTHING HAS CHANGED" pin. I write separately because I also believe that the pin is not protected activity within the

meaning of Iowa Code section 20.8(3); thus, the State could lawfully prohibit the pin without a showing of special circumstances. While the ALJ's proposed decision and the majority's opinion on this issue is well-reasoned and fully supported by cases interpreting protected rights under the National Labor Relations Act (NLRA), there are legitimate reasons and legal support for a narrower reading of protected rights under Iowa's Public Employment Relations Act (PERA) which does not include the wearing of this particular pin.

In the forty years since Iowa enacted the PERA, the Board has only had one occasion to consider the meaning of section 20.8(3) in the context of wearing a union issued button, pin or t-shirt. In *AFSCME Local 751 & Davenport Community School District*, 02 PERB 6243, the Board evaluated whether the district committed a prohibited practice by forbidding school cafeteria staff from wearing a union distributed button that stated in bold print, "THERE'S SOMETHING REALLY WRONG HERE!" superimposed over a faint AFSCME logo. The Board employed the NLRB's approach to analyzing union insignia. *AFSCME Local 751 & Davenport Cmty. Sch. Dist.*, 02 PERB 6243 at 10-12. Although not expressly stated in the decision, the Board seemed to presume that employees' wearing of the union issued button was "other concerted activit[y] for the purpose of collective bargaining or other mutual aid or protection" under section 20.8(3). However, it held that the district

demonstrated 'special circumstances' sufficient to justify banning the pin in order to prevent alienation of customers, where the pin was being worn in a food service setting in which employees came into contact with customers, including impressionable students, and where the pin displayed an ambiguous message that could reasonably be interpreted as a criticism of the product or service

being sold.

Id. at 12. Thus, while the Board has addressed whether the prohibition of union issued buttons or pins is a prohibited practice on one prior occasion, it has not previously addressed the scope of what “other concerted activities for the purpose of . . . mutual aid or protection” means in the context of wearing union issued buttons, pins or t-shirts.

It is clear that under the NLRA the pin in this case would be considered protected activity. See *Mt. Clemens Gen. Hosp. v. NLRB*, 328 F.3d 837, 844-45 (2003); *Caterpillar, Inc. & Int’l Union, United Auto., Aerospace and Agric. Implement Workers of Am. et. al.*, 1997 WL 33315977 at 6-7 (NLRB March 19, 1997); *Caterpillar, Inc. & Int’l Union, United Auto., Aerospace and Agric. Implement Workers of Am.*, 1996 WL 713068 at 5-8 (NLRB Dec. 10, 1996). While the board has previously sought guidance from NLRB decisions interpreting NLRA language that is similar or identical to language in the PERA, the Board is not bound by NLRB decisions. I find the NLRB approach to be inappropriate in evaluating whether Iowa Code section 20.8(3) encompasses public employees’ right to wear union issued adornments.¹³ Specifically, I do not agree that the NLRB’s approach of *presuming* that the wearing of any union

¹³ Distinguishing the NLRA from the Iowa PERA (or from other states’ public employment relations acts) in determining the scope of public employees’ protected rights is not a new concept. See *Clay County v. PERB*, 784 N.W.2d 1, 5-7 (Iowa 2010) (recognizing the importance of distinguishing the purposes behind the PERA and the NLRA in interpreting rights under section 20.8(3) and interpreting “other concerted activities for the purpose of collective bargaining or other mutual aid or protection” more narrowly than the NLRB); see also *Omaha Police Union Local 101, IUPA, AFL-CIO v. City of Omaha*, 736 N.W.2d 375, 384 (Neb. 2007) (distinguishing the purposes of the Nebraska public employment relations act from the NLRA to conclude that Nebraska public employees’ protected right to engage in union speech was not as broad as that conferred by the NLRA); *Rosen v. PERB*, 526 N.E.2d 25, 29 (N.Y. Ct. App. 1988) (relying in part on the different objectives between the New York public employment relations act and the NLRA to find a narrower scope of protected activity for public employees).

issued adornment is protected activity unless the employer demonstrates “special circumstances” to warrant prohibition is appropriate in the public sector.

Without question, public employees have the right to express union solidarity and concerns about work conditions through union issued adornments. However, I believe that the specific message conveyed by the pin, button or t-shirt must be considered in light of the legislature’s objective to promote harmonious and cooperative working relationships in the public sector and its declaration that management has the authority to determine the means of how its operation is conducted. See Iowa Code § 20.1(1); 20.7(6).¹⁴ The board has previously noted that the content of a union adornment’s message must be taken into account. In *Davenport Community School District*, the board stated, “We think that an analysis of whether a particular button may be lawfully prohibited requires consideration of the message itself and the context and circumstances in which it is worn. A message in one setting may be inappropriate in another.” *Davenport Cmty. Sch. Dist.*, 02 PERB 6243 at 11.

I would conclude that public employees’ right to wear union issued adornments is more circumscribed than that of private sector employees and is only protected activity under section 20.8(3) if the adornment (1) readily identifies that it is a message conveyed by or on behalf of the union, and (2) if the adornment conveys a message about the union’s position on a collective

¹⁴ These legislative pronouncements are especially pertinent in this case where the public employees at issue wear distinct uniforms that convey to inmates and the public a message of safety, discipline and authority. Uniforms serve a unique and important purpose in how operations are conducted in a prison setting.

bargaining issue or other work condition, that the message unambiguously references that issue or work condition.¹⁵ If these requirements are met, which I believe the vast majority of union issued adornments will, then the wearing of the union issued button, pin or t-shirt is protected activity unless the public employer presents special circumstances that warrant prohibition of the adornment.

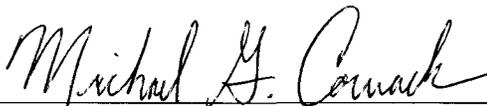
The pin at issue in this case does not meet this minimal standard. First, the pin makes no reference to AFSCME. The union name appears nowhere on the pin and does not display the union's colors. The only union identification on the pin is an indiscernible printer's union bug that is so tiny that it cannot be deciphered with the naked eye. With no reference to the union, the pin risks being perceived as part of a uniform or issued by the public employer which could confuse the public, other coworkers or inmates.

Second, the pin's message, the phrase "1991 or 2011, NOTHING HAS CHANGED" surrounding a photograph of Governor Branstad's face with the universal no symbol bisecting the photo, does not unambiguously refer to a collective bargaining issue or work condition. I acknowledge that the message does in fact express a show of solidarity and discontent with a labor relations matter. But this fact cannot be gleaned from the pin itself. Only after a lengthy explanation of the 1991 arbitration, subsequent legislative

¹⁵ See *NLRB v. Leslie Metal Arts Co., Inc.*, 509 F.2d 811, 813 (6th Cir. 1975) (noting that protected activity must in some way involve the employees' relations with their employer and if activity is directed at circumstances other than conditions of employment, it is not protected as "concerted activity for the purpose of collective bargaining or other mutual aid or protection"); *Joanna Cotton Mills Co. v. NLRB*, 176 F.2d 749, 753 (4th Cir. 1949) (noting that to be protected activity, the purpose of the activity must have a relation to collective bargaining, hours or conditions of work, or any sort of mutual aid or protection of employees).

appropriation, item veto and litigation over the item veto, and litigation again in 2011 over another item veto, can one understand that the union issued pin is an expression of union support and discontent with the Branstad administration's policies that adversely affect collective bargaining unit members. Without having the benefit of this explanation and with no reference to AFSCME, the pin appears to be only an individual's expression of dissatisfaction with the current governor that in no way relates to collective bargaining or work conditions.¹⁶ An average Iowan would not likely understand that the pin's message pertained to any labor relations matter.

Consequently, I would conclude that the public employees' wearing of the pin was not protected activity within the meaning of section 20.8(3). Because wearing the pin was not activity protected by section 20.8(3), the State did not interfere, restrain or coerce employees in exercising a Chapter 20 right by prohibiting the pin.

By: 
Michael G. Cormack, Chair

¹⁶ I do not suggest that only a complete and detailed explanation of a labor relations matter will suffice to meet the requirement that an adornment unambiguously reference a collective bargaining issue or work condition to be protected activity. The lengthy, contentious and complicated history between AFSCME and the Branstad administration need not be expressed in an adornment to be protected, but there must at least be some readily identifiable reference to the union and a labor relations issue. The current pin makes no reference to a union and the "1991 or 2011, NOTHING HAS CHANGED" message gives no hint of any union activity or labor relations matter.

Niebuhr, Member, concurring in part and dissenting in part.

I concur with the majority to the extent it adopts the ALJ's findings of fact and conclusions of law. I would adopt the ALJ's proposed decision and order in its totality because it is legally sound and correctly applies the law to the record developed at hearing before the ALJ.

I respectfully dissent as to section 3 of the majority's opinion. I agree with the standards set forth—that special circumstances may warrant an employer's prohibition of union-issued adornments and that “the employer must establish the actual existence of special circumstances and speculative statements that the union adornment will cause potential disruption unsupported by evidence are insufficient to meet this burden.” Under these standards, I disagree that the State has met its burden to prove special circumstances and for this reason, I dissent.

The majority suggests that the “paramilitary” nature of the DOC is a special circumstance as a matter of law or that it is entitled to deference to the extent that evidence of actual disruption among employees or inmates or adverse effects on the public is not required. However, they also seem to hinge their decision on the complaints by two employees as evidence of actual disruption—“We find the fact that employees had actually complained is sufficient evidence of workplace disruption in a prison setting to establish special circumstances.” As set forth below, these two factors, the paramilitary nature of the organization and the two employees' complaints, do not constitute special circumstances to justify a union pin prohibition in this case.

In contrast to the case cited by the majority,¹⁷ the DOC is not a military organization nor is it the U.S. Department of Justice Border Patrol. The DOC employees are neither soldiers nor officers patrolling our country's borders and it should not be assumed that the DOC shares the same interests as these organizations. In this case, the DOC employees would include cooks, clerks, and medical personnel. The majority overlooks this fact and that the union pin prohibition applied to all DOC employees, regardless of position, whether in uniform, or whether a part of a paramilitary structure. It is therefore incorrect to state that the pin prohibition is needed to maintain "uniformity, esprit de corps and discipline."¹⁸ I agree that this may be a factor in any given case if evidence of its paramilitary nature is present, but to suggest that a paramilitary organization has special circumstances *per se* goes too far and would preclude union-issued adornment regardless of setting, interests, and other circumstances. For these reasons, it is incorrect to suggest that the DOC's "paramilitary" structure should constitute special circumstances as a matter of law or that it is entitled to deference to the extent that it is not required to provide evidence of actual disruption or adverse effects.

Second, I disagree that the two employees' complaints were evidence of an actual disruption rather than evidence of an orderly expression of views. Neither employee testified at the hearing. The State's witnesses only vaguely described the contents of the complaints despite the purported existence of an

¹⁷ *U.S. Dep't of Justice v. FLRA*, 955 F.2d 998 (5th Cir. 1992).

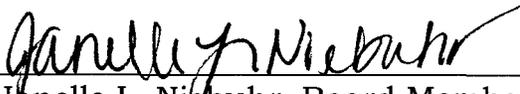
¹⁸ The parties have also implicitly agreed to this as evidenced by the collective bargaining provision allowing bargaining unit members to wear up to two union-issued pins.

email from at least one of the employees. Two employees complaining about a pin through appropriate channels is hardly a workplace disruption, safety concern, or any other special circumstance that might warrant a union pin prohibition. Assuming *arguendo* that the mere speculation of a disruption is sufficient as the majority suggests, two employees' complaints do not lead one to objectively believe that a workplace disruption is likely to result.

I can certainly imagine possible scenarios where this pin might lead to safety issues and a workplace disruption in a prison setting. In fact, when reviewing the record developed before the ALJ, I anticipated seeing such evidence, but it was not presented. It is not our prerogative to base our decision on speculation or presume the existence of the evidence necessary for the State to meet its burden. I will not do so. It is well settled that general, speculative, isolated, or conclusory evidence of potential disruption does not amount to "special circumstances" sufficient to justify a pin prohibition. *See, e.g., Boise Cascade Corp.*, 300 NLRB 80, 82 (1990). My decision is based on the facts in the record and not on the speculative and conclusory testimony presented at hearing. Just as the ALJ, I conclude that the State failed to prove special circumstances and that AFSCME met its burden to establish the State's commission of a prohibited practice under Iowa Code section 20.10(2)(a) by interfering, restraining, or coercing employees in the exercise of their section 20.8(3) rights.

I also disagree with the special concurrence. The special concurrence opinion ignores established legal precedent of the U.S. Supreme Court on

union pins¹⁹ and, for over 30 years, the Iowa Supreme Court's reliance on the NLRB cases where the Iowa statute is similar.²⁰ There is no legal basis to carve out Iowa public sector employment as an exception to employee rights found elsewhere under similar statutes—whether public or private. The cited authority does not support the proposition advocated. Additionally, the special concurrence's newly constructed test for an employee's right to wear union-issued adornment has no legal basis. This three-part test is unduly narrow and, in this case, would prohibit all but one of the pins entered into evidence. I believe we should adhere to the law, just as the Iowa Supreme Court has done in its cases, and follow the approach of the National Labor Relations Board (*i.e.* presuming that the wearing of union-issued adornment is protected activity unless the employer demonstrates special circumstances).

By: 
Janelle L. Niebuhr, Board Member

¹⁹ *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945). *See, also, Mt. Clemens Gen. Hosp. v. NLRB*, 328 F.3d 837 (6th Cir. 2003); *Albertson's, Inc.*, 319 NLRB 93 (1995); *Caterpillar, Inc.*, Cases 33-CA-9876-3, JD-45-97, 1997 WL 33315977 (NLRB Div. of Judges Mar. 19, 1997).

²⁰ *See, e.g., City of Davenport v. PERB*, 264 N.W.2d 307 (Iowa 1978) (relying on NLRB cases and stating “*(W)here * a state legislature adopts a federal statute which had been previously interpreted by federal courts it may be presumed it knew the legislative history of the law and the interpretation placed on the provision by such federal decisions, had the same objective in mind and employed the statutory terms in the same sense. As a result, federal court decisions construing the federal statute are illuminating and instructive on the meaning of our statute, although they are neither conclusive nor compulsory.”) (internal citations omitted). *See, also, Mt. Pleasant Cmty Sch. Dist. v. PERB*, 343 N.W.2d 472 (Iowa 1984) (relying on the interpretation of a parallel provision in the NLRB); *State of Iowa v. PERB*, 560 N.W.2d 560 (Iowa 1997) (same).

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