NOT YET SCHEDULED FOR ORAL ARGUMENT
No. 18-1125, consolidated with No. 18-1143

United States Court of Appeals for the District of Columbia Circuit

LONG BEACH MEMORIAL MEDICAL CENTER D/B/A MEMORIALCARE LONG BEACH MEDICAL CENTER & MEMORIALCARE MILLER CHILDREN'S AND WOMEN'S HOSPITAL LONG BEACH,
Petitioner/Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent/Cross-Petitioner,

and,

CALIFORNIA NURSES ASSOCIATION / NATIONAL NURSES UNITED,
Intervenor for Respondent.

On Petition for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board • Case No. NLRB-21-CA-157007

JOINT APPENDIX
VOLUME III OF III – Pages 566 to 812

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TABLE OF CONTENTS TO JOINT APPENDIX

VOLUME I — PRE-HEARING PLEADINGS & HEARING TRANSCRIPTS

Date	Item	Page
---	Certified List of the Board (June 25, 2018)	JA 1-5
7.28.2015	Charge filed by CNA/NNU (Charging Party) in NLRB Case No. 21-CA-157007 (Charge)	JA 6
9.16.2015	First Amended Charge	JA 7
10.19.2015	Second Amended Charge	JA 8
12.29.2015	Complaint and Notice of Hearing	JA 9-16
1.11.2016	Answer to Complaint	JA 17-22
3.1.2016	Order Rescheduling Hearing to April 19, 2016	JA 23-24
4.14.2016	Order Rescheduling Hearing to May 23, 2016	JA 25
5.23.2016	Transcript of Hearing before the ALJ (May 23, 2016)	JA 26-179
5.24.2016	Transcript of Hearing before the ALJ (May 24, 2016)	JA 180-362

VOLUME II — HEARING EXHIBITS

Date	Item	Page
---	GC EXH. 1	JA 363-464
---	GC EXH. 2	JA 465-466
---	GC EXH. 3	JA 467-469
---	GC EXH. 4	JA 470-472
---	GC EXH. 5	JA 473-476
---	GC EXH. 6	JA 477-479
---	GC EXH. 7	JA 480
---	GC EXH. 8	JA 481
---	GC EXH. 9	JA 482
---	GC EXH. 10	JA 483
---	GC EXH. 11	JA 484

VOLUME II — HEARING EXHIBITS (Continued)

Date	Item	Page
---	GC EXH. 12	JA 485
---	GC EXH. 13	JA 486
---	GC EXH. 14	JA 487
---	GC EXH. 15	JA 488
---	GC EXH. 16	JA 489
---	GC EXH. 17	JA 490
---	GC EXH. 18	JA 491
---	GC EXH. 19	JA 492
---	GC EXH. 20	JA 493
---	GC EXH. 21	JA 494
---	GC EXH. 22	JA 495
---	GC EXH. 23	JA 496
---	---	---
---	ER EXH. 1	JA 497-499
---	ER EXH. 2	JA 500-516
---	ER EXH. 3	JA 517-521
---	ER EXH. 4	JA 522-524
---	ER EXH. 5	JA 525
---	ER EXH. 6	JA 526
---	ER EXH. 7	JA 527-529
---	ER EXH. 8	JA 530-532
---	ER EXH. 9 (rejected)	JA 533-548
---	ER EXH. 10	JA 549
---	ER EXH. 11	JA 550
---	ER EXH. 12	JA 551
---	ER EXH. 13	JA 552

VOLUME II — HEARING EXHIBITS (Continued)

Date	Item	Page
---	ER EXH. 14	JA 553
---	ER EXH. 15	JA 554-555
---	ER EXH. 16 (rejected)	JA 556-564
---	ER EXH. 17 (rejected)	JA 565

VOLUME III — POST-HEARING PLEADINGS

Date	Item	Page
8.31.2016	ALJ's Decision	JA 566-580
8.31.2016	Order Transferring Proceeding to the NRLB (with attachments)	JA 581-586
9.12.2016	Letter from Counsel for the General Counsel Requesting Extension of Time to File Exceptions	JA 587-588
9.13.2016	Board's Granting Extension of Time to File Exceptions and Supporting Brief	JA 589
10.12.2016	Counsel for the General Counsel's Limited Exception to the ALJ's Decision	JA 590-592
10.12.2016	Counsel for the General Counsel's Brief in Support of Its Limited Exception to the ALJ's Decision[1*]	JA 593-611
10.12.2016	Charging Party's Exceptions to the ALJ's Decision	JA 612-615
10.12.2016	Charging Party's Brief in Support of Exceptions to ALJ's Decision[*]	JA 616-629
10.14.2016	Letter from Long Beach to Board re Requests of Extensions of Time for all Parties filing of Responsive Exceptions and Briefs dated October 14, 2016	JA 630-632
10.19.2016	Letter from Board to Parties Granting Long Beach's Extensions of Time dated October 19, 2016	JA 633-634

[*]Whether these briefs constitute part of the record is a contested issue before the merits panel.

VOLUME III — POST-HEARING PLEADINGS (Continued)

Date	Item	Page
11.14.2016	Long Beach's Limited Cross-Exceptions to the ALJ's Decision	JA 635-639
11.14.2016	Long Beach's Brief in Support of Its Limited Cross-Exceptions to the ALJ's Decision*	JA 640-681
11.14.2016	Long Beach's Answering Brief to the General Counsel's Limited Exception and the Charging Party's Exceptions to the ALJ's Decision	JA 682-736
11.21.2016	Letter from Counsel for the General Counsel to Board Requesting a 14-day Extension to file Answering Briefs	JA 737-738
11.21.2016	Letter from the Board to Counsel General Counsel Granting re Extension of Time to File Answering Briefs	JA 739
11.28.2016	Counsel for the General Counsel's Reply Brief to Long Beach's Answering Brief	JA 740-747
12.12.2016	Counsel for the General Counsel's Answering Brief to Long Beach's Limited Cross-Exceptions	JA 748-764
12.12.2016	Charging Party's Answering Brief to Long Beach's Limited Cross-Exceptions	JA 765-773
12.26.2016	Long Beach's Reply Brief to the General Counsel's and Charging Party's Answering Briefs	JA 774-785
4.20.2018	Decision and Order	JA 786-798
6.20.2018	Correction to Decision and Order	JA 799-812

* Whether these briefs constitute part of the record is a contested issue before the merits panel.

JD(SF)–33–16
Long Beach, CA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

LONG BEACH MEMORIAL MEDICAL CENTER, INC. d/b/a LONG BEACH MEMORIAL MEDICAL CENTER & MILLER CHILDREN'S AND WOMEN'S HOSPITAL LONG BEACH

and Case 21–CA–157007

CALIFORNIA NURSES ASSOCIATION/ NATIONAL NURSES UNITED (CNA/NNU)

Lindsay Parker and Molly Kagel, Esqs., for the General Counsel
Adam Abrahms and Kathleen Paterno, Esqs. (Epstein Becker & Green, P.C.), for Respondent
Micah Berul, Esq., for Charging Party

DECISION

JEFFREY D. WEDEKIND, **Administrative Law Judge**. The complaint in this case challenges two employee dress code and appearance rules at Long Beach Memorial Medical Center and Miller Children's and Women's Hospital. The rules prohibit employees from wearing a nonapproved pin or badge reel. The General Counsel alleges that, on their face, the rules violate Section 8(a)(1) of the National Labor Relations Act because they are not expressly limited to immediate patient care areas and restrict the ability of employees to engage in protected conduct (wearing union pins and badge reels).

The General Counsel also alleges that Respondent violated Section 8(a)(1) of the Act by disparately enforcing the badge reel rule. Specifically, the General Counsel alleges that Respondent prohibited two registered nurses, who served as union representatives in their medical units, from wearing a badge reel with the union logo in patient care areas, while permitting nurses to wear other badge reels in such areas that did not have the approved logo.

A hearing to address the allegations was held on May 23 and 24, 2016, in Los Angeles. The parties thereafter filed briefs on July 20. As discussed below, the General Counsel has adequately established that the pin rule is facially unlawful, but not that the badge reel rule is facially unlawful or has been disparately enforced.

I. FACTUAL BACKGROUND

Respondent is a large urban medical facility. It includes two licensed hospitals and employs about 6000 employees, including over 2100 registered nurses (RNs) represented by the California Nurses Association/National Nurses United (CNA/NNU).[1]

[1] There is no dispute, and the record establishes, that the Board has jurisdiction.

To help maintain safety and security at the facility, Respondent employs its own security force, including 70 security guards and three K-9 units. Since at least 2012, it has also required all staff to wear an "ID badge" visible at all times while on the job. The ID badge displays the employee's photo, name, and title and is coded electronically to allow the employee appropriate and necessary access to hospital and parking areas by swiping it across an electronic panel. Some badges also have a color-coded stripe across them; for example, RNs have a blue stripe, and employees authorized to remove infants and children from their room or unit have a pink stripe, across their ID badge. (R. Exh. 3; Tr. 109–110, 200–201.)[2]

Since March 2014, Respondent has also maintained a "dress code and grooming" policy for all employees who work at the facility, including but not limited to those who wear uniforms. The policy (#318), which is published on Respondent's intranet, was adopted and established by Memorial Health Services d/b/a MemorialCare Health System (MHS), Respondent's parent corporation. The policy sets forth standards of "appropriate dress, appearance, and grooming" to "promote an efficient, orderly and professionally operated organization" at all MHS facilities.

The policy also lists several "examples of minimum requirements." Consistent with the security policy, the first requirement is that all employees must wear their "identification badges" with the name and picture facing out, at a level that can be readily seen. Other requirements address such things as hair (no "extreme styles or colors" allowed), and earrings or other jewelry (must be "conservative," nondangling, and not "prove to be a distraction to others").

The last requirement (#9) is the subject pin rule, which states, "Only MHS approved pins, badges, and professional certifications may be worn." Under this rule, RNs are permitted to clip various small pins to the top of the badge, including years of service pins and "I Give" pins (indicating that they donate to the medical center) issued by Respondent, and certification pins issued by professional associations or organizations indicating that they have been certified in a particular specialty (e.g., pediatric nursing). (GC Exhs. 3, 20–21; Tr. 38, 65–67, 127–131; 209–211, 265–266.)[3]

Since October 2014, Respondent has also maintained two new policies applicable only to employees who provide direct patient care at the facility. Both of these policies are likewise published on Respondent's intranet. The first is a "uniform and infection prevention" policy (PC–261.01), which establishes standards of attire to assist patients in easily identifying their care providers and to prevent hospital acquired infections. It requires direct care providers to

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[2] Specific citations to the record are provided to aid review, and are not necessarily exclusive or exhaustive. In making credibility findings, all relevant factors have been considered, including the interests and demeanor of the witnesses; whether their testimony is corroborated or consistent with the documentary evidence and/or the established or admitted facts; inherent probabilities; and reasonable inferences that may be drawn from the record as a whole. See, e.g., *Daikichi Corp*., 335 NLRB 622, 633 (2001), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003); and *New Breed Leasing Corp. v. NLRB,* 111 F.3d 1460, 1465 (9th Cir.), cert. denied 522 U.S. 948 (1997).

[3] Policy #318 was modified in certain respects in July 2014; for example, a requirement was added stating that "clothing must cover the back, shoulders, thighs, midriff, and must not be excessively short, tight, or revealing" (GC Exh. 4.) However, the pin rule was retained without change.

wear a standard hospital uniform, color coded by discipline and embroidered with the approved logo and their discipline when on duty. Pursuant to this new policy, RNs who provide direct patient care may no longer wear scrubs of any color or pattern. Rather, they must wear navy blue scrubs provided by Respondent with the MHS name and logo (a medical cross in a circle design) and their discipline (RN) embroidered in white on the upper left side of the scrub top.

To help prevent infections, the policy also establishes a "bare below the elbows" rule. The rule prohibits RNs and other direct care providers from wearing such things as long-sleeved jackets or wristwatches in direct patient care areas. It also specifically prohibits them from wearing lanyards around their neck to attach and extend their ID badge for inspection or swiping. As a result, RNs must either attach the badge to a retractable badge reel or attach and detach the badge directly to and from their uniform. (GC Exh. 5; see also GC Exh.7; and Tr. 51, 78, 202–205, 233, 249.)

The second new policy applicable to direct patient care providers is an "appearance, grooming, and infection prevention" policy (PC–261.02). Like the new uniform and infection prevention policy, it establishes standards of appropriate appearance for those employees who provide direct patient care in order to assist patients in easily identifying them and to prevent hospital acquired infections. Indeed, it references and repeats portions of that policy. For example, it contains a similar "bare below the elbows" rule. It also sets forth numerous specific appearance and grooming requirements. For example, like the MHS policy, it states that "identification badges" shall be worn with the name and picture facing forward. It specifically adds, however, that the badges must be worn at collar level, on the right side, so they can be readily seen. Pursuant to this rule, the new RN uniform has a small piece of fabric sown onto the scrub top on the right side so that the badge reel or badge itself can be attached to it with a clip.

The policy also includes the subject badge reel rule (#12), which states, "Badge reels may only be branded with MemorialCare approved logos or text."[4] Pursuant to this rule, Respondent provided each RN and other direct care provider with a new badge reel displaying the same MHS medical-cross logo as the uniform. At least some received the new MHS badge reel with their new uniform order in November or December 2014. Others received it directly from their managers. Respondent also provided a replacement on request if the badge reel broke, which it often did. Indeed, Respondent had its vendor modify the construction of the badge reel twice in the first 6 months to make it more durable. (GC Exhs 6, 8; R. Exhs. 10–13; Tr. 85–86, 113, 148–149; 238–240, 294–298.)

Finally, all of the foregoing policies state that it is the responsibility of the supervisors to "consistently enforce compliance" with the standards and requirements by taking appropriate corrective or disciplinary action with employees who violate them. [5]

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[4] This is the only rule where badge reels are specifically addressed. There is no mention of badge reels in the MHS dress code and grooming policy or Respondent's uniform policy.

[5] The subject pin and badge reel rules were apparently adopted and implemented without the Union's agreement. See Tr. 308–310. There is no contention that the Union waived the RNs' right under the Act to wear union insignia in non-direct patient care areas. See generally *AT&T*, 362 NLRB No. 105, slip op. at 5 (2015).

II. Alleged Unfair Labor Practices

A. Alleged Unlawful Maintenance of the Pin and Badge Reel Rules

It is well established that, absent special circumstances, employees have a right under the Act to wear union insignia at work. However, due to concerns about disrupting patient care, the Board has adopted certain rules unique to healthcare facilities. In such facilities, a ban on wearing any nonofficial insignia in immediate patient care areas is presumptively valid.[6] However, restrictions on wearing insignia in other areas are presumptively invalid. A hospital or other healthcare facility must therefore establish special circumstances justifying such restrictions; specifically, that the restrictions are necessary to avoid disruption of healthcare operations or disturbance of patients. See *HealthBridge Management, LLC*, 360 NLRB No. 118 (2014), enfd. 798 F.3d 1059 (D.C. Cir. 2015); and *Washington State Nurses Assn. v. NLRB*, 526 F.3d 577, 580 (9th Cir. 2008), and cases cited there.

Here, the General Counsel contends that Respondent's pin and badge reel rules on their face apply—or would reasonably be construed by employees to apply—even in non-direct patient care areas of the facility; that the rules are therefore presumptively invalid; and that Respondent has failed to establish special circumstances justifying the application of the rules to such areas.

1. The Pin Rule

As indicated above, the MHS dress code and grooming policy containing the pin rule applies to all employees, including non-direct patient care providers.[7] Thus, it is clear that the pin rule is not limited to direct patient care areas of the facility. Accordingly, the rule is presumptively invalid, and Respondent must show that the restriction on any employees wearing nonapproved pins in non-direct patient care areas is necessary to avoid disruption of its operations or disturbance of patients.

Respondent has failed to make the required showing. Respondent argues that the ban on wearing nonapproved pins on ID badges in all areas is justified because ID badges are part of the hospital safety and security protocol (Br. 39–42, 46–47). However, there is no substantial evidence indicating that *pins* are part of the safety and security protocol. As indicated above, the pin rule is set forth exclusively in the MHS dress code and grooming policy. Cf. *Boch Honda*, 362 NLRB No. 83, slip op. at 3 (2015), enfd. --- F.3d ---, 2016 WL 3361733, at *14 (1st Cir.

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[6] The presumption of validity applies only to a ban on all nonofficial insignia in immediate patient care areas; it does not apply to a selective ban on only union or certain union insignia. *St. Johns Health Center*, 357 NLRB 2076, 2079 & n. 3 (2011).

[7] Judith Fix, Respondent's senior vice president of patient care services and chief nurse officer, testified that the MHS policy applies *only* to non-direct patient care providers, as that policy was superseded by Respondent's subsequent policies applicable to direct patient care providers (Tr. 217–218). However, she later testified that direct patient care providers are still prohibited by the appearance policy from wearing nonapproved pins on their badge or when in uniform (Tr. 250–251, 265–266, 271). Further, she acknowledged that the source of that prohibition is the MHS policy (Tr. 276).

June 17, 2016) (rejecting employer's assertion that its ban on unofficial pins was necessary for safety purposes, as the ban was contained in the "dress code and personal hygiene policy," which did not include any statement linking it to safety). Further, employees are permitted under the rule to wear a variety of pins on their badge in addition to professional certifications, including "I Give" pins distributed by Respondent. Cf. *London Memorial Hospital*, 238 NLRB 704, 709 (1978) (rejecting hospital's contention that its ban on nonprofessional insignia was imperative for patient care, given that the hospital encouraged employees to wear "I Care" buttons). Finally, Judith Fix, who as noted above is Respondent's senior vice president of patient care services and chief nurse officer, acknowledged that there is no limit to how many pins employees can wear on their ID badge, as long as the badge remains readable (Tr. 267).[8]

In any event, the rule on its face is not limited to wearing nonapproved pins on ID badges. Respondent argues that "no reasonable employee would read, in the context of the whole, the challenged [rule] as restricting the wearing of pins anywhere except for on an employee's ID badge" (Br. 48). However, Respondent cites no provision in its dress code and grooming policy or other policies that would reasonably be interpreted by employees to narrow the otherwise broad restriction to only badge pins.

Respondent also argues that there is no explicit ban on wearing union insignia in the policy; thus, "when read in the context of the whole," the rule "would not make a reasonable employee think they were prohibited from wearing union insignia" (Br. 50). However, on its face, the ban on all nonapproved pins would include union pins. Cf. *Albertsons, Inc.*, 351 NLRB 254, 256–57 (2007) (employer's restriction on wearing badges or pins other than name badges on its face covered union badges and pins of all types and sizes). And, again, Respondent cites no specific provision that would reasonably be interpreted by employees to narrow the otherwise broad restriction to only nonapproved pins other than union pins.

Citing Fix's testimony, Respondent also argues that employees are not prohibited from displaying union insignia in other ways while working at the facility. Fix testified that Respondent does not prohibit non-direct patient care employees, who are not required to wear a standard uniform, from wearing other items, such as jackets, lanyards, earrings, and necklaces, that display union or other insignia. Indeed, she testified that even uniformed direct care providers may display the union logo on earrings and necklaces, and could also tattoo it on

[8] The General Counsel argues that Respondent has also permitted employees, particularly those in the pediatric units, to wear pins with cartoon characters on their badge, such as Ariel the Mermaid, Mickey Mouse, and Bugs Bunny. In support, the General Counsel cites the testimony of RN/Union Representative Brandy Welch and former RN/Union Representative Theresa Stewart, who retired in January 2016 (Tr. 65, 74, 126). However, as indicated by Respondent, their testimony is too vague and insubstantial to establish that employees have worn such pins with any regularity or frequency, or that Respondent has permitted them to do so expressly or impliedly through lax enforcement of the pin rule.

their forearm or paint it on their fingernails.[9] However, there is no evidence that Respondent has communicated this to employees (other than by not explicitly prohibiting it).[10] Nor is there any evidence that Respondent's employees have regularly or routinely displayed union or other logos in such a manner at the facility during the relevant period. To the extent Respondent's brief (pp. 21–22) suggests otherwise, it is incorrect.

In any event, Respondent's burden is not satisfied simply by showing that all possible alternatives to union pins are not likewise expressly banned. Rather, as indicated above, Respondent must show special circumstances justifying the ban on union pins. This is illustrated by the very cases Respondent cites. For example, in *Albis Plastics*, 335 NLRB 923 (2001), enfd. 67 Fed. Appx. 253 (5th Cir. 2003), the Board upheld the employer's ban on nonapproved helmet stickers because the employer had shown that union or other nonapproved stickers on the employees' helmets would pose a threat to safety. The same was true in *Standard Oil Co. of California*, 168 NLRB 153 (1967). Although in both cases employees were free to display union insignia elsewhere on their clothing, the Board did not rely on this as a basis for upholding the helmet sticker ban in *Albis*, and cited it only as an additional ("furthermore") reason for upholding the similar ban in *Standard Oil*.

Respondent also argues that there is no evidence that any employee was actually prohibited from wearing a union pin.[11] However, in the absence of special circumstances, requiring management preapproval is itself an unlawful interference with employee rights under the Act, as the requirement may chill employees from exercising those rights. See *Lily Transportation Corp.*, 362 NLRB No. 54, slip op. at 6 (2015); and *Middletown Hospital Assn.*, 282 NLRB 541, 552–553 (1986), and cases cited there. As discussed above, Respondent has failed to show special circumstances.

Finally, Respondent argues that there was no actual approval process for pins at the facility, citing Fix's testimony that "MHS approved pins" really means "MHS distributed pins" (Tr. 273). However, as Fix acknowledged, the rule does not say that. Nor is there a substantial evidentiary basis to conclude that employees would reasonably interpret the rule to mean that. In any event, even if they did, and therefore knew for certain that union pins could not be worn, the resulting chilling effect on their rights would be no less.

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[9] See Fix's testimony, Tr. 218, 261–263. The MHS and Respondent dress code, grooming, and appearance policies prohibit visible tattoos except for employees with direct patient care responsibilities who, for infection control purposes, are not allowed to wear any clothing below the elbows to cover such a tattoo. Thus, the written policies appear to prohibit employees in non-direct patient care areas from displaying a union tattoo on their forearm.

[10] As indicated above, the MHS dress code and grooming policy requires earrings and other accessories and jewelry to be "conservative" and not "distracting."

[11] There is no evidence that employees have worn union pins while working during the relevant period. RN Welch, who as noted above is a union representative and has worked at the facility for 18 years, testified that she had seen a union pin on an employee's ID badge; however, she was not sure when or if it was during the past 2 years (Tr. 73–74).

2. The Badge Reel Rule

As indicated above, unlike the MHS policy, Respondent's appearance, grooming, and infection prevention policy containing the badge reel rule is expressly limited to direct patient care providers. Nevertheless, the General Counsel argues that, like the pin rule, the badge reel rule is facially unlawful because it "does not clearly state whether it is applicable to patient or non-patient care areas and any ambiguity in this regard should be construed against Respondent" (Br. 24). [12]

The argument is unpersuasive. It is true that ambiguities in employee conduct rules are construed against the employer. See, e.g., *Valley Health System LLC*, 363 NLRB No. 178, slip op. at 1 (May 5, 2016); and *Lafayette Park Hotel*, 326 NLRB 824, 828 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999). However, a rule is not ambiguous merely because it *could be* interpreted to apply to protected activity; the test is whether employees *would* reasonably interpret it to apply to such activity. *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647–648 (2004).

Here, employees would not reasonably conclude that the badge reel rule applies in non-direct patient care areas. Respondent's appearance, grooming, and infection prevention policy clearly states that its purpose is to assist patients in easily identifying their direct patient care providers and to prevent hospital acquired infections. Further, although the badge reel rule does not itself reference patient care or patient care areas, some of the other provisions and rules do. See p. 1, purpose #4 (bare-below-elbows approach is intended to prevent infection in "patient care areas"), and p. 2, policy #4 (long hair must be tied back or pulled up "during care").

Moreover, the policy specifically provides (p. 2, policy #1) that employees who come into the hospital for education or meetings, rather than to provide patient care, may wear "business casual" attire instead of "MHS logo" attire. And there is no contention or evidence that the badge reel rule has ever been applied to employees when they are not providing direct patient care. Cf. *Mt. Clemens General Hospital*, 335 NLRB 48, 50–51 (2001), enfd. 328 F.3d 837 (6th Cir. 2003) (hospital's ban on a particular union button protesting forced overtime was

[12] The allegation that the badge reel rule is facially unlawful was added to the complaint on the first day of hearing, after Respondent's counsel cited it in his opening statement and the General Counsel's first witness, Respondent's HR Director and custodian of records, testified about it. The General Counsel explained the delay in alleging the violation on the ground that the Regional Office was previously unaware of the rule. Respondent disputed this, asserting that the rule was quoted in the position statement it filed during the Region's investigation of the Union's charge, and therefore objected to adding the allegation. Respondent renews this objection in its posthearing brief (p. 30 n. 30), and requests that the allegation be stricken. The request is denied, essentially for the same reasons that the General Counsel's amendment was granted (Tr. 47–48). Even if Respondent had informed the General Counsel of the badge reel rule during the investigation of the other allegations, the allegation that the rule is facially unlawful is closely related to the complaint allegation that Respondent disparately required RNs to remove the union badge reel; the new allegation was added early in the hearing during the General Counsel's case in chief; and Respondent does not assert that it was denied sufficient time to prepare its defense or otherwise suffered any prejudice.

overbroad because supervisors required RNs to remove the button at times when they were in non-patient care areas, such as nurses lounges).[13]

B. Alleged Disparate Enforcement of the Badge Reel Rule

Even if an employer's rule is facially lawful, the disparate enforcement of that rule against union or other protected concerted activity violates the Act. See, e.g., *Shelby Memorial Home*, 305 NLRB 910, 919 (1991), enfd. 1 F.3d 550, 565 (7th Cir. 1993) (nursing home's selective enforcement of its rule restricting pins or badges against union insignia but not other insignia was unlawful). See also *Stabilus, Inc.*, 355 NLRB 836, 839 (2010); and *Nestle Co.*, 248 NLRB 732, 737 (1980), affd. mem. 659 F.2d 252 (D.C. Cir. 1981). The General Counsel alleges that such disparate enforcement occurred here when Respondent refused to allow two RNs, Brandy Welch and Theresa Stewart, to continue wearing a union badge reel in July and October 2015, respectively. As discussed below, however, the evidence fails to adequately support this allegation as well.

As noted above, both Welch and Stewart were union representatives for their respective medical units during the relevant period. It is undisputed that, notwithstanding the new appearance policy, they both regularly wore a union badge reel during much or most of 2015 without incident. The union badge reel was identical in size, shape, and function to the MHS badge reel. The only significant difference was that the face displayed the union (CNA) logo rather than the MHS logo and was encased in red rather than white plastic. Welch testified that she began wearing the union badge reel in February 2015, after the first MHS badge reel she was given broke. Stewart testified that she began wearing the union badge reel well before the new rule, and resumed doing so shortly after the new rule when her first MHS badge reel likewise broke. Elizabeth Castillo, another RN/union representative who works in the diabetes medical surgical unit,[14] testified that she also wore a union badge reel throughout most of 2015. (Tr. 54–55, 75–76, 85, 88, 115, 170–171; GC Exh. 10.)

Eventually, in July 2015, Welch was told by the clinical director of her pediatric unit, Colleen Coonan, that she could no longer wear the union badge reel. Welch had been talking with Coonan and another manager just outside the pediatric unit door about a grievance matter. As Welch was leaving the conversation to enter the unit, Coonan told her that she could not wear the badge reel, she had to wear the MHS badge reel. (Tr. 58, 304.) About 3 months later, in October 2015, Stewart was likewise told to remove her union badge reel by one of the two assistant unit managers in her outpatient surgery unit, Robin Johnson. Stewart was caring for a patient when Johnson entered the room, gave her an MHS badge reel, and told her she needed to

[13] As discussed infra, RN Welch was just outside the patient care area when she was told to remove her union badge reel. However, she was on her way into that area. See Tr. 58, 304, and GC Br. 17. And the General Counsel does not cite this incident as evidence that the badge reel rule was applied outside immediate patient care areas.

[14] There are about 50 union representatives at Respondent's facility (Tr. 315–316). There is no record evidence whether the other 47 likewise wore union badge reels or were told to remove them.

wear it under the new policy. About 2 months later, in December 2015, Castillo was also told by a manager that she had to wear the MHS badge reel.[15] (Tr. 115–117, 149, 170–171, 283–284.)[16]

The parties presented conflicting testimony regarding whether RNs and other direct care providers were allowed to continue wearing other types of non-MHS badge reels during the relevant period. For example, Fix, who is responsible for all patient care, testified that the MHS badge reel is considered part of the standard uniform and that no other type of badge reel is permitted. Further, she testified that she has never seen anyone wearing a non-MHS badge reel, even though she frequently observes and interacts with the staff during her multiple daily rounds in the patient care units and has seen other violations such as clothing below the elbows. (Tr. 233, 239, 247–248, 264).

Coonan likewise testified that the MHS badge reel is part of the uniform. She testified that she told the staff in her unit this at the time the new rule was implemented, and that she thereafter reminded anyone she saw who was not wearing the MHS badge reel. She testified that, other than Welch, she has had to remind only about four employees of the rule, whom she observed during daily "huddles" between June and September 2015 wearing a badge reel with Hello Kitty, a frog, or a princess on it. (Tr. 295, 299–305.)

Johnson similarly testified that she looked for anyone without an MHS badge reel, because the hospital director told the assistant unit managers to distribute the MHS badge reels in accordance with the policy. She testified that, in addition to Stewart, she saw only one other RN without the MHS badge reel, and that she gave her one too. Moreover, she testified that she did not even notice what kind of badge reels they were wearing, only that they were not the MHS badge reel. (Tr. 284–285.)

The General Counsel's witnesses, on the other hand, painted a distinctly different picture. Welch testified that she was unaware until the July 2015 incident with Coonan that only the MHS badge reel was allowed. Further, she testified that both before and after that incident she saw other RNs wearing badge reels with cartoon characters (Ariel the Mermaid, Spiderman, Sponge Bob, Mickey Mouse, and Batman), badge reels decorated with jewelry, and badge reels with logos for breast cancer research and organ donation (One Legacy). She testified that she saw RNs wearing such badge reels daily, including on the patient care floor, and was not aware of any manager asking that they be removed. (Tr. 58–59, 60, 64, 76, 95–96.) She also submitted a photograph she took in July 2015 (the same day as the incident with Coonan) of another RN working on her unit who was wearing a One Legacy badge reel (GC Exh. 13).[17]

Similarly, Stewart testified that she had never been instructed to wear the MHS badge reel prior to the October 2015 incident with Johnson; that it was merely recommended to be worn. She further testified that, after the incident until her retirement in January 2016, she saw

[15] Unlike the July and October incidents involving Welch and Stewart, this December incident involving Castillo is not alleged as a violation in the complaint.

[16] Coonan and Johnson are admitted supervisors of Respondent.

[17] Welch also submitted a photo she took the same day of an RN wearing a badge reel with Ariel the Mermaid on it. However, the RN was not in uniform or working in a direct patient care area at the time. (GC Exh. 12; Tr. 61, 94–95).

nurses wearing "I Give" badge reels, badge reels with logos for the Oncologic Nurse Society (ONS), Vascular Access Certification (VAC), and Care Ambulance (an ambulance service used by the hospital), badge reels with decorative flowers (made out of the plastic safety tops of vials), and badge reels with nothing at all on them. Like Welch, she testified that she did not see any nurses being told to remove such badge reels. (Tr. 118–125.) She also submitted three photographs she took during that period. See GC Exh. 16 (close up of a VAC badge reel on an RN's uniform); GC Exh. 18 (close up of a plain black badge reel on an RN's uniform); and GC Exh. 19 (close up of an "I Give" badge reel on an RN's uniform).[18]

Castillo testified that she has also seen RNs wearing other badge reels notwithstanding the new policy. Like Welch and Stewart, she testified that she has seen One Legacy badge reels, badge reels with cartoon characters, and badge reals that say nothing at all. She has also seen badge reels covered in rhinestones, and badge reels that say PACU (one of the units in the hospital). She testified that she has seen RNs wearing such badge reels on the patient care floor, even during the past 6 months, and that no one to her knowledge said they had to be removed. (Tr. 162–164, 180.) She also submitted a photo she took on her unit floor in May 2016. See GC Exh. 23 (RN badge attached to a heart-shaped badge reel covered with rhinestones).

None of the foregoing testimony, by either the Respondent's or the General Counsel's witnesses, was particularly credible or persuasive. For example, it seems highly unlikely, based on the record as a whole (including the undisputed fact that the MHS badge reels frequently broke), that Fix has never noticed any RNs or other direct care providers wearing a non-MHS badge reel, and that Johnson has seen only one RN in addition to Stewart wearing a non-MHS badge reel. There is also reason to doubt Johnson's testimony that she did not notice or know what type of badge reel Stewart was wearing. As discussed above, Stewart was a union representative and had been wearing the CNA badge reel for months.

However, there is also substantial reason to discount the testimony of Welch, Stewart, and Castillo. As indicated above, Respondent employs thousands of RNs and other direct care providers. Yet, not one confirmed personally wearing a cartoon-character or other type of non-MHS badge reel during the relevant period (none were called or subpoenaed to testify). Further, between the three of them, Welch, Stewart, and Castillo could offer only five photographs purporting to show an RN wearing a non-MHS badge reel in a patient care area. No explanation for this was given and none is obvious. According to their testimony, their fellow RNs are unafraid to openly wear nonapproved badge reels in front of their supervisors on a daily basis. And it is undisputed that Respondent has never actually disciplined an RN or other direct patient care provider for violating the badge reel rule or any of the other new uniform and appearance rules.

Moreover, as discussed above, Welch, Stewart, and Castillo admitted that Respondent did not tell them to remove their union badge reels until approximately 6, 9, and 11 months, respectively, after they began wearing them. On its face, this seems inconsistent with the theory that Respondent more strictly enforced the rule against union badge reels. Cf. *University of Richmond*, 274 NLRB 1204, 1210 (1985) (finding no disparate enforcement in part because a

[18] The three photos do not show the RN's face or badge and Stewart did not otherwise identify them.

union supporter was asked to remove her union button only twice even though she wore it throughout the organizing campaign); and *Hanes Hosiery, Inc*., 219 NLRB 338, 346–347 (1975) (finding no disparate enforcement in part because the employer did not prohibit all of the employees from wearing union buttons). And neither the General Counsel nor the Union offers a rationale for disregarding it.

All things considered, therefore, the truth is likely in the middle: some, but not many, of the RNs and other direct patient care providers have worn non-MHS badge reels at various times since the new rule became effective, and Respondent's enforcement of the new rule has been soft and sporadic, but not selective against union badge reels. Accordingly, as this falls short of a disparate-enforcement violation, the General Counsel has failed to carry the burden of proof.[19]

CONCLUSIONS OF LAW

1. Respondent has violated Sections 8(a)(1) and 2(6) and (7) of the Act by maintaining a rule, set forth in the MemorialCare Health System (MHS) dress code and grooming policy applicable to all employees, including employees in non-direct patient care areas, which states, "Only MHS approved pins, badges, and professional certifications may be worn."

2. Respondent has not otherwise violated the Act as alleged in the complaint.

REMEDY

The appropriate remedy for the violation found is an order requiring Respondent to cease and desist from its unlawful conduct and to take certain affirmative action. Specifically, Respondent will be required to rescind the unlawful MHS rule at its facility and to advise the employees that it has done so.[20] Respondent will also be required to post a notice to employees assuring them that it will not violate their rights in the same or any like or related manner in the future.

ORDER

The Respondent, Long Beach Memorial Medical Center, Inc., d/b/a Long Beach Memorial Medical Center & Miller Children's and Women's Hospital Long Beach, its officers, agents, succesors, and assigns, shall

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[19] The two cases cited in the General Counsel's and the Union's posthearing briefs—*Raley's Inc*., 311 NLRB 1244, 1245 (1993) and *Holyoke Visiting Nurses Assn*., 313 NLRB 1040, 1047 (1994)—are factually distinguishable for the reasons indicated above. They also lack any precedential weight, as no exceptions were filed in either case to the relevant ALJ findings regarding disparate enforcement. See generally *Operating Engineers Local 39 (Mark Hopkins Intercontinental Hotel*)**,** 357 NLRB 1683 n. 1 (2011); and *Trump Marina Associates LLC*, 354 NLRB 1027 n. 2 (2009), reaffd. 355 NLRB 585 (2010), enfd. 435 Fed.Appx. 1 (D.C. Cir. 2011).

[20] The complaint does not name MHS as a party respondent and neither the General Counsel nor the Union request an order requiring MHS to rescind the rule set forth in its policy or to take any other affirmative action at its other facilities.

1. Cease and desist from

(a) Maintaining a rule at its facility that prohibits all employees, including employees in non-direct patient care areas, from wearing any pins, badges, and professional certifications that have not been approved by MemorialCare Health System (MHS).

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the rule at its facility, set forth in the MHS dress code and grooming policy applicable to all employees, which states, "Only MHS approved pins, badges, and professional certifications may be worn."

(b) Publish on its intranet and distribute to all of its current employees a revised policy that does not contain the unlawful rule or that contains a lawfully worded rule.

(c) Within 14 days after service by the Region, post at its facility in Long Beach, California copies of the attached notice marked "Appendix".[21] Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 1, 2015.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.[22]

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[21] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[22] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Dated, Washington, D.C., August 31, 2016

5

Jeffrey D. Wedekind
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT maintain a rule at our facility that prohibits all of our employees, including employees in non-direct patient care areas, from wearing any pins, badges, and professional certifications that have not been approved by MemorialCare Health System (MHS).

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL rescind the rule at our facility, set forth in the MHS dress code and grooming policy applicable to all employees, which states, "Only MHS approved pins, badges, and professional certifications may be worn."

WE WILL publish on our intranet and distribute to all current employees a revised policy that does not contain the unlawful rule or that contains a lawfully worded rule.

LONG BEACH MEMORIAL MEDICAL CENTER, INC., d/b/a LONG BEACH MEMORIAL MEDICAL CENTER & MILLER CHILDREN'S AND WOMEN'S HOSPITAL LONG BEACH

(Employer)

Dated _____ By _____

(Representative) (Title)

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/21-ca-157007 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

888 South Figueroa Street, 9th Floor, Los Angeles, CA 90017-5449
(213) 894-5200, Hours: 8:30 a.m. to 5 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/21-CA-157007 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (213) 894-5184.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

EPSTEIN BECKER & GREEN

SEP 6 2016

LONG BEACH MEMORIAL MEDICAL CENTER, INC. d/b/a LONG BEACH MEMORIAL MEDICAL CENTER & MILLER CHILDREN'S AND WOMEN'S HOSPITAL LONG BEACH and CALIFORNIA NURSES ASSOCIATION/ NATIONAL NURSES UNITED (CNA/NNU)	Case 21-CA-157007

ORDER TRANSFERRING PROCEEDING TO THE NATIONAL LABOR RELATIONS BOARD

A hearing in the above-entitled proceeding having been held before a duly designated Administrative Law Judge and the Decision of the said Administrative Law Judge, a copy of which is annexed hereto, having been filed with the Board in Washington, D.C.,

IT IS ORDERED, pursuant to Section 102.45 of the National Labor Relations Board's Rules and Regulations, that the above-entitled matter be transferred to and continued before the Board.

Dated, Washington, D.C., August 31, 2016.

By direction of the Board:

Gary Shinners

Executive Secretary

NOTE: Communications concerning compliance with the Decision of the Administrative Law Judge should be with the Director of the Regional Office issuing the complaint.

Attention is specifically directed to the excerpts from the Board's Rules and Regulations and on size of paper, and that requests for extension of time must be served in accordance appearing on the pages attached hereto. **Note particularly the limitations on length of briefs with the requirements of the Board's Rules and Regulations Section 102.114(a) & (i).**

Exceptions to the Decision of the Administrative Law Judge in this proceeding must be received by the Board's Office of the Executive Secretary, 1015 Half Street SE, Washington, DC 20570, on or before **September 28, 2016.**

NLRB ADR PROGRAM
FOR SETTLING UNFAIR LABOR PRACTICE CASES
PENDING BEFORE THE BOARD

The Board invites parties who have unfair labor practice cases pending before the Board to consider participating in the Board's ADR program.

Since December 2005, the National Labor Relations Board's alternative dispute resolution (ADR) program has assisted parties in settling unfair labor practice cases pending before the Board. For parties who have chosen to participate in the ADR program, mediators have assisted parties in reaching settlements in approximately 60% of the cases. The Board approved the parties' settlements in each of those cases.

Participation in the Board's ADR program is voluntary, and a party who enters into settlement discussions under the program may withdraw its participation at any time. There are no charged fees or expenses for using the program. The Board will provide the parties with an experienced mediator, either a mediator with the Federal Mediation and Conciliation Service or the ADR program director, to facilitate confidential settlement discussions and explore resolution options that serve the parties' interests. Depending on the parties' preference, the settlement conferences will be held in person, telephonically, or by videoconference.

The Board established the ADR program in response to the success experienced by other federal agencies and the federal courts in settling contested cases through ADR, as well as the success of the NLRB's own settlement judge program at the trial level. In announcing the Board's decision to make the program permanent, the Chairman stated:

> ADR programs provide the parties with several benefits, including savings in time and money, greater control over the outcome of their cases, and more creative, flexible, and customized resolutions of their disputes. Settlement discussions conducted with the assistance of an ADR neutral may broaden resolution options, often by going beyond the legal issues in controversy, and may be particularly useful where traditional settlement negotiations are likely to be unsuccessful or have already been unsuccessful. Our experience with the pilot ADR program demonstrates that participation in the program provides the parties with a process for expeditiously resolving their disputes, which serves to effectuate the purposes of the Act.

Features of the Board's ADR program include:

- The Board will stay further processing of the unfair labor practice case for 30 days from the first meeting with the mediator or until the parties reach a settlement, whichever occurs first. Requests for extension of the stay beyond the 30 days will be granted only with the approval of and in the sole discretion of the mediator and the program director upon a showing that such an extension is

supported by good cause. However, no case may be in the program for more than 60 days.

- The preferred method of conducting settlement conferences is to have the parties or their representatives attend in person, and therefore the mediator will make every reasonable effort to meet with the participants face-to-face at the parties' location. Settlement conferences by telephone or through videoconference may be held if the parties so desire.
- Parties may be represented by counsel at the conferences, but representation by counsel is not required. Each party must have in attendance, however, a representative who has the authority to bind the party to the terms of a settlement agreement.
- The parties may be asked to submit to the mediator a confidential memo setting forth what is in dispute between the parties, prior settlement efforts, and anything else that the parties would like to bring to the mediator's attention. The memo will be treated as a confidential submission unless the party that prepared the memo authorizes release to the other parties.
- The mediator has no authority to impose a settlement.
- Discussions between the mediator and the participants will be confidential, and there will be no communication between the program and the Board on specific cases submitted to the ADR program, except for procedural information such as case name, number, and status.
- Nothing in the ADR program is intended to discourage or interfere with settlement negotiations that the parties wish to conduct outside the program.
- Deadlines for filing pleadings with the Board will be stayed effective the date that the case enters the ADR program. In the event the case is removed from the program, the time period for filing will begin running again from where it left off.
- Settlements reached are subject to approval in accordance with the Board's existing procedures for approving settlements.

If you have questions about the program, or if your client would like to participate in the program, please contact the program director, Gary Shinners, at (202) 273-3737, or by email at gary.shinners@NLRB.gov.

NLRB Rules and Regulations
Procedures for Filing Documents

The following information is provided to help you file certain documents after an administrative law judge's decision has issued. The information provided below is not comprehensive. To fully read the Board's Rules and Regulations with respect to the filing of documents after a judge's decision has issued, please see Sections 102.46 through 102.48 and Sections 102.111 through 102.114 of the Board's Rules and Regulations. A complete copy of the Board's Rules and Regulations may be viewed at the NLRB's public website at www.nlrb.gov/reports-guidance/rules-regulations.

Exceptions to Judge's Decision and Briefs in Support of Judge's Decision - Section 102.46 (a) – Within 28 days from the date of the Order Transferring Proceeding to the Board, parties may file exceptions to the administrative law judge's decision, together with a brief in support of the exceptions. Any party may also, within the same time frame, file a brief in support of the judge's decision. Please note that the due date for exceptions is stated at the bottom of the Order Transferring Proceeding to the Board.

- **Example**: If the date of the Order Transferring Proceeding to the Board is October 1, then exceptions are due on October 29.
- **Extensions of Time**: Requests for an extension of time to file exceptions or briefs must be in writing and filed with the Office of the Executive Secretary at least three days prior to the due date for exceptions. In addition, a copy of the extension of time request must be timely served on all parties.

Oppositions to Exceptions - Section 102.46 (d)(1) – 14 days after the last due date for exceptions, any party opposing the exceptions may file an answering brief to the exceptions with the Office of the Executive Secretary.

- **Example**: If the last due date for exceptions is October 29, then the answering brief is due on November 12.
- Per Section 102.46 (d)(2), matters discussed in the answering brief are limited to what is raised in the exceptions and the brief in support of exceptions.
- **Extensions of Time**: Requests for an extension of time to file an answering brief must be made in writing and filed with the Office of the Executive Secretary at least three days prior to the due date for the answering brief. In addition, a copy of the extension of time request must be timely served on all parties.

Cross-Exceptions - Section 102.46 (e) – 14 days after the last due date for exceptions, any party that has not yet filed exceptions may file cross-exceptions and a supporting brief to any portion of the administrative law judge's decision.

- **Example**: If the last due date for exceptions is October 29, then cross-exceptions are due on November 12.
- **Extensions of Time**: Requests for an extension of time to file exceptions or briefs must be in writing and filed with the Office of the Executive Secretary at least three days prior to the due date for exceptions. In addition, a copy of the extension of time request must be timely served on all parties.

Answering Briefs to Cross-Exceptions - Section 102.46 (f)(1) – 14 days after the last due date for cross-exceptions, any party may file an answering brief to the cross-exceptions.

- **Example**: If the last due date for cross-exceptions is November 12, then the answering brief to the cross-exceptions is due on November 26.
- **Extensions of Time**: Requests for an extension of time to file an answering brief must be in writing and filed with the Office of the Executive Secretary at least three days prior to the due date for exceptions. In addition, a copy of the extension of time request must be timely served on all parties.

Reply Brief to Answering Brief - Section 102.46 (h) – 14 days after the last date on which an answering brief is due, any party may file a reply brief to the answering brief.

- **Example**: If the last due date for answering briefs is November 12, then the reply brief is due on November 26.
- The reply brief shall not exceed 10 pages. Requests for permission to exceed this page length will NOT be granted.
- **No extensions of time are permitted for reply briefs.**

Page Limits and Index Requirement - Section 102.46 (j) – Any brief filed pursuant to Section 102.46 must not be combined with any other brief. In addition, except for reply briefs, briefs filed under this section must not exceed 50 pages in length, unless permission to do so is obtained from the Board by motion. The details for this type of a motion are fully set forth in the Board's Rules and Regulations, Section 102.46 (j). Any brief that exceeds 20 pages in length must contain a subject index with page references and an alphabetical table of cases and other authorities cited.

Automatic Adoption of Judge's Decision in Absence of Exceptions - Section 102.48 – If no party files exceptions to the judges' decision, then the finding, conclusions, and recommendations contained in the judge's decision shall automatically become the decision and order of the Board, and all objections and exceptions shall be waived for all purposes.

Computation of Filing Period - Section 102.111 – In computing any period of time under the Board's Rules and Regulations, the day of the act (for example, issuance of the decision) is not to be counted. The last day on which the document is due is to be counted, *unless* that day is a Saturday, Sunday, or a legal holiday, in which case, the time period continues until the next Agency business day. **For instance**, if the due date for exceptions falls on a Monday that is a holiday (such as Labor Day), then the exceptions will be due the following Tuesday.

- In computing the period of time for filing a responsive document, the designated period begins to run on the date the preceding document was required to be received by the Agency, even if the document was filed prior to that date.

Filing Receipt Rules - Section 102.111 (b) –

- The filing of any document by hard-copy must be **received** before the official closing time of the *receiving office* on the last day of the time limit.
  Example: If a document is filed by hand delivery, the document must be received by the Office of the Executive Secretary prior to 5:00 p.m. ***Eastern time*** on the due date.
- The electronic filing of any document on the NLRB's website must be received before midnight for the time zone of the *receiving office* on the last day of the time limit.

Example: If electronically filing a document with the Office of the Executive Secretary in Washington, DC, then that document must be filed prior to 11:59 p.m. ***Eastern time*** on the due date.

- Requests for extension of time that are filed within three days of the due date must be based on circumstances not reasonably foreseeable in advance.
- Documents may be hand-delivered to the Board.
- Documents postmarked on the day before (or earlier than) the due date are considered timely even if they are received by the Office of the Executive Secretary after the due date; documents which are postmarked on or after the due date are untimely.

Late Filings - Section 102.111 (c) – A party may file motions, exceptions, requests for review, briefs, and any responses after the due date **only upon good cause shown based on excusable neglect and when no undue prejudice would result.**

- A party that is attempting to file documents after the due date must file, in addition to the documents, a motion that states the reasons for requesting to file in an untimely manner.
- A party must also file an affidavit sworn to by individuals with personal knowledge of the facts relating to the late filing.

Service and Filing Dates - Section 102.112 – The date of service is the day on which the document is placed in the mail, or with a private delivery service, or is delivered in person. If the document is faxed, then the date of service is the date on which the transmission is received.

Service Requirements - Section 102.113 and 102.114 –

- Where the rules require service of documents on other parties, a copy of the documents must also be served on any attorney or other representative who is representing that party. **For example**, if Company ABC is represented by John Doe, an attorney, then John Doe must be served a copy of the documents.
    - ***Please note that exceptions, cross-exceptions, answering briefs, reply briefs, extensions of time, and/or any other motion, must be served on all parties in a case.***
- Service of documents by a party on other parties can be done either personally, by registered mail, certified mail, regular mail, electronic mail (if the document is filed electronically), or by private delivery service. Please note that ***service on all parties must be made in the same manner as the filing of the document***, or in a more expeditious manner.
- Failure to follow the procedures relating to timeliness in Section 102.114, may result in: 1) rejection of the document; or 2) withholding a ruling on the matter until service has been completed.
- Papers that are filed with the Board must be typewritten on 8.5 by 11-inch plain white paper; margins must be no less than one inch on each side; typeface must not be smaller than 12 characters per inch; document must be double-spaced. Documents that do not comply with these requirements may be rejected.
- The person or party serving the papers on other parties must submit a written statement of service. This statement must have the following information: 1) the names of the parties served; the date on which these parties were served; and 3) the method of service.

United States Government
NATIONAL LABOR RELATIONS BOARD
Region 21
888 South Figueroa Street, Ninth Floor
Los Angeles, CA 90017-5449
Telephone: (213) 634-6511
Facsimile: (213) 894-2778
E-mail: molly.kagel@nlrb.gov

Resident Office:
555 W Beech Street - Suite 418
San Diego, CA 92101-2939
Telephone: (619) 557-6184
Facsimile: (619) 557-6358

September 12, 2016

VIA E-FILING
Gary Shinners, Executive Secretary
National Labor Relations Board
1015 Half Street SE
Washington, D.C. 20570-0001

RE: Long Beach Memorial Medical Center Inc.
D/B/A Long Beach Memorial Medical
Center & Miller Children's And
Women's Hospital Long Beach
Case 21-CA-157007

Dear Mr. Shinners:

I write on behalf of the General Counsel to request a 14-day extension of time to file exceptions to Administrative Law Judge Jeffrey D. Wedekind's decision in the above-captioned case that issued on August 31, 2016. The General Counsel's exceptions are currently due on September 28, 2016. General Counsel requests that the deadline be moved to October 12, 2016.

In light of our current caseload and necessary attention to other pressing work-related matters, including work travel and additional trial work, we will need these additional 14 days to have sufficient time to draft General Counsel's exceptions to Judge Wedekind's decision. Both Counsel for Respondent Long Beach Memorial Medical Center and Counsel for Charging Party California Nurses Association/National Nurses United have advised that they have no objection to this request.

Sincerely,

Molly A. Kagel
Lindsay R. Parker
Counsel for the General Counsel
NLRB, Region 21

STATEMENT OF SERVICE

I hereby certify that a copy of the Request for Extension of Time was submitted by e-filing to the Executive Secretary of the National Labor Relations Board on September 12, 2016.

The following parties were served with a copy of said documents by electronic mail on September 12, 2016.

Counsel for Respondent
Epstein, Becker & Green
1925 Century Park East, Suite 500
Los Angeles, CA 90067-2506
AAbrahms@ebglaw.com
KPaterno@ebglaw.com

Counsel for the Charging Party
California Nurses Association/National Nurses United
2000 Franklin Street
Oakland, CA 94612
mberul@calnurses,org

Respectfully submitted,

Aide Carretero
Secretary to the Acting Regional Attorney
National Labor Relations Board

Dated at Los Angeles, California, this 12th day of September, 2016.

United States Government

OFFICE OF THE EXECUTIVE SECRETARY
NATIONAL LABOR RELATIONS BOARD
1015 HALF STREET SE
WASHINGTON, DC 20570

September 13, 2016

Re: Long Beach Memorial Medical Center Inc.
d/b/a Long Beach Memorial Medical Center &
Miller Children's and Women's Hospital Long Beach
Case 21-CA-157007

EXTENSION OF TIME TO FILE
EXCEPTIONS AND SUPPORTING BRIEF

The request for extension of time in the above-referenced case is granted. The due date for the receipt in Washington, D.C. of Exceptions and Brief In Support of Exceptions is extended to **October 12, 2016**. This extension applies to all parties.

/s/ Roxanne L. Rothschild
Deputy Executive Secretary

cc: Parties
Region

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Washington, D.C.

LONG BEACH MEMORIAL MEDICAL CENTER, INC. d/b/a LONG BEACH MEMORIAL MEDICAL CENTER & MILLER CHILDREN'S AND WOMEN'S HOSPITAL LONG BEACH

and Case 21–CA–157007

CALIFORNIA NURSES ASSOCIATION/ NATIONAL NURSES UNITED (CNA/NNU)

COUNSEL FOR THE GENERAL COUNSEL'S LIMITED EXCEPTION TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

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STATEMENT OF LIMITED EXCEPTION

Pursuant to Section 102.46 of the Board's Rules and Regulations, Counsel for the General Counsel (General Counsel) hereby excepts to limited portions of the Decision of Administrative Law Judge Jeffrey D. Wedekind, issued in the above-captioned case on August 31, 2016.

Specifically, the General Counsel files the following limited exception to the Administrative Law Judge's Decision (ALJD):

1. Counsel for the General Counsel excepts to Administrative Law Judge Wedekind's finding on page 7 (lines 5-30) that the Respondent did not violate Section 8(a)(1) of the Act by maintaining a rule that restricts the wearing of badge-reel holders to those only approved of by the Respondent.

DATED AT Los Angeles, California, this 12th day of October, 2016.

Respectfully submitted,

Molly Kagel (SC)

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Lindsay Parker
Counsels for the General Counsel
National Labor Relations Board
Region 21

STATEMENT OF SERVICE

I hereby certify that a copy of the **GENERAL COUNSEL'S LIMITED EXCEPTION TO THE ADMINISTRATIVE LAW JUDGE'S DECISION** was submitted by e-filing to the Executive Secretary of the National Labor Relations Board on October 12, 2016.

The following parties were served with a copy of said document by electronic mail on October 12, 2016:

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Respectfully submitted,

Aide Carretero

Aide Carretero
Secretary to the Regional Attorney
National Labor Relations Board
Region 21

UNITED STATES OF AMERICA
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Washington, D.C.

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CALIFORNIA NURSES ASSOCIATION/ NATIONAL NURSES UNITED (CNA/NNU)

COUNSEL FOR THE GENERAL COUNSEL'S BRIEF IN SUPPORT OF ITS LIMITED EXCEPTION TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

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Table of Contents

I. INTRODUCTION. .1

II. FACTS. .2

III. ARGUMENT .4

A. ALJ Wedekind Properly Found the Pin Provision in Policy 318 was Unlawful. .4

B. The Badge Reel Holder Rule is Overbroad and Violates Section 8(a)(1) of the Act. .5

C. ALJ Wedekind incorrectly interprets *Lutheran Heritage Village-Livonia* in his decision. .9

D. ALJ Wedekind inappropriately established the scope of the badge reel holder rule. .11

IV. CONCLUSION. .14

Table of Authorities

Albertson's Inc, 351 NLRB 704 (1978). 5

Asociacion Hosp. Del Maestro, 283 NLRB 419 (1987). 12

Enloe Medical Center, 345 NLRB 874 (2005). 7

In Re S. Monterey Cty. Hosp., 348 NLRB 327 (2006). .12

Lafayette Park Hotel, 326 NLRB 824 (1998). .11

Lily Transportation Corp., 362 NLRB No. 54 (2015). 13

Lutheran Heritage Village-Livonia, 343 NLRB 646 (2004) 1, 9, 10, 11, 13

Middletown Hosp. Ass'n, 282 NLRB 541 (1986) 11, 14

McDonnell Douglas Corp, 240 NLRB 794 (1979). 12

NLRB v. Miller-Charles & Co., 341 F.2d 870 (2d Cir. 1965). 6

Presbyterian/St. Lukes Center v. NLRB, 723 F.2d 1468 (10th Cir. 1983). .6

Saint John's Health Center, 357 NLRB 2078 (2011) 5, 6, 7, 8

St. Joseph's Hospital, 263 NLRB 375 (1982). 6

The Ohio Masonic Home, 205 NLRB 357 (1973) 10, 11

GENERAL COUNSEL'S BRIEF IN SUPPORT OF LIMITED EXCEPTIONS

I. INTRODUCTION

On August 31, 2016, following a hearing on the complaint in the above matter, Administrative Law Judge Jeffrey D. Wedekind (ALJ Wedekind) issued his decision. The unfair labor practice allegations before ALJ Wedekind concerned two workplace rules maintained by Long Beach Memorial Hospital (herein, Respondent or the Hospital) and the disparate enforcement of those rules.

ALJ Wedekind correctly concluded that the maintenance of the workplace rule regarding pins set forth in Respondent's Policy 318 of the complaint (which states that "Only MHS approved pins, badges, and professional certifications may be worn) violated Section 8(a)(1) of the Act because it would reasonably be interpreted by employees to prohibit Section 7 activity and sets forth an overly broad restriction that interferes with the Section 7 rights of employees to engage in union and/or protected concerted activity and Respondent failed to establish special circumstances to justify such a rule.

ALJ Wedekind erred, however, in failing to reach the same conclusion about the workplace rule set forth in Respondent's PC-261.02, "appearance, grooming, and infection prevention" policy. This rule states that "Badge reels may only be branded with MemorialCare approved logos or text."

For the reasons set forth below, the General Counsel respectfully excepts to ALJ Wedekind's reliance on *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), and his concomitant failure to conclude that the rule concerning badge reel holders set forth in Respondent's PC-261.02 violates Section 8(a)(1).

By these Exceptions, the General Counsel again asserts that the broad restrictions imposed by the badge reel rule violates Section 8(a)(1), as it would prohibit employees from wearing union insignia, effectively prohibiting employees from engaging in protected Section 7 activities.

II. FACTS

The Respondent is a tertiary medical center, which includes two licensed hospitals and employs about 6,000 employees. (Tr. 185-188).[1] Of those 6,000 employees, 2,100 of them are registered nurses (RNs) represented by the California Nurses Association/National Nurses United (CAN/NNU) (the Union). (ALJD 1; Tr. 207). The Hospital is an independent nonprofit subsidiary corporation of its parent corporation, Memorial Health Services (herein MHS). (Tr. 13). The Hospital both maintains separate policies from MHS and shares or adopts policies promulgated by MHS. (Tr. 186). MHS creates different policies and the Hospital has the option to individualize those policies for its facility, with approval from its board of directors. (Tr. 186-187). Because of the size and scope of the Hospital and an active shooter incident in 2008, the Hospital adopted certain policies and procedures to address these security concerns. (ALJD 2: 5; Tr. 189

Since March, 2014, the Respondent has maintained a "dress code and grooming' policy," also known as Policy 318, applicable to "all those who work in any capacity for MHS," meaning all 6,000 employees who work at the facility. (ALJD 2:10; Tr. 37-38, 216; GCx-4). The purpose of Policy 318 is to "promote an efficient, orderly and professionally operated organization" at all

[1] Herein, citations to the ALJD will be followed by the appropriate page and line number. Citations to the hearing transcript will be designated as "Tr.," followed by the transcript page number. References to exhibits from Counsel for the General Counsel will be designated as "GCx-" followed by the specific exhibit number.

MHS facilities." (ALJD 2: 15; GCx-4). It contains "examples of minimum requirements," such as identification badges, which must contain the employee's name and picture facing out and be worn at a level that can be readily seen, and also has other hair and jewelry requirements. (ALJD 2: 15-20; Tr. 51, 52, 111, 168; GCx-4). Policy 318 also contains a provision governing the wearing of pins: "Only MHS-approved pins, badges, and professional certifications may be worn." (ALJD 2:25; GCx-4).

Since December, 2014, the Respondent has also maintained two new policies applicable only to employees who provide direct patient care at the facility: PC-261.01, Respondent's "uniform and infection prevention" policy, and PC-261.02, Respondent's "appearance, grooming, and infection prevention" policy. PC-261.02 established "standards of appropriate appearance for those employees who provide direct patient care in order to assist patients in easily identifying them and to prevent hospital acquired infections." (ALJD 3: 10; GCx-6). It outlines numerous appearance and grooming requirements, including an ID badge requirement and a "bare below the elbows" rule which prohibits RNs and other direct care providers from wearing items such as wristwatches or long-sleeves in direct patient care areas. (ALJD 3:15-20).

The new uniform requirements in PC-261.02 require RNs to wear navy blue scrubs with the Respondent's logo and the employee's job position embroidered on the left-hand side of the employee's scrub top. (Tr. 50; GCx-6). For example, an RN's scrub top has the letters "RN" embroidered on the left-hand side of the top with "Long Beach Memorial" or "Memorial Care" embroidered underneath. (Tr. 50; GCx-7). Each discipline wears different colored scrubs and employees are required to wear the uniform when on duty. (Tr. 267; GCx-5). An extra piece of fabric, sewn like a tab, was specially placed on the right-hand side of the scrub top so employees could either attach their badge reel holder or their badges directly to the tab, giving employees a

standard place where the badge would reside on the uniform. Therefore, the badge is part of the actual uniform. (Tr. 233).

PC-261.02 also contains the following requirement: "Badge reels may only be branded with MemorialCare approved logos or text." (ALJD 3: 25-30; GCx-6). The badge reel holder can be affixed to the free piece of material on the right-hand side of the uniform. (GCx-7). A string pulley extends from the badge reel and attaches to the employee's identification badge, allowing the employee to access the badge to swipe or scan it for access into different areas of the hospital or for other uses. (Tr. 55; GCx-8, 9). Employees have also worn badge reel holders in the shape of a heart with "I give" written on them, given to them by the Respondent, referring to the Hospital's donation program. The Respondent's name or logo is not visible on these "I give" badge reel holder. (Tr. 118, 123, 126; GCx-19). During the relevant time periods, the Union has issued badge reel holders to unit members that are virtually identical in size and function to those issued by Respondent. The Union badge reel holder works the same as the badge reels issued by Respondent. It can be clipped to the same piece of material on the uniform and also utilizes a string pulley to attach itself to the identification badge. (Tr. 56, 110; GCx-10, 11). It is a red and circular, about an inch in diameter, with the "CNA" logo written out in lettering as if it were an EKG. (TR. 113; GCx-10). In fact, the way the "CNA" lettering is written, it is almost difficult to make out the CNA logo. (GCx-10).

III. ARGUMENT

A. ALJ Wedekind Properly Found the Pin Provision in Policy 318 was Unlawful

ALJ Wedekind correctly held that the pin rule contained in Policy 318 was violative of Section 8(a)(1) of the Act. ALJ Wedekind found that the pin rule was presumptively invalid,

given that it was "clear" that the policy was not limited to direct patient care areas of the facility as it applied to all employees, including non-direct patient care providers. (ALJD 4: 25; GCx-4). The pin rule was facially unlawful because the Respondent failed to make the required showing that the rule was necessary to avoid disruption of its operations or disturbance of patients per the requirements set forth in *Saint John's Health Center*, 357 NLRB 2076, 2079 & n.3 (2011). (ALJD 4: 30-35, n. 6).

ALJ Wedekind rejected the Respondent's argument that the pin rule was necessary for safety purposes because the ban was contained in a policy titled "dress code and personal hygiene policy," which has no link to safety, and the Respondent did not present any evidence "indicating that *pins* are part of the safety and security protocol" given the role of ID badges in the hospital's safety and security protocol. (ALJD 4:35, ALJD 5: 5). ALJ Wedekind also rejected the Respondent's argument that the rule did not explicitly ban union insignia and, when read wholly, a reasonable employee would not think he or she was prohibited from wearing union insignia. (ALJD 5: 20). Citing *Albertsons, Inc.*, ALJ Wedekind highlighted that, on its face, the ban on all nonapproved pins would include union pins and the Respondent failed to point to any specific provision that would be reasonably interpreted by an employee to narrow the "otherwise broad restriction to only nonapproved pins other than union pins." 351 NLRB 704, 709 (1978). (ALJD 5: 20-25).

B. <u>The Badge Reel Holder Rule is Overbroad and Violates Section 8(a)(1) of the Act</u>

ALJ Wedekind, however, erroneously declined to extend the same ruling and analysis for Policy PC-261.02. Similar to Policy 318's restrictions on pins, which ALJ Wedekind rules is violative of Section 8(a)(1), the provision referring to badge reel holders contained in Policy

261.02 is overbroad and interferes with employees' rights. Policy 261.02 specifically states: "badge reels may only be branded with Memorial Care approved logos or text." Again, like Policy 318, this rule is unlawful as it is overbroad and leaves it to the Respondent's discretion to approve or disapprove insignia that may be protected by Section 7 of the Act. Policy 261.02 apparently establishes "appropriate appearance, grooming and infection control standards for those who are direct patient care providers at Community Hospital Long Beach, Long Beach Memorial, and Miller and Women's Hospital Long Beach, including off-site clinics and satellite work locations"; however, it does not clearly state whether it is applicable to patient or nonpatient care areas.

Even if the rule as written and applied were to be viewed as somehow ambiguous, the Board, with court approval, has long held that any limitation on employee exercise of Section 7 rights on company premises must be clear and unambiguous. As the Second Circuit has noted: [T]he risk of ambiguity must be held against the promulgator of the rule rather than the employees who are supposed to abide by it. *NLRB v. Miller-Charles & Co.*, 341 F.2d 870, 874 (2d Cir. 1965); see also *St. Joseph's Hospital*, 263 NLRB 375 (1982); *Presbyterian/St. Lukes Center v. NLRB*, 723 F.2d 1468 (10th Cir. 1983). Policy 261.02 does not clearly state whether it is applicable to patient or nonpatient care areas and any ambiguity in this regard should be construed against Respondent. Thus, as was the case with Policy 318, Policy 261.02 is presumptively invalid and Respondent bears the burden of establishing special circumstances.

In *Saint John's Health Center*, the respondent-hospital banned a union ribbon stating "Saint John's RNs for Safe Patient Care" but allowed employees to wear a hospital-endorsed ribbon. 357 NLRB 2078, 2079 (2011). The hospital-issued ribbon was nearly identical to the ribbon issued by the union. *Ibid.* Additionally, the respondent in that case allowed employees to

wear other union insignia and political buttons throughout all areas of the hospital, including immediate patient care areas. *Ibid.* When there is an "across-the-board" ban on insignia, the hospital could rely on the protection of the presumption of validity; however, that presumption could not apply because of the hospital's selective ban of only the specific union insignia. *Saint John's Health Center*, supra at 2079. The Board subsequently found that the hospital's ban on the union ribbon was not protected by the presumption of validity. *Ibid.*

Similarly, in *Enloe Medical Center*, the Board affirmed the administrative law judge's ruling that the respondent-hospital violated Section 8(a)(1) of the Act when its supervisors told employees to remove or cover badges that stated "Ask me about our union" or "Ask me about SEIU." 345 NLRB 874, 875 (2005). The badges were clipped on to employee lanyards, which employees wore around their necks. *Enloe Medical Center*, supra at 876. Nothing prevented the employees from removing their badges when entering immediate patient care areas. *Ibid.* The difficulty or impracticality of removing the badges does not justify a flat prohibition of the union badges in both patient-care and nonpatient-care areas. *Ibid.*

As in *Enloe Medical Center*, badge reel holders are removable from the rest of a direct patient- care employee's uniform. Similar to the facts in *Saint John's Health Center*, the Respondent-issued badge reel holder is nearly identical in appearance and functionality to the Union badge reel holder. Additionally, Judith Fix, Respondent's Senior Vice President of Patient Care Services and Chief Nurse Officer, herself testified that employees could wear other types of union insignia, such as earrings, a tattoo, or nail polish, throughout the Hospital, including in immediate patient-care areas. (Tr. 262). It also has allowed employees to wear other types of insignia, such as badge holders with the name of other companies that come into contact with the Respondent, in immediate patient-care areas. Because Respondent purportedly allows other types

of Union insignia and other types of insignia, PC-261.02 is not protected by the presumption of validity.

The Respondent has legitimate security concerns given the nature and operations of the Hospital. As set forth with the subject of pins, badge reel holders are not used as a form of identification; they are used as a means to facilitate an employee's access to his or her identification badge. Employees must wear their uniforms while at work, and have their identification badges on their persons at all times while at the Hospital. As above, the record contains numerous examples of the Respondent allowing employees to wear badge reel holders not issued by the Respondent or affiliated with the Hospital. In fact, while the "I give" badge reel holder is issued by the Respondent, there is no indication on the badge reel holder itself that it is affiliated with the Hospital in any way.

Likewise, there is no evidence that badge reel holders constitute a disturbance to patients. The Board in *Saint John's Health Center* found that the respondent hospital had not presented any evidence to support a reasonable belief that the ban on the union ribbons was necessary to avoid the disruption of its operations or protect against the disturbance of patients. *Saint John's Health Center*, supra at 2080. The Board found that there was no difference between the two messages on the union ribbon and the respondent hospital's ribbon as they would be perceived by a patient. *Ibid.* The badge reel holders in this case that are issued by the Union are similar in appearance, size, and functionality to those issued by the Respondent. Additionally, there is no evidence in the record that indicates that any patients or patients' family have been alarmed by the messages on any badge reel holders, Union or otherwise. The Union badge reel holders specifically do not contain any message that is controversial or inflammatory, and it is clear from the established record that the Union logo is small and inoffensive. Therefore, Respondent has

not proven that the proper special circumstances are present to justify the existing restrictions on badge reel holders in Policy 261.02. For these reasons, Policy 261.02 interferes with employees Section 7 rights and violates Section 8(a)(1) of the Act.

C. ALJ Wedekind incorrectly interprets *Lutheran Heritage Village-Livonia* in his decision

While ALJ Wedekind wrote that the badge reel rule contained in PC-261.02 is ambiguous, he cited *Lutheran Heritage Village-Livonia* when he wrote that " a rule is not ambiguous merely because it *could be* interpreted to apply to protected activity; the test is whether employees *would* reasonably interpret it to apply to such activity." 343 NLRB 646, 647-648 (2004). (ALJD 7:10-15). The rules at the center of *Lutheran Heritage Village-Livonia* prohibited "abusive or profane language," solicitation while an employee is "on duty or off duty, unless. given written permission," "loitering on company property without permission. .," harassment of any individual in any way, "engaging in unlawful strikes, work stoppages, slowdowns or other interference with production. ," and "verbally, mentally or physically abusing" anyone while at work. While ALJ Wedekind correctly quotes *Lutheran Heritage Village-Livonia*, the Board found that the rules involving solicitation, loitering, and the unlawful strikes case violated Section 8(a)(1) and the rules on profane language, harassment, and abuse did not violate the Act for the "reasons explained by the judge." *Lutheran Heritage Village-Livonia*, supra at 646. The Board summarized ALJ Rosenstein's findings and wrote that the "no solicitation," "no loitering," and "no unlawful strikes, work stoppages, slowdowns, or other interference" rules were "unlawfully overbroad or ambiguous and that a reasonable employee *could* conclude that these rules restrict Section 7 activity. *Ibid.* (emphasis added). Specifically, ALJ Rosenstein wrote that it was "not 'far-fetched' that reasonable employees *could* conclude

that some Section 7 activity could be covered by this rule." *Lutheran Heritage Village-Livonia*, supra at 655. (emphasis added). Like the badge reel holder in this case, ALJ Rosenstein deemed the aforementioned rules as overly broad as they made no allowances for employee protected activity during "break, before or after regular duty hours and does not exclude from its coverage the cafeteria or parking areas" and required employees to "obtain the employer's permission" before engaging in the protected activity. *Ibid.*

The Board specifically adopted ALJ Rosenstein's decisions involving whether a reasonable employee *could* interpret a rule to apply to protected activity when the rule under scrutiny references Section 7 activity. When the Board discussed the harassment rule in *Lutheran Heritage Village-Livonia*, it specifically declined to conclude that a "reasonable employee would read the rule to apply to such activity simply because the rule *could* be interpreted that way" and adopted this line of reasoning for rules that do not refer to Section 7 activity, i.e. the rules involving prohibition on the use of any profane language, harassment, or abuse. *Lutheran Heritage Village-Livonia*, supra at 647. However, the distinguishing factor in this case is that, unlike the harassment rule in *Lutheran Heritage Village-Livonia*, the badge reel holder rule explicitly refers to Section 7 activity: the ability to wear union insignia at work. Therefore, the Board's concern that it would be required to find a violation "whenever the rule could conceivably be read to cover Section 7 activity, even though that reading is unreasonable" is quelled as Section 7 activity is unequivocally referred to in this case. *Ibid.*

The Board's willingness to apply whether an employee "could" interpret a policy a certain way extends beyond *Lutheran Heritage Village-Livonia.* The Board in *The Ohio Masonic Home* overruled ALJ Bush and decided that the policy under examination, which forbade nurses' assistants from "discussing any personal matters or anything else that does not pertain to patient

care with patients," violated Section 8(a)(1) of the Act because, like the badge reel holder rule, it was "ambiguous." 205 NLRB 357 (1973). Therefore, it "*could* reasonably be interpreted to mean that an employee may not engage" in the protected activity "at any time the employee is on the clock, even at a time the employee has finished his work and is a nonwork area." *Ibid.* (emphasis added). In *Middletown Hosp. Ass'n*, the employer-respondent's policy prohibited "general solicitation and/or distribution of literature," including badges and buttons, throughout the hospital unless approved by the employer. 282 NLRB 541, 552 (1986). The Board found that the "blanket ban," without "specification of exempted areas or times of applicability, *could* reasonably be interpreted as an injunction against any solicitation or distribution at any time during the day or any place on the premises." *Ibid.* (emphasis added). Consequently, Board precedent indicates that ALJ Wedekind's insistence on using the language "whether an employee *would* reasonably interpret a rule to apply to protected activity" instead of "whether an employee *could* reasonably interpret a rule to apply to protected activity" is incorrect in situations where the language in the rule specifically refers to conduct protected by Section 7, as it does for the badge reel holder rule, and is not applicable when analyzing whether the badge reel holder rule is unlawful under Section 8(a)(1) of the Act.

D. <u>ALJ Wedekind inappropriately established the scope of the badge reel holder rule</u>

Unlike the rule dictating approved pins, the policy for badge reel holders did not establish a scope for the provisions contained within it. ALJ Wedekind inappropriately established the scope of the badge reel holder rule by examining other provisions contained that referenced "patient care areas" and that were applicable "during care." (ALJD 7:20). *Lutheran Heritage Village-Livonia*, the very case ALJ Wedekind relies on to define the ambiguous nature of the

badge reel holder provision, plainly states that the Board must give a rule a "reasonable reading" by "refrain[ing] from reading particular phrases in isolation. " 342 NLRB 646, citing *Lafayette Park Hotel*, 326 NLRB 824 (1998). ALJ Wedekind contravened established Board precedent when he defined the scope of the policy containing the badge reel holder rule by selectively reading certain provisions that mentioned areas of the hospital or job duties that are confined to certain areas of the hospital or working times.

ALJ Wedekind's also applies the purpose of the rule, "to assist patients in easily identifying their direct patient care providers, to establish the scope of the rule. (ALJD 7: 15-20). This assertion does not establish the scope of a rule when that scope is ambiguous or not explicitly stated. In *Asociacion Hosp. Del Maestro*, the policy in question prohibited the wearing of insignias or buttons because it interfered with the "rendering of. health services. .," caused "confusion and insecurity in. patients," and provoked "friction and discord between visitors and employees. 283 NLRB 419, 426 (1987). Despite this purpose, the Board ruled that the policy violated Section 8(a)(1) of the Act because the rule made "no distinction relating to immediate patient care areas, other patient care areas, and nonpatient care areas" and the rule did not "permit employees to wear their ribbons and buttons in any hospital nonwork area." *Ibid.* In the case of *In Re S. Monterey Cty. Hosp.*, the Board found that the employer-respondent's policy that only minimal jewelry should be worn so as not to "interfere with direct patient care or other on-duty responsibilities" violated Section 8(a)(1) as it was "not limited to patient care areas. 348 NLRB 327 (2006).

ALJ Wedekind's reading of the overall policy containing the badge reel holder rule additionally does not comport with how a reasonable employee could interpret it. The Board has held that employees, unlike lawyers, "cannot be expected to have the expertise to examine

company rules from a legal standpoint." *McDonnell Douglas Corp.*, 240 NLRB 794, 802 (1979). In that case, the Board found that a no-distribution rule was facially overbroad, explaining that "it can reasonably be foreseen that employees would not know what conduct is protected by the National Labor Relations Act and, rather than take the trouble to get reliable information on the subject, would elect to refrain from engaging in conduct that is in fact protected by the Act." *Ibid.* A reasonable employee would not pick through PC-261.02 and determine that, because one or two provisions contained within the policy mention certain locations or duties, the entire policy, including the badge reel holder provision, also must only apply to those specific locations or duties. Moreover, because a reasonable employee may not know that wearing union insignia is protected Section 7 activity, he or she would not "take the trouble" to seek approval for badge reel holders bearing the union logo or other protected messages.

As the above analysis illustrates, there are a myriad of cases where the Board ruled that similar work rules violate Section 8(a)(1) of the Act for being ambiguous, overbroad and vague; however, ALJ Wedekind fails to cite any other case besides *Lutheran Heritage Village-Livonia.* In fact, he provides a very limited explanation in his decision to deem the badge reel holder rule as a valid work rule and even contradicts his own previous decisions. Referring to the badge reel holder rule, ALJ Wedekind wrote that there was "no contention or evidence that the badge reel rule has ever been applied to employees when they are not providing direct patient care"; however, by ALJ Wedekind's own words when analyzing the pin rule contained in Policy 318, "in the absence of special circumstances, requiring management preapproval is itself an unlawful interference with employee rights under the Act, as the requirement may chill employees from exercising those rights. See *Lily Transportation Corp.*, 362 NLRB No. 54, slip op. at 6 (2015);

and *Middletown Hospital Assn.*, 282 NLRB 541, 552-553 (1986), and cases cited there." (ALJD 6: 20-24).

Consequently, the badge reel holder rule is invalid and the Respondent did not present any legitimate special circumstances to allow such a rule to lawfully remain in place, in violation of Section 8(a)(1) of the Act. Allowing ALJ Wedekind's decision regarding this rule to remain in place as it is would be to disregard established Board precedent and deny employees their right to engage in Section 7 activity.

IV. CONCLUSION

It is respectfully submitted that the record evidence, as set forth at the hearing and argued above, amply supports the General Counsel's limited exceptions to the Administrative Law Judge's Decision.

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Accordingly, the General Counsel respectfully requests that the Board find that by maintaining the portion of PC-261.02 set forth in paragraph 6(b) of the complaint, Respondent violates Section 8(a)(1) of the Act, and issue a recommended Order requiring Respondent to cease and desist from all of its unlawful conduct, and affirmatively directing Respondent to appropriately remedy all of its unfair labor practices found in this case.

DATED AT Los Angeles, California, this 12th day of October, 2016.

Respectfully submitted,

Molly Kagel

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STATEMENT OF SERVICE

I hereby certify that a copy of the **BRIEF IN SUPPORT OF ITS LIMITED EXCEPTION TO THE ADMINISTRATIVE LAW JUDGE'S DECISION** was submitted by e-filing to the Executive Secretary of the National Labor Relations Board on October 12, 2016.

The following parties were served with a copy of said document by electronic mail on October 12, 2016:

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Respectfully submitted,

Aide Carretero
Secretary to the Regional Director
National Labor Relations Board
Region 21

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON D.C.

In a Matter Between:	)	
	)	
LONG BEACH MEMORIAL MEDICAL CENTER, INC. d/b/a LONG BEACH MEMORIAL MEDICAL CENTER & MILLER CHILDREN'S AND WOMEN'S HOSPITAL LONG BEACH,	)	Case 21-CA-157007
	)	
Respondent,	)	
and	)	
	)	
CALIFORNIA NURSES ASSOCIATION/NATIONAL NURSES UNITED (CNA/NNU),	)	
Charging Party.		

CHARGING PARTY'S EXCEPTIONS TO ADMINSTRATIVE LAW JUDGE'S DECISION

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Pursuant to NLRB Rules and Regulations §102.46, Charging Party, California Nurses Association/National Nurses United (the "Union"), excepts to portions of the of the Administrative Law Judge Decision ("ALJD") of Jeffrey D. Wedekind (the "Judge") in JD(SF)-33-16 dated August 31, 2016, as follows. The Union separately files its Brief in Support of its Exceptions to portions of the ALJD.

1. The Union excepts to the Judge's conclusion that "employees would not reasonably conclude that the badge reel rule applies in non-direct patient care areas." [ALJD 7:17-18]. The Judge's conclusion is not supported by the record evidence as a whole and is contrary to Board law.
2. The Union excepts to the Judge's implicit finding that the badge reel rule applies only to patient care areas. [ALJD 7:17-23]. The Judge's finding is not supported by the record evidence as a whole and is contrary to Board law.
3. The Union excepts to the Judge's implicit conclusion that the badge reel rule is not unlawful because it applies only to direct patient areas. [ALJD 7:1-8:2]. The Judge's conclusion is not supported by the record evidence as a whole and is contrary to Board law.
4. The Union excepts to the Judge's failure to find that Respondent selectively banned Union insignia in immediate patient care areas by prohibiting the wearing of badge reel holders containing Union insignia, while allowing other Respondent-approved insignia to be worn on employee identification badges in immediate patient care areas. [ALJD 7:1-8:2]. The Judge's conclusion is not supported by the record evidence as a whole and is contrary to Board law.

5. The Union excepts to the Judge's failure to conclude that Respondent did not establish special circumstances to justify its selective ban of badge reel holders containing Union insignia, while allowing other Respondent-approved insignia to be worn on employee identification badges in immediate patient care areas. [ALJD 7:1-8:2]. The Judge's conclusion is not supported by the record evidence as a whole and is contrary to Board law.
6. The Union excepts to the Judge's conclusion that Respondent's badge reel rule does not violate the Act [ALJD 7:1-8:2, 11:20]. The Judge's conclusion is not supported by the record evidence as a whole and is contrary to Board law.
7. The Union excepts to the Judge's conclusion that the badge reel rule was not disparately enforced. [ALJD 8:4-11:11; 11:20]. The Judge's conclusion is not supported by the record evidence as a whole and is contrary to Board law.

DATED: October 12, 2016

Respectfully submitted,

CALIFORNIA NURSES ASSOCIATION/
NATIONAL NURSES UNITED (CNA/NNU)
LEGAL DEPARTMENT

Micah Berul
CNA/NNU Registered In-House Counsel

PROOF OF SERVICE

The undersigned hereby declares under penalty of perjury that I am a citizen of the United States, over the age of eighteen years, and not a party to the within action; that my business address is 155 Grand, Oakland, California 94612.

On the date below, I served a true copy of the following document:

CHARGING PARTY'S EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION

BRIEF IN SUPPORT OF EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE JEFFREY D. WEDEKIND'S AUGUST 31, 2016, DECISION, FILED BY CALIFORNIA NURSES ASSOCIATION/NATIONAL NURSES UNITED (CNA/NNU)

[Case 21-CA-157007]

via Electronic Mail as follows:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

DATED: October 12, 2016

Tym Tschneaux

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

In a Matter Between:	)	
	)	
LONG BEACH MEMORIAL MEDICAL CENTER, INC., d/b/a LONG BEACH MEMORIAL MEDICAL CENTER & MILLER CHILDREN'S AND WOMEN'S HOSPITAL LONG BEACH	)	Case 21-CA-157007
	)	
Employer,	)	
and	)	
	)	
CALIFORNIA NURSES ASSOCIATION/ NATIONAL NURSES UNITED (CNA/NNU),	)	
	)	
Charging Party.	)	
	)	

BRIEF IN SUPPORT OF EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE JEFFREY D. WEDEKIND'S AUGUST 31, 2016, DECISION, FILED BY CALIFORNIA NURSES ASSOCIATION/ NATIONAL NURSES UNITED (CNA/NNU)

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I. INTRODUCTION[1]

Charging Party California Nurses Association/National Nurses United (hereinafter the "Union") files this brief in support of its exceptions to portions of the Administrative Law Judge (the "Judge") Jeffrey D. Wedekind's decision ("ALJD") in the above-captioned matter, pursuant to Section 102.46 of the National Labor Relations Board's Rules and Regulations.

The Union agrees with the Judge's conclusions as to the unlawfulness of the rule contained in Respondent's policy #318, which states that "[o]nly MHS[2] approved pins, badges, and professional certifications may be worn." ALJD 11:15-18. The Union, however, excepts to the Judge's failure to find that policy PC-261.02, containing the "badge reel rule," violates the Act.

Specifically, the Union excepts to the Judge's conclusion that "employees would not reasonably conclude that the badge reel rule applies in non-direct patient care areas" [ALJD 7:17; his implicit finding that the badge reel rule applies only to patient care areas; the Judge's implicit conclusion that the badge reel rule is not unlawful because it applies only to direct patient areas; the Judge's failure to find that Respondent selectively banned Union insignia in immediate patient care areas by prohibiting the wearing of Union badge reel holders, while allowing other Respondent-approved insignia to be worn on employee identification badges in immediate patient care areas, as well as the Judge's failure to conclude that Respondent did not establish "special circumstances" to justify its ban of Union badge reel holders. The Union also excepts to the Judge's conclusion that the badge reel rule was not disparately enforced.

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[1] "ALJD" refers to the Administrative Law Judge's decision. "Tr. ___" refers to pages of the transcript of the hearing in this matter. "GC Exh." refers to General Counsel's Exhibits. "Resp. Exh." refers to Respondent's Exhibits.

[2] " MHS " is the abbreviation for Memorial Health System, the parent company of Respondent (Tr. 13), also referred to as "MemorialCare." GC Exh. 6.

As will be set forth below, the record evidence and Board law require a finding that the badge reel rule is unlawful, has been disparately enforced, and should be rescinded.

II. STATEMENT OF THE FACTS

Respondent's Appearance, Grooming and Infection Prevention Standards for Direct Care Providers, Policy PC-261.02 provides on page 3, paragraph 12: "Identification badges shall be worn by everyone with name and picture facing forward. Badges must be worn at collar level, right side, so they can be readily seen. Lanyards are not permitted. *Badge reels may only be branded with MemorialCare approved logos or text.*" GC Exh. 6. (Italicized for emphasis.) Policy PC-261.02, while directed towards direct care providers does not provide that the rules contained therein are applicable only while providing direct patient care in immediate patient care areas. GC Exh. 6. To the contrary, the Policy explicitly addresses non patient care settings, as well, such as on page 2, paragraph 1, which provides that "[a]ll direct care providers will be expected to dress in a professional manner. . . Employees, who come into the hospital for education or meetings, are to be dressed conservatively in business casual or MHS logo attire." GC Exh. 6.

Respondent's Registered Nurses (RNs) are required to wear an identification badge as part of their uniform. Tr. 50. The identification badge "must be worn and displayed at all times while on campus, including any off-site buildings managed by the hospitals." Resp. Exh. 4. The badge identifies employees and the position they hold. Tr. 50, 109. It also allows RNs to enter and exit a particular department by swiping the badges at the doors to the department. Tr. 51, 109, 200. The badge may be affixed to an extra piece of material on the RN's scrub top, or can be worn with a badge reel. Tr. 50-51. Judith Fix, Respondent's Senior Vice President of Patient Care Services and Chief Nursing Officer, testified that the requirement that employees wear the identification badge is part of Respondent's security protocols, and to assist patients in

identifying their caregiver. Tr. 190-200. Employees are required to wear them at all times, even while on break. Tr. 199.

With regard to the badge reel holders with Union insignia, the employee identification badge attaches to the badge reel, and the back of the badge reel attaches to the RN 's uniform. The badge reel contains a pulley string that extends from it to allow the RN to extend the badge away from their uniform to access various points of the hospital. Tr. 55. The badge reel holders with the Union's insignia (GC Exh. 10), Respondent Vice President Fix admitted, do not obstruct the badge identification of the RN. Tr. 270. The badge reel holder with the Union insignia contains no messaging, merely displaying the name of the Union and its logo. GC Exh. 10. Respondent also provided RNs a badge reel holder with a Memorial Health System logo in about January 2015. Tr. 54.

Both the Respondent-provided badge reel holder and the badge reel holder with Union insignia function in the same manner, clipping onto the RN's uniform and badge, each containing a string pulley. Tr. 56; GC Exh. 11. As found by the Judge, the Union badge reel and Respondent's badge reel are "identical in size, shape and function" and that the "only significant difference was that the face displayed the union (CNA) logo rather than the MHS logo and was encased in red rather than white plastic." ALJD 8:18-20. And as also found by the Judge, the badge reels provided to RNs by Respondent often broke (ALJD 3:32-33), and there is no evidence that the badge reel holders with the Union's name and logo malfunctioned in any manner.

Respondent permits employees to wear pins and other emblems on their badges, and as set forth above, the badge must be worn by the RNs and other employees and displayed at all times while on campus. Resp. Exh. 4. Such pins that Respondent allows employees to affix to their identification badge, include pins to commemorate an employee's years of service (Tr. 65-

66, GC Exhs. 7, 14); pins that display professional certifications (Tr. 66, 209); as well as pins that state, "I Give," in acknowledgment of an employee's contributions to Respondent-approved philanthropic programs. Tr. 123, 265-266, GC Exh. 20.

RN Brandy Welch wore the badge reel holder with the Union's insignia from about February 2015 through July 19, 2015. Tr. 57. She received it from her Union labor representative. Tr. 55. She began wearing the badge reel holder with the Union insignia because the one provided with Respondent's logo broke shortly after she received it. Tr. 57. RN Welch wore the badge reel holder with Union insignia until she was told by her Director, Colleen Coonan, to remove it on July 9, 2015. Tr. 55-58. RN Welch, who is a Nurse Representative (Tr. 76) was walking out of Director Coonan's office, after entering to discuss a grievance, when this occurred. Tr. 57. She has not worn it since. Tr. 58. No patients ever complained about RN Welch's badge reel with Union insignia during the time period she was wearing it. Tr. 58.

RN Welch, however, has seen RNs wearing various other badge holders with cartoon characters, breast cancer awareness insignia, and jewelry decorated badge reel holders without the Memorial Health System logo. Tr. 59. RN Welch is unaware that any of the RNs with badge reel holders, containing such other non-Union insignia, have been instructed by Respondent managers or supervisors to remove them. Tr. 60. There are approximately 80 RNs in RN Welch's department with six Assistant Unit Managers, one Manager and one Director. Tr. 62. The RNs have "huddles " on a daily basis. Tr. 62-63. Usually the second huddle of the day is led by the Assistant Unit Manager with four to five RNs in attendance. Tr. 63. There are also quarterly staff meetings with RNs, managers, and supervisors. Tr. 64. RN Welch has also observed RNs wear pins on their identification badges, some issued by Respondent for service excellence, and some from outside entities that issue extra certifications a nurse may achieve. Tr. 66. RN Welch wears her 15 year service pin on her identification badge. Tr. 67.

Recently retired RN Theresa Stewart also wore a badge reel holder with Union insignia until she was directed to remove it. Tr. 114-115. She tried to use the badge reel holder provided by Respondent, but it fell apart, so she went back to using the badge reel holder with Union insignia until directed not to wear it. Tr. 115. About October 7, 2015, Assistant Unit Manager (AUM) Robin Johnson came into a patient room while RN Stewart was caring for a patient. Tr. 117. AUM Johnson was holding a Respondent badge reel holder and put it down on the work station and told RN Stewart that she had to use that badge reel holder. Tr. 117. After RN Stewart was directed by AUM Johnson to wear the badge reel holder she put at RN Stewart 's work station, another nurse walked into the patient room as AUM Johnson was walking out. Tr. 132. The nurse entering the room was wearing a badge reel with a key chain in the shape of a pig affixed to the badge, as well as flower decorations on her badge. Tr. 132-135. RN Stewart observed that nurse continued to wear the pig key chain on her badge through RN Stewart's retirement on January 7, 2016. Tr. 117-118, 133.

RN Stewart also observed other RNs wearing badge reel holders other than those provided by Respondent. Tr. 117. From about October 2015 through January 7, 2016, when RN Stewart retired, she observed nurses wearing badge reel holders from outside entities such as the Oncologic Nurse Society and Care Ambulance, as well as badge reels with decorations of flowers made of tops of vials. Tr. 117-118.

RN Elizabeth Castillo also has observed RNs wearing various badge reel holders other than those provided by Respondent, some with studs, rhinestones, or non-Union insignia such as cartoon characters, over a clear badge reel within the last six months of the date of her testimony. Tr. 162-163. RN Castillo has not heard of any nurses having been asked to remove any of these types of badge reel holders by Respondent, despite the fact that the RNs in her department interact with managers or supervisors on a daily basis. Tr. 164-165.

III. ARGUMENT

A. The Badge Reel Rule Violates Section 8(a)(1) of the Act. [Exception Nos. 1-6].

It is axiomatic that under Board law a rule is unlawful when "employees would reasonably construe the language of the rule to prohibit Section 7 activity. . ." See, e.g., *The NLS Group,* 352 NLRB 744, 745 (2008). Board law also holds that "[i]t is well established that employees have a protected right to wear union insignia at work in the absence of "special circumstances." See *London Memorial Hospital*, 238 NLRB 704, 708 (1978); *Ohio Masonic Home*, 205 NLRB 357 (1973), enfd. 511 F.2d 27 (5th Cir. 1975); see also *Republic Aviation Corp. v. NLRB,* 324 U.S. 793, 801-803 (1945). It is also well established that an employer's requirement of preapproval of insignia violates the Act. See, e.g., *Middletown Hospital Assn.,* 282 NLRB 541, 552-553 (1986).

Respondent's requirement in Policy PC-261.02 that "[b]adge reels may only be branded with MemorialCare approved logos or text" is unlawful. Any reasonable employee would understand the language to require employees wear only badge reels with MemorialCare approved logos or text. And Respondent's requirement of preapproval of insignia with regard to the badge reel violates the Act.

1. The Badge Reel Rule Applies in Direct and Non-Direct Patient Care Areas, which Employees Would Reasonably Conclude. [Exceptions No. 1 and 2].

The Judge erroneously concluded that "employees would not reasonably conclude that the badge reel rule applies in non-direct patient care areas" [ALJD 7:17-18] despite the fact that the Policy within which the badge reel rule is contained, Policy PC-261.02, references non-direct patient care areas. As set forth above, the Policy explicitly addresses non patient care settings, such as on page 2, paragraph 1, which provides that "All direct care providers will be expected to dress in a professional manner. . . Employees, who come into the hospital for education or

meetings, are to be dressed conservatively in business casual or MHS logo attire." GC Exh. 6. The Judge reasoned that because Policy "clearly states that its purpose is to assist patients in easily identifying their direct patient care providers and to prevent hospital acquired infections," and because some of the provisions in the Policy reference patient care areas, even though "the badge reel rule does not itself reference patient care or patient care areas" that "employees would not reasonably conclude that the badge reel rule applies in non-direct patient care areas." ALJD 7:17-23. The Judge also notes a lack of evidence "that the badge reel rule has ever been applied to employees when they are not providing direct patient care." ALJD 7:27-29. RN Welch, however, as set forth above, was told to remove the Union badge reel holder by her director, Colleen Coonan, on July 9, 2015, as she was walking out of Coonan's office, which is not a patient care area. Tr. 58.

The Judge cites *Lutheran Heritage Village-Livonia,* 343 NLRB 646, 647-648 (2004) for the proposition that "a rule is not ambiguous merely because it *could* be interpreted to apply to protected activity; the test is whether the employees *would* reasonably interpret it to apply to such activity." ALJD 7:13-15. Here, however, in light of the above, clearly employees would reasonably interpret the rule that "[b]adge reels may only be branded with MemorialCare approved logos or text" to apply to Section 7 activity.

2. The Badge Reel Rule is Unlawful Irrespective of whether it Applies only in Direct-Patient Care Areas. [Exception Nos. 3, 4, 5, and 6].

While the Judge's finding that employees would not reasonably conclude that the badge reel rule applies in non-patient care areas is erroneous, in any event, Respondent permits employees to wear pins and other emblems on their identification badges, and the badges must be worn at all times while RN's and other employees are at work, necessarily including immediate patient care areas. Respondent, as stressed above, allows employees to affix to their

badges a variety of pins, including pins to commemorate an employee's years of service; pins that display professional certifications, as well as pins that state, "I Give," in acknowledgment of an employee's contributions to Respondent approved philanthropic programs.[3] (Tr. 123, 265-266, GC Exh. 20). Yet, Respondent will not allow its Registered Nurses to wear a badge reel holder that merely states the Union's name.

Respondent's rule that "[b]adge reels may only be branded with MemorialCare approved logos or text " is unlawful, irrespective of whether they are worn in direct patient care areas, because the Board's presumption that an employer may ban insignia in immediate patient care areas does not protect a selective ban of union insignia. See *Saint John's Health Center,* 357 NLRB 2078, 2079 (2011). Such a selective ban again requires an employer to show the ban is necessary to avoid disturbing patients or to prevent disruption of healthcare operations. See *Beth Israel Hospital v. NLRB,* 437 U.S. 483, 507.

In *Saint John's Health Center,* the Board found that the employer's banning of the union's ribbon stating, "Saint John's RNs for Safe Patient Care," while allowing a similar "hospital endorsed ribbon" and other insignia, violated the Act. *Saint John's Health Center,* 357 NLRB at 2079. "Having allowed other types of insignia to be worn in immediate patient care areas, the Respondent may not now rely on the protection of the presumption of validity applicable to an across-the-board ban to justify its selective ban of only the specific union insignia at issue. Under the circumstances presented here, we find that the Respondent's ban on the Union's ribbon is not protected by the presumption of validity." *Id.*

Neither is Respondent's ban on the Union badge reel protected by the presumption of

[3] That the "I Give" insignia affixed to employee identification badges relates to "beneficent acts" is irrelevant, as the limited exception for "beneficent acts" applies to an employer's deviation from a solicitation policy, not the wearing of union insignia. See, e.g., *Hammary Mfg. Corp.,* 265 NLRB 57 fn. 4 (1982).

validity in immediate patient care areas here because Respondent allows employees to wear other insignia, approved by MemorialCare, to be worn on Respondent's employees' badges. That Policy PC-261.02 refers specifically to badge reels is irrelevant, as both the pins that are worn on employee identification badges (the rule correctly found unlawful by the Judge), as well as the badge reel holders, are affixed to the employee identification badge. Nor was the Judge's conclusion based on this distinction, as the Judge failed to conclude the Badge Reel Rule was unlawful, in light of his finding that the rule only applied to "direct patient care areas." [ALJD 7:17-8:2].

Respondent must therefore demonstrate "special circumstances" that would justify its ban of badge reel holders with Union insignia. As the Board explained in *Saint John's Health Center,* it will find special circumstances to exist "in a healthcare setting where the restriction is 'necessary to avoid disruption of health-care operations or disturbance of patients.'" *Saint John's Health Center,* 357 NLRB at 2079 (quoting *Beth Israel Hospital v. NLRB,* 437 U.S. 483, 507 (1978)).

The employer in *Saint John's Health Center* argued "that the ban was necessary because the ribbon was part of a larger campaign by the Union to show that patient care at the Hospital is not safe" and that it was "permitted to ban any insignia that it reasonably believes may disturb patients." *Saint John's Health Center,* 357 NLRB at 2079. The Board in *Saint John's Health Center,* however, concluded that the employer "presented no evidence to support a reasonable belief that the ban was necessary to 'avoid disruption of health-care operations or disturbance of patients.'" *Id.*

Similarly, in *Healthbridge Management, LLC,* 360 NLRB No. 118, slip op. at 2 (2014), the Board found the employer violated the Act by selectively banning the union's "Busted" sticker in immediate patient care areas, and did not establish special circumstances to justify its

rule. As the Board determined in *Healthbridge Management,* the Employer's evidence in support of asserted special circumstances was based on belief and conjecture that patients would be upset by the sticker, and was not based on any "specific experience with a patient, family member, or employee" without evidence as to "harm or likelihood of harm to patients from employees wearing the sticker." *Healthbridge Management, LLC,* 360 NLRB No. 118, slip op. at 2-3.

Here, Respondent also did not produce any evidence that would establish "special circumstances," demonstrating the Union's name and logo on the badge reel could disturb patients or disrupt health-care operations. Respondent Vice President Fix testified that the employee identification badge is part of Respondent's security protocol, and designed to help patients identify their caregiver, yet she admitted that the badge reel holders with the Union's insignia (GC Exh. 10) do not obstruct the badge identification of the RN. Tr. 270. Nor did Respondent produce any evidence demonstrating how a badge reel holder with the Union's name and logo interfered in any way with its security protocol. Again, it should be stressed that there was no evidence adduced that the badge reels with Union insignia do not work properly. Rather, as the Judge found, the record evidence established that the badge reels provided to RNs by Respondent frequently broke. ALJD 3:32-33.

As set forth above, Respondent has selectively banned Union insignia in immediate patient care areas and has not established special circumstances to justify its conduct. Such conduct is thus unlawful, and the Board should require Respondent to rescind the badge reel rule and allow the RNs to utilize the badge reel with the Union insignia in all areas of the Respondent's facilities, including immediate patient care areas.

B. The "Badge Reel Rule" Was Disparately Enforced by Respondent in Violation of Section 8(a)(1) of the Act. [Exception No. 7].

As set forth above, Respondent has enforced its unlawful rules with regard to Nurses Theresa Stewart and Brandy Welch. Moreover, the record is replete with evidence that Respondent has also enforced its rules disparately, allowing a plethora of other non-Respondent insignia to be worn, while requiring RNs Stewart and Welch to remove their Union insignia. Even if Respondent, as it claims, asked some nurses to remove badge reels with non-Union insignia (ALJD 9:15-18), it is simply implausible that given the record evidence of the wide extent of nurses wearing non-Respondent provided non-Union insignia on their badges, discussed above, and the frequency of interaction with managers and supervisors on a daily basis, that Respondent was not disparately enforcing its unlawful rules with regard to badge reel holders with Union insignia.

In *Holyoke Visiting Nurses Association,* 313 NLRB 1040 (1994), the Board upheld the ALJ with regard to his finding that the employer disparately enforced its dress code to prohibit employees from wearing union insignia. The ALJ found that the employer's supervisors saw but did not notice the pins without union insignia but "did take notice of the union pin… because it was a union pin." *Id.* at 1047. The same can be said here with regard to Respondent requiring RNs Welch and Stewart to remove their badge reels with Union insignia, in light of the record evidence of the widespread wearing of other non-Union non-Respondent insignia.

Even if the badge reel rule were to be construed as lawful, which it is not, Respondent has disparately enforced this rule. However, for the reasons set forth above, Respondent's badge reel rule is clearly unlawful, and Respondent enforced its unlawful rule with regard to both RNs Welch and Stewart.

IV. CONCLUSION

For the foregoing reasons, the Board should issue a Decision and Order consistent with the Union's exceptions to the ALJD.

DATED: October 12, 2016

Respectfully submitted,

Micah Berul
CNA/NNU Registered In-House Counsel

PROOF OF SERVICE

The undersigned hereby declares under penalty of perjury that I am a citizen of the United States, over the age of eighteen years, and not a party to the within action; that my business address is 155 Grand, Oakland, California 94612.

On the date below, I served a true copy of the following document:

CHARGING PARTY'S EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION

BRIEF IN SUPPORT OF EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE JEFFREY D. WEDEKIND'S AUGUST 31, 2016, DECISION, FILED BY CALIFORNIA NURSES ASSOCIATION/NATIONAL NURSES UNITED (CNA/NNU)

[Case 21-CA-157007]

via Electronic Mail as follows:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

DATED: October 12, 2016

Tym Tschneaux

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October 14, 2016

VIA E-FILE

Gary Shinners
Executive Secretary
National Labor Relations Board
1015 Half Street SE
Washington, D.C. 20570-00001

Re: **Long Beach Memorial Medical Center, Inc. dba Long Beach Memorial Medical Center & Miller Children's And Women's Hospital Long Beach Case No.: 21-CA-157007**

Dear Mr. Shinners:

The purpose of this letter is to request dual extensions of time in the above-referenced matter relating to all parties.

First, on behalf of Long Beach Memorial Medical Center, Inc. ("Employer"), we request an extension of time for the Employer to file its responses to the Exceptions and supporting Briefs filed by the Counsel for the General Counsel of Region 21 ("General Counsel") and the California Nurses Association ("Union") on October 12, 2016. The current deadline is October 26, 2016. The Employer requests a 16-day extension, which would place the deadline, if granted, on Friday, November 11, 2016.

This request is made due to previously scheduled, back-to-back arbitrations and negotiation sessions, which require extensive traveling, that fall within the next few weeks. We will need the requested additional 16 days in order to adequately respond to the Exceptions and Briefs.

The General Counsel and the Union have been informed of this extension request, and they have no objections.

In fact, we would like to also herein request that the Board simultaneously grant an extension of time to the General Counsel and the Union for their filing of any answering or reply briefs to Wednesday, November 30, 2016.

In sum, we request:

(1) an extension of time for the Employer to file its Answering Briefs/Cross-Exceptions until **Friday, November 11, 2016**, and

(2) an extension of time for the General Counsel and the Union to file any applicable Answering/Reply Briefs until **Wednesday, November 30, 2016**.

We look forward to hearing from you at your earliest convenience regarding this matter. Thank you in advance for your professional consideration and courtesies.

Very truly yours,
Epstein Becker & Green, P.C.

Adam C. Abrahms

cc: Kat Paterno, Esq.

CERTIFICATE OF SERVICE

I hereby certify that on October 14, 2016, I E-Filed and served the attached copy of the **Request for Extension of Time** submitted by Long Beach Memorial Medical Center, Inc. in Case No. 21-CA-157007 on the parties and in the manner listed below:

VIA E-FILE

Gary Shinners
Executive Secretary
National Labor Relations Board
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VIA E-MAIL

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USCA Case #18-1125 Document #1758750 Filed: 11/05/2018 Page 73 of 253

United States Government
NATIONAL LABOR RELATIONS BOARD
Office of the Executive Secretary
1015 Half Street, SE
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October 19, 2016

Adam C. Abrahms
Epstein Becker & Green, P.C.
1925 Century Park East, Suite 500
Los Angeles, CA 90067

Re: Long Beach Memorial Medical Center Inc. d/b/a Long Beach Memorial Medical Center & Miller Children's and Women's Hospital Long Beach, Case 21-CA-157007

Dear Mr. Abrahms:

This acknowledges receipt on October 14, 2016 of Respondent's request for an extension of time to file answering briefs, cross-exceptions, answer to cross-exceptions and reply briefs in the above-referenced case. As noted in your request, you seek the following extended due dates to which the other parties to this case do not object:

(1) an extension of time for the Employer to file its Answering Briefs/Cross-Exceptions until Friday, November 11, 2016, and

(2) an extension of time for the General Counsel and the Union to file any applicable Answering/Reply Briefs until Wednesday, November 30, 2016.

Your requested extensions of time are granted in part and denied in part. In this regard it is has been our experience that numerous issues can arise with respect to the filing with and acceptance by the Board of exceptions, cross-exceptions, briefs in support and answering briefs. The resolution of such issues often affects the remainder of the briefing schedule which can result in confusion over due dates for the other briefs. Accordingly, it is our preference and practice to entertain extension requests only with respect to the documents and briefs currently due. Thus, at this time we will entertain extension requests regarding the due date for the filing of answers to exceptions and cross-exceptions, but we are not willing to decide extension requests for the remainder of the briefing schedule. Also, please note that Section 102.46(h) of the Board's Rules and Regulations prohibits extensions to the 14 days allowed for the filing of reply briefs. Thus, to the extent that your request seeks additional time for the filing of reply briefs, that is not allowed under the Board's Rules.

As to your request to extend the due date for filing answering briefs and cross-exceptions until Friday, November 11, 2016, that day is a federal holiday (Veteran's Day). As such, we cannot set that as the due date for these documents. Instead we will grant the extension of time to the next business day.

Accordingly, your request for an extension of time for the filing of answer to exceptions and cross-exceptions will be granted to Monday, <u>November 14, 2016</u>. This extension applies to all parties. **In all other respects, your extension of time request is denied**. You or any of the other parties may request an extension of time to file answering briefs to cross-exceptions after answering briefs to exceptions and cross-exceptions have been filed. As noted above, please note that extensions of time are not granted for the filing of reply briefs.

Very truly yours,

/s/ Roxanne Rothschild
Deputy Executive Secretary

cc: Parties
Region

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

LONG BEACH MEMORIAL MEDICAL CENTER INC. d/b/a LONG BEACH MEMORIAL MEDICAL CENTER AND MILLER CHILDREN'S and WOMEN'S HOSPITAL LONG BEACH (RESPONDENT) -and- CALIFORNIA NURSES ASSOCIATION/NATIONAL NURSES UNITED (CNA/NNU) (CHARGING PARTY)	Case 21-CA-157007

RESPONDENT'S LIMITED CROSS-EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

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Respondent Long Beach Memorial Medical Center, Inc. d/b/a Long Beach Memorial Medical Center and Miller Children's and Women's Hospital Long Beach ("Hospital" or "Employer" or "Respondent"), by and through its attorneys Epstein Becker & Green, P.C., and pursuant to Section 102.46 of the National Labor Relations Board's ("Board") Rules and Regulations, hereby cross-excepts to limited portions of the Administrative Law Judge Jeffrey D. Wedekind's ("ALJ" or "Judge Wedekind") Decision in Case No. 21-CA-157007 issued on August 31, 2016 ("ALJ Decision" or "Judge Wedekind's Decision"). Respondent files Respondent's Limited Cross-Exceptions to the ALJ's Decision concurrently and together with Respondent's Brief in Support of Its Limited Cross-Exceptions (collectively "Cross-Exceptions"), as well as concurrently with Respondent's Answering Brief to the Counsel for the General Counsel's ("General Counsel") Limited Exception[1] and the California Nurses Association/National Nurses United's Exceptions ("Union" or "CNA"), and their Briefs in Support of their Exceptions, to the ALJ's Decision in Case No. 21-CA-157007 (collectively "Exceptions"). As described below, the Hospital hereby respectfully cross-excepts to the legal standards, factual findings, rulings and conclusions in Judge Wedekind's Decision that the Hospital has not proven special circumstances with respect to the pin rule, and that, in the context of the whole and in light of the specific facts and circumstances in this case, the maintenance of the pin rule in MHS'[2] Policy #318 entitled "Dress Code and Grooming

[1] This Exception is to Judge Wedekind's rulings, findings and conclusions to the dress code allegation originally at issue in Paragraph 6(a) of the Complaint and Notice of Hearing ("Complaint"), and that remained unchanged in the Complaint as amended on the first day of the two-day Hearing ("Amended Complaint).

[2] The Hospital is a non-profit subsidiary of its parent corporation, Memorial Health Services ("MHS"), which does business as "MemorialCare." (Tr. 13-14; 186).

Standards" ("Policy #318")[3] violates Section 8(1)(a) of the National Labor Relations Act ("Act").

Specifically, Respondent cross-excepts to the following limited portions of the ALJ's Decision:

1. Respondent cross-excepts to the portions of Judge Wedekind's conclusion on page 1, Paragraph 3 of his Decision, as follows:

> [T]he General Counsel has adequately established that the pin rule is facially unlawful.... (ALJD 1:¶3).

2. Respondent cross-excepts to the portions of Judge Wedekind's factual findings, legal conclusions and the legal standard applied and relied upon on page 4, lines 24-29 of his Decision, as follows:

> [T]he MHS dress code and grooming policy containing the pin rule applies to all employees, including non-direct patient care providers. Thus, it is clear that the pin rule is not limited to direct patient care areas of the facility. Accordingly, the rule is presumptively invalid, and Respondent must show that the restriction on any employees wearing nonapproved pins in non-direct patient care areas is necessary to avoid disruption of its operations or disturbance of patients. (ALDJ 4:24-29).

3. Respondent cross-excepts to Judge Wedekind's factual findings and legal standards applied and relied upon in his Decision to (incorrectly) conclude that (1) in the context of the whole, a reasonable employee would **not** read the language in the pin rule as limiting the wearing of pins **only** to employee I.D. Badges, and (2) the Hospital has **not** proven special circumstances. (*See* ALDJ 5:7-26; 6:6-25).

[3] The current version of Policy #318 was last revised on July 7, 2014. (*See* GC Exh. 4)

4. Respondent cross-excepts to the Conclusion of Law found on page 11, lines 15-18, of the ALJ's Decision that states:

> Respondent has violated Sections 8(a)(1) and 2(6) and (7) of the Act by maintaining a rule, set forth in MemorialCare Health System (MHS) dress code and grooming policy applicable to all employees, including employees in non-direct patient care areas, which states, "Only MHS approved pins, badges, and professional certifications may be worn." (ALDJ 11:15-18).

Respectfully submitted,

EPSTEIN, BECKER and GREEN, P.C.

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CERTIFICATE OF SERVICE

I hereby certify that on November 14, 2016, I E-Filed and served the attached copy of the **RESPONDENT'S LIMITED CROSS-EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION** submitted by Long Beach Memorial Medical Center, Inc. in Case No. 21-CA-157007 on the parties and in the manner listed below:

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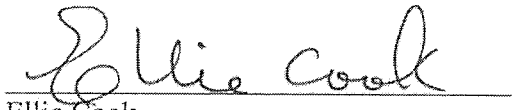

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

LONG BEACH MEMORIAL MEDICAL CENTER INC. d/b/a LONG BEACH MEMORIAL MEDICAL CENTER AND MILLER CHILDREN'S and WOMEN'S HOSPITAL LONG BEACH (RESPONDENT) -and- CALIFORNIA NURSES ASSOCIATION/NATIONAL NURSES UNITED (CNA/NNU) (CHARGING PARTY)	Case 21-CA-157007

RESPONDENT'S BRIEF IN SUPPORT OF ITS LIMITED CROSS-EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

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TABLE OF CONTENTS

Page

I. INTRODUCTION 2

II. FACTUAL BACKGROUND. 4

A. The Union Has Represented the Hospital's Registered Nurses for Over 15 Years. 4

B. The Purpose and Importance of the Hospital's Extensive Security System and Protocols, Including Requirements Relating to Employees and Employee I.D. Badges. 5

C. The word *Badge* in the Context of the Hospital is Widely Understood as Only Referring to the I.D. Badge. 7

D. Hospital Employees Understand the Restrictions on I.D. Badges. 11

E. The Hospital Has a Long-Standing Culture and Legitimate Reasons for Its Requirements Regarding Employees Wearing Pins on their Employee I.D. Badges. 12

F. The Hospital's Policy #318 Regarding Employees' Wearing of I.D. Badges. 15

G. Hospital Employees May and Do Wear Union and Other Imaging and Insignia, As Appropriate. 16

III. THE ALLEGATION THAT IS THE SUBJECT OF THESE CROSS-EXCEPTIONS. . 17

IV. ANALYSIS. 18

A. The Hospital has Proven Special Circumstances for Limiting the Information Placed on Its Employee I.D. Badges. 20

B. The Hospital's Maintenance of the Challenged Rules Is Entirely Lawful. 24

1. A Reasonable Hospital Employee, and, In Fact, Hospital Employees Would and Do Read the Rule in Policy #318 as Only Applying to Identification Pins Affixed to Employee I.D. Badges. 25

2. A Reasonable Reading of Policy #318, When Viewed in the Context of the Whole, Can Only Result in a Reading that Limits the Restriction on the Wearing of Pins to Only Those Identification Pins Worn on a Hospital Employee's I.D. Badge. 28

3. A Reasonable Hospital Employee Understands the Obvious and Varying Legitimate Business Reasons for the Hospital Wishing to Control the Information on the Employee I.D. Badge. 30

4. Given the Context, the "Approval" Language Is Not Relevant to the Analysis. 32

5. No Reasonable Hospital Employee Would Construe the Badge Reel Rule in the Hospital's Policy #318 as Restricting Their Section 7 Rights. 32

TABLE OF CONTENTS
(continued)

Page

C. This Case is Distinguishable From Those Cited By the ALJ, the General Counsel and the Union. 34

V. CONCLUSION 36

TABLE OF AUTHORITIES

Page(s)

Cases

Albis Plastics,
335 NLRB 923 (2001) 20, 32

Boch Honda,
362 NLRB No. 83, slip op. (2015) 23

Evergreen Nursing Home & Rehabilitation Center
198 NLRB 775, 778-779 (1972) 20

Flagstaff Medical Center,
357 NLRB 659 (2011) 31

Guardsmark, LLC,
344 NLRB 809 ..... 25, 33

Komatsu America Corp.,
342 NLRB 649 (2004) 20, 33

Lafayette Park Hotel,
326 NLRB 824 (1998), *enfd*. 203 F.3d 52 (D.C. Cir. 1999) 24

Lutheran Heritage Village-Livonia,
343 NLRB 646 (2004) ..... *passim*

NLRB v. Baptist Hospital,
442 U.S. 773 (1979) 20

Republic Aviation Corp. v. NLRB,
324 U.S. 793 (1945) 20

Southwestern Bell Telephone Co.,
200 NLRB at 671 33

Standard Oil Company of California,
168 NLRB 153 (1967) 33

Starwood Hotels and Resorts Worldwide, Inc. d/b/a W San Diego,
348 NLRB 372 (2006) 20, 22, 32

Tradesmen International,
383 NLRB 460 (2002) 29

TABLE OF AUTHORITIES
(continued)

Page(s)

United Parcel Service,
312 NLRB 596 (1993) 22, 23

United Parcel Service, Inc.,
195 NLRB 441 (1972) 25, 26, 33

Statutes

National Labor Relations Act
Section 8(a)(1) 1, 18, 24, 26

Respondent Long Beach Memorial Medical Center, Inc. d/b/a Long Beach Memorial Medical Center and Miller Children's and Women's Hospital Long Beach ("Hospital" or "Employer" or "Respondent"), by and through its attorneys Epstein Becker & Green, P.C., and pursuant to Section 102.46 of the National Labor Relations Board's ("Board") Rules and Regulations, hereby files Respondent's Brief in Support of its Limited Cross-Exception ("Cross-Exceptions") to Administrative Law Judge Jeffrey D. Wedekind's ("ALJ" or "Judge Wedekind") Decision in Case No. 21-CA-157007 ("ALJ Decision" or "Judge Wedekind's Decision"). Respondent files these Cross-Exceptions concurrently with Respondent's Answering Brief to the Counsel for the General Counsel's ("General Counsel") Limited Exception and the California Nurses Association/National Nurses United's Exceptions ("Union" or "CNA"), and their Briefs in Support of their Exceptions, to the ALJ's Decision in Case No. 21-CA-157007 (collectively "Exceptions").[1] As described below, the Hospital hereby respectfully cross-excepts to the ruling, findings, the legal standards applied and conclusions in Judge Wedekind's Decision that the Hospital's maintenance of a single line contained in Paragraph 10 in MHS'[2] Policy #318 entitled "Dress Code and Grooming Standards" ("Policy #318")[3] violates Section 8(1)(a) of the National Labor Relations Act ("Act").[4] (ALJD 1:¶3; 4:24-29; 11:15-18; GC. Exh. 4).

---

[1] Hereinafter "ALJD" refers to pages of the Administrative Law Judge Decision, "GCX" refers to the pages of the General Counsel's Brief in Support of Limited Exceptions, "UBX" refers to the pages of the Union's Brief in Support of its Exceptions, "Tr." refers to the pages of the Official Transcript of Hearing, "GC. Exh." refers to the General Counsel's Exhibits, and "Er. Exh." refers to the Hospital's Exhibits.

[2] The Hospital is a non-profit subsidiary of its parent corporation, Memorial Health Services ("MHS"), which does business as "MemorialCare." (Tr. 13-14; 186). "MemorialCare" and "Memorial" are used interchangeably throughout.

[3] The current version of Policy #318 was last revised on July 7, 2014. (*See* GC Ex. 4)

[4] The Cross-Exceptions are to Judge Wedekind's rulings, findings and conclusions to the dress code allegation originally at issue in Paragraph 6(a) of the Complaint and Notice of Hearing ("Complaint"), and that remained unchanged in the Complaint as amended on the first day of the two-day Hearing ("Amended Complaint).

I. INTRODUCTION

While Judge Wedekind applied the correct facts and legal standards with respect to his rulings, findings and conclusions relating to the uniform badge reel rule and the disparate enforcement allegations in his Decision, Judge Wedekind did not apply the appropriate facts or legal standards with regard to his rulings, findings and conclusions regarding the pin rule allegation and referenced in Paragraph 10 of Policy #318, which states "Only MHS approved pins, badges, and professional certifications may be worn." (ALDJ 1:¶3; 4:24-29; 11:15-18; GC. Exh. 4).

The evidence unquestionably demonstrates that the Hospital's employees understand and are keenly aware that: (1) the challenged rule **only relates to Hospital-related identification pins worn on employee identification badges ("I.D. Badges")** and (2) the Hospital has legitimate business reasons for the restrictions it has placed on what information may be displayed on employee I.D. Badges.

The record is clear: Pursuant to a long-standing, widely-known and observed practice and culture, Hospital employees wear their Hospital-provided and Hospital-related identification pins on the plastic cover that holds the employee I.D. Badges. The evidence was clear that this culture is so ingrained and understood that the Hospital's 6,000 employees would **only** read the single sentence in Policy #318 as referring to the wearing of identification pins **on employee I.D. Badges**—and not pins or buttons worn anywhere else.[5] The evidence and testimony presented over the course of the two-day Hearing, particularly the evidence presented by the General Counsel and Union, undeniably prove this fact. And, in fact, the record is completely absent of

[5] The Hospital has unrelated and unchallenged restrictions against pins being worn pursuant to other policies, but such restrictions are only applicable to direct patient-care employees performing patient-care duties in patient-care areas, including surgery and operating rooms.

any reference to any Hospital employee being restricted in the wearing of pins while at work—including on the employee I.D. Badge.

Further, the evidence unquestionably proves that the Hospital has legitimate business justifications related to the myriad of very serious and strict safety rules and protocols relating to I.D. badges, generally, and specifically to employee I.D. Badges, and that the Hospital's 6,000 employees understand these legitimate business justifications. The evidence presented demonstrates that the Hospital's 6,000 employees are acutely aware of the Hospital's security rules and concerns and unquestionably understand the Hospital's important business reasons for placing multiple rules and restrictions in its multiple employee I.D. Badge-related policies.

The uncontroverted evidence showed that Hospital employees utilize their employee I.D. Badges on a regular basis throughout their work day. The evidence shows that employees are all aware that not a single person, whether visitor, physician, patient, contractor or employee, may enter the Hospital without first being issued an I.D. badge by the Hospital's security personnel, and that all badges must be readily displayed and visible at all times. The evidence proves that the Hospital's 6,000 employees understand and regularly use their employee I.D. Badges as security access tools, which provide individualized access to only limited, authorized areas, as applicable, by both electronic programing contained inside each hard plastic employee I.D. Badge, as well as by the information displayed on the front of the I.D. Badge itself via color-coded bars. The evidence shows that Hospital employees understand and support the Hospital's reasons for the security-related access restrictions, as such restrictions are critical for the safety of patients, employees and all who enter the Hospital. Hospital employees understand that only pins portraying accurate information relating to professional qualifications and service may be worn on employee I.D. Badges, and they understand the Hospital's legitimate business reasons

for ensuring no inaccurate professional identifying information is displayed, or improper modifications made, to employee I.D. Badges.

In sum, the evidence overwhelmingly demonstrates that the Hospital's reasons for requiring restrictions relating to the information displayed on employee I.D. Badges are legitimate, obvious and clearly understood by all 6,000 Hospital employees.

Furthermore, the evidence shows that employees regularly wear union insignia, and know they can wear union insignia, in accordance with Hospital policy. Thus, no reasonable Hospital employee would possibly read the challenged language as restricting their Section 7 rights.

The clear, undisputed evidence in the record, along with the application of the correct legal standards and Board law, prove not only that a "reasonable Hospital employee" "would" or "could" understand that the challenged sentence in Policy #318 **only applies to identification pins worn on employee I.D. Badges**, but that, in fact, Hospital employees clearly **do** understand because it is such a long-standing, ingrained and obvious part of the Hospital's culture.

Accordingly, the Hospital respectfully requests that the Board decline to adopt the ALJ's Decision and Order and find the Hospital's maintenance of the challenged rule regarding identification pins worn on employee I.D. Badges and referenced in Policy #318 is lawful.

II. FACTUAL BACKGROUND.

A. The Union Has Represented the Hospital's Registered Nurses for Over 15 Years.

The Union has represented the Hospital's RNs for over 15 years. (Tr. 106; 108).

The General Counsel put on three witnesses to support its case; all three have served as Union stewards. (Tr. 49-50; 106; 108; 159-160). Brandy Welch ("Welch") has worked for the Hospital for 18 years and has served as a Union steward for approximately 14 years. (Tr. 49-50). Theresa Stewart ("Stewart"), who retired in January 2016, worked for the Hospital for 18 years, serving as a Union steward "since the inception" of the parties' collective bargaining agreement.

(Tr. 106; 108). And Elizabeth Castillo ("Castillo") has worked for the Hospital for eight years, with two years serving as a Union steward. (Tr. 159-160).

B. The Purpose and Importance of the Hospital's Extensive Security System and Protocols, Including Requirements Relating to Employees and Employee I.D. Badges.

The Hospital employs approximately 6,000 employees, and approximately 3,800 of those employees are direct patient-care providers. (Tr. 184-185). The Hospital is enormous; it is the second largest hospital campus west of the Mississippi River. (Tr. 187; *see e.g.* Er. Exh. 2). The Hospital is located in an urban area of Long Beach and takes up approximately 10 city blocks. (Tr. 188). Due to multiple factors, such as the Hospital's location, the necessity of heightened security that comes with having a children's and women's hospital, and the fact that there was a fatal shooting within the Hospital in 2008, the Hospital has invested enormous financial and other resources toward extensively enhancing its security protocols over the years. (Tr. 186; 188-189). The Hospital brings in outside consultants and experts to ensure its security "is at the highest standard possible around all areas." (Tr. 189). The Hospital employs its own 24/7 security force consisting of approximately 70 dedicated security personnel and three K-9 units. (Tr. 189-190). The Hospital's multiple security policies and systems are carefully designed and vigilantly enforced. (Er. Exhs. 1-4).

There are security desks at every public entrance, and every single person who enters the Hospital is required to wear an I.D. badge, including children. (*Id.*; Tr. 191-192). The Hospital has implemented an electronic visitor management system that requires all visitors to have their drivers' license electronically swiped to ensure they are not a registered sex offender or on a "suspected sex offender watch list."[6] (Er. Exh. 2). The electronic visitor management system is

[6] The electronic visitor management system automatically issues a paper badge that displays the visitor's driver's license photo and information. (Er. Exh. 2).

also designed to prevent child abductions and to prevent known violent individuals, such as known domestic violence offenders, from entering the Hospital. (Er. Exhs. 1-4).

Judy Fix, the Hospital's Senior Vice President of Patient-Care Services and Chief Nursing Officer, is responsible for overseeing all employees who provide hands-on care to patients, and for ensuring that the Hospital provides the highest standards and quality of care to the Hospital's patients. (Tr. 183-184). Fix's role involves creating, modifying or administering policies that affect direct patient-care or the environment of care for patients, which include the Hospital's security policies. (Tr. 185).

The pin rule at issue here in Policy #318 states, "Only MHS approved pins, badges, and professional certifications may be worn." (GC. Exh. 4). Under this rule, employees are permitted to attach small pins to the top of the plastic cover which holds the employee I.D. Badge which further identify their individual professional qualifications and service. These identification pins include professional certification pins issued by recognized Hospital-related professional associations or organizations, such as the American Heart Association, indicating that the employee has been certified in a particular specialty (e.g., pediatric nursing) as well as years of service pins and "I-Give" pins (a Hospital employee program that promotes service, commitment and ownership by enabling employees to donate to the various Hospital health centers) issued by the Hospital. (ALJD 2:23-29; GC Exhs. 3, 20-21; Tr. 38, 65-67, 127-131; 209¬211, 265-266.).

The evidence presented consistently and unquestionably demonstrated that the term "badge" only relates to I.D. Badges.

The evidence makes clear that in accordance with the longstanding practice and culture, the sentence at issue in Policy #318 relates **only** to the professional identification pins worn on

employee I.D. Badges, and that no Hospital employee would construe it as restricting pins or buttons worn anywhere **except** for on the employee I.D. Badge.

C. The word *Badge* in the Context of the Hospital is Widely Understood as Only Referring to the I.D. Badge.

The General Counsel's and the Union's Briefs in Support of their Exceptions cite cases and make references to employees reading the challenged sentence as limiting their right to wear "badges." However, within the context of the Hospital and its 6,000 employees, that term is unambiguously and globally only used in reference to the I.D. Badges. Multiple Hospital policies prove this is true, and there was no testimony presented or reference made during the two-day Hearing to any other type of badge ever being worn by any Hospital employee.

The Hospital has eight policies of varying types that together set forth the rules and requirements relating to Hospital I.D. badges, including employees' I.D. badges. (GC. Exhs. 4 and 6; Er. Exhs. 1-4; 7 and 8). Employee I.D. badges are addressed in four Hospital security policies, two Hospital Influenza vaccination policies and two Hospital dress/appearance policies. *Id.*

All eight such policies, including Policy #318, use the words "identification badge," "I.D. badge," "name badge" and/or "badge" **interchangeably** to refer to employee I.D. badges.[7] (*Id.*) Of note, there was no evidence presented of any other type of badge being worn at the Hospital except for the I.D. Badge. Thus, this is not a case about any type of badge **other than** employee I.D. Badges.

All eight policies, particularly when viewed in the context of the Hospital's extensive security system and the reasons for them, make it clear that the Hospital takes employee I.D. Badges very seriously. (GC. Exhs. 4 and 6; Er. Exhs. 1-4; 7 and 8). In fact, it is clear that

[7] The Hospital's two Influenza vaccination policies ***only*** refer to "badges" or "name badges." (Er. Exhs. 7 and 8).

employee I.D. Badges are an important, intricate and crucial part of ensuring the Hospital's security system and **are directly related to patient safety**. (*Id.*) Accordingly, all eight policies reserve and reference the Hospital's right to approve, authenticate, authorize, verify, inspect, etc., the varying aspects of the employee I.D. badges. (*Id.*)

As is stated in the Hospital's security policies, as well as in Policy #318 and the Hospital's "Appearance, Grooming and Infection Prevention Standards for Direct Care Providers" policy ("Appearance Policy"), all Hospital employees are required to wear Hospital-approved employee I.D. Badges at all times, front-facing and at a level that can be readily seen by others. (GC. Exhs. 4 and 6; Er. Exhs. 3 and 4).

The Hospital's policy entitled "Security: Infants and Children" has multiple provisions applicable to Hospital employees. (Er. Exh. 3). For example, the "Staff Identification" section of the policy states: "Wear the LBM photo ID badge visibly at all times while on the job. Employees, including primary caregivers, who are authorized to remove infants and children from their room and/or unit are required to wear a pink bar prominently displayed." (*Id.*) Employee I.D. Badges must include a photo, the name and title of the employee. (*Id.*) The employee I.D. badge holds so much power that employees must "immediately report" the loss of their badge to Security or their manager. (*Id.*)

The Hospital's policy entitled "Environment of Care Security Management—Providing Identification to Staff, Patients, Visitors" ("EOC Policy") states its purpose is: "To establish the procedure for issuance of **identification badges to employees**, physicians, contract employees, volunteers, clergy and vendors of the hospitals, and the requirement for wearing same on campus at all times." (Er. Exh. 4). Under the "Procedure" section of the policy, it states: "The Security Department is responsible for producing and issuing all **identification badges** with the picture,

person's name, title and personnel information, and department on the **badge**. **All badges are the property of the hospital**." (*Id.*) (emphasis added). The EOC Policy provides multiple rules regarding employee I.D. Badges, including clear instruction that "**Possession or use of another employee's I.D. badge is prohibited**." (*Id.*) (emphasis added).

The purpose of the many security-related restrictions is clearly to ensure the information on the I.D. Badges is accurate and not abused.

Policy #318 contains 10 Paragraphs that contain examples of the "minimum requirements of dress and appearance," two of which contain examples relating to employee I.D. Badges. (GC. Exh. 4). Paragraph 1 of Policy #318 states: "**Identification badges** shall be worn by **everyone** with name and picture facing out, at a level that can be readily seen." (*Id.*) (emphasis added) And Paragraph 10 of Policy #318 states: "Only MHS approved pins, **badges** and professional certifications may be worn." *Id.* (emphasis added).

The Appearance Policy,[8] which is more specific than Policy #318 and thus trumps it, also states in its Paragraph 12: "**Identification badges** shall be worn by everyone with the name and picture facing forward. **Badges** must be worn at collar level, right side, so they can be readily seen." (GC. Exh. 6) (emphasis added).

The Hospital takes security and I.D. Badges so seriously that employees are prohibited from wearing their employee I.D. Badges when visiting a patient while off-duty. The Hospital's Visiting Plan policy states on page 2: "All employees are discouraged from visiting patients during their 'on duty' time. If employees come in on 'off duty' time to visit a patient in the hospital, they will check in like any other visitor through the electronic visitor management system and wear a visitor badge." (Er. Exh. 1).

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[8] *See* Respondent's Answering Brief to the General Counsel's and the Union's Exceptions.

Further, the Hospital makes it the responsibility of employees to help enforce the I.D. badge policies relating to all who enter patient-care areas, including fellow employees. Pursuant to Section D.V. of the Hospital's Visitor Management Policy, Hospital employees in patient-care areas are required "**to check the badges worn by others to verify that the person is appropriate to enter the unit**." (Er. Exh. 2) (emphasis added).

Finally, the Hospital requires all Hospital employees to be vaccinated against Influenza on an annual basis. (Er. Exhs. 7 and 8). Employees who do not have **proof** that they have received a vaccination are required to wear surgical masks at all times. (*Id.*) The Hospital's policy entitled "Influenza Vaccination and Protection Program" ("Influenza Policy") states: "**A notation will be placed on the badges** of all individuals who have received influenza vaccinations in order to better enable management to identify those individuals who require surgical masks. These notations must be displayed at all times." (Er. Exh. 7) (emphasis added). It also states that employees have the choice of either receiving the vaccination for free at the Hospital or they must "provide **written proof of receipt** of the influenza vaccination from **another source**." (*Id.*) (emphasis added).

Similarly, the "Frequently Asked Questions" handout regarding the 2015-2016 Influenza season ("Flu Shot FAQ") states: "Staff who have been vaccinated (either by us or who bring in **proof** of vaccination) will receive a new **colored special 'dot' for their name badge**.... Please be sure to display your sticker while in the workplace." Er. Exh. 8 (emphasis added).[9]

[9] The Influenza Policy only makes one single reference to badges, simply referring to a notation to be placed on the "badge" of anyone who has received the shot. (Er. Exh. 7). Similarly, the Flu Shot FAQ simply states that employees who are vaccinated will receive a sticker to place on their "name badge." (Er. Exh. 8). Again, this makes it clear that the word "badge" is understood by employees as ***only*** referring to the I.D. Badge.

D. Hospital Employees Understand the Restrictions on I.D. Badges.

Employees also understand the Hospital's multitude of extremely legitimate reasons for the rules and restrictions relating to employee I.D. Badges. When an employee is hired, the employee is issued an I.D. Badge with the correct identifying information on it. (Er. Exh. 4). The I.D. Badges contain a distinctive color strip denoting the employees' discipline, and the color strip also indicates certain access permissions and restrictions. (Tr. 200-201). The hard I.D. Badge itself is also electronically coded. (Tr. 109; 199-200). The electronic coding provides only authorized access to vital areas, such as the children's units, and to sensitive materials, such as medications, within the Hospital. (*Id.*)

As retired Hospital RN and Union steward Stewart explained, and as is generally understood by Hospital employees:

> The identification badge allows you to clock in so you can get paid; it allows you to park your vehicle on campus because you can't get the gate to come up without your badge; **it allows you to go down corridors, open doors; you can't get into certain areas such as the pharmacy without your badge. Your badge is a security device, it is a picture ID, and <u>it allows the patient to see that indeed you are who you say you are</u>.**

(Tr. 109; *see also* Tr. 51) (emphasis added).

Welch, a Union steward, testified that she understood the purpose of the I.D. Badge, specifically that it "identifies who we are and what position we hold" and "allows us to get in and out of the department by swiping our badge to get out of doors that are controlled." (Tr. 50-51). Hospital employees use their I.D. Badge multiple times on any given workday to swipe it against a coded, electronic plate located outside access-limited doors to gain entry, as authorized. (Tr. 51; 109-110).

The Hospital provides all employees with a yellow emergency code card along with the badge, and the Hospital places both the employee I.D. badge and the emergency code card in a plastic cover that comes with a clip. (Er. Exh. 5). The clip is attached by a piece of plastic attached by a snap enclosure which can be removed. (*Id.*) The plastic badge cover has two holes at the top, to which employees affix Hospital-related professional identification pins provided by the Hospital or professional certification pins provided by accredited outside providers. (*Id.*; *see also* GC. Exh. 7; Tr. 64-65).

E. The Hospital Has a Long-Standing Culture and Legitimate Reasons for Its Requirements Regarding Employees Wearing Pins on their Employee I.D. Badges.

The evidence presented at the Hearing reflects the Hospital's long-standing policy and culture that is widely known and understood by employees that I.D. Badges should be unadulterated with the limited exceptions of Hospital-related service identification pins and Flu shot stickers provided by the Hospital, and professional certification identification pins provided by approved, accredited outside providers, which may be worn on the outside plastic badge cover and as part of the employee I.D. Badge so long as the critical identifying information is still clearly visible. (GC. Exhs. 7 and 21; Tr. 72).

This culture regarding employees wearing of such identification pins on employees I.D. Badges has remained unchanged for many years. (Tr. 72). The Hospital's Policy #318 rule limiting only Hospital-approved "pins, badges and professional certification pins" reflects this widely known culture and is understood to refer only to employee I.D. Badges and the professional identification pins that may be worn on the plastic cover which holds the Badge.

Hospital employees may and do wear professional certification pins denoting they have achieved a specialized skill above and beyond their primary discipline on their employee I.D. Badges. (Tr. 65-67). However, consistent with the purpose of the I.D. Badges, Hospital

employees may only wear professional certification pins **actually earned from an accredited, Hospital-approved outside provider**, such as the American Heart Association. (Tr. 126-127; 209).

Employees may also wear Hospital-related qualification and service pins provided by the Hospital, such as recognition and achievement pins, on their employee I.D. Badges. (Tr. 65-66). Employees understand that the identification pins displayed on I.D. Badges are related to the Hospital's patient-care mission and the employees' professional qualifications and service experience.

The testimony and evidence presented at the Hearing confirm that Hospital employees understand that the only pins referenced in Paragraph 10 of Policy #318 relate to those that may be worn on the employee I.D. Badge. (UBX 3-4; GC. Exhs. 4; 14; 20; 21; Tr. 66).

Union steward Welch testified that she received her "15 years with Memorial" service pin at an award luncheon, then stated "So it's on my badge." (Tr. 65-66).

Union steward Stewart testified regarding the type of pins RNs wear on their employee I.D. Badges as follows:

> Pins; pins can be issued from the hospital, from your certification agency or your certification body, from the American Heart Association. It could be from your pediatric group, it can be a Bugs Bunny pin,[10] it can be all kinds of different things. But the badges can include anything from your years of service pin, which might be on there, all the way to your credentialing.

(Tr. 126-127).

Stewart also testified that she saw pins displaying the branding of the Hospital's donation program "I-Give," and that such pins were worn on employee's I.D. Badges regularly. (Tr. 127;

[10] Notwithstanding Stewart's self-serving statement regarding "a Bugs Bunny pin," there was no evidence of any such pin being worn and it is certainly ***not*** part of the Hospital's policy regarding what can be worn on employee I.D. badges. (GC. Exh. 4; Tr. 209).

see also GC. Exh. 20). Stewart explained: "I Give is Memorial's philanthropic arm in the organization where employees who give to the charity of patients or programs in the property that promote patient safety, wellness, education, are given the I Give as indicative that they've participated by making a contribution." (Tr. 123).

Stewart took a photo of her own pins, which General Counsel introduced as Exhibit 21. Stewart stated: "These are pins that have either been issued through Long Beach Memorial or through a certification body **for the purpose of wearing on your badge**." (Tr. 127-130; GC. Exh. 21) (emphasis added).

The General Counsel introduced multiple exhibits that included images of various different employment or Hospital-related pins. (GC. Exhs. 7; 12; 14; 20-21; and 23). Some of the exhibits show the pins actually affixed to employee I.D. Badges. (GC. Exhs. 7; 12; and 23). Importantly, all the testimony at the Hearing made clear that employees **only** wore such pins on their employee I.D. Badges. All 15 pin examples (except one)[11] offered as evidence by the General Counsel at the Hearing relate to the identification of Hospital employees' professional role, achievements or recognition and/or service qualifications directly related to the Hospital's patient-care mission.[12] (GC. Exhs. 7; 12; 14; 20-21). And while there was some vague testimony about wearing cartoon character pins,[13] there was **not one exhibit** introduced by the General Counsel depicting any cartoon character pins worn by Hospital employees on their I.D.

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[11] A CNA pin was included in General Counsel's Exhibit 21 for blatantly self-serving purposes.

[12] Welch testified that she wore two (2) breast cancer pins, as evidence that they weren't Hospital issued. (Tr. 64-65). However, she never actually stated from where she obtained them. (*Id.*)

[13] While there was extremely brief testimony from Welch about allegedly seeing employees wearing "Disney, like Ariel or Mickey Mouse" pins, the bulk of her testimony described pins that were actually in line with Policy #318 and the longstanding practice. (Tr. 65-67).

Badges, and certainly no evidence the Hospital approved and/or distributed such pins. (ALJD 5:fn. 8).

F. The Hospital's Policy #318 Regarding Employees' Wearing of I.D. Badges.

The Hospital adopted MHS' Policy #318.[14] (GC. Exh. 4; Tr. 37-38). Policy #318 is applicable to all Hospital employees. (*Id.*) There is no reference whatsoever to "unions" or "union insignia" in Policy #318. (GC. Exh. 4). In fact, the evidence shows that Hospital employees have historically and routinely worn Union insignia without incident or objection from the Hospital. (Tr. 151-152; 261-263; 323). Policy #318 is available to Hospital employees to access and view at any time on the Hospital's Intranet site. (Tr. 39).

Policy #318 states that "[w]hile it is impossible to specifically identify all appropriate or inappropriate descriptions of dress and grooming, **the following are examples of minimum requirements of dress and appearance**." (*Id.*) (emphasis added). Policy #318 then offers 10 paragraphs containing some such examples of the minimum requirements. (*Id.*)

Paragraph 1 of Policy #318 states:

> **Identification badges** shall be worn by everyone with name and picture facing out, at a level that can be readily seen.

And Paragraph 10 of Policy #318 states:

> **Only MHS approved pins, badges and professional certifications may be worn.**

Importantly, and indicative of the limited scope of the identification pin rule at issue as well as the fact the Hospital's policy does not improperly limit Section 7 activity, Paragraph 8 of Policy #318 states:

[14] MHS provides the Hospital access to broad policies, and the Hospital may choose to adopt, amend or modify MHS policies as it sees fit in order to suit its distinct business needs. (Tr. 186-187). And the Hospital maintains its own, separate policies from MHS. (*Id.*).

> **Jewelry and other accessories** shall be minimized and may not be worn where safety or health standards might be compromised. Body piercing anywhere other than the ear shall not be displayed. Tattoos are not to be visible; except for those with direct patient care responsibilities in order to protect patients from potential fabric-born contaminants.

(GC. Exh. 4) (emphasis added).

There was no testimony at all of any employee asking for "approval" before wearing any pin on the I.D. Badge, or anywhere else for that matter. Fix testified that the language in Policy #318 refers to a Hospital "distributed pin or badge" and employees understood this, particularly as there is no actual "approval" process in place or in existence at the Hospital. (Tr. 273).

G. Hospital Employees May and Do Wear Union and Other Imaging and Insignia, As Appropriate.

Other than the single sentence at issue here, Policy #318 does not reference or limit the wearing of any insignia, much less union insignia. (GC. Exhs. 4). Hospital employees always have, and still do, wear union insignia, as appropriate. Cinthya Rocha ("Rocha"), Director of Human Resources, testified that, between December 2014 and the present, she has seen Union stewards, including both Welch and Stewart, **actually wearing** Union insignia while walking through patient-care areas while conducting Union business and being paid for their Union steward duties. (Tr. 323). The Hospital has about 50 Union stewards. (Tr. 316).

Rocha testified that since December 2014, she has seen Union stewards wearing Union related insignia at the Hospital "very often" when they are performing their Union steward duties and not working in uniform in their patient-care role. (Tr. 323). And Hospital employees may wear shirts, jackets, lanyards, badge reels, etc., bearing union or any other insignia as long as they are not a direct patient-care provider who is on duty in a patient-care area and required to wear a standardized uniform. (Tr. 261-263; 323).

To this day, the approximately 2,200 non-direct patient-care providers may still wear buttons, lanyards and badge reels with any logo they wish and any apparel with logos or texts so long as they are compliant with the other non-challenged aspects of Policy #318. (GC. Exhs. 4-6; Tr. 139; 251-252). And importantly, even direct patient-care providers who are ***not*** working in a patient-care area, but rather who are in elevators, the cafeteria, the parking lot, the lobby, in meetings, break rooms, attending training sessions, etc. may do so as well—and, in fact, they do. (GC. Exhs. 4-6; Tr. 94-95; 139; 173; 212-213; 251-252; 257; 259). Thus, as admitted by two Union stewards and confirmed by the Senior Vice President of Patient-Care Services, even direct patient-care employees who attend "Skills Day," trainings or meetings at the Hospital or who work in the "Blood Donor Center"[15] are not required to wear the standardized uniform, and may wear union attire, as appropriate. (Tr. 94-95; 173; 212-213; 251-252; 257; 259).

III. THE ALLEGATION THAT IS THE SUBJECT OF THESE CROSS-EXCEPTIONS.

The relevant allegation here, as stated in Amended Paragraph 6(a)[16] of the Complaint, is as follows:

> Since at least July 1, 2015, Respondent has maintained the following rule which is contained in Respondent's Dress Code and Grooming Standards Policy/Procedure #318 (dated March 3, 2014 and revised July 7, 2014): "Only MHS approved pins, badges, and professional certifications may be worn."

Pursuant to Paragraph 8 of the Complaint states that by the conduct described in Paragraph 6, the Hospital "has been interfering with, restraining, and coercing employees in the

[15] Thus, General Counsel's Exhibit 12 depicts a registered nurse who is not providing direct patient-care in a patient-care area and is not required to wear the standardized uniform, including the Memorial Badge Reel.

[16] The General Counsel's requests that Paragraph 6 of the Complaint be amended to read "Paragraph 6(a)" and that the date of the policy be amended to read "July 7, 2014" were granted. (Tr. 9-12; 41-48).

exercise of the rights guaranteed them in Section 7 of the Act in violation of Section 8(a)(1) of the Act."

IV. ANALYSIS.

At the outset, it must be noted that this case is distinguishable from all other cases we could find, and particularly the cases cited by the General Counsel, the Union and the ALJ.

First and foremost, the I.D. Badge at issue here is different than other forms of attire in that it displays a great deal of critical information that directly relates to the safety of patients and others in the Hospital, while simultaneously acting as a powerful access tool, which also directly relates to the safety of patients and others in the Hospital. The Hospital's employee I.D. Badge is not merely a "name tag." And it is not merely an "access card" that employees are free to place in their pocket while inside the Hospital. The Hospital requires all people who enter the Hospital to be readily identifiable by displaying a badge with a photo, a name and specifying the limited area(s) that each person is authorized to enter. Various employees may utilize their I.D. Badge to enter the Hospital through authorized access-only doors, and they may enter authorized and restricted areas within the Hospital only if their job position, and thus employee I.D. Badge, allows them access.

All others who enter the Hospital must go through a security check process first that includes swiping each person's driver's license to ensure they are not a pedophile, domestic violence offender, etc., after which they are issued a temporary I.D. badge upon which their driver's license photo and information appear, along with the specific and only area(s) of the Hospital that the visitor is allowed to enter. Just like employees, visitors must also have their badges visible at all times. The Hospital, which is set in an urban location and has experienced an off-duty employee shooting, has gone to great lengths to ensure it is providing the best safety

measures possible. The Hospital is responsible for maintaining order and ensuring the safety of the approximately 10,000 to 12,000 people who enter and exit the Hospital each day.

The Hospital must have the right to control the information that is displayed on its 6,000 employees' I.D. Badges, which is the purpose of the policy language at issue here.

The Board law exception that allows certain restrictions on the wearing of union insignia is called "special circumstances" for a reason; and there can be no doubt that the "special" facts and circumstances here fully justify the Hospital's legitimate business reasons for maintaining the rule in Policy #318 that limits the information that can be placed on a Hospital employee's I.D. Badge.

Furthermore, as was made clear by the fact that **all the evidence** presented by the General Counsel over the course of the two-day Hearing proves that not merely a reasonable Hospital employee, but rather **all Hospital employees**, equate "pins," "badges" and "professional certifications" with the longstanding custom and practice of employees wearing Hospital-provided and related identification pins and professional certification pins on their employee I.D. Badges. The custom is so inherently obvious and ingrained to Hospital employees, that no Hospital employee would read the sentence in Policy #318 as a directive prohibiting them from wearing pins or buttons anywhere else **but** on their employee I.D. Badges. And the evidence overwhelmingly proves that all Hospital employees understand and are acutely aware of the Hospital's legitimate reasons for controlling the rules that pertain to the employee I.D. Badges.

When the relevant law and facts are applied as is made clear below, the Hospital's maintenance of the challenged sentence in Policy #318 is lawful. Accordingly, the Hospital respectfully requests that the Board reverse the ALJ's Decision and Order regarding the Policy #318 rule, and deem it lawful.

A. The Hospital has Proven Special Circumstances for Limiting the Information Placed on Its Employee I.D. Badges.

While employees generally have a right to wear "union insignia" while at work, the right is not without limitation. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 801-803 (1945). Section 7 rights "may give way when 'special circumstances' **override the employees' Section 7 interests** and **legitimize the regulation of such apparel**." *Komatsu America Corp.*, 342 NLRB 649, 650 (2004) (emphasis added); citing *Evergreen Nursing Home & Rehabilitation Center*, 198 NLRB 775, 778-779 (1972).

This is clearly a case where the Hospital's need to regulate the apparel, in this case the employee I.D. Badge, overrides the employees' Section 7 rights, particularly considering the 15 plus year relationship between the Hospital and the Union, the complete lack of any union animus and the fact that employees at the Hospital can and do wear union insignia regularly at the Hospital without incident and as appropriate.

"In cases where the employer argues that special circumstances[17] justify a ban on union insignia, the Board and courts balance [18] the employee's right to engage in union activities against the employer's right to maintain discipline or **to achieve other legitimate business objectives, under the existing circumstances**." *Albis Plastics*, 335 NLRB 923 (2001) (emphasis added). Again, the ability to control the information displayed on an I.D. Badge is critical and unquestionably legitimate under the existing circumstances here.

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[17] "Special circumstances justify restrictions on union insignia or apparel 'when their display **may jeopardize** employee **safety**, damage machinery or products, exacerbate employee dissension, or unreasonably interfere with a public image that the employer has established, or **when necessary to maintain decorum** and discipline among employees.'" *Starwood Hotels and Resorts Worldwide, Inc. d/b/a W San Diego ("W Hotel")*, 348 NLRB 372, 373 (2006); citing *Komatsu*, 342 NLRB at 650; *NLRB v. Baptist Hospital*, 442 U.S. 773, 781 (1979).

[18] *Republic Aviation*, 324 U.S. at 797-798 (balancing test must be applied between the employees' rights to exercise their Section 7 rights against an employer's right to "manage its business in an orderly fashion").

Given the breadth and scope of the safety and security-sensitive Hospital environment, the Hospital has demonstrated special circumstances justifying its **multiple** legitimate business reasons for limiting and controlling the information its employees display on their I.D. Badges and for creating reasonable rules to ensure employees do not misuse or improperly alter their employee I.D. Badges.

The Hospital places a huge priority on security for all the very legitimate reasons stated above. The Hospital has created multiple security policies and protocols, hired 70 dedicated security personnel who offer 24/7 security protection, has three (3) K-9 units, and has engaged in training and taskforce-like simulations. It is obvious that the Hospital has made and continues to make substantial financial contributions to ensure the highest level of safety possible. The security relating to I.D. Badges also directly relates to patient-care and safety, as well as to the safety of others. Both the access information on the badges and the electronic coding must be strictly adhered to ensure patients are safe, and to avoid disruption of healthcare operations and disturbance of patients.

In addition to the Hospital having proven special circumstances to limit what employees wear on their Hospital-issued I.D. Badges, the Hospital also has a responsibility to do so for legal, safety and liability purposes. The Hospital must ensure employees do not hold themselves out in a false manner, such as by an employee displaying false information on their badge, including a false flu shot sticker, professional certification pin or Hospital-related pins not actually earned by an employee. (GC. Exh. 4; Er. Exhs. 1-4; 7 and 8).

The Hospital must ensure that employees are wearing real, Hospital-issued badges, not fake ones. (Er. Exhs. 2 and 4). The Hospital must ensure that all the identifying information on employees' badges is visible at all times. (GC. Exhs. 4 and 6; Er. Exhs. 3 and 4). For instance,

employees may not cover their identifying information with stickers or pins of any kind whatsoever, including Hospital-provided stickers or pins. (*Id.*)

The potential for liability if employees misuse their I.D. Badges in any way cannot be understated, and the Hospital must be able to control the information on the I.D. Badges for this reason.

The special circumstances test requires a balancing of interests, and here, the balance clearly weighs heavily in favor of the Hospital. The fact that it is unclear whether any employee has even ever worn a union pin on their employee I.D. Badge, as there was only some very vague brief testimony given by Welch, whose testimony Judge Wedekind found "substantial reason" to discount, is of paramount importance and makes the decision a simple one. (ALJD 6:note.11; 10:28-44). There can be no doubt that the Hospital has proven special circumstances that far outweigh any "new" reading or understanding of an long uncontested rule that is imposed to "prove" a possibility of a restriction on employees' Section 7 activity.

Moreover, the Board has distinguished between situations where adornments were directly related to the employer's business and situations where employers allowed employees to wear other adornments that were **not** directly related to an employer's business, such as military support adornments worn by package delivery drivers. *W Hotel*, 348 NLRB 373; *United Parcel Service*, 312 NLRB 596, 597 (1993) (finding that public contact alone was not enough to support special circumstances when the employer had allowed package delivery drivers to wear military support pins and other pins that had "**no apparent relation to the Respondent's business**" (emphasis added)). Here, the Hospital limits the pins that can be worn on I.D. Badges to identification pins that directly relate to employees' qualifications and service.

In his Decision, Judge Wedekind missed the important distinctions between this case and others. He also seems to have misunderstood the Hospital's position regarding its asserted special circumstances. Judge Wedekind stated that while the Hospital (purportedly) argued that "the ban on wearing nonapproved pins on ID badges in all areas is justified because ID badges are part of the hospital safety and security protocol," there was "no substantial evidence indicating that *pins* are part of the safety and security protocol." (ALJD 4 32-34)(emphasis added). In his Decision, Judge Wedekind seemed to find it important that the language regarding "pins" is found "exclusively" in Policy #318. To support his conclusions, he cites to *Boch Honda*, 362 NLRB No. 83, slip op. at 3 (2015). However, the highly distinguishable rule at issue in that case stated: "Employees who have contact with the public may not wear pins, insignias, or other message clothing." (*Id.* at 2.) The reason Judge Wedekind included the citation is because the employer in that *Boch Honda* argued that its rule's ban on pins was for safety reasons. (*Id.* at 3.)

To be clear, the Hospital here is not arguing that the pins attached to the I.D. Badges are safety hazards. And in contrast with the *Boch Honda* rule, the rule in Policy #318 is limited strictly to pins worn on employee I.D. Badges; it does not apply to pins worn anywhere else. The Hospital has a legitimate business reason for needing to control the information that employees display on their I.D. Badges due to the specific, unique circumstances in this case. The employee I.D. Badges are the property of the Hospital and serve multiple practical and important purposes, a primary one being the proper identification of the employee. (Er. Exhs 1-4; 7-8).

With 6,000 employees and 12,000 people in the Hospital on a given day, proper employee identification is a crucial and important business issue and concern. This is not a name

badge for a Starbucks employee who knows the 10 other employees who work with them each day and are not even close to being in a comparable environment. The Hospital employees' job duties vary obviously, however, the security issues relating to identification and I.D. Badges are very serious and very real, *i.e.,* access to drugs and medication, life and death situations, suicide watch patients, visitors carrying weapons, etc., and as there are thousands of employees, often the only way for employees to identify one another and distinguish between an employee versus a physician, contractor or visitor is by looking at each other's I.D. Badges. If an employee holds themselves out in any sort of a false manner, the consequences could be devastating. The Hospital has a legitimate interest in ensuring that its employees display proper, accurate and relevant identifying information on employee I.D. Badges. The Hospital must be able to control and limit what information is placed on its very important employee I.D. Badges.

This case is one that highlights the dangers of allowing unions and the Board to overly dissect and prescribe unintended meaning to employers' policies that have real-life, important and legitimate purposes and meanings that are widely understood in the workplace but not to an outsider. For these reasons alone, the ALJ's Decision and Order as to the pin rule/Policy #318 should be reversed.

B. <u>The Hospital's Maintenance of the Challenged Rules Is Entirely Lawful.</u>

The Hospital's mere maintenance of the sentence in Policy #318 at issue, taken in context of the circumstances at hand, is entirely lawful. When faced with an allegation that an employer's work rule violates Section 8(a)(1), the Board applies the principles set forth in *Lafayette Park Hotel*, 326 NLRB 824 (1998), *enfd.* 203 F.3d 52 (D.C. Cir. 1999), and *Lutheran Heritage Village-Livonia ("Lutheran Heritage")*, 343 NLRB 646 (2004). The Board has held that an employer violates the Act when it maintains a work rule or policy that **reasonably** tends

to chill employees in the exercise of their Section 7 rights. *Lafayette Park Hotel*, 326 NLRB at 825.

A work rule that explicitly restricts activities protected by Section 7 will be held unlawful. *Lutheran Heritage*, 343 NLRB at 646. If the rule does not explicitly restrict Section 7 activity, the Board will only find a violation upon a showing that: "(1) employees would reasonably construe the language of the rule to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." *Id.*

1. A Reasonable Hospital Employee, and, In Fact, Hospital Employees Would and Do Read the Rule in Policy #318 as Only Applying to Identification Pins Affixed to Employee I.D. Badges.

Even giving the pin, badges and professional certification rule in Policy #318 the most strained reading possible, it is still easily upheld as lawful. **All the evidence** demonstrates that **Hospital employees do read** the sentence as **only** limiting the types of pins worn on employee I.D. Badges.

The Board has held that employers can rely upon "narrowing interpretations of overly broad rules" if such narrowing interpretations are **"communicated to the entire work force covered by the rule."** *Guardsmark, LLC*, 344 NLRB 809, 811(2005) (citation omitted). This is precisely the case here. While there may not be a specific explanatory written communication presented at the Hearing, the culture and practice has existed for many, many years. It is widely and openly known that employees may wear their identifying professional qualification, certification and years of service pins on the plastic badge cover that holds the employee I.D. Badge.

Further, the Board has repeatedly held that employees can make **reasonable judgments based on context**. For example, in one case, United Parcel Service ("UPS") addressed a notice

to "All Employees" that explicitly prohibited the wearing of an intra-union button on the employer's standardized uniform. *United Parcel Service, Inc.*, 195 NLRB 441 (1972). The employer had both non-uniformed employees and uniformed employees. *Id.* The union argued that the notice violated Section 8(a)(1) too because it applied to non-uniformed employees and uniformed employees during times when they were not interacting with the public. *Id.* The Board disagreed, finding that because the notice specifically concerned the company uniform, which only applied to drivers, and because the drivers knew and understood that the uniform rule only applied to them when they were out on deliveries and interacting with customers and the public, **the reasonable UPS employee** would not find the notice to restrict the exercise of their Section 7 rights. *Id.*

Therefore, just as the Board found the UPS employees would reasonably understand that a rule stating it applied to "All Employees" only applied to uniformed employees while working, the Hospital's employees are all well aware and understand that the rule in Policy #318 only applies to the employee I.D. Badge and the identification pins that can be worn on it.

Given the longstanding and widespread practice and culture of Hospital employees displaying qualification and service-related identification pins on their I.D. Badges, no reasonable employee who has ever spent more than one day in the Hospital would read the sentence in Policy #318 as limiting their right to wear a pin anywhere **except on their employee I.D. Badge**. Just as the UPS communication may have been read differently under a different set of facts, such as a different group of employees working for a different employer, the rule in Policy #318 must be read in the context of the undisputed unique set of facts here, which is that there is an open, widely known, longstanding culture and current practice wherein Hospital employees wear identifying service and professional certification pins on their I.D. Badge cover.

The evidence presented at the two-day Hearing all confirmed that the meaning, scope and context of the application of the rule in Policy #318 are clear to all 6,000 Hospital employees. At the Hospital, the word "pin" and "badge" and "professional certification" placed together in the same sentence is only referring to the pins—both Hospital service-related and professional certification pins denoting specialized skills—have historically been worn on the employee I.D. Badge. Just because other hospitals or employers have had union organizing drives that involved some other type of "badges" does not mean that because the word "badge" here means the same thing.

Judge Wedekind adopted the General Counsel's and Union's contorted reading of the challenged provision in Policy #318 without giving any weight to the context, which the overwhelming testimony presented proves that all Hospital employees are aware of the longstanding practice and widely known and followed culture of wearing Hospital-related pins on employee I.D. Badges.

The Union, at the Hearing, took issue with the words "pins" and "badges."

This further highlights the slippery slope that can so easily result in unions and the Board becoming policy drafters without fully understanding or respecting the unique and nuanced culture, the lingo, the people or operations of the business that the policy re-drafting will affect. For the word "pin" itself is not an unlawful word. Police officers, UPS drivers, W Hotel public-interfacing employees, etc., are all required to wear a "pin" displaying the employer's name or logo as part of the employers' image and branding efforts. These uniform requirements are not in and of themselves unlawful, thus the word "pin" itself cannot be.

While the Union[19] attempted to stretch the word "badge" to presumably include items that have been called "badges" in contentious organizing campaign Board cases, no Hospital employee, from the CEO to the janitor, would think of anything other than the I.D. Badge when the word "badge" is mentioned at the Hospital. What might be a "hot item" word for the Union's attorney does not even register with the employees at the Hospital. And it is most certainly the "reasonable Hospital employee's" view that matters, not the "reasonable Union attorney's"[20] view.

For these reasons, as well as the others in this Brief, the Hospital respectfully requests the Board reverse the ALJ's Decision regarding the rule in Policy #318.

2. A Reasonable Reading of Policy #318, When Viewed in the Context of the Whole, Can Only Result in a Reading that Limits the Restriction on the Wearing of Pins to Only Those Identification Pins Worn on a Hospital Employee's I.D. Badge.

The Board has made clear that when determining whether a challenged rule is unlawful, the Board must "give the rule a **reasonable reading**." *Lutheran Heritage*, 343 NLRB at 647 (emphasis added), *citing Lafayette Park Hotel*, 326 NLRB at 825, 827. The Board has held that it "must **refrain from reading particular phrases in isolation**, and it must not presume improper interference with employee rights." *Id.*

A reasonable reading of the rule here, in light of the context of the whole, in light of the longstanding and widely understood culture, and in light of the fact that the word "badge" universally, throughout all policies, refers **only** to the I.D. Badge, requires a finding that Policy #318 is lawful.

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[19] There was no evidence presented of any other type of "badge" being worn by employees—whether Hospital-issued or otherwise—**except** for the employee I.D. Badges. In fact, the General Counsel actually utilized this point to clarify the General Counsel's own (unproven) allegations by explicitly noting that the "Respondent regularly allowed employees to embellish their **badges** and badge reel holders with pins, stickers and other decorations." (Tr.17) (emphasis added).

[20] This term is used only for comparison purposes.

Even when a rule includes words or phrases that, **alone**, reasonably would be interpreted to ban protected activity, the rule can be upheld as lawful when those words or phrases are **viewed in the appropriate circumstances and context**. See *Tradesmen International*, 383 NLRB 460, 460-462 (2002).

The evidence showed that the term **"badge"** is widely and ONLY understood to mean the hard employee I.D. Badge issued by the Hospital. The evidence showed that all Hospital employees understand the I.D. Badge contains critical information that directly relates to security and patient safety issues, as well as controls access to important restricted areas.

The evidence demonstrated that **"professional certifications"** is widely understood to mean the professional certification **pins** that Hospital employees receive after successfully completing specialized professional certification courses offered by **accredited outside providers**, such as the American Heart Association.

The evidence demonstrated that the word **"pins"** as used in Policy #318 is widely understood to mean the Hospital-related pins that the Hospital provides employees, such as qualification or service pins. Professional certification pins and the Hospital-provided pins specifically and clearly relate to the Hospital's business and support the Hospital's patient-care mission. And the evidence proved that the Hospital has a longstanding practice and culture wherein employees may wear, with certain limitations, professional certification or Hospital-provided pins on the plastic employee I.D. Badge covers. (Tr. 126-130).

Further, no reasonable Hospital employee would read, in the context of the whole, the challenged language in Policy #318 as restricting the wearing of pins or buttons anywhere **except** for on an employee's I.D. Badge.

The General Counsel introduced **seven Exhibits** at the Hearing **cementing the widespread, common understanding** among Hospital employees that the words "pins, badges and professional certifications," in context, relate **only** to employees' I.D. Badges. (GC. Exhs. 7; 12-14; 21-23). And the General Counsel offered the testimony of Union stewards to authenticate the documents and describe the culture. In fact, all three of the General Counsel's witnesses described the Hospital's culture of allowing employees to display identification pins **on** their employee I.D. Badges.

The evidence overwhelmingly and undeniably demonstrates not merely that a hypothetical "reasonable Hospital employee" would or could, but rather that Hospital employees, including seasoned Union representatives with over 15 years of service at the Hospital, **widely do equate** "pins" and "badges" and "professional certifications" **solely** with the Hospital-issued employee I.D. Badge. Even under the most strained reading, the pin rule is lawful.

3. A Reasonable Hospital Employee Understands the Obvious and Varying Legitimate Business Reasons for the Hospital Wishing to Control the Information on the Employee I.D. Badge.

It is clear that the Hospital has proven special circumstances as it has legitimate business reasons for its policy restrictions relating to I.D. Badges at issue in Policy #318. All Hospital employees are clearly aware of the importance of security and patient safety in relation to the I.D. Badge system. Employees are reminded daily of all the legitimate security-related measures the Hospital has taken to ensure the safety of its patients, visitors and employees.

Even aside from the "special circumstances" rule, the Board has held that employers have a "legitimate right to adopt prophylactic rules" in order to **"maintain order and avoid liability."** *Lutheran Heritage*, 343 NLRB at 647. The Board has found that rules that are "designed to maintain order in the workplace and to protect the [employer] from liability by

prohibiting conduct that, if permitted, could result in such liability" **would not be reasonably read** by employees as interfering with their exercise of Section 7 rights. *Id.*

In sum, the Board has held that employees **reasonably understand** that employers have **"legitimate business" reasons** to proscribe certain conduct, such as to maintain decorum or to limit liability. *Lutheran Heritage*, 343 NLRB at 647.

The Board has held that context is relevant to determining a reasonable employee ***would*** construe a rule, stating:

> We will not conclude that a reasonable employee would read the rule to apply to [Section 7] activity simply because the rule *could* be interpreted that way. To take a different analytical approach would require the Board to find a violation whenever the rule could conceivably be read to cover Section 7 activity, even though that reading is unreasonable. We decline to take that approach.

Id. (footnote omitted) **(emphasis in original).**

Here, the many restrictive rules regarding I.D. Badges are in place to protect the Hospital's very serious and very obvious, legitimate safety, business and liability concerns, and employees understand this. When employees would reasonably understand that the employer would reasonably need to protect against liability, such as here, there is no violation of the Act. *Id.*; see also *Flagstaff Medical Center*, 357 NLRB 659, 663 (2011) (holding that employees would reasonably interpret the hospital's rule of prohibiting photographing of "patients and/or hospital equipment, property, or facilities" as a "legitimate means of protecting the privacy of patients and their hospital surroundings, not as a prohibition of protected activity.").

Both Stewart and Welch testified that they understood that the purpose of the I.D. Badge was to help others identify employees and to control employees' access to only authorized areas within the Hospital. (Tr. 50-51; 109-110). Accordingly, Hospital employees would reasonably understand the legitimate purpose for the Hospital to create a rule restricting the allowable

information on an employee I.D. Badge, and no reasonable Hospital employee would construe the limitations on the challenged language in Policy #318 as limiting their Section 7 rights.

As demonstrated above, the Hospital has plain, necessary and obvious justifications and legitimate business reasons for limiting the information on employee I.D. Badges, and employees fully understand the legitimate reasons.

4. Given the Context, the "Approval" Language Is Not Relevant to the Analysis.

There was no testimony at all of any employee asking for "approval" before wearing any pin on the I.D. Badge, or anywhere else for that matter. Additionally, the "approval language" in *W Hotel*, *Alibis Plastics* and other cases demonstrate that the inclusion of "approval language" in a policy itself does not violate the Act as it **must be read in context**. *Albis Plastics*, 335 NLRB at 929; *W Hotel*, 348 NLRB at 373.

The approval aspect of Policy #318, when read in the context of the whole, would not make a reasonable Hospital employee think they were prohibited from wearing union insignia. Furthermore, under a "reasonable reading" of the rule, if the Hospital had intended to prohibit the wearing of pins from anywhere **other than** the employee I.D. Badge, the Hospital would have included such a reference in the "jewelry and other accessories" or some other section of Policy #318, which it did not. (GC. Ex. 4).

5. No Reasonable Hospital Employee Would Construe the Badge Reel Rule in the Hospital's Policy #318 as Restricting Their Section 7 Rights.

It is important to note that the General Counsel failed to provide any evidence whatsoever that the Hospital unlawfully chilled, interfered with or restrained the Section 7 rights of any employees. The evidence was clear: The Hospital's Paragraph 9 in Policy #318 **has never been construed by any employee** as restricting their Section 7 activity, **nor has it been applied as such**.

Employees clearly understand that the purpose for the restriction on the employee I.D. Badge is not to restrain their Section 7 rights, but rather to maintain order, ensure the safety of patients and others, avoid liability, etc. *Guardsmark, LLC*, 344 NLRB at 811; *United Parcel Service*, 195 NLRB at 441.

In rare cases, such as this one, where there was no active union campaign or actual discipline, the Board has looked to the overall circumstances to fortify its upholding of an employers' policy as lawful, such as where the parties enjoyed a longstanding bargaining relationship, where there was a lack of any anti-union animus, and where "employees could, and without company objection did," express their union messaging in other lawful ways. *Southwestern Bell Telephone Co.*, 200 NLRB at 671; see also *Komatsu*, 342 NLRB at 650.[21]

Here, the evidence made clear that employees are free to, and do wear, union insignia attire at work, in the Hospital, as appropriate. This only serves to further demonstrate that the Hospital's benign, and long-ignored and unnoticed by the Union, line in Policy #318 is lawful. (GC. Exh. 4).

Under these facts and circumstances, to hold that the challenged sentence in Policy #318 is unlawful would be in direct contradiction of the Board's explicit mandate that a rule be given a "reasonable reading," that the Board "must refrain from reading particular phrases in isolation, and it must not presume improper interference with employee rights." *Lutheran Heritage*, 343 NLRB at 647. The evidence presented at the Hearing demonstrated that **no reasonable Hospital employee <u>has ever</u> *or* would ever construe** the language to restrict their Section 7 rights.

[21] Furthermore, the Board has noted that a narrow restriction on a specific area of an employee's attire that is based on "a legitimate, longstanding and not unwarranted concern" is lawful if it leaves employees free to wear union insignia elsewhere. *Standard Oil Company of California*, 168 NLRB 153, fn. 1 (1967). In that case, the Board noted that "**employees were freely permitted to wear emblems signifying union affiliation on any part of their clothing *except* their safety hats**." *Id.* (emphasis added).

Accordingly, the Hospital's Policy #318 language is lawful and the ALJ's Decision should be reversed.

C. This Case is Distinguishable From Those Cited By the ALJ, the General Counsel and the Union.

The pin rule at issue here is distinguishable from the healthcare and other cases that involve contentious union organizing where there is **a selective ban on specific, inflammatory, content-based union messaging** displayed on a button, ribbon or similar item. Thus, the facts and the legal analysis underlying the cases where healthcare facilities are required to justify why a selective ban on inflammatory, content-based messaging are not analogous and not applicable here.

Furthermore, the healthcare and other cases cited and relied upon that challenge a rule based on its overbroad application to certain employees and/or certain areas are not applicable here.

Moreover, this case is not even about a ban on union insignia. As detailed at the Hearing, the Hospital permits employees to exercise their Section 7 rights to display/wear union insignia. Employees both can, and do, routinely wear Union jackets, shirts, lanyards and other insignia when not working as a direct patient-care employee in a patient-care area, such as when attending meetings or trainings (i.e. Skills Day) or when walking throughout the Hospital (including walking through patient-care areas) to reach areas where they may conduct Union business as a Union steward.

In fact, Policy #318 does not ban, limit or even mention the wearing of "insignia" or "union insignia,"—a fact which greatly distinguishes this case from myriad others, including cases upon which the ALJ relied. There is no limitation placed on wearing messaging clothing whatsoever in Policy #318. On page 2, it states: "For those individuals not in uniform,

employees shall wear professional business attire that is clean, and appropriately fitting. Workout clothes are not appropriate for work areas." (GC. Exh. 4). In the context of the whole, after over a 15-year relationship with the Union during which stewards have gone into the cafeteria and walked through lobbies and hallways with Union jackets and other Union insignia on, to nit-pick to such a degree as the Union has done here is absurd. Essentially, the Union and General Counsel have brought a case alleging that a longstanding policy and practice—one that has not been challenged in the 15 years the Union has been representing Hospital RNs—is suddenly unlawful because they have chosen to ignore the abundance of factual evidence and instead focus on words in isolation.

Even in theory this does not make sense. What employer would limit Union pins, the smallest of all items, but allow Union shirts and jackets? No employee has been restrained here. No one seems to know whether anyone has even worn a union pin on their employee I.D. Badge. Allowing this incorrect reading of this wholly innocuous sentence and a totally legitimate longstanding widely known practice that provides the Hospital with the ability to protect and dictate what identifying information can appear on an employee I.D. Badge would take Board policy interpretation to a dangerously microscopic level. Consequently, the ALJ's finding that Policy #318 is unlawful and would reasonably be construed as interfering with or chilling Hospital employees' Section 7 rights is in error and should be reversed.

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V. CONCLUSION

The law governing this case is clear and the material facts are undisputed. The Hospital respectfully requests that the Board grant its Limited Cross-Exceptions and reverse the ALJ's Decision and Order with respect to the rule relating to pins worn on employee I.D. Badges.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 14, 2016, I E-Filed and served the attached copy of the **RESPONDENT'S BRIEF IN SUPPORT OF ITS LIMITED CROSS-EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION** submitted by Long Beach Memorial Medical Center, Inc. in Case No. 21-CA-157007 on the parties and in the manner listed below:

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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RESPONDENT'S ANSWERING BRIEF
TO THE GENERAL COUNSEL'S LIMITED EXCEPTION
AND THE CHARGING PARTY'S EXCEPTIONS
TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

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TABLE OF CONTENTS

Page

I. INTRODUCTION. 1

II. FACTUAL BACKGROUND. 6

A. The Union Has Represented the Hospital's Registered Nurses for Over 15 years. 6

B. The Background of the Hospital. 7

C. The Attire and Badge Reel History Prior to Implementing a Standardized Uniform Requirement for the Hospital's Direct Patient-Care Employees. 8

D. The Hospital Decided, for Unchallenged, Legitimate Business Reasons, to Require its Direct Patient-Care Employees to Wear a Standardized Uniform. 9

E. The Hospital Commissioned a Company to Design the Standardized Uniform. 11

F. By December 2014, the Hospital's Direct Patient-Care Employees Were Well Aware of the New Standardized Uniform, Including the Requirement that Only the Uniform Memorial Badge Reel Be Worn. 12

G. The Union Has Known About the Uniform and Appearance Policies, Including the Requirement that Only the Uniform Memorial Badge Reel be Worn By Patient-care Providers in Patient-care Areas Since Prior to November 14, 2014. 14

H. The Hospital's Uniform and Appearance Policies, and Thus the Uniform Memorial Badge Reel rule, Are Clearly Only Applicable to Direct Patient-Care Employees Performing Patient-Care Duties in Patient Care Areas. 15

I. The Hospital Verbally Communicated the Rule and Physically Distributed the Uniform Memorial Badge Reel to Direct Patient-Care Employees Individually and/or in Groups On Multiple Occasions Over the Course of Months While it Perfected the Badge Reel's Quality and Durability. 17

J. Hospital Employees May and Do Wear Union and Other Imaging and Insignia, As Appropriate, and Direct Patient-Care Employees May Wear Insignia While On Breaks in Non-Patient Care Areas. 19

K. The Hospital's Even and Non-Disparate Enforcement of Its Standardized Badge Reel Rule. 21

1. Coonan Did Not Disparately Enforce the Badge Reel Requirement Against Welch. 25

2. Johnson Did Not Disparately Enforce the Badge Reel Uniform Requirement Against Stewart. 27

III. THE ALLEGATIONS, AS AMENDED. 28

IV. ANALYSIS. 30

TABLE OF CONTENTS
(continued)

Page

A. The Hospital Has Proven Special Circumstances Justifying Its Legitimate Business Reasons for Its Uniform Rules Relating to Badge Reels and Employee I.D. Badges. 31

1. The Hospital Has Proven Special Circumstances Justifying Its Requirement that Only the Uniform Memorial Badge Reel Be Worn as Part of the Standardized Uniform for Direct Patient-Care Employees. 35

B. The Hospital's Maintenance of the Challenged Rule Is Entirely Lawful. 40

1. A Reasonable Reading and a Reasonable Employee Are Viewed in the Context of the Whole. 41

2. A Reasonable Hospital Employee Would Not Construe the Badge Reel Rule in the Hospital's Appearance Policy as Restricting Their Section 7 Rights. 42

C. The Hospital Did Not Disparately Enforce Its Lawful Badge Reel Rule. 47

V. CONCLUSION 49

TABLE OF AUTHORITIES

Page(s)

Cases

Albis Plastics,
335 NLRB 923 (2001) 32

Beth Israel Hospital v. NLRB,
437 U.S. 483 (1978) 33

Casa San Miguel, Inc.,
320 NLRB 534 (1995) 33

Enloe Medical Center,
345 NLRB 874 (2005) 33, 47

Evergreen Nursing Home & Rehabilitation Center
198 NLRB 775, 778-779 (1972) 32

Guardsmark, LLC,
344 NLRB 809 ..... 43, 45

Healthbridge Management, LLC,
360 NLRB No. 118 (2014) 34, 40

The Hertz Corp.,
305 NLRB 478 (1991) 48

Komatsu America Corp.,
342 NLRB 649 (2004) 32, 33, 39

Lafayette Park Hotel,
326 NLRB 824 (1998), *enfd.* 203 F.3d 52 (D.C. Cir. 1999) 41

Lutheran Heritage Village-Livonia,
343 NLRB 646 (2004) 41, 42, 43

NLRB v. Baptist Hospital,
442 U.S. 773 (1979) 33, 40

Nordstrom, Inc.
264 NLRB 698, 700 (1982) 33, 36

Republic Aviation Corp. v. NLRB,
324 U.S. 793 (1945) 32

TABLE OF AUTHORITIES
(continued)

Page(s)

Sacred Heart Medical Center,
347 NLRB 531 (2006) 34

Saint John's Health Center,
357 NLRB 2078 (2011) 34, 40

Southwestern Bell Telephone Co.,
200 NLRB 667 (1972) 39

Starwood Hotels and Resorts Worldwide, Inc. d/b/a W San Diego,
348 NLRB 372 (2006) ..... *passim*

United Parcel Service, Inc.,
195 NLRB 441 (1972) 42, 45

Statutes

National Labor Relations Act
Section 8(a)(1) 1, 30, 41, 42

Respondent Long Beach Memorial Medical Center, Inc. d/b/a Long Beach Memorial Medical Center and Miller Children's and Women's Hospital Long Beach ("Hospital" or "Employer" or "Respondent"), by and through its attorneys Epstein Becker & Green, P.C., and pursuant to Section 102.46 of the National Labor Relations Board's ("Board") Rules and Regulations, hereby files its Answering Brief to the Counsel for the General Counsel's ("General Counsel") Limited Exception and the California Nurses Association/National Nurses United's Exceptions ("Union" or "CNA") to Administrative Law Judge Jeffrey D. Wedekind's ("ALJ" or "Judge Wedekind") Decision ("Decision") in Case No. 21-CA-157007 (collectively "Exceptions").[1] As described below, the Hospital respectfully requests the Board dismiss the Exceptions and adopt the ALJ's findings that the Hospital did not violate Section 8(a)(1) of the National Labor Relations Act ("Act"), as was alleged in Paragraphs 6(b), 7(a) and 7(b) of the Amended Complaint.[2]

I. INTRODUCTION.

These Exceptions should be easily dismissed. The record is crystal clear. All the evidence shows that the Hospital has a lawful uniform policy that has been consistently lawfully applied only to direct patient care employees performing patient care duties in patient care areas. There was not one iota of evidence to the contrary.

[1] Hereinafter "ALJD" refers to pages of the Administrative Law Judge Decision, "GCX" refers to the pages of the General Counsel's Limited Exceptions, "GCBX" refers to the pages of the General Counsel's Brief in Support of Limited Exceptions, "UX" refers to the pages of the Union's Brief in Support of its Exceptions, "UBX" refers to the pages of the Union's Brief in Support of its Exceptions "Tr." refers to the pages of the Official Transcript of Hearing, "GC. Exh." refers to the General Counsel's Exhibits, and "Er. Exh." refers to the Hospital's Exhibits.

[2] The Complaint and Notice of Hearing ("Complaint"), which originally contained one dress code allegation and two disparate enforcement allegations, was amended ("Amended Complaint") at the Hearing, and a "new" "dress code" allegation regarding badge reels was added and appears in the Transcript as Amended Complaint Paragraph 6(b).

The lack of facts in support of the Exceptions is likely why the arguments in the General Counsel's and Union's Briefs are so muddied and confusing; no applicable law is even cited in either.

To be clear, this is not a work rule or policy interpretation case. It is not a ban on the wearing of union insignia case. It is not a selective ban on the wearing of union insignia case. It is not a disparate enforcement case. Rather, this is a uniform case, and one in which the Union is wrongly seeking to dictate and limit what an employer, in this instance a hospital, may require its employees to wear while at work.

The Union, here, is seeking to force the Hospital to **discard** an existing, required element of a standardized uniform, one that was designed to intentionally bear the Hospital's branded logo, and **replace** it with the Union's own non-uniform item bearing the Union's own logo. The Board must not allow this to happen. Granting these Exceptions would rob employers of the basic and lawful right to establish a uniform in accordance with its legitimate business reasons and to determine the desired image that an employer wishes to convey through its employees' attire.

Starting in early 2014, the Hospital invested a significant amount of money, time, and resources, which included the commissioning of a company to design a standardized uniform for the Hospital's 3,800 direct patient-care employees to wear while they are working in direct patient-care roles and areas. The Hospital hired the company to design an easily identifiable, standardized, professional, and clean looking uniform in accordance with the Hospital's legitimate business reasons, including enhancing the professional environment of care, more

prominently featuring the Hospital's branding and MemorialCare[3] logo and improving patient care, safety and well-being health standards. (GC. Exhs. 5 and 6; Tr. 220-222; 225; 232; 233).

The uniform design resulted in the same MemorialCare logo displayed in a balanced manner on both on the upper right (embroidered) and the upper left shoulder (badge reel) of each uniformed scrub top. (ALJD 3:28-35; 9:6-8; 9:13; GC. Exhs. 5-8; Er. Exhs. 10-15; Tr. 85-86; 148-149; 160-161; 220-222; 225; 232; 233). The company designed a badge reel bearing the MemorialCare the logo ("Uniform Memorial Badge Reel") for this purpose. (*Id.*) The Uniform Memorial Badge Reel was intentionally designed to be an integral and important part of the standard uniform. (*Id.*)

The commissioned company also designed a unique fabric loop on the upper left side of the scrub tops for the purpose of attaching the Uniform Memorial Badge Reel in perfect alignment with the Hospital branding, logo and identifying information embroidered on the left shoulder of the scrub. (*Id.*) The placement and design of the Uniform Memorial Badge Reel was intentional and was meant to provide a uniform look and a place for employees to affix the security and patient safety-related employee identification badges ("I.D. Badge") they must wear and have readily visible at all times. (*See* GC. Exh. 7). The Hospital intended, and its actions—via multiple forms of communication, including multiple person-to-person discussions and physical distributions of the Uniform Memorial Badge Reel over the course of several months—made it abundantly clear that only the Uniform Memorial Badge Reel could be worn as part of the required uniform that is only applicable to direct patient-care employees performing patient-care duties in patient-care areas. The Hospital has clearly proven special circumstances entitling

[3] The Hospital is a non-profit subsidiary of its parent corporation, Memorial Health Services ("MHS"), which does business as "MemorialCare." "MemorialCare" and "Memorial" are used interchangeably throughout.

it to require that only the Uniform Memorial Badge Reel be worn its direct patient-care employees while performing patient care duties in patient care areas.

Union stewards testified that they understood that Hospital employees who are working in a direct patient-care role and in a patient-care area are required to wear the Uniform Memorial Badge Reel because it is a part of their standardized uniform.

Union steward and Hospital RN Elizabeth Castillo ("Castillo") testified three times in a row that she understood she was **required** to wear "The Memorial reel." (Tr. 160-161). On the issue of disparate enforcement, Castillo admitted that about a week before the Hearing, she had intentionally gone looking through the Hospital for RNs wearing non-compliant badge reels and had found only one person who was out of uniform with respect to their badge reel. (Tr. 169-170; GC. Exh. 23).

Hospital RN and Union steward, Brandy Welch ("Welch"), who alleged she was subjected to disparate enforcement with regard to not wearing the correct badge reel as she was about to enter a patient care area and begin working as a registered nurse ("RN") on July 9, 2015,[4] testified that she intentionally went looking for someone who was **not** wearing the Uniform Memorial Badge Reel to prove she had been treated differently. (ALJD 9: n.17; Tr. 61; 94-95). That same day, Welch took a photograph of another RN who was not wearing the Uniform Memorial Badge Reel, and the General Counsel introduced that as Exhibit 12 during the first day of the Hearing. (ALJD 9: n.17; Tr. 61; 94-95; GC. Exh. 12). However, the testimony and evidence showed that the person in the photograph—apparently the only RN Welch could find who was not in compliance with the requirement that the Uniform Memorial Badge Reel be worn as part of the uniform while working in a patient care area—(1) was not

[4] (ALJD 8:n.13; Tr. 58, 304)

wearing the standardized uniform; (2) was not performing patient-care duties; and (3) was not working in a patient-care area that day. (*Id.*). She was a RN who was working in the Blood Donor Center, which is not considered a patient care area. And although she was working for the Hospital as a RN, on July 9, 2015, she on light duty and was not performing patient-care duties, thus was not required to be in the standardized uniform and wear the Uniform Memorial Badge Reel. (*Id.*).

The policies challenged in the Exceptions are entirely unambiguous and could not be any clearer, beginning with the title of each—the "Uniform and Infection Prevention Standards **for Direct Care Providers**" policy PC-261.01 ("Uniform Policy") and the "Appearance, Grooming and Infection Prevention Standards **for Direct Care Providers**" policy PC-261.02 ("Appearance Policy")—which specify without question that the Policies apply to "Direct Care Providers." Numerous detailed and unambiguous references (and cross-references) appear in both Policies to their applicability and purpose relating only to direct-care providers, to the concerns that come from touching patients, as well as to the importance of the effect standardized uniforms of patient-care providers have on the well-being and care of patients. (ALJD 3:6-35).

On the second day of the Hearing, the Union stipulated that it had been given draft copies of the Uniform and Appearance Policies **prior to November 14, 2014**, copies that contained identical language to the language at issue today. (Tr. 307-311; Er. Exhs. 14 and 15). The Union also stipulated that it knew in 2014 that the Hospital intended that the Uniform Memorial Badge Reel—and only the Uniform Memorial Badge Reel—could be worn as it was a part of the standardized uniform the Hospital designed for its direct patient-care employees. (*Id.*) And the Union knew that the Hospital implemented its Uniform and Appearance (and Uniform Memorial

Badge Reel) requirements with respect to the approximately 2,100 Hospital RNs it represents on December 1, 2014. (Tr. 307-311; Er. Exhs. 10-14 and 15).

Despite this, there was no evidence presented during the two-day Hearing that the scope of the rule had ever been unlawfully applied. (ALJD 7:37-39). In fact the evidence presented by the General Counsel and the Union fully support a finding that the Hospital has only ever lawfully applied the uniform requirement to direct patient care employees who were performing patient care duties in patient care areas. As Judge Wedekind pointed out, "the badge reel rule is expressly limited to direct patient-care providers." (ALJD 7:4-5).

Similarly, there was no evidence presented demonstrating any disparate enforcement of the Hospital's Uniform Memorial Badge Reel requirement. (ALJD 10:40-44). In fact, the evidence revealed that other direct patient-care employees wearing non-Union yet non-compliant badge reels, such as Hello Kitty, were treated in the exact same manner and merely received a gentle "reminder" about the relatively new uniform requirement. Finally, the evidence made clear that the two registered nurses who alleged disparate enforcement were not restrained in the least from exercising their Section 7 rights and, in fact, regularly wore Union insignia while walking through the Hospital when not in uniform and when performing their Union steward duties.

Accordingly, each and every Exception that has been filled should be dismissed.

II. FACTUAL BACKGROUND.

A. The Union Has Represented the Hospital's Registered Nurses for Over 15 years.

The Union has represented the Hospital's RNs for over 15 years. (Tr. 106; 108).

The General Counsel put on three Hospital RN witnesses to support its case; all three have served as Union stewards at the Hospital. (Tr. 49-50; 106; 108; 159-160). Welch has worked for the Hospital for 18 years and has served as a Union steward for approximately 14

years. (Tr. 49-50). Theresa Stewart ("Stewart"), who retired in January 2016, worked for the Hospital for 18 years, serving as a Union steward "since the inception" of the parties' collective bargaining agreement. (Tr. 106; 108). And Hospital RN, Castillo, has worked for the Hospital for eight years, with two years serving as a Union steward. (Tr. 159-160).

B. The Background of the Hospital.

The Hospital employs approximately 6,000 employees, and approximately 3,800 of those employees are direct patient-care providers. (Tr. 184-185). The Hospital is enormous; it is the second largest hospital campus west of the Mississippi River. (Tr. 187; *see e.g.* Er. Exh. 2). The Hospital is located in an urban area of Long Beach, California and takes up approximately 10 city blocks. (Tr. 188). Due to multiple factors, such as the Hospital's location, the necessity of heightened security that comes with having a children's and women's hospital, and the fact that there was a fatal shooting within the Hospital in 2008, the Hospital has invested enormous financial and other resources toward extensively enhancing its security protocols over the years. (Tr. 186; 188-189). There are security desks at every public entrance, and every single person who enters the Hospital is required to wear an I.D. badge, including children. (*Id.*; Tr. 191-192.)

As is stated in the Hospital's security policies, as well as in the Appearance Policy, all Hospital employees are required to wear Hospital-approved employee I.D. badges at all times, front-facing and at a level that can be readily seen by others. (GC. Exhs. 5-6; Er. Exhs. 3-4).

The Hospital has numerous security policies applicable to identification badges, including employee I.D. Badges. (Er. Exhs. 1-4, 7-8). Employee I.D. Badges must display all identifying information at all time, which includes the employee's photograph, name, job title/discipline, access permission information and health-related information. (*Id.*) The employee I.D. Badges also contain and electronic coding that provides each employee with access to areas of the Hospital, as authorized and applicable. (Er. Exhs. 1-4).

C. The Attire and Badge Reel History Prior to Implementing a Standardized Uniform Requirement for the Hospital's Direct Patient-Care Employees.

Prior to the Hospital's moving to a standardized uniform, the Hospital allowed its direct patient-care providers to wear, while working, scrubs of varying colors and patterns and bearing varying images and insignia. (Tr. 52; 111; 113). Stewart testified that uniform tops, bottoms and jackets "could be any color that you wanted. If pink looked good on you and blue looked good on you, you wore the color that you wanted. Nurses would wear colored, themed-type tops. If it was Thanksgiving, you might have a top that has turkeys on it; if you worked in Peds you might have Bugs Bunny or Mickey Mouse on your uniform top." (Tr. 111).

Similarly, Colleen Coonan, ("Coonan") the clinical operations director of two pediatric units at the Hospital, testified that prior to the standardized uniform requirements, the direct patient-care employees in the Pediatrics Department had "always worn, you know princess uniforms and cat uniforms. And, everything just to help the children feel more comfortable." (Tr. 290; 297). She also testified that direct patient-care employees in the Pediatrics Department were "used to having the children's things around" and that badge reels with "little cartoon characters" on them were common prior to the standardized uniform. (Tr. 299).

On direct examination, Welch testified as follows:

> Q: And were employees required to wear identification badges prior to December, 2014?
>
> A: Yes.
>
> Q: Were there any requirements as to how the identification badge was to be affixed to your uniform?
>
> A: No.
>
> Q: How did you affix your identification badge to your uniform prior to December, 2014?
>
> A: I wore a lanyard, which is a necklace that goes over and holds your badge.
>
> Q: And what type of lanyard would you wear?

A: **I had various different ones promoting TV shows or characters.**

(Tr. 52) (emphasis added).

When asked to explain what she meant by "promoting TV shows or characters," Welch explained the lanyard "was material with characters" on it. (Tr. 52-53). She testified: "I did "Catching Fire. I did Sons of Anarchy. Sponge Bob." (Tr. 52). When asked why she "liked to wear lanyards with different types of characters," Welch replied: "**It helped me connect to my patients**." (Tr. 53) (emphasis added). Welch further clarified that her patients are children, as she works in the Pediatrics Department. (Tr. 53).

Welch later changed her testimony on cross-examination when she stated that she had worn not "character" lanyards, but rather a CNA lanyard "for years prior to the recent uniform policy changes without issue." (Tr. 75; 89). When questioned about when she had first worn the CNA badge reel, she stated: "I'd worn badge reel holders on and off, I think, but mostly it was my lanyard, not the reel holder." (Tr. 89). Her story varied slightly yet again when she was asked what she had meant when she had testified that she had "worn that [CNA] badge holder for years prior to the use – the recent uniform policy changes without issue…," she testified that she "was referring to my CNA lanyard." (Tr. 98).

D. The Hospital Decided, for Unchallenged, Legitimate Business Reasons, to Require its Direct Patient-Care Employees to Wear a Standardized Uniform.

In early 2014, the Hospital, based on various legitimate and uncontested business purposes, began working toward having all of its direct patient-care employees wear a standardized uniform.

The Hospital made the decision to move to a standardized uniform based on feedback from patients and their families and based on actual studies regarding the positive patient-care and health related effects of creating an easily identifiable, standardized uniform to enhance

patient-care.[5] (Tr. 206-207). The Senior Vice President of Patient-Care Services and Chief Nursing Officer, Fix,[6] noted that the studies the Hospital relied upon found that standardized uniforms in a Hospital setting promoted a feeling of security for patients, "very similar to how a police officer's uniform creates safety and security." (Tr. 220).

The Hospital also decided to adopt a "Bare Below the Elbows" ("BBE") approach for all its direct patient-care employees to prevent Hospital-acquired infections due to items, such as watches, lanyards, sleeves, bracelets, etc. that studies have shown are easily contaminated but not easily disinfected in between patients. (GC. Exhs. 5 and 6). As noted by Union steward Stewart, it was eventually discovered that while the hanging lanyards previously allowed under the Hospital's previous dress and appearance policies "gave us access to moving the badge for a tool, it also created the potential to become something that would contaminate a work area." (Tr. 112). She further explained: "So a badge that might fall into a place when you're setting up a sterile field would become a public safety issue." (*Id.*)

Thus, the Hospital decided that the new standardized uniforms and policies it was creating would prohibit direct care providers from wearing long dangling objects, including necklaces and lanyards; any jewelry below the elbow, including watches; and sleeves worn below the elbow when in a direct patient-care area. (GC. Exhs. 5 and 6; Tr. 110; 13).

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[5] There can be no question that the Hospital has the right to create a standardized uniform for patient-care purposes. The Union and the General Counsel objected to the Hospital's Exhibit 9, which Fix stated was "about attire" as well as infection control. (Tr. 225; *see also* Tr. 223-232).

[6] Fix, who has a Master of Science in Nursing ("MSN") degree and 42 years of acute-care hospital nursing experience (32 of which were in hospital administration positions), testified without challenge to her credentials or credibility and presented undisputed patient-care based legitimate special circumstances as to the basis of the challenged policies. (Tr. 183-184, 191-234).

E. The Hospital Commissioned a Company to Design the Standardized Uniform.

The Hospital went to great lengths and great expense to commission a company to design a standardized, professional, customized and consistent looking uniform. (GC. Exhs. 5 and 6; Tr. 220-222; 225; 232; 233).

The uniforms were designed to be color-coordinated by professional discipline, such as navy blue for registered nurses, wine for emergency department technicians, etc. (GC. Exh. 5). Embroidered on the upper-left hand shoulder of each uniform is the MemorialCare logo and name ("text")[7] with the discipline of the direct care provider just underneath. (*See e.g.* GC. Exh. 7 and Er. Exh. 12). As lanyards were prohibited, and with the visibility of the employee I.D. badge paramount, the Hospital asked the design company to come up with a solution to ensure badge reels affixed to the uniforms would be worn high enough so as to not touch patients and ensure I.D. badges were visible. The company specifically designed a fabric "loop" placed on the upper-right hand shoulder of each uniform for the purpose of having employees affix a badge reel and I.D. badge. (Tr. 233). This design is unique; generic scrubs do not have a "loop" or extra piece of cloth to which an employee can affix their badge reel. (Tr. 87; 140). The company designed the loop to perfectly align and balance the employees' Uniform Memorial Badge Reel and I.D. badge (on the right) precisely on the opposite side of the uniform as the embroidered logo and discipline (on the left) so that the branding and identifying information on both sides would be easy to read and at about eye-level. (Tr. 233; Er. Exh. 13). **As a result of the design process, the badge reel became a part of the actual uniform.** (Tr. 233).

[7] The Appearance Policy states "MemorialCare approved logo or text," which would encompass the logo and name as seen as embroidered on the uniform.

The company then designed both a badge reel and a specialized watch[8] each displaying the Memorial logo to attach to the loop as part of the standardized uniform. (GC. Exh. 7; Er. Exhs. 10; 12 and 13; Tr. 234-235; 239). The fabric loop was designed to be strong enough not only to hold the Uniform Memorial Badge Reel and I.D. badge, but also the Memorial watch. (Tr. 234-235).

Direct patient-care employees were well aware that the Hospital had intentionally commissioned the design of the uniform loop, the Uniform Memorial Badge Reel and the Memorial watch. (Er. Exhs. 10; 12 and 13; Tr. 142-143; 234-235).[9] As Welch pointed out, the badge reel "attaches to a free piece of material that we have on our uniform. Our badges attach here. And then we can use them to access the various points of entry for the hospital." (Tr. 55).

As noted by Stewart, the Hospital's move to the standardized uniform was "a big change" for the direct patient-care employees at the Hospital. (Tr. 136-137).

F. By December 2014, the Hospital's Direct Patient-Care Employees Were Well Aware of the New Standardized Uniform, Including the Requirement that Only the Uniform Memorial Badge Reel Be Worn.

In early October 2014, the Hospital distributed flyers to all direct patient-care providers, including registered nurses, regarding uniform fitting days for registered nurses and EDTs only. (Er. Exh. 11). The flyer explained that "only RNs and EDTs will be able to place their uniform orders for the **Phase 1**, "Go-Live" on Dec. 1." (*Id.*). Thus, employees understood that the new uniforms and policies were being implemented in "phases" and by discipline. (*Id.*) The flyer, along with another one distributed in early November 2014, explained that the Hospital was moving to a standardized uniform for its direct patient-care employees. (Er. Exhs. 11 and 12).

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[8] Because of the BBE approach, wrist watches are not allowed to be worn by direct patient-care providers.

[9] Stewart admitted that the individuals in General Counsel's Exhibits 18 and 19 who were wearing their badge reel clipped to the v-neck rather than attached to the specially-created loop on the right side of the uniform was ***not*** in accordance with the policy. (Tr. 143-144).

Both flyers also stated that more information was available on the "Uniform Store front intranet page." (*Id.*)

In November 2014, another flyer was distributed to direct patient-care employees with pictures of the new Uniform Memorial Badge Reel and Memorial watch, and once again stating: "For more information, visit the Uniform Store Front intranet page or speak with your manager." (Er. Exh. 13). Stewart testified that there was a page on the Intranet that facilitated employees in ordering uniforms. (Tr. 147).

The Uniform Store Front page on the Hospital Intranet Site provides links to the Uniform and Appearance Policies, and the Policies reference the Uniform Store Front on the Intranet Site. (GC. Exhs. 5-6; Tr. 327-328). The Hospital provided multiple fitting days and times, just for the RNs and EDTs alone in late 2014. (Er. Exhs. 12 and 13; Tr. 145-146). The Intranet Site is available and accessible to all employees. (Tr. 39).

Also in November 2014, the Hospital distributed a flyer to the managers of all direct patient-care employees informing the managers that they needed to pick up the Uniform Memorial Badge Reels and Memorial watches on December 1, 2014 and distribute them. (Er. Exh. 10).[10] Coonan testified that she received the flyer, picked up the Uniform Memorial Badge Reels and watches, and distributed them to her approximately 200 employees. (Tr. 293-294). The Hospital intended and considers the Uniform Memorial Badge Reel to be a part of the standardized uniform. (Tr. 233; 244).

The Hospital's Uniform and Appearance Policies went into effect on December 1, 2014, beginning with all RNs and EDTs. (Er. Exhs. 10-13).

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[10] This flyer states: "In ***compliance*** with the new policy Uniform and Infection Prevention Standards for Direct Care Providers and The Bare Below the Elbows approach, effective December 1, 2014, all Direct patient contact providers will receive one badge reel and watch." (Er. Exh. 10) (emphasis added). It also pictorially demonstrates how the watch can be worn behind the I.D. badge and affixed to the Memorial Badge Reel. (*Id.*)

Even though the color-coded and embroidered-by-discipline scrubs were only rolled-out to the RNs and EDTs in December 2014, the Hospital managers began distributing the Uniform Memorial Badge Reels and watches to ***all*** direct patient-care employees in December 2014, and describing that it would be a part of the uniform. (Er. Exh. 10). Direct patient-care employees were aware in December 2014 that the new standardized uniform requires that ***only*** the Uniform Memorial Badge Reel be worn. (Tr. 110; 136). Further, the Hospital delivered the new Hospital uniforms directly to the patient-care employee's home **in a box that included the Uniform Memorial Badge Reel**, as Union steward Stewart confirmed at the Hearing, and as described in #5 of the Uniform Policy's "Procedure" section. (ALJD 3:30-31; GC. Exh. 5; Tr. 114; Tr. 293-294; Er. Exh. 10).

G. The Union Has Known About the Uniform and Appearance Policies, Including the Requirement that Only the Uniform Memorial Badge Reel be Worn By Patient-care Providers in Patient-care Areas Since Prior to November 14, 2014.

During the first day of the Hearing, the Union denied ever having any knowledge of the badge reel rule or policy and the Complaint was amended to add the badge reel rule allegation in what is now Paragraph 6(b) of the Amended Complaint. (Tr. 32-33). On the second day of the Hearing, however, the Union reversed course and stipulated that, **prior to November 14, 2014**, the Union had in fact known and understood that the Hospital intended that the Uniform Memorial Badge Reel—and only the Uniform Memorial Badge Reel—be worn as part of the standardized, consistent uniform the Hospital designed for its direct patient-care employees. (Tr. 307-311; Er. Exhs. 14 and 15). Moreover, the Union also stipulated that, **prior to November 14, 2014**, the Hospital had in fact provided the Union with draft copies of both the Uniform and Appearance Policies that contained **the exact same language**, including the language regarding the wearing of the Uniform Memorial Badge Reel that the Union is contesting here. In fact, the Hospital had openly discussed, on more than one occasion in 2014, its plans regarding the

Uniform and Appearance Policies. (Tr. 307-311; Er. Exhs. 14 and 15). The Union even created a flyer dated November 21, 2014, which it distributed to the bargaining unit, describing varying aspects of the Uniform and Appearance Policies that were to be implemented on December 1, 2014, including the requirement that **only** the Uniform Memorial Badge Reel be worn. (*Id.*). The Hospital also sent a letter to the Union dated December 3, 2014, in which the Hospital stated that the Hospital intended for the Uniform Memorial Badge Reel to be "uniform in nature, reflecting the Hospital's branding." (Er. Exh. 15) (emphasis added). The Union knew that the Hospital implemented its new standardized uniform with respect to its 2,100 RNs on December 1, 2014. (Er. Exhs. 10-13; and 15). The Union filed the unfair labor practice charge in the instant matter on July 28, 2015.[11]

H. The Hospital's Uniform and Appearance Policies, and Thus the Uniform Memorial Badge Reel rule, Are Clearly Only Applicable to Direct Patient-Care Employees Performing Patient-Care Duties in Patient Care Areas.

As Judge Wedekind pointed out, the Uniform and Appearance Policies are so clear on their face as to the lawful limit of their scope that "employees would not reasonably conclude the badge reel rule applies in non-patient care areas." (ALJD 7:16-17). The Uniform and Appearance Policies clearly state that they are applicable only to direct patient-care providers while on duty for the purpose of protecting and benefiting the Hospital's patients, and there was no testimony or dispute to the contrary. (GC. Exhs. 5 and 6).

[11] The instant charge was filed on July 28, 2015 but was not the Union's first attempt to challenge the Appearance Policy. Rather, after being notified and bargaining with the Hospital over the Uniform and Appearance Policies, the Union filed Charge 21-CA-142289 on December 4, 2014. (Rejected Er. Exhs. 16 and 17). Over six months after being forced to withdraw that meritless charge, the Union improperly attempted a second bite at the apple by filing the instant Charge. Additionally, it was revealed on the first day of the Hearing that the General Counsel not only had been provided with the exact language newly challenged in the Hospital's position statement, but also that Welch had gone to the Intranet Site in Jul 2015, printed a copy of the Appearance Policy, and provided it to the General Counsel along with her Affidavit. (Tr. 41-48; 84-85). The Hospital maintains its position that the at Hearing, the late amendment to the Complaint to add allegations related to the Uniform Memorial Badge Reel implementation and policy were improper, and the allegations themselves are time-barred.

The "Purpose" sections of both Policies are substantively identical, and each Policy repeats language found in the other and both cross-references the other. (ALJD 3:19-25; GC. Exhs. 5 and 6). Each Policy begins by stating it is intended to establish standards applicable to direct patient-care providers at the Hospital, including the Hospital's "off-site clinics and satellite work locations."[12] (GC. Exhs. 5 and 6). Both Purpose sections explicitly state that the Hospital is dedicated to "the safest care of patients including the prevention and transmission of pathogens" and that the Policies apply to "the attire of healthcare providers" in order to prevent "hospital acquired infections" and "contamination by attire. (*Id.*). Both Purpose sections also explicitly describe the important affect that patient-care providers' appearance and attire have on the "perception of patients" (*Id.*). Both also state: "Patients may lack confidence and trust in individuals that are not easily identified as **health care professionals**. Promoting standard attire will assist **patients in easily identifying their care providers** and in promoting satisfaction." (*Id.*). Both Policies describe the "Bare below the elbows" ("BBE") approach, which prohibits items listed in both Policies, is meant to "prevent hospital acquired infections in all patient care areas." (Id.) They both also state: "Because it is not feasible to disinfect or replace sleeves, lanyards, and watches between patients these items are part of the BBE prohibited items." (*Id.*). The Uniform Policy addresses the "sleeves" and the Appearance Policy addresses the "lanyards" and "watches," thus further cementing the fact that the Policies were meant to be read together.

Both Policies make clear that when a direct patient care employee comes to the Hospital for non-patient care purposes "are to be dressed conservatively in business casual[13] **<u>or</u>** MHS logo attire." (ALJD 7:25-29). The Uniform Policy states that "Direct Care Providers must wear the

[12] Fix testified that there are direct patient-care employees who work with patients in patient-care areas at the Hospital's off-site clinics and satellite work locations. (Tr. 259-260).

[13] The Uniform Policy, which covers the "clothing" aspect of the uniform includes this additional statement just after the words "business casual": "(including jeans or clothing made of denim)." (GC. Exh. 5).

approved hospital uniform **when on duty**." (GC. Exh. 5). The Appearance Policy describes its "Scope" as to "apply to **all those who work in any capacity in providing direct patient care,**" and in #14 states that "Clothing/uniform guidelines are outlined in the Uniform Policy for Direct Care Providers." (GC. Exh. 6). Moreover, the Appearance Policy #13 describes the required method to clean **stethoscopes** "after each patient encounter." (*Id.*) Both Policies make multiple additional references that can leave no doubt that the scope of the Policies is lawful.

The only portion of the 3-page Appearance Policy being challenged is the last sentence Paragraph #12, which states:

> Identification badges shall be worn by everyone with the name and picture facing forward. Badges must be worn at collar level, right side, so they can be readily seen. Lanyards are not permitted. Badge reels may only be **branded** with MemorialCare approved **logos** or texts.

(GC. Exh. 6) (emphasis added).

I. The Hospital Verbally Communicated the Rule and Physically Distributed the Uniform Memorial Badge Reel to Direct Patient-Care Employees Individually and/or in Groups On Multiple Occasions Over the Course of Months While it Perfected the Badge Reel's Quality and Durability.

The Hospital communicated the rule that only the Memorial Badge Reel could be worn as it was a part of the standardized uniform in a multitude of ways—via flyers, emails, information provided at fittings, on the Intranet, delivering it in the same box along with the uniform and in-person with each direct care employee on multiple occasions. Not only did the Hospital managers distribute the new Memorial Badge Reels and explain the new badge reel rule to direct patient-care employees in December 2014, but the managers also did so on numerous other occasions over the course of several months.

The consistent, MemorialCare branded and logoed, uniformed image that the Hospital invested so much time and money to design and create prior to implementation was so important to the Hospital that it continued to invest time and money commissioning the design company to

perfect the quality and functionality of the Uniform Memorial Badge Reel after implementation. (Tr. 233-236; Tr. 237-239; *see also* Er. Exhs. 10 and 13).

To improve quality while maintaining its uniform image, the Hospital ultimately paid for ***three*** different versions of the Uniform Memorial Badge Reel (and ***two*** different versions of the watch) to be made. All three of the Uniform Memorial Badge Reel versions contained the same Memorial logo; the only changes were to the durability and functionality of the badge reel. (Tr. 238-239).

After receiving some complaints that the first Uniform Memorial Badge Reel provided was too heavy, the Hospital asked the company to design another, lighter badge reel, which it did. (Tr. 85; Tr. 238). The lighter badge reel was again explained and distributed to direct patient-care employees in-person in about February or March 2015. (Tr. 85-86; 238; 295-296).

Welch received the second, lighter badge reel from her Assistant Unit Manager ("AUM"). (Tr. 85-86).

After receiving complaints that the second version of the Uniform Memorial Badge Reel was not of sufficient quality as the pulley string was allegedly "too flimsy," the Hospital asked the company to design yet a ***third*** badge reel, of a similar lighter weight, but that would not break. (Tr. 238; 295-296). The third (and final) version of the Uniform Memorial Badge Reel contains a stronger fishing wire-like string and is much more durable. (*Id.*).

The varying quality versions of the Uniform Memorial Badge Reels were distributed in waves, as they were made available, by Hospital managers either **to groups of employees during shift change meetings or individually.** (Tr. 85-86; 148-149; 235; 238-240; 295-296). There were ongoing discussions had with employees about the Uniform Memorial Badge Reel and its requirement as part of the uniform for direct patient-care employees. (*Id.*) The Uniform

Memorial Badge Reels are provided to employees for free, and they are readily available. (Tr. 268-269; 274-275).

The evidence made clear that direct patient-care employees understood that the Uniform Memorial Badge Reel was meant to be a part of the new uniform requirement. (Tr. 160-161). Castillo, a Union steward, testified that pursuant to the new uniform requirements, she understood she was ***required*** to wear "The Memorial reel." (*Id.*) In fact, she confirmed her clear understanding by testifying three times in a row that she understood that she was required to wear the Uniform Memorial Badge Reel as part of her standardized uniform. (*Id.*) Welch also admitted that, during a meeting she attended as a Union steward with Hospital representatives in the fall of 2014—prior to the implementation of the Uniform and Appearance Policies—Welch understood that the Hospital's position was that it wanted to require ***only*** the Hospital's uniform badge reel. (Tr. 80).

J. Hospital Employees May and Do Wear Union and Other Imaging and Insignia, As Appropriate, and Direct Patient-Care Employees May Wear Insignia While On Breaks in Non-Patient Care Areas.

The Hospital's Appearance and Uniform Policies do not reference or limit the wearing of union insignia. (GC. Exhs. 5 and 6). Hospital employees always have, and still do, wear union insignia, as appropriate. Cinthya Rocha ("Rocha"), Director of Human Resources, testified that, between December 2014 and the present, she has seen Union stewards, including both Welch and Stewart, ***actually wearing*** Union insignia when not working as direct patient-care providers but while walking through patient-care areas in order to reach an area, such as a break room, where they can perform their paid Union steward duties. (Tr. 323). The Hospital has about 50 Union stewards. (Tr. 316). Rocha testified that since December 2014, she has seen Union stewards wearing Union related insignia in various areas of the Hospital "very often" when they are performing their Union steward duties and not working in uniform in their patient-care role.

(Tr. 323). And Hospital employees may wear shirts, jackets, lanyards, badge reels, etc., bearing union or any other insignia as long as they are not a uniformed direct patient-care provider who is on duty in a patient-care area. (Tr. 261-263; 323).

Direct patient-care employees who are on breaks in a break room or any time they are not working and not in a patient-care area may do the same. (Tr. 261-262). Fix testified that until they walk out onto the patient-care floor, direct-patient care employees can wear a Union-logoed jacket if they wish. (Tr. 256-258). Moreover, nothing in the Uniform or Appearance Policies would prohibit a direct patient-care employee who is working from wearing Union insignia non-dangling earrings or necklaces. (Tr. 261-263).

To this day, all approximately 2,200 non-direct patient-care providers may, and do, still wear lanyards, badge reels or other attire with the logo/insignia of their choosing—including union insignia—so long as it is appropriate and compliant with the other non-challenged aspects of any applicable policies. (GC. Exhs. 4-6; Tr. 139; 251-252). And importantly, direct care providers who are ***not*** working in a patient-care area, but rather who are in elevators, the cafeteria, the parking lot, the lobby, in meetings, attending training sessions, etc. may do so as well—and, in fact, they do. (GC. Exhs. 4-6; Tr. 94-95; 139; 173; 212-213; 251-252; 257; 259).

Thus, as admitted by two Union stewards and confirmed by the Senior Vice President of Patient-Care Services, direct patient-care employees who attend "Skills Day," trainings or meetings at the Hospital or who work in the "Blood Donor Center"[14] or are in non-patient care areas **are *not* required** to wear the standardized uniform, which includes the Uniform Memorial Badge Reel. (Tr. 94-95; 173; 212-213; 251-252; 257; 259).

[14] Again, General Counsel's Exhibit 12 depicts a RN on light duty in the Blood Donor Center and is thus **not** providing direct patient-care in a patient-care area and is **not** required to wear the standardized uniform with the Memorial Badge Reel.

K. The Hospital's Even and Non-Disparate Enforcement of Its Standardized Badge Reel Rule.

Because of the size of the Hospital, its 3,800 direct care provider population, the multitude of new uniform requirements and the time it takes to communicate the details of such vast policies to so many people, the Hospital took a soft, patient approach in enforcing the Uniform and Appearance Policies.[15] (Tr. 245). The Hospital consistently treated all patient-care employees the same when it came to enforcing not only the badge reel portion of the Policies, but all the various new provisions of the Uniform and Appearance Policies. (*Id.*).

For example, Castillo testified that Fix informed her that she was not supposed to be wearing the non-compliant jacket she was wearing, but rather the Memorial jacket. (Tr. 171-172). Castillo testified that Fix did not stand there and "wait" for her to change her jacket, but rather just "walked away" after delivering the policy reminder. (Tr. 172). Johnson and Coonan treated all the employees they encountered in a similar manner, merely reminding them of the policy changes and requirements. (Tr. 281-287; 298-306).

While the General Counsel introduced some exhibits and specious testimony in an attempt to prove that a handful of others wore non-compliant badge reels at some point or another, the bulk of the testimony demonstrates it is a rarity and difficult to come across uniformed direct care employees wearing non-compliant badge reels while performing duties in patient-care areas.

For example, Welch testified that she took a photograph of a nurse wearing a Disney Ariel, the Mermaid badge reel on July 9, 2015 to demonstrate she had been subjected to disparate enforcement. (Tr. 61; GC. Exh. 12). However, on cross-examination, Welch admitted that the

[15] Notably, prior to 2014, direct patient-care employees were wearing all different varying types of badge reels and lanyards, and it took time to communicate the new uniform standards, including the Uniform Memorial Badge Reel requirement.

woman donning the Ariel the Mermaid[16] badge reel was not working as a direct patient-care provider that day and was actually a good friend of Welch's. (Tr. 94-95). In fact, she worked in a non-patient-care area, the Blood Donor Center, and was not required to wear a standardized uniform, thus she was not required to wear the Uniform Memorial Badge Reel. (Tr. 212-213; 257).

Welch testified that she had seen "Cartoon characters, Ariel the Mermaid, One Legacy, which is our procurement program at the hospital. I've seen breast cancer. I've seen just decorated like jewelry type ones." (Tr. 59). And when asked where in the Hospital she had seen these being worn, Welch replied: "All over. In the elevator, when we – when I was working the skills lab, CORPORATION [sic] and on the floor." (Tr. 60). There are approximately 2, 200 Hospital employees who are **not** required to wear the standardized uniform with the Uniform Memorial Badge Reel who could be "all over" the Hospital, including "in the elevator," and Skills Lab attendees are **not** required to be in uniform. (Tr. 173; 251-252).

Similarly, Castillo testified that she had seen One Legacy badge reels, badge reels covered in rhinestones, and Uniform Memorial Badge Reels with stickers covering the logo. (Tr. 162). However when asked where she had seen the badges she had described, she said: "On my floor and then also during our skills training." (Tr. 162-163). On cross-examination, Castillo admitted that Skills Day training occurs on non-scheduled work days and that people who attend Skills Day are not in uniform. (Tr. 173).

Further, despite Castillo's vague description of some other badge reels she had seen, including a rhinestone badge reel, **Castillo admitted that about a week before the Hearing, she had *intentionally* gone looking through the Hospital for non-compliant badge reels and**

[16] Welch repeatedly referred to the "Ariel the Mermaid" as the "example."

had found *only one* person who was wearing a non-uniform badge reel. (Tr. 169-170; GC. Exh. 23). Welch also went intentionally searching on the same day that Coonan spoke to her and only came up with one "example"—and an example that proves the Hospital's contention that RNs and direct patient-care employees understood they were not required to wear the Memorial Badge Reel when not performing patient-care duties in patient-care areas.

Stewart testified, that she had "seen employees wear badge reels that come from different programs throughout the hospital. One in particular is called the I-Give program. I have seen them from the ONS, which is the Oncologic Nurse Society. I have seen them from Care Ambulance." (Tr. 118). Stewart, when "authenticating" General Counsel's Exhibit 17, which depicts two badge reels lying on a bedspread, did not answer the question of how she had obtained them and provided no timeframe in which she saw them being worn. (Tr.121-122). In fact, Stewart apparently continued to take pictures of non-compliant badge reels for months on end, only coming up with allegedly six non-compliant badge reels in that time. (Tr. 117-124). Stewart also "authenticated" two (2) exhibits demonstrating a violation of Hospital policy: the flower badge reel marked as General Counsel's Exhibit 15 and the pig flashlight marked as General Counsel's Exhibit 22. (GC. Exh. 15; GC. Exh. 22; Tr. 116-118; 134). Stewart admitted that it was the same person who wore the flower badge reel in General Counsel's Exhibit 15 that also wore the pig flashlight shown in General Counsel's Exhibit 22. (Tr. 134). The "evidence" in those Exhibits shows a person willing to intentionally violate the Appearance and Uniform policies in ***two*** different ways and on a consistent basis, thus should not be relied upon as "evidence" of what is normal, much less as the basis to prove any disparate treatment. (GC. Exh. 15; GC. Exh. 22; Tr. 116-118; 134). It also demonstrates that there were far less employees who were non-compliant than the "testimony" and "evidence" attempted to show, as it is apparent

that Stewart needed to stretch the evidence to make it appear that more employees were non-compliant. *Id.*

On the other hand, Fix testified: "I have not personally seen a non-uniform badge reel." (Tr. 247). Coonan testified that she had not seen a non-compliant badge reel since October 2015, and Johnson, all the way back in June 2015, only could find two non-compliant employees when actively searching. (Tr. 281-287; 298-306). Again, Castillo admitted that about a week before the Hearing, she had intentionally gone looking through the Hospital for RNs wearing non-compliant badge reels and had found one person who was wearing a rhinestone badge reel. (Tr. 169-170; GC. Exh. 23).

In any event, with 6,000 employees at the Hospital and 3,800 direct patient-care employees, it is not possible for the Uniform and Appearance Policies to be perfectly enforced at all times. (Tr. 251; 327). Rocha testified that because of the huge number of employees, it is possible that at some time, somewhere in the Hospital, some employee is out of compliance. (Tr. 327).[17] However, that does not mean that the Hospital authorizes that non-compliant behavior. (Tr. 326-327).

Most important, neither the General Counsel nor the Union provided even one incident, example or other evidence indicating that any Hospital supervisor or manager ever observed an employee wearing a non-uniform badge reel and responded in any way other than consistent with the way they responded when they observed an employee wearing non-uniform CNA badge reel.

[17] In fact, the evidence establishes that in the busy Hospital environment, where patient needs are paramount, supervisors did not inspect direct patient-care employees' uniforms like Drill Sergeants' readying the troops. (Tr. 327). This is exemplified by Stewart's brazen admission that she knowingly violated standardized uniform policy by continuing to wear her CNA badge reel until she retired. (Tr. 151-152).

1. Coonan Did Not Disparately Enforce the Badge Reel Requirement Against Welch.

On direct, Welch testified that she had **never** worn a badge reel **before** December 2014. (Tr. 52). Welch admitted that she was provided the Uniform Memorial Badge Reel in January 2015 and that she had received it from her Assistant Unit Manager. (Tr. 54). Welch testified that she received a CNA badge reel **from her CNA labor representative**, and began wearing it **after** the Hospital implemented the Uniform and Appearance Policies in December 2014. (Tr. 54-55).

Welch then testified that she went from February 2015 through July 9, 2015, wearing the CNA badge reel before anyone ever said anything to her about it. (Tr. 57; 95).

She testified that on July 9, 2015 her Director, Colleen Coonan ("Coonan"), stated:

> "I need—you need to remove that." And I said, "What?" And she says, "That badge reel holder." And I said, "Okay." And I did.

(Tr. 58).

Welch testified that Coonan did not mention the Union's logo at all.[18] (Tr. 94). Welch testified that during her July 2015 conversation with Coonan that she had the first version of the Uniform Memorial Badge Reel holder—the heavy one—along with the Memorial Watch, clipped in her pocket. (Tr. 91-92).

Welch at first testified that she did not know that the Uniform Memorial Badge Reel was "required" until Coonan spoke to her on July 9, 2015. (ALJD 9:27; Tr.76). However, she subsequently testified that she had been in a meeting prior to the December 2014 implementation where the Hospital stated that only the Memorial logoed badge reel would be allowed as part of

[18] The Union makes misleading statements and distorts the facts in its Exceptions Brief with regard to the incidents between Coonan and Welch. (UBX 7, 11). The Union's "characterization" of the facts on page 7 of its Brief that Welch was not in a patient care area performing patient care duties is misleading. (UBX 7). Welch was just about to walk into a patient care area to perform patient care duties when Coonan pointed out that she was required to wear the Uniform Memorial Badge Reel. (ALJD 8:32-33; Tr. 57-58; 304).

the uniform. (Tr. 79-80). She also testified that she had received at least two versions of the Uniform Memorial Badge Reel between December 2014 and July 9, 2015 and understood that the Hospital was investing in perfecting the quality of the Uniform Memorial Badge Reel. (Tr. 85-86). She also admitted that the picture she took on July 9, 2015, "allegedly" demonstrating that she had been "treated differently," was of a friend and co-worker who was not in uniform and was not performing direct patient-care duties in a patient care area, even though she was a RN. (Tr. 94-95).

Coonan testified that, between the time when the third version of the Uniform Memorial Badge Reel had been distributed in about May or June 2015 and the Hearing that she had only ever seen or noticed four employees who were not wearing the Uniform Memorial Badge Reel, and she treated them all the same. (Tr. 299-306). In May or June of 2015, Coonan saw two different nurses on a Pediatrics unit wearing a Hello Kitty badge reel and a frog badge reel. (Tr. 299-304). She informed both nurses that they could no longer wear those badge reels because they are not the standard uniform, informed them that they needed to have the Uniform Memorial Badge Reel and asked if they needed a new one. (Tr. 299-304; 306). Coonan testified that she did not ask or require any of the four nurses she saw out of compliance between May 2015 and October 2015, including Welch, to change their badge reel on the spot. (Tr. 299-306). Coonan testified she had "Pretty much the same" encounter with Welch as she did with the others.[19] (Tr. 304-305). The last non-compliant badge reel saw was in October 2015 and was a princess badge reel. (Tr. 305). Coonan testified that she had a similar brief conversation and the nurse who told Coonan that her Uniform Memorial Badge Reel had broken. (*Id.*) Coonan testified that "everyone needed to have the Memorial reel, because that was the standard

[19] Though substantively unimportant, it varied only in that Welch gave an odd reason for wearing a non-Memorial Badge Reel, namely that she had received permission from Fix to do so. (Tr. 304).

uniform. So, it didn't matter what the reel was, if it wasn't a Memorial one, they were out of uniform." (Tr. 306).

2. Johnson Did Not Disparately Enforce the Badge Reel Uniform Requirement Against Stewart.

Stewart testified that she wore the first version of the Uniform Memorial Badge Reel for less than a full shift because it had allegedly broken. (Tr. 115). Even though she acknowledged that it came in the box with the uniform and that she understood it was part of the uniform, she admitted that, after it broke, she went right back to wearing her CNA badge reel. (*Id.*; Tr. 117).

Stewart alleged that her AUM, Johnson, asked her to remove her CNA badge reel in or about October 2015. (GC. Exh. 1(l)). While it does not necessarily substantively matter whether Stewart's alleged timing of the alleged "disparate enforcement" is accurate, it does raise underlying credibility issues. Stewart, an ardent, vocal and active Union advocate who retired on January 7, 2016, coincidentally added an allegation to the Second Amended Charge, alleging she had been "harassed" and subjected to disparate treatment by Johnson just five days after the Region received the Hospital's 18-page statement of position on October 2, 2015. Johnson's recollection of the timing was the far more reasonable one, as she testified it occurred during one of the quality-improved Uniform Memorial Badge Reel mass distributions, which at the latest was in June 2015. (Tr. 281-283).

Johnson testified that, about a year prior to the May 2016 hearing, her manager gave her some badge reels and asked that she distribute them in accordance with the Uniform and Appearance Policies. (Tr. 280-283). Johnson testified that she immediately complied with her manager's request and walked around two different areas of the Hospital that she supervised. (Tr. 281-282; 285). Johnson testified that she actually **went looking** for nurses who were not wearing the Uniform Memorial Badge Reel. (Tr. 283; 285). All of the approximately 25 direct

patient-care providers she encountered were **already wearing** the Uniform Memorial Badge Reel, except for two: Stewart and another employee. (Tr. 282-285). She treated both Stewart and the other employee exactly the same by giving them a Uniform Memorial Badge Reel and simply stating that "we needed to wear this to be in compliance with the dress code policy." (Tr. 284-285). Stewart testified that Johnson "said, you need to be wearing this" and then "put the badge reel down and walked out of the room." (Tr. 117). Stewart admitted that Johnson did not make any comment about what type of badge reel Stewart was wearing, and made no mention of it being a "Union" badge reel. (Tr. 150). Johnson testified that she did not even notice what kind of badge reel Stewart was wearing, other than it "wasn't the Memorial Logo." (Tr. 284). Stewart admitted that Johnson did not stand there and wait for Stewart to take off her badge reel. (Tr. 150). Johnson testified that she thereafter "walked around the room and I didn't see anyone else who didn't have one, a Memorial badge reel."[20] (Tr. 285). And Johnson testified that when she went to the other side of the Hospital that she supervised, "[a]nd I looked at those employees, too, but everybody already had one." (*Id.*).

III. THE ALLEGATIONS, AS AMENDED.

There were only three allegations plead in the Complaint: an allegation of a facial violation of Policy #318 (related to pins on an I.D. Badge) in Paragraph 6 and, separately, two disparate enforcement allegations regarding badge reels in Paragraphs 7(a) and 7(b). (GC. Exh. 1(l)). At the Hearing, after the Hospital laid out its position in its opening statement, the General Counsel moved to amend the Complaint to revise language and to add a *fourth* allegation

[20] There was no testimony that supports the Union's misleading statement in its Brief that Johnson ever "crossed paths" with an RN allegedly wearing a flower badge reel and pig key chain. (UBX 5). And while the Union insinuates on page 11 of its Brief that both Welch and Stewart were required to "remove their badge reels with Union insignia" ***because*** the badge reels contained Union insignia, both Stewart and Welch admitted there was no mention of the word "Union," and the testimony of Coonan and Johnson also made clear that was not the case. (UBX 11).

regarding the uniform badge reel requirement portion of the Appearance Policy. The motion was granted based on the stated assertion that neither the General Counsel nor the Union knew about the Appearance Policy language relating to badge reels at issue.[21]

Amended Paragraph 6(a)[22] of the Complaint contains the original challenge to the pin rule and states:

> Since at least July 1, 2015, Respondent has maintained the following rule which is contained in Respondent's Dress Code and Grooming Standards Policy/Procedure #318 (dated March 3, 2014 and revised July 7, 2014): "Only MHS approved pins, badges, and professional certifications may be worn."

Amended Paragraph 6(b)[23] of the Complaint added the entirely new challenge to the uniform badge reel requirement and states:

> Since at least July 1st, 2015,[24] Respondent has maintained the following rule, which is contained in Respondent's PC261.02. "Badge reels may only be branded with MemorialCare approved logos or text."

Paragraph 7(a) of the Complaint states:

> About July 9, 2015, Respondent, by Colleen Coonan, in the Children's Department of the Long Beach facility, prohibited an employee from wearing a badge reel holder containing Union insignia while permitting employees to wear badge reel holders containing other insignia.

Paragraph 7(b) of the Complaint states:

> About October 7, 2015, Respondent, by Robin Johnson, in the Outpatient Surgery Department of the Long Beach facility, prohibited an employee

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[21] The amendment was based on false grounds. (Tr. 242; 307-311; Er. Exhs. 14 and 15). As clearly established at the Hearing, both the Union and the General Counsel were explicitly made aware of the Appearance Policy long before the original Complaint issued. Accordingly, General Counsel's Paragraph 6(b) should be stricken from the Amended Complaint.

[22] The General Counsel's requests that Paragraph 6 of the Complaint be amended to read "Paragraph 6(a)" and that the date of the policy be amended to read "July 7, 2014" were granted. (Tr. 9-12; 41-48).

[23] (Tr. 42; *see also* 41-48)

[24] As admitted by the Union at the Hearing, this is a manufactured, false date; the Union admitted it knew of the language and policy in December 2014. (Tr. 307-311; Er. Exhs. 14 and 15).

> from wearing a badge reel holder containing Union insignia while permitting employees to wear badge reel holders containing other insignia.

Pursuant to Paragraph 8 of the Complaint states that by the conduct described in Paragraphs 6 and 7, the Hospital "has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act in violation of Section 8(a)(1) of the Act."

Judge Wedekind found that the Hospital did not violate the Act per the allegations in the Amended Complaint Paragraphs 6(b), 7(a) and 7(b). The General Counsel Excepted to the Judge Wedekind's findings and rulings regarding the badge rule only, and the Union Excepted to the Judge's findings and rulings regarding the badge reel rule and the disparate enforcement allegations. (GCX #1; UX #s 1-7).

IV. ANALYSIS.

First and foremost, if the Board were to grant the Exceptions requested here, it would be tantamount to allowing a union to simply replicate a scrub top or any uniformed item that employees are required to wear that bear an employer's logo or branding and replace it with a union's own logo or branding. Brands and logos are obviously important and legitimate business interests, as are uniforms and the way employees present themselves. These are basic, fundamental rights and concepts that should protected and preserved, not vulnerable to greedy, frivolous or confused ever-shifting attempts made by a union to "work the system." The Exceptions are wholly unfounded in reality, fact and law.

As will be demonstrated below, the General Counsel and Union failed to put forth any evidence that supports the asserted allegations. In fact, the opposite is true. The testimony and documentary evidence presented by the General Counsel overwhelmingly supports the

Hospital's case, and together with the applicable law, easily demonstrate that the Hospital has not violated the Act in any way whatsoever.

Under applicable law, the Hospital's uniform badge reel requirement is lawful if the Hospital has proven "special circumstances" justifying its legitimate business reasons for maintaining its challenged uniform requirements, which the Hospital has. Even if the Hospital has not proven special circumstances, which it has by an abundance, the Hospital's challenged rule is still lawful if a Hospital employee would not reasonably construe the language—in the context of the whole, including the Hospital's practice and legitimate business reasons for its uniform requirement—as restricting their exercise of their Section 7 rights. There is no allegation that the rule was promulgated for unlawful purposes.[25] Further, the facts demonstrate that there was no disparate enforcement of the Appearance Policy.

Accordingly, the Hospital requests that the Board uphold the rulings, findings and conclusions reached by Judge Wedekind in the ALJ Decision that relate to the issues and allegations set forth in the General Counsel's and the Union's Briefs Exception(s).

A. The Hospital Has Proven Special Circumstances Justifying Its Legitimate Business Reasons for Its Uniform Rules Relating to Badge Reels and Employee I.D. Badges.

It is important to note at the outset that this case does not involve an explicit ban on the wearing of "union insignia"—the two rules being challenged in this case **do not** explicitly refer to, or explicitly ban, the wearing of wearing union insignia, a fact which greatly distinguishes this case from the others upon which the General Counsel and Union rely. Thus, the Hospital merely needs to prove it has special circumstances justifying its legitimate business reasons for its uniform standards and rules.

[25] The General Counsel did not allege a motive-based violation regarding the Hospital's badge reel policy.

While employees generally have a right to wear "union insignia" while at work, the right is not without limitation. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 801-803 (1945). Section 7 rights "may give way when 'special circumstances' **override** the employees' Section 7 interests and **legitimize the regulation of such apparel**." *Komatsu America Corp.*, 342 NLRB 649, 650 (2004) (emphasis added); citing *Evergreen Nursing Home & Rehabilitation Center*, 198 NLRB 775, 778-779 (1972). "In cases where the employer argues that special circumstances justify a ban on union insignia, the Board and courts[26] balance the employee's right to engage in union activities against the employer's right to maintain discipline ***or to achieve other legitimate business objectives, under the existing circumstances***." *Albis Plastics*, 335 NLRB 923 (2001) (emphasis added).

Here, the Hospital's legitimate reasons and business objectives to regulate the apparel at issue, particularly under the circumstances in this case, far outweigh any purported restriction on employees' Section 7 rights. Here, the scale clearly weighs in favor of the Hospital's right pursuant to proven special circumstances to establish a specific, custom made, standardized uniform, including a requirement that only the Uniform Memorial Badge Reel be worn, and its right and duty to establish reasonable and legitimate safety and security rules regarding the wearing of employee I.D. badges.

"Special circumstances justify restrictions on union insignia or apparel 'when their display may **jeopardize employee safety**, damage machinery or products, exacerbate employee dissension, or unreasonably interfere with a public image that the employer has established, or **when necessary to maintain decorum** and discipline among employees.'" *Starwood Hotels*

[26] *Republic Aviation*, 324 U.S. at 797-798 (balancing test must be applied between the employees' rights to exercise their Section 7 rights against an employer's right to "manage its business in an orderly fashion").

and Resorts Worldwide, Inc. d/b/a W San Diego ("W Hotel"), 348 NLRB 372, 373 (2006); citing *Komatsu*, 342 NLRB at 650; *NLRB v. Baptist Hospital*, 442 U.S. 773, 781 (1979).

The Board has held it will find "special circumstances" justifying a ban on union insignia where the employer has demonstrated that the display of insignia may "**unreasonably interfere** with the public image that the employer has established, ***as part of its business plan*, through appearance rules for its employees**." *W Hotel*, 348 NLRB at 373 fn.9; citing *Nordstrom, Inc.*, 264 NLRB 698, 700 (1982). The Board favors limitations on employees' wearing of union insignia in the workplace that are **narrowly tailored** to the special circumstances justifying maintenance of the rule. *W Hotel*, 348 NLRB at 373 (the special circumstances that justified the employer's ban in public areas did not justify the ban in nonpublic areas). Here, such narrowly tailored limitations exist and have been proven.

Furthermore, the burden is even lighter in hospital settings. The Board will find special circumstances justifying a ban on union insignia in circumstances where such a ban is "necessary to avoid disruption of health-care operations or disturbance of patients." *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 507 (1978). The Board has upheld cases prohibiting employees from wearing union insignia in patient-care areas. *Enloe Medical Center*, 345 NLRB 874, 876 (2005); *Casa San Miguel, Inc.*, 320 NLRB 534 (1995).

It is important to note that unlike the entirely distinguishable and irrelevant healthcare facility line-of-cases cited to by the General Counsel and Union, **this case does not involve a selective ban** on **inflammatory, content-based union messaging** displayed on a button, ribbon or similar item during a contentious union campaign. The facts and legal analysis and

justifications in those cases are not analogous or applicable here, **thus, the General Counsel's and the Union's reliance upon such cases is entirely misplaced.**[27] (GCXB: 6-9; UXB 7-10).

Rather, this is a case regarding the Hospital's right to set forth specific, unique and narrowly tailored uniform requirements based on special circumstances justifying its legitimate business purposes that are clearly apparent to employees. Moreover, this case is not even about a ban on wearing union insignia. As detailed at the Hearing, the Hospital permits employees to exercise their Section 7 rights to display/wear union insignia. Employees both can, and do, routinely wear Union jackets, shirts, lanyards and other insignia when not working as a direct patient-care employee in a patient-care area, such as when attending meetings or trainings (*i.e.* Skills Day) or when walking throughout the Hospital (including walking through patient-care areas) to reach areas where they may conduct Union business as a Union steward. Additionally, direct patient-care employees who desire to wear union insignia while working in a patient-care area may still wear union insignia by wearing union insignia earrings, necklaces or even a union tattoo. The Hospital has ***not*** interfered with employees' Section 7 rights; in fact, the opposite is true. The Hospital has freely and repeatedly permitted employees to freely and repeatedly exercise their Section 7 rights.

Therefore, this is not a case about a ban at all. This is a case about the Union's improper attempt to ***replace*** the Hospital's logo on nurses' uniforms with its own logo. Not only is the Hospital legally entitled to maintain its uniform requirements, but also, we are not aware of a single case where a union has so stridently attempted to usurp the employer's uniform, much less a case where the Board has sanctioned any such improper attempt. Contrary to the General

[27] See e.g. *Healthbridge Management, LLC*, 360 NLRB No. 118 (2014) (finding a ban on employees wearing a "Busted" sticker unlawful); *Saint John's Health Center*, 357 NLRB 2078 (2011) (finding a prohibition against wearing a ribbon stating "Saint John's RNs for Safe Patient-Care" unlawful); *Sacred Heart Medical Center*, 347 NLRB 531 (2006) (holding that a prohibition against wearing a button stating "RNs Demand Safe Staffing" ***lawful***).

Counsel's and the Union's assertions, the Hospital is solidly within its rights under the Act and Board law.

1. The Hospital Has Proven Special Circumstances Justifying Its Requirement that Only the Uniform Memorial Badge Reel Be Worn as Part of the Standardized Uniform for Direct Patient-Care Employees.

Here, the Hospital has proven special circumstances justifying its standardized uniform requirement that all direct care providers wear the Uniform Memorial Badge Reel while working.

As noted, the Union is seeking to ***alter*** the Hospital's standardized uniform and dictate what the Hospital can or cannot include as part of its uniform. There is no case law that empowers a union, or the Board for that matter, to unilaterally ***replace*** an existing employer's uniform item bearing the employer's logo with some other item bearing the union's logo. The Uniform Memorial Badge Reel is not a "button" or a "sticker" or a "ribbon" that is merely ***attached*** to an existing uniform; **it is an integral part of the Hospital's standardized uniform itself**. It is this fact that distinguishes this case from any others to which the General Counsel and the Union may cite. For instance, the uniform cases and the healthcare facility line-of-cases are clearly distinguishable in that the unions in those cases were not seeking to **alter an existing uniform**, as the Union is here.

If the Union's allegation as plead is sustained, every hospital could be forced to include a union logo as part of its uniform, and any small sized removable legitimate uniform item bearing the employer's logo will be subject to being ***replaced*** by a union logo item instead. In fact, if sustained, what would stop a nurse from embroidering a CNA logo next to or, worse yet, sewing a CNA logo on top and instead of the Memorial logo on the scrub itself. Basic common sense and reasonableness **alone** tips the balancing test in favor of the Hospital here.

Further, allowing any non-uniform badge reel to be worn, **except** for the Uniform Memorial Badge Reel, would "unreasonably interfere" with the specific, standardized, unique and expensive uniformed image that the Hospital has intentionally created and established "as part of its business plan" for its direct patient-care employees and its mission of providing top quality patient-care. *W Hotel*, 348 NLRB at 373 citing *Nordstrom,* 264 NLRB at 700.

Instructive and on point is that the Board has held that a hotel—and one that had invested far less time, money and effort into creating a standardized uniform than the Hospital has here—had proven special circumstances lawfully justifying it to restrict its public-interfacing employees from wearing any items other than those described in the hotel's standardized uniform policy while working. *W Hotel*, 348 NLRB at 372.

Pursuant to the W Hotel in San Diego's "Appearance" policy, W Hotel employees were required to wear an all-black outfit and a small "W" pin—only 1/2 inch in size—on the employees' upper left chest that was "**directly related to the employer's business**." *Id.* at 373 (emphasis added). Specifically, it was a pin bearing the W logo. *Id.* Similarly, the Uniform Memorial Badge Reel is directly related to the Hospital's business as it bears the Memorial logo.

Moreover, unlike here, in that case, the union was not seeking to **replace** the W Hotel's logo pin with a union pin instead. Rather, the union was arguing that employees should also be able **to affix a separate union button elsewhere on the uniform**.

The Board held that W Hotel had proven special circumstances justifying its uniform requirements and prohibiting a union button from being affixed to its public-contact employees while working. *Id.* The Board found special circumstances were justified because W Hotel had specially commissioned the standardized uniform design, and spent significant resources to do

so, in accordance with its business strategy of providing a trendy and chic atmosphere to help guests feel as though they were in a "wonderland." *Id.* at fn.4 and 378.

Here, the Hospital's business objective was to provide a standardized, easily-identifiable, customized, consistent and professional look in accordance with its business strategy of providing quality patient-care. And, just as W Hotel did, the Hospital also commissioned a company to specially design its unique and balanced uniform look, including a unique fabric loop, a unique Uniform Memorial Badge Reel and a unique Memorial logoed watch. In the end, the Hospital commissioned the three different versions of the Uniform Memorial Badge Reel in order to perfect the badge reel's quality and functionality.

W Hotel's "Appearance" policy is instructive here, and stated, in part, the following:

> You are an important element in creating the unique atmosphere that our hotels are known for. Always present a professional look and avoid the extreme.
>
> ....
>
> Wear minimal amounts of jewelry—no more than two simple rings per hand. Two earrings are allowed in each ear for men and women. If second earrings are worn, they should be small studs. Dangling earrings should also be no longer than an inch. Visible body piercing and tattoos are not appropriate.
>
> ....
>
> At W Hotels, we do not believe in nametags. **You will be presented with a W lapel pin that is part of your attire. You must wear it at all times.** Since your name will not be pinned to your attire, you must always introduce yourself to each of your guests. **No other buttons, pins or decorations aside from the W lapel pin are permitted, unless approved by the General Manager.**

Id. at 378-379 (emphasis added).

The policy did not prohibit union insignia; nor does the Uniform Memorial Badge Reel rule or Appearance Policy here. Unlike W Hotel's appearance policy, the Hospital's policy **only** applies to direct patient-care employees while in patient-care areas and while working. The only

issue the Board found with W Hotel's policy was that it was overbroad with respect to its application to employees during off-duty time and to employees who were on duty but in areas of the Hotel where members of the pubic were not allowed to enter. *Id.* at 373. While that part of the ruling is inapplicable here, what is analogous and relevant to this case is that the Board upheld the judge's ruling that W Hotel had proven "special circumstances," namely unreasonable interference with W Hotel's public image, justifying the prohibition of an employee affixing a union button to the employee's uniform while the employee was in public areas of the hotel.[28] *Id.*

There can be no question that the Hospital spent far more time and money on just the Uniform Memorial Badge Reel aspect of its uniform than the W Hotel did on its entire uniform. Allowing direct patient-care employees to wear any type of badge reel other than the Uniform Memorial Badge Reel—whether containing a CNA logo or any other insignia or logo—would ***unreasonably* interfere** with the public image that the Hospital **has established, as part of its business plan**, through appearance rules for its employees. *Id.* at 373. The Hospital has proven more than sufficient special circumstances—**far *more* than W Hotel had**—for establishing and requiring its direct care employees wear the Uniform Memorial Badge Reel as part of its standardized uniform.

To highlight the ridiculousness of the allegations in this case, the union in *W Hotel* did ***not* attempt to *replace* the W Hotel logo pin with a union logo pin** instead, as the Union here is seeking to do.

[28] The Board did not take issue with the approval aspect of the policy. *Id.* at 373, 378-379. Thus, there should be no issue with the "approval" aspect of the Appearance Policy here.

The Hospital, here, is not selectively banning insignia or banning insignia at all,[29] but rather it has established a uniform. The Hospital's standardized uniform is a blanket restriction only against wearing anything ***but*** the standardized uniform.

Furthermore, in rare cases, such as this one, where there was no active union campaign or actual discipline, the Board has looked to the overall circumstances to fortify its upholding of an employers' special circumstances, such as where the parties enjoyed a longstanding bargaining relationship, where there was a lack of any anti-union animus, where no employee was disciplined for wearing the union insignia but simply asked to remove or cover it, and where "employees could, and without company objection did," express their union messaging in other lawful ways. *Southwestern Bell Telephone Co.*, 200 NLRB 667, 671 (1972); see also *Komatsu*, 342 NLRB at 650. All of these extra, fortifying factors are present here and only serve as further reasons why the Hospital's Policies are lawful.

Additionally, for all of the above reasons, the General Counsel's assertion that the Hospital has not proven special circumstances simply because the CNA badge reel is "small, innocuous and similar in appearance, size and function" (Tr. 18) to the Uniform Memorial Badge Reel is misplaced. The Hospital has a standardized uniform policy and the Uniform Memorial Badge Reel is an integral part of that uniform. If the 1/2 W Hotel pin is lawfully part of W Hotel's uniform, then so is the much larger Uniform Memorial Badge Reel. The Hospital has proven special circumstances for its legitimate standardized uniform requirements; the Union has no lawful right to alter the standardized elements of its uniform that the Hospital invested so much time and money to create. In this case, size does ***not*** matter.

[29] As noted, the Policies allow direct patient-care employees to wear non-dangling earrings or necklaces with any insignia, including union insignia.

The General Counsel's argument that the Hospital has somehow waived its right to special circumstances because some employees have—at some point in time—worn badge reels "not specifically approved by Respondent without issue" (Tr. 18) is equally incorrect. The Hospital was aware it would take time patience and repeated communication to ensure all 3,800 employees understood the varying aspects of the new Uniform and Appearance Policies. Just because it took time for employees to understand the new uniform requirements or just because a few random and rogue employees intentionally violated the new requirements by wearing the wrong jacket or badge reel at some point in time certainly cannot amount to any kind of a waiver on the Hospital's part.

Finally, even though special circumstances were definitively established, they need not be, as in a hospital context they are presumed and blanket restrictions on employees' wearing of insignia "in immediate patient care areas are **presumptively valid**." *Healthbridge Management*, 360 NLRB No. 118 at 2 (emphasis added), *citing NLRB v. Baptist Hospital*, 442 U.S. at 781. Thus, the Board has held that healthcare facilities may lawfully ban **all nonofficial insignia** in immediate patient-care areas **without being required to prove special circumstances**. *Saint John's Health Center*, 357 NLRB at 2079. Here, the Hospital's Uniform and Appearance Policies, including the badge reel rule, lawfully ban ***all*** nonofficial badge reels worn by working direct patient-care employees in patient-care areas, and thus are presumptively valid. (GC. Exhs. 5 and 6).

Accordingly, the challenged language in the Appearance Policy is lawful and the allegation in Paragraph 6(b) of the Amended Complaint must be dismissed.

B. <u>The Hospital's Maintenance of the Challenged Rule Is Entirely Lawful.</u>

Because the Hospital has proven special circumstances, the Hospital's mere maintenance of the rule/policy language at issue is entirely lawful. However, even assuming the Hospital has

not proven special circumstances, which it has, the Hospital's challenged rule is still lawful under applicable law.

When faced with an allegation that an employer's work rule violates Section 8(a)(1), the Board applies the principles set forth in *Lafayette Park Hotel*, 326 NLRB 824 (1998), *enfd.* 203 F.3d 52 (D.C. Cir. 1999), and *Lutheran Heritage Village-Livonia ("Lutheran Heritage")*, 343 NLRB 646 (2004). The Board has held that an employer violates the Act when it maintains a work rule or policy that reasonably tends to chill employees in the exercise of their Section 7 rights. *Lafayette Park Hotel*, 326 NLRB at 825.

A work rule that explicitly restricts activities protected by Section 7 will be held unlawful. *Lutheran Heritage*, 343 NLRB at 646. If the rule does not explicitly restrict Section 7 activity, the Board will only find a violation upon a showing that: "(1) employees ***would*** reasonably construe the language of the rule to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." *Id.*

1. A Reasonable Reading and a Reasonable Employee Are Viewed in the Context of the Whole.

The Board has made clear that when determining whether a challenged rule is unlawful, the Board must "give the rule a **reasonable reading**." *Lutheran Heritage*, 343 NLRB at 647 (emphasis added), *citing Lafayette Park Hotel*, 326 NLRB at 825, 827. The Board has held that it "must **refrain from reading particular phrases in isolation**, and it must not presume improper interference with employee rights." *Id.*

The Board has held that context is relevant to determining a reasonable employee **would** construe a rule, stating:

> We will not conclude that a reasonable employee would read the rule to apply to [Section 7] activity simply because the rule *could* be interpreted

> that way. To take a different analytical approach would require the Board to find a violation whenever the rule could conceivably be read to cover Section 7 activity, even though that reading is unreasonable. We decline to take that approach.

Id. (footnote omitted) **(emphasis in original).**

The Board has repeatedly held that employees can make reasonable judgments based on context. For example, in one case, United Parcel Service ("UPS") addressed a notice to "All Employees" that explicitly prohibited the wearing of an intra-union button on the employer's standardized uniform. *United Parcel Service, Inc.*, 195 NLRB 441 (1972). The employer had both non-uniformed employees and uniformed employees. *Id.* The union argued that the notice violated Section 8(a)(1) to because it applied to non-uniformed employees and uniformed employees during times when they were not interacting with the public. *Id.* The Board disagreed, finding that because the notice specifically concerned the company uniform, which only applied to drivers, and because the drivers knew and understood that the uniform rule only applied to them when they were out on deliveries and interacting with customers and the public, **the reasonable UPS employee** would not find the notice to restrict the exercise of their Section 7 rights. *Id.* Here a reasonable Hospital employee would understand the uniform badge reel requirement of the Appearance Policy for direct patient-care providers only applied to direct patient-care providers and even then only applied while they working in uniform in a direct patient-care area.

2. A Reasonable Hospital Employee Would Not Construe the Badge Reel Rule in the Hospital's Appearance Policy as Restricting Their Section 7 Rights.

The Hospital's uniform badge reel rule in Paragraph 12 of the Appearance Policy would not reasonably be construed as restricting Section 7 activity. As demonstrated above, the Hospital's proven special circumstances justify its legitimate business reasons for creating a standardized uniform. Furthermore, the overwhelming evidence proves that there was **no**

discretion, no other option available, for uniformed direct patient-care employees to wear—the only badge reel that is, or ever was, compliant with the Hospital's standardized uniform for its direct patient-care employees is the Uniform Memorial Badge Reel.

The Board has held that employees reasonably **understand** that employers have "legitimate business" reasons to proscribe certain conduct, such as to maintain decorum or to limit liability. *Lutheran Heritage*, 343 NLRB at 647. The Uniform and Appearance Policies clearly state that the purpose of the standardized uniform requirement for the Hospital's direct patient-care employees performing patient-care duties in patient-care areas is for the protection, health and well-being of the Hospital's patients, which is an easily understandable, legitimate business reason. Further, this reason was communicated direct patient care employees on multiple occasions over the course of a long period of time. And direct patient care employees clearly understood that the Hospital had made and continued to make significant financial investments to perfect the functionality of the Uniform Memorial Badge Reel, which employees would reasonably understand was done for legitimate business purposes entirely unrelated to Section 7 rights or activities.

Moreover, the Board has held that employers can rely upon "narrowing interpretations of overly broad rules" if such "narrowing interpretations" are **"communicated to the entire work force covered by the rule."** *Guardsmark, LLC*, 344 NLRB 809. 811(2005) (citation omitted). This is precisely the case here.

The Hospital's direct patient-care employees received multiple and varying types of communications about the Memorial Badge Reel requirement, as well as multiple versions of the Uniform Memorial Badge Reel as the Hospital perfected the functionality and durability of the Badge Reel over time. The direct patient-care employees received emails and flyers with color

photos of the Uniform Memorial Badge Reel. They saw pictures of it on the Intranet after they had been fitted and were asked to go on the Hospital's Intranet site to order their uniforms. They received the Uniform Memorial Badge Reel in the same box together with their uniform. They complained about the weight or durability of the different quality versions of the Uniform Memorial Badge Reel, which prompted the Hospital to go back to the design company over and over again and ask the company to make the Uniform Memorial Badge Reel more durable or lighter. And the evidence showed that the Hospital dedicated an extraordinary amount to time distributing the Uniform Memorial Badge Reel and communicating to employees about it, both individually and in groups, on three separate occasions, as well as on an ongoing, as-needed basis. The Hospital clearly communicated, time and time again to its direct patient-care employees, and all the evidence demonstrates that direct patient-care employees **understood** that the Uniform Memorial Badge Reel—and **only** the Uniform Memorial Badge Reel—was allowed to be worn because it was a part of the standardized uniform.

With this amount of clarity, **not even an unreasonable (or a dishonest) person** could possibly understand anything other than that the Uniform Memorial Badge Reel was part of the uniform and no other type of badge reel, Hospital-issued or otherwise, was authorized. Welch at first denied knowing that the Uniform Memorial Badge Reel was "required" until Coonan spoke to her on July 9, 2015. (ALJD 9:27; Tr.76). Ultimately, she got tied up in a knot and had to admit: (1) she had been in a meeting prior to the December 2014 implementation where the Hospital stated that only the Memorial logoed badge reel would be allowed as part of the uniform;[30] (2) that she had received at least two versions of the Uniform Memorial Badge Reel between December 2014 and July 9, 2015 and understood that the Hospital was investing in

[30] (Tr. 79-80).

perfecting the quality of the Uniform Memorial Badge Reel;[31] and (3) that on July 9, 2015, when Coonan spoke to Welch about her badge reel, Welch had the "heavy" version of the Uniform Memorial Badge Reel, along with the Memorial watch, clipped in her pocket.[32]

Even the General Counsel and Union realized this by the end of the second day of the Hearing. This is why there are no relevant facts cited in their Briefs in Support of their Exceptions. The only avenue possible left unexplored was about the application of the scope of the rule, and as Judge Wedekind openly stated and discussed with the parties on the record at the end of the second day of the Hearing, there was absolutely no evidence that it had been applied in any way but lawfully. (Tr. 216-265; 316-326). After two days of testimony and evidence, it was clear that all the witnesses had understood that the rule only applied to direct patient care employees performing patient care duties in patient care areas.

Therefore, just as with the Board found that "reasonable UPS employees" would reasonably understand that a rule stating it applied to "All Employees" only applied to uniformed employees while working, the Hospital's direct patient-care providers were all well informed and understood that the policy requires that ***only*** the Uniform Memorial Badge Reel be worn. *Guardsmark, LLC*, 344 NLRB at 811; *United Parcel Service*, 195 NLRB at 441.

Contrary to any misguided allegations or arguments made in the Exceptions, the record is clear: **Given the context, multiple communications and totality of the circumstances, <u>no</u> "reasonable Hospital employee"** would read the Uniform and Appearance Policies and badge reel rule to apply at any time or place **except** when they are performing patient care duties in patient care areas. And as it is abundantly clear that the standardized uniform requires that they

[31] (Tr. 85-86).

[32] (Tr. 91-92).

only may wear the Uniform Memorial Badge Reel at such times, no reasonable Hospital employee would think they were even allowed to request, much less seek "approval" to wear any other type of badge reel, Mickey Mouse, Union or otherwise.[33] (Tr. 94-95; GC. Exh. 12).

Under all the circumstances—after watching the Hospital spend an enormous amount of time, money and effort into creating a standardized look that includes the Uniform Memorial Badge Reel—any reasonable Hospital employee would find the Union's contention that it has the right to alter the Hospital's uniform in such a substantial way **highly unreasonable**, as it would unreasonably interfere with the image the Hospital worked so hard to create.

And finally, the evidence established that employees did **not** feel limited or restrained in the least. Employees may, and do, wear whatever badge reel that they desire when not working as a direct patient-care provider in a patient-care area, such as when attending Skills Day or performing representational duties as a Union steward. Similarly, employees commonly wear Union insignia of various forms when not in uniform, including when performing Union steward functions in patient-care areas. Finally, the record clearly established that while the uniform could not be altered, the Hospital's policies still provided avenues (including wearing Union insignia earrings, displaying tattoos, etc.) for employees in direct patient-care areas to exercise their Section 8 rights. And the testimony revealed that even direct patient-care employees working in direct patient-care areas did not feel restrained.

Therefore, no reasonable employee would construe the Hospital's limitation requiring that only the Hospital-provided Uniform Memorial Badge Reel be worn as limiting or chilling their Section 7 activity.

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[33] Welch admitted that the picture she took on July 9, 2015, allegedly demonstrating that she had been treated differently, was of a friend and co-worker who was not in uniform and was not performing direct patient-care duties in a patient care area.

C. The Hospital Did Not Disparately Enforce Its Lawful Badge Reel Rule.

At the Hearing, the General Counsel alleged that the Hospital "fixated on Union insignia when it instructed two employees to remove Union issued badge reel[s]." (Tr. 17). The Union also insinuated that the Hospital had disparately enforced the badge reel portion of the Appearance Policy by "fixating on the Union insignia" and insinuated that the Hospital had done so because the nurse(s) was "a long term nurse activist in the Union." (Tr. 19). Both disparate enforcement paragraphs of the Complaint allege that the Hospital "***prohibited*** an employee from wearing a badge reel holder containing Union insignia while ***permitting*** employees to wear badge reel holders containing other insignia." (GC. Exh. 1(l)) (emphasis added). The evidence presented at the Hearing unquestionably proved that **none of these allegations are true**.

As demonstrated by the facts at the Hearing, neither Stewart nor Welch was "prohibited" from wearing their Union badge reel. There was no evidence that the Hospital unlawfully chilled, interfered with or restrained the Section 7 rights of either Welch or Stewart. In fact, Stewart boasted that she continued to wear her CNA badge reel until her retirement, which occurred well over a year after the Appearance Policy was implemented. (Tr. 151-152). Welch testified that she continued to wear her CNA badge reel in her pocket.[34] Also, Stewart and Welch both regularly wore Union insignia while walking through the Hospital when performing their Union steward duties, including walking through patient-care areas in order reach break rooms or other non-patient-care areas in which to conduct Union business.

Furthermore, Stewart and Welch were treated the same as everyone else and simply were "reminded" that under the new standardized uniform policies, they were required to wear the

[34] This proves the General Counsel's citation to *Enloe Medical Center*, 345 NLRB at 875 supports the Hospital's position, not the General Counsel's, as it shows that employees can and did switch out their Uniform Memorial Badge Reel—for a Union badge reel no less—when they were not performing patient-care duties in patient-care areas. (GCBX 7).

Uniform Memorial Badge Reel. Other employees were not permitted to wear other non-compliant badge reels, and there was absolutely no showing whatsoever of any Union animus. Hospital managers and supervisors have been consistently and non-discriminatorily enforcing the Uniform Memorial Badge Reel requirement for direct care providers. The evidence revealed that all direct patient-care employees wearing non-compliant badge reels, whether bearing images of princesses or frogs, a Hello Kitty or a Union logo were treated in the exact same manner. All such employees merely received the same gentle "reminder" that those badge reels were no longer allowed under the new standardized uniform and that only the Uniform Memorial Badge Reel could be worn. No direct patient-care employee was disciplined for non-compliance with the Uniform Memorial Badge Reel requirement.

Even "occasional lapses in otherwise consistent application of a detailed uniform policy" will not amount to disparate enforcement, particularly if an employer takes "concrete steps" to enforce its dress code. *The Hertz Corp.*, 305 NLRB 478, 488 (1991) (finding that occasional lapses merely showed that the employer had problems in attempting to carry out its uniform policy effectively as employee cooperation with the employer's comprehensive uniform policy and the employer's diligence in enforcing it were less than perfect.).

And as discussed above, just because at some point in time, whether during the rollout or after, a few random employees were non-compliant because they were confused or lazy, or a few rogue employees intentionally violated the Policy requirement does not amount to the Hospital granting its "permission" or "acquiescing" to such non-compliant behavior. At the time of the Hearing, almost all 3,800 direct patient-care employees were wearing the Uniform Memorial Badge Reel.

Stewart and Welch were clearly not restrained from exercising their Section 7 rights and they were not treated differently or subjected to disparate enforcement of the badge reel rule.

Accordingly, each and every one of the Exceptions should be denied.

V. CONCLUSION

The law governing this case is clear and the material facts are undisputed. Judge Wedekind, who sat through two days of Hearing, correctly held that the General Counsel had failed to establish any violation of the Act related to the uniform badge reel rule or disparate enforcement. Therefore, Hospital respectfully requests the Board affirm the rulings, findings and conclusions of the ALJ's Decision that relate to the allegations at issue in the Exceptions.

Respectfully submitted,

EPSTEIN, BECKER and GREEN, P.C.

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CERTIFICATE OF SERVICE

I hereby certify that on November 14, 2016, I E-Filed and served the attached copy of the **RESPONDENT'S ANSWERING BRIEF TO THE GENERAL COUNSEL'S LIMITED EXCEPTION AND THE CHARGING PARTY'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION** submitted by Long Beach Memorial Medical Center, Inc. in Case No. 21-CA-157007 on the parties and in the manner listed below:

VIA E-FILE

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November 21, 2016

VIA E-FILING
Gary Shinners, Executive Secretary
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Washington, D.C. 20570-0001

RE: Long Beach Memorial Medical Center Inc.
D/B/A Long Beach Memorial Medical Center &
Miller Children's And
Women's Hospital Long Beach
Case 21-CA-157007

Dear Mr. Shinners:

I write on behalf of the Counsel for the General Counsel to request a 14-day extension of time for parties to file answering briefs to Respondent's cross-exceptions in the above-captioned case. Answering briefs are currently due on November 28, 2016, and we are requesting that the deadline for filing answering briefs be extended until December 12, 2016. The additional time is being requested in light of our current heavy caseload in conjunction with pre-planned holiday vacation and travel.

Neither Respondent nor the Charging Party has any objection to the additional two weeks, and the Charging Party also joins in this extension request.

Sincerely,

Molly A. Kagel
Lindsay R. Parker
Counsel for the General Counsel
NLRB, Region 21

STATEMENT OF SERVICE

I hereby certify that a copy of the General Counsel's Request for Extension of Time to File Answering Briefs was submitted by e-filing to the Executive Secretary of the National Labor Relations Board on November 21, 2016.

The following parties were served with a copy of said documents by electronic mail on November 21, 2016.

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Respectfully submitted,

Aide Carretero
Secretary to the Regional Attorney
National Labor Relations Board

Dated at Los Angeles, California, this 21st day of November, 2016.

United States Government

OFFICE OF THE EXECUTIVE SECRETARY
NATIONAL LABOR RELATIONS BOARD
1015 HALF STREET SE
WASHINGTON, DC 20570

November 21, 2016

Re: Long Beach Memorial Medical Center Inc.
d/b/a Long Beach Memorial Center &
Miller Children's and Women's Hospital
Long Beach
Case 21-CA-157007

EXTENSION OF TIME TO FILE ANSWERING BRIEF TO CROSS-EXCEPTIONS

The request for extension of time in the above-referenced case is granted. The due date for the receipt in Washington, D.C. of Answering Brief to Cross-Exceptions is extended to **December 12, 2016**. This extension applies to all parties.

/s/ Roxanne L. Rothschild
Deputy Executive Secretary

cc: Parties
Region

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LAOR RELATIONS BOARD
WASHINGTON, D.C.

LONG BEACH MEMORIAL MEDICAL CENTER INC. D/B/A LONG BEACH MEMORIAL MEDICAL CENTER & MILLER CHILDREN'S AND WOMEN'S HOSPITAL LONG BEACH,

Case 21-CA-157007

and

CALIFORNIA NURSES ASSOCIATION/ NATIONAL NURSES UNITED (CNA/NNU)

COUNSEL FOR THE GENERAL COUNSEL'S
REPLY BRIEF TO RESPONDENT'S ANSWERING BRIEF

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Virtually all of the arguments in Respondent's Answering Brief which address the Exceptions the General Counsel made to the Decision of the Administrative Law Judge have already been addressed in the General Counsel's Brief in Support of its Limited Exceptions. Therefore, this Reply Brief is limited to the following two issues:

1. Respondent has Failed to Prove Special Circumstances Justifying its Requirement under Policy 261.02 that Only the Memorial Badge Reel be Worn by its Employees

Respondent's Policy 261.02, which states in relevant part, that "badge reels may only be branded with Memorial Care approved logos or text" is overbroad as it infringes on employees' rights to wear badge reels containing insignia protected by Section 7 of the Act. A rule prohibiting the wearing of union insignia in non-patient care areas is presumptively invalid, absent a showing by the employer of "special circumstances" – that banning the wearing of insignia was "necessary to avoid disruption of health care operations or disturbance of patients." *NLRB v. Baptist Hospital*, 442 U.S. 773, 781 (1979).

As already detailed in the parties' previous filings, Policy 261.02 establishes "appropriate appearance, grooming and infection control standards for those who are direct patient care providers at Community Hospital Long Beach, Long Beach Memorial, and Miller and Women's Hospital Long Beach, including off-site clinics and satellite work locations." Policy 261.02 does not clearly state whether it is applicable to patient or non-patient care areas, and any ambiguity in this regard should be construed against Respondent. *NLRB v. Miller-Charles & Co.,* 341 F.2d 870, 874 (2d Cir. 1965). Thus as contended in General Counsel's exceptions, Policy 261.02 is presumptively invalid and Respondent bears the burden of establishing special circumstances.

Respondent has not established special circumstances here. Respondent has not shown how its ban on badge reel holders which do not contain Respondent's logo is necessary to avoid

the disruption of Hospital operations or protect against the disturbance of patients. See *Saint John's Health Center,* 357 NLRB 2078, 2080 (2011). Respondent, like any Hospital and other places of business, may have legitimate security concerns and a need to establish standard uniform requirements, however this alone does not constitute a special circumstance significant enough to override employees' Section 7 rights.

In making its arguments justifying its special circumstances, Respondent relies heavily upon *Starwood Hotels and Resorts Worldwide, Inc. d/b/a W San Diego ("W Hotel"),* 348 NLRB 372 (2006). In *W Hotel*, the Board found that the employer (a hotel) in that matter met this "special circumstances" standard in that the hotel had a particular image it tried to convey. In *W Hotel,* the hotel tried to create a "Wonderland" ambiance and chose uniforms to further the trendy, distinct and chic look that they were aiming for. These uniforms were entirely black and the only adornment the *W Hotel* employees were permitted on their uniforms was a small pin, about 1/2 an inch in size which bore the W logo. Id at 372.

The hearing transcript in this matter shows that there were different uniform colors assigned to employees based on their job title within the Hospital. (Tr. 267; GCx-5). Hospital employees are also permitted to select uniforms of varying cuts and style. Employees are permitted to wear Hospital issued coats or jackets as part of their uniform. Moreover at the hearing Judith Fix, Respondent's Senior Vice President of Patient Care Services and Chief Nurse Officer, testified that employees could wear other types of union insignia, such as earrings, a tattoo, or nail polish, throughout the Hospital, including in immediate patient-care areas. (Tr. 262). Additionally, as made clear in the transcript, Respondent has also has allowed employees to wear various Hospital approved pins which adorn their identification badges as well as other

types of insignia, such as badge holders with the name of other companies, in immediate patient-care areas. (Tr. 59-60;118-122, 162; GCx-12, 13, 15, 16, 17, 18, 19).

Thus unlike the *W Hotel* uniform requirements, Respondent's employees did not wear a standard identical uniform or color. They were permitted to wear other adornments on their uniform itself and on their person. The record evidence does not establish that Respondent's operations were special or unique from any other hospital which also has certain security and uniform protocols in place. The badge reel holders themselves are small and innocuous, they serve the purpose of holding the employees' identification badges alone and are not a form of identification themselves. A badge reel holder bearing the logo of the Union or any other entity would not detract from a patient's ability to identify Hospital employees, namely when those Hospital employees are already wearing designated scrubs containing Respondent's logo as well as their identification badge identifying them as Hospital employees. In light of the above Respondent has failed to meet its burden of proving any special circumstances justifying its prohibition on wearing badge reel holders that do not contain Respondent's logo.

2. Respondent has Waived its Opportunity to Except to ALJ Wedekind's Decision to Allow the General Counsel to Amend the Complaint to include PC-261.02 on the First Day of the Hearing

On page 32 of its Answering Brief, Respondent appears to make a thinly veiled argument that ALJ Wedekind improperly permitted the General Counsel to amend its complaint at hearing to include an allegation regarding Policy 261.02. Although it raised this issue in its Answering Brief to the General Counsel's and the Union's exceptions, Respondent did not raise ALJ Wedekind's decision to allow the General Counsel to make this amendment at hearing as one of its exceptions.

Section 102.46 of the Board's Rules and Regulations provides as follows:

> 102.46 (b)(2) Any exception to a ruling, finding, conclusion, or recommendation which is not specifically urged shall be deemed to have been waived.
>
> 102.46 (g) No matter not included in exceptions or cross-exceptions may thereafter be urged before the Board, or in any further proceeding.

Consequently, although Respondent raised this argument in its Answering Brief, it failed to do so in its exceptions or in its brief in support of its exceptions, thus it has waived its opportunity to object to that portion of ALJ Wedekind's decision.

Regardless, ALJ Wedekind's decision to allow the General Counsel to make this amendment at hearing was proper. According to Section 102.17 of the Board's Rules and Regulations, any complaint may be amended "upon such terms as may be deemed just. . .at the hearing and until the case has been transferred to the Board. . .upon motion, by the administrative law judge. . . ."

In *Massey Energy Company d/b/a Mammoth Coal Company*, the respondent argued that it was unaware that a single-employer issue would be raised in any way at the hearing, thereby denying the respondent proper notice to allow it to address the issue. 358 NLRB 1643, 1650-1652 (2012). The Board found, "in light of Board law and due process," the single-employer issue had been properly established. Id. at 1652. The language in the complaint implied that "something more than a garden-variety agency relationship [was] alleged; therefore, respondent had "unequivocal notice" and "an opportunity to be heard." *Massey Energy Company*, supra at 1651. In addition, at the hearing, the Union cited *Pergament United Sales*, which states that the Board may find and remedy a violation even "in the absence of a specified allegation in the complaint if the issue is closely connected to the subject matter of the complaint and has been fully litigated." 296 NLRB 333, 334 (1989), enfd. 920 F.2d 138 (2d Cir. 1990).

The fact that General Counsel amended the complaint soon after opening the record did not deny Respondent due process. Paragraphs 7(a) and 7(b) in the complaint both reference incidents where members of management ordered employees to remove their Union-issued badge reel holders. This language indicates that the subject of badge reel holders and the policies regulating permitted badge reel holders would be raised and discussed at length by both parties at the hearing. Additionally, General Counsel moved to amend the complaint only after Respondent's Custodian of Records had testified, and only after General Counsel became aware of Policy 261.02. General Counsel could not have moved to amend the complaint to include Policy 261.02 any sooner than it did because Respondent had never provided a copy of this policy to the General Counsel prior to the first day of the hearing.

Judge Wedekind allowed the amendment as both parties would be relying on PC-261.02 for their cases and it is sufficiently related to the existing allegations contained in the complaint. In fact, Respondent raised PC-261.02 in its opening statement. (Tr. 26). Therefore, even with the amendment at the hearing, the issue was fully litigated, Respondent had the proper notice, reasonably assumed that this policy would come up during the course of litigation and in fact raised this very policy during its opening statement. Thus Respondent was afforded due process and any arguments to the contrary should be rejected.

3. Conclusion

It is respectfully submitted that the record evidence, as set forth at the hearing and argued in this Reply Brief and in its Brief in support of its Limited Exceptions, amply supports the General Counsel's limited exceptions to the Administrative Law Judge's Decision. The General Counsel contends that ALJ Wedekind erred in failing to find that the broad restrictions imposed by the badge reel rule embodied in Policy 261.02 violates Section 8(a)(1) of the Act as it interferes with employees' Section 7 right to wear protected insignia. Accordingly the General Counsel urges the Board not to adopt those portions of ALJ Wedekind's decision and instead to find that in addition to unlawfully maintaining Policy 318, Respondent has also unlawfully maintained Policy 261.02.

Respectfully submitted,

Lindsay Parker (mmp)

Lindsay Parker
Molly Kagel
Counsels for the General Counsel
National Labor Relations Board

Dated at Los Angeles, California, this 28th day of November, 2016.

STATEMENT OF SERVICE

I hereby certify that a copy of the **COUNSEL FOR THE GENERAL COUNSEL'S REPLY BRIEF TO RESPONDENT'S ANSWERING BRIEF** was submitted by e-filing to the Executive Secretary of the National Labor Relations Board on November 28, 2016.

The following parties were served with a copy of said document by electronic mail on November 28, 2016:

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Respectfully submitted,

Aide Carretero
Secretary to the Regional Attorney
National Labor Relations Board
Region 21

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Washington, D.C.

LONG BEACH MEMORIAL MEDICAL CENTER, INC. d/b/a LONG BEACH MEMORIAL MEDICAL CENTER & MILLER CHILDREN'S AND WOMEN'S HOSPITAL LONG BEACH

and Case 21–CA–157007

CALIFORNIA NURSES ASSOCIATION/ NATIONAL NURSES UNITED (CNA/NNU)

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Table of Contents

I. INTRODUCTION.....1

II. FACTS.....1

A. *Policy/Procedure 318*.....1

B. *Respondent Regularly Permits its Employees to Wear Hospital-Approved Insignia on their Uniforms*.....3

C. *ALJ Wedekind Correctly Found Policy #318 Facially Unlawful*.....4

III. ARGUMENT.....5

A. *ALJ Wedekind's Decision that Respondent Has Violated Section 8(a)(1) of the Act by Maintaining Policy 38 Conforms with Established Board Law*.....5

B. *Policy #318 is Presumptively Invalid On Its Face*.....6

C. *Respondent's Concerns About Identification Do Not Justify Policy #318's Rule on Pins*.....8

D. *Any Ambiguity in Policy #318 Should be Construed Against Respondent*.....9

IV. CONCLUSION.....12

Table of Authorities

Albertson's Inc, 351 NLRB 704 (1978) 5

Beth Israel Hospital v. NLRB, 437 U.S. 483 (1978) 6

Guardsmark, LLC, 344 NLRB 809 (2005) 10

London Memorial Hospital, 238 NLRB 704 (1978) 6

Lutheran Heritage Village-Livonia, 343 NLRB 646 (2004) 6

McDonnell Douglas Corp, 240 NLRB 794 (1979) 11

NLRB v. Baptist Hospital, 442 U.S. 773 (1979) 6

NLRB v. Miller-Charles & Co., 341 F.2d 870 (2d Cir. 1965) 9, 11

Presbyterian/St. Lukes Center v. NLRB, 723 F.2d 1468 (10th Cir. 1983) 9

Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945) 6

Saint John's Health Center, 357 NLRB 2078 (2011) 4

St. Joseph's Hospital, 263 NLRB 375 (1982) 9

Tradesmen International, 338 NLRB 460 (2002) 7

I. Introduction

On October 12, 2016, the General Counsel filed Limited Exceptions and a Brief in Support of Limited Exceptions over the ALJ's dismissal of the allegation that Respondent violated Section 8(a)(1) by maintaining a rule concerning badge reel holders set forth in Respondent's PC-261.02.

Although the ALJ dismissed that allegation, he decided that Respondent violated Section 8(a)(1) of the Act by maintaining a rule concerning pins set forth in Respondent's Policy/Procedure #318. On November 14, 2016, Respondent filed cross-exceptions to this finding.

For the reasons described more fully below, the ALJ's findings and conclusions on Policy #318 are supported by the record evidence and applicable Board law.

II. Facts[1]

A. Policy/Procedure #318

Respondent takes issue with ALJ Wedekind's decision regarding Policy/Procedure 318: Dress Code and Grooming Standards (herein Policy #318). The policy is a broad Memorial Health Services policy on dress code and grooming standards adopted by Long Beach Memorial Medical Center (herein the Hospital). (Tr. 37, 216; GCx-4).[2] The current and applicable Policy

[1] Certain undisputed background information/facts about the parties have been left out of this brief because they are already set forth in the General Counsel's Brief in Support of Limited Exceptions.
[2] Herein, citations to the hearing transcript will be designated as "Tr.," followed by the transcript page number. Citations to ALJ Wedekind's decision will be designated as "ALJD," followed by the appropriate page and line number. References to exhibits from Counsel for the General Counsel will be designated as "GCx-" followed by the specific exhibit number.

#318 went into effect on July 7, 2014.[3] In creating these policies, Respondent's Custodian of Records testified that Policy #318 applies to all employees at the Hospital. (Tr. 38). Respondent's Custodian of Records testified at the hearing that the current version of Policy #318 has been maintained and has been in effect since at least July 1, 2015. (Tr. 38; GCx-4). Policy #318 dictates Respondent's dress code and grooming standards. (GCx-4). Policy #318 is dated March 3, 2014, and was revised on July 7, 2014. The Hospital has adopted this MHS policy for its use and it applies to all of the roughly 6,000 employees at the hospital. (Tr. 38). It applies to ". . .those who work or volunteer at Memorial Health Services ('MHS') facilities, including off-site clinics and satellite work locations, at all times to promote an efficient, orderly and professionally operated organization." It specifically defines its scope to "all those who work in any capacity for MHS . . . ."

Policy #318 contains "examples of minimum requirements," such as identification badges, which must contain the employee's name and picture facing out and be worn at a level that can be readily seen, and also has other hair and jewelry requirements. (ALJD 2: 15-20; Tr. 51, 52, 111, 168; GCx-4). It also contains a provision relating to pins. (GCx-4). Employees affix pins to their identification badges through small holes provided in the badge's plastic sleeves. (Tr. 66). Policy #318 contains the following rule:

> "Only MHS approved pins, badges, and professional certifications may be worn." (GCx-4).

[3] Respondent updated Policy/Procedure # 318 and it went into effect on March 3, 2014. (Tr. 37-38, GCx-3). The current Policy #318, like most of Respondent's policies, can be accessed by employees on Respondent's Intranet Site. (Tr. 39, 40).

B. Respondent Regularly Permits its Employees to Wear Hospital-Approved Insignia on Their Uniforms

Judith Fix, senior vice president of patient care services and chief nurse officer, (herein Fix) testified that the approval process for pins refers exclusively to Respondent-distributed pins or badges. She admits that this is not explicitly stated in the policy. (Tr. 273). When questioned about whether there was a written policy that dictates which pins an employee can wear, she answered that it comes from Policy #318. (Tr. 276-277). All policies dealing with patient care services are signed off on by Fix. (Tr. 193). Respondent maintains that pins with cartoon characters or other "similar personal items" are not permitted to be worn by employees in order to minimize patient confusion. (Tr. 250-251, 276). Fix admitted that the star-shaped pin affixed on the badge photographed in GCx-23, a pin provided by Respondent to an employee to denote that they are a preceptor, is not acceptable to wear, even though it displays two recognizable Respondent logos. (Tr. 211).

Respondent has issued various pins to employees, such as pins to commemorate an employee's years of service and to award an employee for excellent service (Tr. 65-66; GCx-7; GCx-14). Respondent allows certification pins to be worn on identification badges: pins that indicate whether an employee is certified for certain skills and duties. (Tr. 66). These certification pins are awarded to employees following a study and testing process in which the registered nurse (herein RN) would demonstrate skill, knowledge, and experience in a specialty type of care for patients. (Tr. 209). Respondent has also issued "I give" pins, which are given to those who contribute to the donation program at the Hospital. (Tr. 126). The "I give" pins are issued in different colors every year. (Tr. 266). The pins do not feature Respondent's name or logo anywhere on the pin but instead feature a colored heart with the words "I give" on them.

(GCx-20). RN Brandy Welch testified that she does not wear two of her years-of-service pins because of the precarious nature of the pins' backings. She testified that the backings on the pins issued by Respondent have come unscrewed. (Tr. 67).[4]

Welch also testified that she and other employees have worn pins at the Hospital not specifically approved by Respondent on their identification badges. She herself has worn two cancer ribbon pins, a pink one for breast cancer and a gray one for brain cancer, and she reported seeing other RNs wear Disney character pins and "Precious Moments" pins.[5] (Tr. 65, 97; GCx-7, GCx-12). In fact, Welch and another nurse passed the gray ribbon pins out in her unit and to her managers. (Tr. 65). While there are no physical exhibits illustrating that employees wear cartoon pins, contrary to Respondent's contentions in its Exceptions, the testimony is far from vague: RN Welch recalled that she had seen an employee with a cartoon character pin about five days before she testified at the hearing, and RN Theresa Stewart recalled seeing Bugs Bunny pins as well. (Tr 74, 126).

C. ALJ Wedekind Correctly Found Policy #318 Facially Unlawful

ALJ Wedekind found that the pin rule was presumptively invalid, given that it was "clear" that the policy was not limited to direct patient care areas of the facility, as it applied to all employees, including non-direct patient care providers. (ALJD 4: 25; GCx-4). The pin rule was facially unlawful because the Respondent failed to make the required showing that the rule was necessary to avoid disruption of its operations or disturbance of patients, per the requirements set forth in Saint John's Health Center, 357 NLRB 2076, 2079 & n.3 (2011). (ALJD 4: 30-35, n. 6).

[4] RN Stewart described the backings as similar to an "earring back." (Tr. 130).
[5] "Precious Moments" is a brand that makes figurines and pins and other types of collectibles. (Tr. 97).

ALJ Wedekind rejected the Respondent's argument that the pin rule was necessary for safety purposes because the ban was contained in a policy titled "dress code and personal hygiene policy," which has no link to safety, and the Respondent did not present any evidence "indicating that *pins* are part of the safety and security protocol" given the role of ID badges in the hospital's safety and security protocol. (ALJD 4: 35, ALJD 5: 5). ALJ Wedekind also rejected the Respondent's argument that the rule did not explicitly ban union insignia and, when read wholly, a reasonable employee would not think he or she was prohibited from wearing union insignia. (ALJD 5: 20). Citing Albertsons, Inc., ALJ Wedekind highlighted that, on its face, the ban on all nonapproved pins would include union pins and the Respondent failed to point to any specific provision that would be reasonably interpreted by an employee to narrow the "otherwise broad restriction to only nonapproved pins other than union pins." 351 NLRB 704, 709 (1978). (ALJD 5: 20-25).

III. Argument

A. *ALJ Wedekind's Decision that Respondent Has Violated Section 8(a)(1) of the Act by Maintaining Policy #318 Conforms with Established Board Law*

ALJ Wedekind properly identified that this case is solely about how Respondent has drafted Policy #318. Respondent is attempting to obscure the direct issue by arguing at length about the history and culture of employee understanding and workplace nuance when Board law clearly dictates that the policy must only be evaluated on its face. An employer's maintenance of a work rule violates Section 8(a)(1) of the Act, *inter alia*, if an employee would reasonably believe that the rule restricts or prohibits Section 7 protected activity. In analyzing work rules, the Board further held that words or phrases must not be interpreted "in isolation," and

"improper interference with employee rights" must not be presumed. Lutheran Heritage Village-Livonia, 343 NLRB 646, 646 (2004).

Established Board law has consistently acknowledged employees' rights to wear union insignia at work. In Republic Aviation Corp. v. NLRB, the Supreme Court held that employees have a right to wear union insignia at work, and that "prohibitions against the wearing of insignia must fall as interferences with union organization." 324 U.S. 793, 801-803 (1945). However, hospitals "are not factories or mines or assembly plants" but are places where ailments are treated, and where patients need a "restful, uncluttered, relaxing and helpful atmosphere." Beth Israel Hospital v. NLRB, 437 U.S. 483, 509 (1978) (concurring opinion).

Whether a rule regarding union insignia in the hospital setting is valid depends upon whether the rule is being applied to a patient care or non-patient care area of the facility. Accordingly, the Board has held that a hospital may prohibit the wearing of union insignia in "immediate patient care areas" and that a rule banning buttons in patient care areas is presumptively valid. London Memorial Hospital, 238 NLRB 704, 708 (1978). However, a rule prohibiting the wearing of union insignia in non-patient care areas is presumptively invalid, absent a showing by the employer of "special circumstances" – that banning the wearing of insignia was "necessary to avoid disruption of health care operations or disturbance of patients." NLRB v. Baptist Hospital, 442 U.S. 773, 781 (1979).

B. Policy #318 is Presumptively Invalid On Its Face

Board law clearly indicates that Policy #318 is presumptively invalid on its face because it plainly applies to both patient and nonpatient care areas of the Hospital. Respondent attempts to deflect from the straightforward issue at hand by presenting convoluted arguments regarding

the importance of identification badges and employees' historical understanding of the context of Policy #318.[6] All in all, Respondent has failed to demonstrate the requisite special circumstances to overcome this presumption of invalidity. It is clear that the provision referring to pins contained in Policy #318 is overbroad and interferes with employees' rights under Section 7 of the Act. As noted above, Policy #318 applies to ". . .those who work or volunteer at Memorial Health Services ("MHS") facilities, including off-site clinics and satellite work locations, at all times to promote an efficient, orderly and professionally operated organization." It specifically defines the scope as to "all those who work in any capacity for MHS . . . ." Policy #318 contains the following rule: "Only MHS approved pins, badges, and professional certifications may be worn."

The record, through GCx-4, illustrates that this rule applies to all areas of Respondent's facility because it applies to all direct patient care employees. Such a broad prohibition of union insignia, indiscriminate of whether the pins are worn in patient or non-patient care areas, is presumptively invalid. Having established that the rule is invalid on its face, the Respondent now bears the burden of demonstrating special circumstances. General Counsel does not deny that Respondent has legitimate security concerns given the hospital's size, the number of employees employed, the urban area surrounding the hospital, and the past active shooter incident, all listed in Respondent's Exceptions. However, Respondent has neither proven why the regulation of the insignia proscribed in Policy #318 is essential to address these safety and security concerns, nor has Respondent shown how the wearing of the proscribed insignia would disrupt health care operations or disturb patients.

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[6] When discussing context, Respondent incorrectly cites Tradesmen International as being at 383 NLRB 460, both in its table of contents and within its brief in support of its cross-exceptions; the case citation is actually 338 NLRB 460 (2002).

C. Respondent's Concerns About Identification Do Not Justify Policy #318's Rule on Pins

Respondent's protracted main argument can be condensed to the following: Policy #318's restrictions on the information an employee can display on her identification badge has been maintained so that Hospital staff and volunteers are easily identifiable, in furtherance of the Hospital's safety and security concerns. However, under Respondent's current uniform procedures and protocols, employees are already required to wear very specific uniforms, color-coded for their profession and job title, with their job title and Respondent's name embroidered on the left-hand side of their scrub shirts. Employees are also required to wear their identification badges, displayed at all times, which show their names and their positions, and are color-coded to attest to their licenses and skills. Thus, while Respondent highlights the dangers of employees holding themselves out in a false manner, the ease of identifying who works at the Hospital, for Respondent's employees, patients and the public, is assured by the required uniform already in place. Any non-Hospital insignia, for instance a Union pin, badge or other insignia, is unlikely to prevent patients, the public or Hospital personnel from identifying Hospital employees for safety and security purposes, and any safety and security concerns in this regard should be rejected.

The record is clear that pins, whether issued by the Respondent or otherwise, are not utilized for identification or security purposes, nor do they block any critical information displayed on the identification badge. Rather, the record evidence shows that the pins issued by Respondent are to commemorate years of service, certifications, or participation in different Respondent programs; they are not the principal means by which other employees, patients, or visitors identify medical personnel. In its endeavor to highlight security concerns over identification badges, Respondent asserted that "the Hospital limits the pins that can be worn in

identification badges to identification pins directly related to employees' qualifications and service." To the contrary, the record verifies that Respondent has regularly allowed employees to wear pins not issued by the Respondent, including various cancer-awareness pins and cartoon-character pins, and that members of management have accepted these pins to wear themselves. This evidence weakens Respondent's argument that controlling the information displayed on identification badges is of the upmost importance. Additionally, there is no evidence on the record of an issue of employees blocking employee identification with pins and Respondent did not present any evidence that any patients or family members have ever complained about or been alarmed by any messages contained on pins worn by employees. Therefore, Respondent has not fulfilled its burden and Policy #318 as written violates the Act.

D. Any Ambiguity in Policy #318 Should Be Construed Against Respondent

Respondent's inappropriate arguments regarding employee understanding of Policy #318 merely highlight the ambiguity of Policy #318. If the rule as written and applied were to be viewed as somehow ambiguous, the Board, with court approval, has long held that any limitation on employee exercise of Section 7 rights on company premises must be clear and unambiguous. As the Second Circuit has noted: "[T]he risk of ambiguity must be held against the promulgator of the rule rather than the employees who are supposed to abide by it." NLRB v. Miller-Charles & Co., 341 F.2d 870, 874 (2d Cir. 1965); see also St. Joseph's Hospital, 263 NLRB 375, 377 (1982); Presbyterian/St. Lukes Center v. NLRB, 723 F.2d 1468, 1474 (10th Cir. 1983).

Respondent states that the purposes and meanings of Policy #318 are "widely understood in the workplace," and that no reasonable employee would ever construe or has construed the policy to restrict their Section 7 activity, an argument that is moot when analyzing the written

policy on its face but additionally only serves to highlight the ambiguity of its text. Specifically, Respondent asserts that this case is not about union insignia or a case about a "selective ban on specific, inflammatory content-based union messaging" because nothing prevents employees from wearing other types of union insignia, such as the hypothetical jewelry or nail polish (Tr. 262). Respondent continues to attempt to overcome the facial invalidity of Policy #318 by arguing that the purposes and meanings are "widely understood in the workplace" and that, because the workforce covered by the rule has the culture and practice of wearing pins on identification badges, the "narrowing interpretation of overly broad rules" is valid under the Act. Guardsmark, LLC, 344 NLRB 809, 811 (2005) (citation omitted).

Despite Respondent's drawn-out arguments, the language "MHS-approved" contained in the rule is actually ambiguous in terms of union insignia, leaving the entirety of discretion to the Respondent. Respondent has actually admitted that some pins that Respondent has issued in the past, even pins that display Respondent's logo, are no longer permitted under Policy #318. For example, the preceptor pin shown to Fix is technically prohibited under Policy #318, even though it bears, not one but two, Respondent logos (Tr. 211). Additionally, the fact that employees have regularly worn a variety of non-Hospital issued pins only serves to confirm that the workforce in fact does not understand which pins have Hospital approval under Policy #318.

Respondent goes on at length against Policy #318, asserting that the record does not demonstrate that any employee has actually sought out approval before wearing any pins on their identification badges; however, again, only the language of the policy is significant when analyzing its lawfulness. The language, coupled with Respondent's inconsistent actions of permitting some types of insignia while prohibiting others, make it exceedingly difficult for an employee to ascertain the plain meaning of the policy. As iterated in General Counsel's Brief in

Support of its Limited Exceptions, the responsibility for interpreting the ambiguity of this policy should not be placed on the employees required to follow it. Miller-Charles & Co., supra at 874. The Board has held that employees, unlike lawyers, "cannot be expected to have the expertise to examine company rules from a legal standpoint." McDonnell Douglas Corp., 240 NLRB 794, 802 (1979). In that case, the Board found that a no-distribution rule was facially overbroad, explaining that "it can reasonably be foreseen that employees would not know what conduct is protected by the National Labor Relations Act and, rather than take the trouble to get reliable information on the subject, would elect to refrain from engaging in conduct that is in fact protected by the Act." Ibid. It cannot be assumed that an employee would reasonably be able to deduce what union insignia is allowed and what is prohibited under Respondent's policy. Moreover, because a reasonable employee may not know that wearing union insignia is protected Section 7 activity, he or she would not "take the trouble" to seek approval for pins bearing the union logo or other protected messages.

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IV. Conclusion

For all of these reasons, ALJ Wedekind properly found that Respondent's Policy #318 interferes with employees' Section 7 rights and violates Section 8(a)(1) of the Act. General Counsel requests that the Board affirm ALJ Wedekind's decision regarding Policy #318.

DATED AT Los Angeles, California, this 12th day of December, 2016.

Respectfully submitted,

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National Labor Relations Board
Region 21

STATEMENT OF SERVICE

I hereby certify that a copy of the **ANSWERING BRIEF TO RESPONDENT'S LIMITED CROSS-EXCEPTIONS** was submitted by e-filing to the Board on December 12, 2016.

The following parties were served with a copy of said document by electronic mail on December 12, 2016:

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Case Number:	21-CA-157007
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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

In a Matter Between:	)	
	)	
LONG BEACH MEMORIAL MEDICAL CENTER, INC., d/b/a LONG BEACH MEMORIAL MEDICAL CENTER & MILLER CHILDREN'S AND WOMEN'S HOSPITAL LONG BEACH	)	Case 21-CA-157007
	)	
Employer,	)	
and	)	
	)	
CALIFORNIA NURSES ASSOCIATION/ NATIONAL NURSES UNITED (CNA/NNU),	)	
	)	
Charging Party.	)	

CHARGING PARTY'S ANSWERING BRIEF TO CROSS-EXCEPTIONS

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I. INTRODUCTION

Pursuant to Section 102.46(d)(1) of the Board's Rules and Regulations, California Nurses Association/National Nurses United (the "Union"), files its answering brief to the limited cross-exceptions filed by Long Beach Memorial Medical Center, Inc. d/b/a Long Beach Memorial Medical Center & Miller Children's ("Respondent") to the Decision of the Administrative Law Judge. The Administrative Law Judge (the "ALJ" or "Judge") correctly found that Respondent violated the Act by maintaining a rule in its Policy #318 that requires employees may only wear Respondent-approved pins, badges, and professional certifications.[1] The rule is clearly unlawful and the issue is one that is straightforward under longstanding law.

Contrary to Respondent's assertions, the ALJ correctly held that the General Counsel established that the rule is unlawful; that Respondent was required to show that the presumptively unlawful restrictions it has imposed on employees are necessary to avoid disruption of its operations or disturbance of patients; that a reasonable employee would read such restrictions as interfering with their right to wear union insignia; that Respondent failed to prove special circumstances; and that Respondent violated the Act by maintaining its unlawful rule in Policy #318.

II. STATEMENT OF FACTS[2]

Respondent's Dress Code and Grooming Policy #318 is currently in effect and has been in effect at all relevant times. Tr. 38-40. One version of Policy #318 is dated March 3, 2014 (GC Exh. 3), and another version is dated July 7, 2014 (GC Exh. 4). Policy #318 applies to all of

[1] On October 12, 2016, Charging Party and General Counsel, respectively, filed exceptions to other portions of the ALJD.

[2] "ALJD" refers to the Administrative Law Judge's decision. "Tr. ___" refers to pages of the transcript of the hearing in this matter. "GC Exh." refers to General Counsel's Exhibits. "Resp. Exh." refers to Respondent's Exhibits.

Respondent's employees and is maintained on Respondent's intranet site under "human resources." Tr. 38-39. It provides: "Only MHS[3] approved pins, badges, and professional certifications may be worn." GC Exhs. 3, 4. Policy #318 is also not limited to patient care or immediate patient care areas, and rather provides that the Policy is applicable ". . . for those who work or volunteer at Memorial Health Service ("MHS") facilities, including off-site clinics and satellite work locations, at all times. . ." GC Exhs. 3 and 4.

Policy #318 covers a wide range of appearance and grooming issues. It provides, inter alia, that [t]hose who work at any MHS facility shall present a clean, neat, well-groomed appearance at all times while at work or conducting business at MHS…" and that "[p]rofessionalism and common sense should be used when dressing for work." GC Exh. 4. Item 1 of Policy #318, Section C, references identification badges, providing that "[i]dentification badges shall be worn by everyone with name and picture facing out, at a level that can be readily seen." GC Exh. 4. Item 2 addresses hygiene; item 3 hair and facial hair; item 4 addresses clothing for those not in uniform, prohibiting workout clothes in work areas. GC Exh. 4. Item 5 indicates that "clothing must cover the back, shoulders, thighs, midriff, and must not be excessively short, tight or revealing." GC Exh. 4. The remaining items address appropriate shoes, gloves, goggles, hard hats, jewelry, tattoos, perfume and cologne, and this section of Policy #318 ends with the language at issue, that "[o]nly MHS approved pins, badges, and professional certifications may be worn." GC Exh. 4.

Respondent's Registered Nurses (RNs) are required to wear an identification badge as part of their uniform. Tr. 50. The identification badge identifies the RN and the position they hold. Tr. 50, 109. It also allows RNs to enter and exit a particular department by swiping the identification badge at the doors to the department. Tr. 51, 109. The badge may be affixed to an

[3] " MHS " is the abbreviation for Memorial Health System, the parent company of Respondent. Tr. 13.

extra piece of material on the RN's scrub top, or can be worn with a badge reel. Tr. 50-51. The badge reel holder attaches to the RN 's uniform, and contains a pulley string that extends from the badge reel. Tr. 55.

An identification badge must be worn by the RNs and other employees and displayed at all times while on campus. Resp. Exh. 4. Respondent allows employees to affix various pins to their identification badges, including pins to commemorate an employee's years of service (Tr. 65-66, GC Exhs. 7, 14); pins that display professional certifications (Tr. 66, 209); as well as pins that state, "I Give," in acknowledgment of an employee's contributions to Respondent-approved philanthropic programs. Tr. 123, 265-266, GC Exh. 20.

There is nothing in Policy #318's requirement that "[o]nly MHS approved pins, badges, and professional certifications may be worn[,]" to indicate the reference is only to the identification badges or that pins refers only to pins on identification badges. GC Exhs. 3 and 4. Director of Human Resources Cynthia Rocha acknowledged that the word "badges" does not state "identification badges," nor does the rule at issue state "pins on badges." Tr. 329.

III. ARGUMENT

Respondent's cross exceptions are perplexing, to say the least. The ALJ, contrary to Respondent's assertions, relied on the correct legal standards in finding the rule set forth in Policy #318 unlawful in the hospital setting, citing *Healthbridge Management, LLC,* 360 NLRB No. 118 (2014), enfd. 798 F.3d 1059 (D.C. Cir. 2015); *Washington State Nurses Assn v. NLRB,* 526 F.3d 577, 580 (9th Cir. 2008), and cases cited therein. Correctly describing the applicable legal principles in those cases with regard to the complaint allegations, the Judge articulated that a ban on nonofficial insignia in immediate patient care areas is presumptively unlawful, and that "a healthcare facility must therefore establish special circumstances justifying such restrictions; specifically, that the restrictions are necessary to avoid disruption of healthcare operations or

disturbance of patients." ALJD 4:5-14. See, e.g., *London Memorial Hospital,* 238 NLRB 704, 708 (1978); *Ohio Masonic Home*, 205 NLRB 357 (1973), enfd. 511 F.2d 27 (5th Cir. 1975); see also *Republic Aviation Corp. v. NLRB,* 324 U.S. 793, 801-803 (1945).

Respondent 's requirement under its Policy #318 (GC Exh. 3 and 4) that "[o]nly MHS approved pins, badges, and professional certifications may be worn" is presumptively unlawful, as any employee would reasonably construe the language to limit the wearing of pins and badges to pins and badges approved by Memorial Health System in all areas. Respondent's claim in its Brief in support of its cross-exceptions at page 6 that "[t]he evidence presented consistently and unquestionably demonstrated that the term 'badge' only relates to I.D. badges" has absolutley no support in the record. It is axiomatic under Board law that a rule is unlawful when "employees would reasonably construe the language of the rule to prohibit Section 7 activity. . ." See, e.g., *The NLS Group,* 352 NLRB 744, 745 (2008). And as the Board has repeatedly held, "any ambiguity in the rule must be construed against the drafter--here, the Respondent." See, e.g., *Rio All-Suites Hotel & Casino*, 362 NLRB No. 190, slip op. at 1 (2015).

A reasonable employee would understand pins and badges as set forth in Policy #318 to encompass any sort of pin or badge, and the Judge correctly rejected Respondent's argument that when read in the context of the entire policy, employees would not believe they were prohibited from wearing union insignia. ALJD 5:12-26. Respondent's witness testimony about the language at issue did not provide any basis for the Judge to conclude a reasonable employee would construe the language as limited to identification badges, which nonetheless would not make the language at issue lawful. As noted, Director of Human Resources Cynthia Rocha acknowledged that the word "badges" does not state "identification badges," nor does the rule at issue state "pins on badges." Tr. 329. This language comes at the end of numerous items covering a wide range of appearance issues. There is no question that the reasonable employee

would conclude from Policy #318 that just as they must have good personal hygiene at work, that any pins or badges they wish to wear in Respondent's facilities must be approved by MHS.

It is also well established that an employer's requirement of preapproval of insignia violates the Act. Such a preapproval process would inform the reasonable employee's reading of the rule and interfere, restrain and coerce the reasonable employee in the wearing of union insignia. See, e.g., *Middletown Hospital Assn.*, 282 NLRB 541, 552-553 (1986). And while an approval process for insignia is unlawful in any event, Judith Fix, Respondent's Senior Vice President of Patient Care Services and Chief Nursing Officer, acknowledged there is not even an approval process for pins and badges if employees sought to have union badges or union pins they wished to wear approved, testifying she "believed in this case [the language] references an MHS distributed pin or badge," though admitted the language in Policy #318 does not state "MHS distributed." Tr. 273. That Respondent may allow other union insignia, such as jackets or hats, to be worn in non-patient care areas of its premises is irrelevant to the reasonable construction of the language of Policy #318 set forth by the Judge, and its effect on the reasonable employee.

And there are clearly no "special circumstances" to justify Respondent's policy. "The Board will find special circumstances in a healthcare setting where the restriction is "necessary to avoid disruption of health-care operations or disturbance of patients.'" *Saint Johns Health Center,* 357 NLRB 2078, 2079 (2011) (citing *Beth Israel Hospital v. NLRB,* 437 U.S. 483, 507 (1978)). In *Saint Johns,* supra, the employer argued unsuccessfully that the employer's prohibition of the union ribbon stating "Saint John's RN's for safe patient care" was necessary to prevent patients from believing patient care at the hospital was not safe. Here, however, Respondent 's Policy #318 unlawfully restricts the wearing of union insignia without regard to

any message on the insignia, requiring only MHS-approved badges and pins to be worn throughout its facilities.

It is therefore not surprising that Respondent put forward no evidence that would establish its rule, that "[o]nly MHS approved pins, badges, and professional certifications may be worn[,]" is needed to prevent disruption of health-care operations or patient disturbance. It has attempted by its cross-exceptions to argue that it has established special circumstances with regard to the use of identification badges in furtherance of its safety and security policies. That is entirely irrelevant to the issue before the Board, as the inquiry is not whether identification badges may be part of safety and security protocol but whether the offending language in Policy #318 would interfere, restrain and coerce employees in the wearing of union insignia by its broad pronouncement that "[o]nly MHS approved pins, badges, and professional certifications may be worn." GC Exh. 4. In any event, as set forth above, Respondent allows employees to affix to their identification badges a variety of pins that so long as Respondent approves of them. (Tr. 123, 265-266, GC Exh. 20).

Respondent's additional claim that there is a lack of a showing of union animus is also completely irrelevant with regard to a Section 8(a)(1) finding of an unlawful rule that on its face interferes, restrains and coerces employees in the exercise of Section 7 rights.

IV. CONCLUSION

For the reasons set forth above, the ALJ correctly held that the General Counsel established that the rule in Policy #318 is unlawful; that Respondent was required to show that the presumptively unlawful restrictions it has imposed on employees are necessary to avoid disruption of its operations or disturbance of patients; that a reasonable employee would read such restrictions as interfering with their right to wear union insignia; that Respondent failed to prove special circumstances; and that Respondent violated the Act by maintaining its unlawful

rule in Policy #318. The Judge's rulings, findings, and conclusions, with regard to the unlawful rule set forth in Policy #318 should be affirmed; and his recommended Order with regard to the unlawful rule set forth in Policy #318 should be adopted, to the extent consistent with the Charging Party's and General Counsel's exceptions to other portions of the ALJD.

DATED: December 12, 2016

Respectfully submitted,

Micah Berul
CNA/NNU Registered In-House Counsel

PROOF OF SERVICE

The undersigned hereby declares under penalty of perjury that I am a citizen of the United States, over the age of eighteen years, and not a party to the within action; that my business address is 155 Grand, Oakland, California 94612.

On the date below, I served a true copy of the following document:

CHARGING PARTY'S ANSWERING BRIEF TO CROSS-EXCEPTIONS

[Case 21-CA-157007]

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DATED: December 12, 2016

Tym Tschneaux

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

LONG BEACH MEMORIAL MEDICAL CENTER INC. d/b/a LONG BEACH MEMORIAL MEDICAL CENTER AND MILLER CHILDREN'S and WOMEN'S HOSPITAL LONG BEACH, (RESPONDENT) -and- CALIFORNIA NURSES ASSOCIATION/NATIONAL NURSES UNITED, (CNA/NNU) (CHARGING PARTY)	Case 21-CA-157007

RESPONDENT'S REPLY BRIEF TO THE GENERAL COUNSEL'S AND CHARGING PARTY'S ANSWERING BRIEFS

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I. INTRODUCTION.

The Respondent,[1] an enormous urban hospital with the second largest hospital campus west of the Mississippi, by and through its attorneys and pursuant to Section 102.46(h) of the National Labor Relations Board's ("Board") Rules and Regulations, files Respondent's Reply Brief to the Answering Briefs of the Counsel for the General Counsel ("General Counsel" or "GC") and the Charging Party ("Union" or "CNA") (collectively "Answering Briefs"). The Hospital has already set forth the relevant facts, applicable law and analysis in its Brief in Support of its Limited Cross-Exceptions ("Cross-Exceptions") to Administrative Law Judge's ("ALJ" or "Judge") Decision in Case No. 21-CA-157007 ("ALJ Decision").

From the outset, the General Counsel and the Union have consistently mixed-up facts, issues and allegations in an attempt to manufacture some solid footing in a case founded upon nothing more than relentless and improper boot-strapping. After three amendments to the Charge, each adding more confusion rather than clarity and inspite of the Hospital's filing of two detailed position statements in response to the ever-shifting allegations, the General Counsel continued to change allegations by seeking to amend the Complaint on the first of a two-day Hearing. The Union and General Counsel had so convoluted the case that it is no wonder the ALJ missed this one Cross-Excepted issue in an otherwise proper Decision. As demonstrated by the Answering Briefs, the General Counsel and the Union are *still* applying the wrong legal standards, are misunderstanding or intentionally misstating the facts, and are crisscrossing policies and mudding issues to such a dizzying degree that it must be purposeful. This Reply Brief will therefore clarify the applicable legal standards, issues and relevant facts and address specific arguments made both Answering Briefs, which should enable the Board to easily reverse

[1] Long Beach Memorial Medical Center, Inc. d/b/a Long Beach Memorial Medical Center and Miller Children's and Women's Hospital Long Beach ("Hospital" or "Employer" or "Respondent")

the portion of the ALJ's Decision which wrongly found a violation of Section 8(1)(a) of the National Labor Relations Act ("Act") by the Hospital's maintenance of one sentence in Paragraph 10 in MHS'[2] Policy #318 [3] which states "Only MHS approved pins, badges, and professional certifications may be worn."[4] (ALJD 1:¶3; 4:24-29; 11:15-18; GC. Ex. 4).[5]

II. ARGUMENT.

A. This is Not a Case about a Ban on Non-Official or Union Insignia in a Patient Care Area, Nor is it an Enforcement Case.

While the Hospital employs about 6,000 employees, this case was initiated by the Union on behalf of the 2,000 registered nurses ("RNs") it represents, and has represented **for over 15 years**, at the Hospital. (Tr. 106-108). The Union's and the General Counsel's Answering Briefs confuse the legal and factual issues, and apply the incorrect legal standard because they are narrowly focused on their own agendas. While this is a "special circumstances" case, it is not a typical hospital case about a ban on "nonofficial insignia"—and it is **definitely not** a case about an actual ban on union insignia—in direct patient-care areas on or otherwise. (GCA-4; GCA-6-9; UBA-3-5; ALJD 4:25)

The Hospital's 3,800 direct patient-care employees, many of whom are RNs, are required to wear a standardized uniform when they are performing patient care duties in patient care areas. (GC. Exs. 5-6). However, at all other times and in all other areas, such as in lobbies, cafeterias, and breakrooms, or when attending meetings or performing non-patient-care duties,

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[2] The Hospital is a non-profit subsidiary of its parent corporation, Memorial Health Services ("MHS"), which does business as "MemorialCare." (Tr. 13-14). "MemorialCare" and "Memorial" are used interchangeably throughout.

[3] Policy #318 is entitled "Dress Code and Grooming Standards," and has been in place for many years. (GC Ex. 3)

[4] The Cross-Exceptions are to the ALJ's rulings, findings and conclusions to the dress code allegation originally at issue in Paragraph 6(a) of the Complaint and Notice of Hearing ("Complaint").

[5] Hereinafter "ALJD" refers to pages of the Administrative Law Judge Decision, "GCA" to the pages of the General Counsel's Answering Brief, "UBA" to the pages of the Union's Answering Brief, "Tr." to the pages of the Official Transcript of Hearing, "GC. Ex." to the General Counsel's Exhibits, and "Er. Ex." refers to the Hospital's Exhibits.

etc., those employees are subject to the same minimum standards set forth in Policy #318 that apply to the Hospital's other 2,200 employees. *Id.* Thus, pursuant to the applicable terms of Policy #318, and as the evidence overwhelmingly proved, *all* 6,000 Hospital employees, when not subject to other policy restrictions, are free to wear any appropriate attire/items bearing any appropriate logos/insignia, **including union insignia,** and the evidence showed that employees **have historically and still regularly do wear union insignia**-bearing items/attire. (GC. Exs. 4-6; Tr. 94-95; 139; 151-152; 173; 212-213; 251-252; 257; 259; 261-263; 323). Thus, unless another policy restriction applies and it is appropriate, **Hospital employees may wear union pins,** or any other insignia/logo pins, **on any apparel** ***except*** their **employee I.D. Badge**.[6] (*Id.*)

The testimony revealed that Hospital employees wear union insignia regularly, including shirts and jackets. (*Id.*). The entire theory of the General Counsel's case does not make sense from this standpoint alone. What employer would limit union pins, the smallest of all items, but allow union shirts and jackets? No employee has been restrained here.

Contrary to the Union's assertion,[7] the fact there is no union animus and that employees **do** wear union insignia is highly relevant here. The Board has looked to the overall circumstances to uphold employers' policies as lawful in precisely this set of circumstances, where (1) the parties have enjoyed a longstanding bargaining relationship, (2) there was a lack of any anti-union animus, and (3) "employees could, and without company objection did," express their union messaging in other lawful ways. *Southwestern Bell Telephone Co.*, 200 NLRB 667, 671 (1972); see also *Komatsu America Corp.*, 342 NLRB 649, 650 (2004).

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[6] The Board has noted that a narrow restriction on a specific area of an employee's attire that is based on "a legitimate, longstanding and not unwarranted concern" is lawful if it leaves employees free to wear union insignia elsewhere. *Standard Oil Company of California*, 168 NLRB 153, fn. 1 (1967).

[7] (UBA-6)

And the red-herring references the General Counsel and the Union make in their Answering Briefs relating to "enforcement" or "approval" are also completely irrelevant. (GCA-6; 10; UBA-5). There was no evidence of pin rule ever being enforced nor was there evidence of any instances over the course of many years of any employee seeking approval. And the Board has made clear that the mere inclusion of "approval language" in a policy does not, by itself, violate the Act as it **must be read in context**. *Starwood Hotels and Resorts Worldwide, Inc. d/b/a W San Diego*, 348 NLRB 372, 373 (2006); *Albis Plastics*, 335 NLRB 923, 929 (2001).

The overwhelming evidence presented at the Hearing made it crystal clear that when a Hospital employee reads the phrase "Only MHS approved pins, badges, and professional certifications may be worn," the ***only*** **"badges"** a Hospital employee thinks it refers to are the employee I.D. Badges and the ***only*** **"pins"** a Hospital employee thinks it refers to are the Hospital-related identification pins ("I.D. pins") worn on the I.D. Badge. For even though the General Counsel and the Union really *want* to read the phrase in isolation, the only testimony offered by the **General Counsel's three witnesses** and 9 exhibits relating to "pins" and "badges" related to the widely understood, longstanding custom of wearing of I.D. pins on employee I.D. Badges.

B. <u>The Special Circumstances Here Are Unique.</u>

The General Counsel, the Union and the ALJ (with respect to this allegation) all applied the incorrect legal standard. For while this is a "hospital setting" and can easily be confused with the standard typically applied when a hospital asserts the special circumstances relate just to "patient care" issues, that standard and the cases cited are irrelevant here. (GCA-4-6; UBA-3-4; ALJD 4:5-14). The Board law exception that allows certain restrictions on the wearing of union insignia is called "special circumstances" for a reason; and there can be no doubt that the

"special" facts and circumstances here fully justify the Hospital's legitimate business reasons for maintaining the rule in Policy #318 that limits the information that can be placed on a Hospital employee's I.D. Badge.

While employees generally have a right to wear "union insignia" while at work, the right is not without limitation. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 801-803 (1945). Section 7 rights "may give way when 'special circumstances' **override the employees' Section 7 interests** and **legitimize the regulation of such apparel.**" *Komatsu America Corp.*, 342 NLRB 649, 650 (2004) (emphasis added); citing *Evergreen Nursing Home & Rehabilitation Center*, 198 NLRB 775, 778-779 (1972). "In cases where the employer argues that special circumstances[8] justify a ban on union insignia, the Board and courts balance [9] the employee's right to engage in union activities against the employer's right to maintain discipline or **to achieve other legitimate business objectives, under the existing circumstances.**" *Albis Plastics*, 335 NLRB at 923 (emphasis added).

The Hospital has demonstrated special circumstances justifying its **multiple** legitimate business reasons for limiting and controlling the information its employees display on their I.D. Badges and for creating reasonable rules to ensure employees do not misuse or improperly alter their employee I.D. Badges. This is clearly a case where the Hospital's need to regulate information on the employee I.D. Badge, overrides the speculative and limited impact on

[8] "Special circumstances justify restrictions on union insignia or apparel 'when their display **may jeopardize** employee **safety**, damage machinery or products, exacerbate employee dissension, or unreasonably **interfere with a public image** that the employer has established, or **when necessary to maintain decorum** and discipline among employees.'" *Starwood Hotels and Resorts Worldwide, Inc. d/b/a W San Diego ("W Hotel")*, 348 NLRB 372, 373 (2006); citing *Komatsu*, 342 NLRB at 650; *NLRB v. Baptist Hospital*, 442 U.S. 773, 781 (1979).

[9] *Republic Aviation*, 324 U.S. at 797-798 (balancing test must be applied between the employees' rights to exercise their Section 7 rights against an employer's right to "manage its business in an orderly fashion").

employees. The Hospital must have the right to control the identifying information that is displayed on its 6,000 employees' I.D. Badges.

The Hospital's vast campus spans across more than 10 city blocks, and its enormity brings between 10,000 and 12,000 to the Hospital each day. The Hospital operates like its own miniature city and maintaining order and safety is of paramount importance.[10] Given the Hospital's special circumstances relating to safety issues, including the extra sensitive nature of the Hospital's business, which includes a women's and children's hospital, the Hospital has invested enormous financial and other resources towards developing elaborate identification and security systems, far and beyond most any other hospital in the country. (GC. Exs. 4 and 6; Er. Exs. 1-4; 7-8). There are security desks at every public entrance, and all 10,000 to 12,000 people who enter the Hospital each day are required to wear an I.D. badge, and there are varying types of I.D. badges issued depending on whether the person is a visitor, a contractor, a physician, etc., and whether the person is authorized to enter on a recurring basis. (Er. Exs. 1-4; Tr. 191-192).

Identification is an important issue at the Hospital; it plays a role in maintaining a safe and orderly environment in a 10-block campus world where there are so many strangers that pass through it each day. There are countless liability and safety issues that relate to the correct or incorrect identification of individuals, which includes specific authorized access to sensitive areas. Those areas are ***not just patient care areas***. The Hospital has liability relating to misuse of medications in the Pharmacy, tampering with lab results, ensuring Protected Health Information is secure, among many others. Identification also contributes to patients' well-being and patient care, and is important to ensure patient safety. It also is important to ensure the safety of the Hospital employees and all those who enter.

[10] The Hospital even has its own "police force," as the Hospital employs its own 24/7 security force consisting of approximately 70 dedicated security personnel and three K-9 units. (Tr. 184-190).

Both the Hospital's security policies ***and*** its dress code policies set forth the rules and restrictions regarding employee I.D. Badges. (GC. Exs. 4; 6; Er. Exs. 1-4; 7-8). All Hospital employees are required to wear an employee I.D. Badge front facing and visible at all times. (GC. Exs. 3-5; 7; 12; 13; 14; 18; 19; 20; 21; 23; Er. Exhs. 1-5; 7-8; 10-12). Employee I.D. Badges are electronically coded to provide employees access on an as-needed/authorized basis. (Tr. 109; 199-201). All Hospital employees are acutely aware of the critical importance of their employee I.D. Badge, as all Hospital employees use their I.D. Badge multiple times each work day. (Tr. 51; 109-110). As a RN who worked at the Hospital for 18 years explained:

> The identification badge allows you to clock in so you can get paid; it allows you to park your vehicle on campus because you can't get the gate to come up without your badge; it allows you to go down corridors, open doors; you can't get into certain areas such as the pharmacy without your badge. Your badge is a security device, it is a picture ID, and **it allows the patient to see that indeed you are who you say you are.**

(Tr. 109) (emphasis added). With the overwhelming power the employee I.D. Badge has in the circumstances here, the Hospital must be able to maintain control over what and how information is displayed on employee I.D. Badges. All employee I.D. Badges **are the property of the Hospital**. (Er. Exs. 1-4). Employees are prohibited from wearing their employee I.D. Badges when visiting a patient while off-duty; instead they must check-in ***as a visitor***. (*Id.*).

Employees are responsible for helping to enforce the many varying I.D. badge policies relating to ***everyone*** who enters the Hospital, including fellow employees. (Er. Ex. 2). Employee I.D. Badges are very different from temporary visitor badges, but they are ***not*** that different from contractor or physician badges. (Tr. 109; 199-201; Er. Exs. 1-4). Further, the identifying information on each badge itself is very specific, and Hospital employees understand the numerous internal identifying codes. (*Id.*) For instance, employee I.D. Badges visibly display a color strip that identifies the employees' job/department and certain access restrictions

and permissions; the color strip for a lab technician is different from a food service worker's, a human resources employee's, etc. (*Id.*)

No modifications may be made to the I.D. Badge. The only items that may be placed on the employee I.D. Badge are (1) Hospital-related I.D. Pins which further identify employees and distinguish employees from all others, whether physicians, contractors, visitors, etc., and (2) a colored dot sticker indicating the employee has received their annual Flu Shot, which again provides further identifying information. (Er. Exs. 7 and 8). The purpose of the many I.D. Badge restrictions is clearly to ensure the information on the I.D. Badges is accurate and not abused. (*Id.*). **All eight policies** reserve and reference the Hospital's right to approve, authenticate, authorize, verify, inspect, etc., the varying aspects of the employee I.D. badges. (GC. Exs. 4; 6; Er. Exs. 1-4; 7-8). The challenged line is found in one of the eight policies, specifically in Paragraph 10 of Policy #318, which states: "Only MHS approved pins, badges and professional certifications may be worn." (GC. Ex. 4).

The Hospital has a legitimate business reason for needing to control the information that employees display on their I.D. Badges due to the specific, unique circumstances in this case.

C. <u>The Hospital's Maintenance of the Challenged Rules Is Entirely Lawful.</u>

The ALJ incorrectly adopted the General Counsel's and Union's contorted reading of the challenged provision in Policy #318 without giving any weight to context, which the overwhelming testimony presented proves that all Hospital employees are aware of the longstanding practice and culture of wearing Hospital-related I.D. pins on employee I.D. Badges. As pointed out in the General Counsel's Answering Brief, the ALJ incorrectly presumed that the language was a ban on ***all non-approved pins*, when it is clearly a ban only on the *pins allowed on employee I.D. Badges*.** (ALJD 5:20-25; GCA-5). The ALJ also found the Hospital had failed to point to any specific provision that would be reasonably interpreted by an employee to narrow

the pin rule. (*Id.*). The Board, however, has held employers can rely upon "**narrowing interpretations of overly broad rules**" if such narrowing interpretations are "communicated to the entire work force covered by the rule." *Guardsmark, LLC*, 344 NLRB 809, 811(2005) (citation omitted). This is precisely the case here. Further, the Board has repeatedly held employees can make reasonable judgments based on context including the culture and practice daily observed by the employees. *United Parcel Service, Inc.*, 195 NLRB 441 (1972) (holding that because the drivers understood that the uniform rule only applied to them when they were out on deliveries and interacting with customers, the reasonable UPS employee would not find the notice to restrict the exercise of their Section 7 rights).

The testimony and evidence presented at the Hearing confirm that Hospital employees understand that **the only pins** referenced in Paragraph 10 of Policy #318 are the I.D. pins that employees wear on their **employee I.D. Badges**. (GC. Exs. 4; 14; 20; 21; Tr. 66). One witness took a photo of her own pins, which General Counsel introduced as Exhibit 21. She described them as follows: "These are pins that have either been issued through Long Beach Memorial or through a certification body **for the purpose of wearing on your badge**." (Tr. 127-130) (emphasis added). Another Union steward witness testified that she received her "15 years with Memorial" service pin at an award luncheon then stated "**So it's on my badge**." (Tr. 65-66). The General Counsel introduced multiple exhibits that included images of various employee I.D. Badges and various Hospital-related I.D. pins that are worn on the I.D. Badges. (GC. Exs. 7; 12-14; 18-21; and 23). The General Counsel's own evidence proves that Hospital employees equate the phrase "pins, badges and professional certifications," **only with the I.D. pins worn on employees' I.D. Badges**. No evidence was presented about any employee being prohibited from wearing a pin on any other part of their attire. All the evidence and testimony related ***only* to**

I.D. pins *worn on* I.D. Badges. Thus, the evidence overwhelmingly and undeniably demonstrates not merely that a hypothetical "reasonable Hospital employee" would or could, but rather that Hospital employees **do equate** "pins" and "badges" and "professional certifications" **solely** with the I.D. pins employees wear on their employee I.D. Badge.

The Board has made clear that when determining whether a challenged rule is unlawful, the Board must "give the rule a reasonable reading." *Lutheran Heritage Village-Livonia,* 343 NLRB 646, 647 (2004) , *citing Lafayette Park Hotel*, 326 NLRB 824, 827 (1998). The Board has held that it "must **refrain from reading particular phrases in isolation**, and it must not presume improper interference with employee rights." *Id.* The ALJ, General Counsel and Union have incorrectly applied Board law and read this phrase in a vacuum.

The General Counsel pointed out employees cannot be expected to read a rule like a lawyer. (GCA-11). The opposite is true here: A reasonable Hospital employee knows what the pin rule in #318 means, but the Union and General Counsel attorneys who have convoluted this case, do not.

D. CONCLUSION

The Hospital respectfully requests that the Board grant its Limited Cross-Exceptions and reverse the ALJ's Decision and Order with respect to the pin rule on employee I.D. Badges.

EPSTEIN, BECKER and GREEN, P.C.

By: _____

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FIRM:42029805v2

CERTIFICATE OF SERVICE

I hereby certify that on December 26, 2016, I E-Filed and served the attached copy of the **RESPONDENT'S REPLY BRIEF TO THE GENERAL COUNSEL'S AND CHARGING PARTY'S ANSWERING BRIEFS** submitted by Long Beach Memorial Medical Center, Inc. in Case No. 21-CA-157007 on the parties and in the manner listed below:

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Long Beach Memorial Medical Center, Inc. d/b/a Long Beach Memorial Medical Center & Miller Children's and Women's Hospital Long Beach *and* California Nurses Association/National Nurses United (CNA/NNU). Case 21–CA–157007

April 20, 2018

DECISION AND ORDER

BY MEMBERS PEARCE, MCFERRAN, AND EMANUEL

On August 31, 2016, Administrative Law Judge Jeffrey D. Wedekind issued the attached decision. The General Counsel filed exceptions, a supporting brief, an answering brief to the Respondent's cross-exceptions, and a reply brief. The Charging Party filed exceptions, a supporting brief, and an answering brief to the Respondent's cross-exceptions. The Respondent filed cross-exceptions, a supporting brief, an answering brief, and a reply brief to the General Counsel's and Charging Party's answering briefs. The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions, cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.[1]

Facts

The Respondent, Long Beach Memorial Medical Center, Inc., is an independent, non-profit subsidiary of Memorial Health Services (MHS), which does business as MemorialCare. The Respondent operates two licensed hospitals in an urban area of Long Beach, California, employing approximately 6000 employees, including over 2100 registered nurses represented by the Charging Party Union. To help maintain safety and security, the Respondent issues identification badges to all its staff, who are required to wear them visibly at all times while on hospital premises. Each badge includes a photograph of the employee, his or her name and job title, and electronic coding that provides the employee with access to authorized areas of the hospital.

The Respondent also requires that all direct care providers wear standard hospital uniforms. Registered nurses (RNs) must wear navy blue scrubs provided by the Respondent with the MHS name and logo and their RN discipline embroidered on the upper left side of the scrub top. RNs must either affix their identification badge directly to their uniform, detaching it each time it must be inspected or swiped, or attach it to a retractable string pulley connected to a badge reel. Since March 2014, the Respondent has maintained a "Dress Code and Grooming Standards" policy (Policy #318), which requires, in relevant part, that "[o]nly MHS approved pins, badges, and professional certifications may be worn." Since October 2014, the Respondent has also maintained an "Appearance, Grooming and Infection Prevention Standards for Direct Care Providers" policy (PC-261.02), which states, in relevant part, that "[b]adge reels may only be branded with MemorialCare approved logos or text." Thus, PC-261.02 prohibits employees from wearing badge reels branded with union insignia.

Discussion

We agree with the judge, for the reasons stated in his decision, that the Respondent violated Section 8(a)(1) by maintaining Policy #318's overly broad prohibition of non-approved pins and badges. Policy #318 is presumptively invalid because it is not limited to direct patient care areas of the Respondent's facility, and the Respondent failed to show special circumstances warranting the restriction. See *Healthbridge Mgmt. LLC*, 360 NLRB 937, 938 (2014), enfd. 798 F.3d 1059 (D.C. Cir. 2015).[2] However, we reverse the judge and find that the badge reel provision in PC-261.02 is unlawful because it applies to all areas of the hospital including non–patient care areas, and the Respondent has not demonstrated special circumstances justifying such an absolute prohibition on the display of union insignia on employee badge reels.

The judge found that the badge reel rule only applied in immediate patient care areas and was therefore presumptively lawful. He reasoned that PC-261.02 "is expressly limited to direct patient care providers" and its stated "purpose is to assist patients in easily identifying their direct patient care providers and to prevent hospital acquired infections." He further noted that other provisions of the policy also reference patient care or patient care areas. Our dissenting colleague endorses the judge's analysis, but in light of Board and judicial precedent, we do not.

[1] We shall modify the judge's recommended Order to include the Board's standard remedial language for the violations found, and we shall substitute a new notice to conform to the language in the Order as modified.

[2] In affirming the judge's findings with regard to Policy #318, we do not pass on whether the prohibition at issue would be lawful if it were limited to attaching non-approved pins and badges to the employee identification badges.

It is well established that employees have a protected right to wear union insignia at work in the absence of special circumstances. See *George J. London Memorial Hospital*, 238 NLRB 704, 708 (1978); *The Ohio Masonic Home*, 205 NLRB 357, 357 (1973), enfd. 511 F.2d 527 (6th Cir. 1975); see also *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 801–803 (1945). In healthcare facilities, the Board and the courts have modified this general rule due to concerns about the possibility of disruption to patient care. Restrictions on wearing union insignia in immediate patient care areas are presumptively valid. See *NLRB v. Baptist Hospital. Inc.*, 442 U.S. 773, 781 (1979). However, following the general rule, restrictions on wearing union insignia in non–patient care areas are presumptively invalid and violate the Act unless the employer establishes special circumstances justifying its action. See *Casa San Miguel*, 320 NLRB 534, 540 (1995).

As noted above, the badge reel provision of PC-261.02 states that "[b]adge reels may only be branded with MemorialCare approved logos or text." On its face, this requirement applies in all areas of the hospital, including non–patient care areas. Contrary to the judge and our dissenting colleague, neither the language of other provisions within PC-261.02 nor the stated purpose of that policy establishes that it is limited to immediate patient care areas. The fact that the rule may only apply to "direct patient care *providers*" (emphasis added) does not establish that it only applies in immediate patient care *areas*. See *George J. London Memorial Hospital*, 238 NLRB at 708 (policy prohibiting insignia other than "of a professional nature" unlawful because, on its face, policy applies outside immediate patient care areas). Direct patient care providers necessarily move throughout the hospital and spend time in non-patient care areas. For instance, policy 1 of PC-261.02 acknowledges that direct care providers are at the hospital for reasons other than providing direct patient care, such as for education and meetings. In addition, nothing in the rule precludes the Respondent from applying it to non-patient care areas, notwithstanding its stated purposes of allowing patients to identify their direct care providers and preventing infection. The fact that other provisions of PC-261.02 explicitly state they only apply in immediate patient care areas does not alter this analysis.[3] To the contrary, those provisions' explicit limitation to patient care areas further suggests that the badge reel rule, which contains no similar language, is not so limited.[4] At the very least, this language creates an ambiguity about the scope of the policy, which must be construed against the Respondent as the drafter. *Lafayette Park Hotel*, 326 NLRB 824, 828 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999). Absent special circumstances, then, the badge reel provision is unlawful.[5]

Within the healthcare setting, the Board will find special circumstances where an insignia restriction is "necessary to avoid disruption of healthcare operations or disturbance of patients." *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 507 (1978). The Board has found special circumstances justifying proscription of union insignia and apparel when their display may "jeopardize employee safety, damage machinery or products, exacerbate employee dissension, or unreasonably interfere with a public image that the employer has established, as part of its business plan, through appearance rules for its employees." *Bell-Atlantic-Pennsylvania*, 339 NLRB 1084, 1086 (2003), enfd. *Communications Workers of America, Local 13000 v. NLRB*, 99 Fed.Appx. 233 (D.C. Cir. 2004). However, "a rule that curtails employees' Section 7 right to wear union insignia in the workplace must be narrowly tailored to the special circumstances justifying maintenance of the rule, and the employer bears the burden of proving such special circumstances." *Boch Honda*, 362 NLRB No. 83, slip op. at 2 (2015), enfd. 826 F.3d 558 (1st Cir. 2016); see also *W San Diego*, 348 NLRB 372, 373–374 (2006) (special circumstances that justified employer's ban on buttons worn in public areas did not justify a ban on buttons worn in nonpublic areas).

Here, the Respondent has presented no evidence showing that employees in any way disrupted healthcare operations or disturbed patients by wearing badge reels branded with union insignia. The union-branded badge

[3] The judge cited PC-261.02's reference to the Respondent's "bare below the elbows" approach required in all patient care areas and policy 4 of PC-261.02, which states: "Hair (if below the shoulder) is to be tied back or pulled up to prevent any 'swing' into the patient area during care." The judge also cited policy 1, which allows employees to wear business casual clothing in addition to "MHS logo" attire when coming to the hospital for education or meetings, but policy 1 does not mention—much less narrow the scope of—the badge reel provision.

[4] Citing the same factors discussed above, our dissenting colleague argues that the badge reel policy should be read to apply only in immediate patient care areas. As we have explained, there is no merit to this view. Our colleague's suggestion that the Respondent's enforcement of the policy only with respect to immediate patient care areas supports his position is similarly misplaced. See *London Memorial Hospital*, supra (hospital's overbroad rule unlawful despite evidence it had only been enforced in immediate patient care areas).

[5] Our dissenting colleague argues that PC-261.02's stated scope "demonstrates that it was promulgated not to restrict employees' rights but to protect its patients" and would reasonably be read accordingly. But this argument gives too little weight to the broad language of the badge reel provision. And, of course, the Board need not find discriminatory motive in order to conclude that the policy is unlawful. Rather, the question is whether the policy as written applies outside immediate patient-care areas—which we find it does—and, if so, whether the Respondent demonstrated special circumstances, which we conclude it has not.

reels are the same size and shape as the Respondent's and similarly contain only a logo. Rather than point to any evidence of a disturbance or disruption, the Respondent, relying principally on *W San Diego*, supra, argues that PC-261.02's badge reel provision is justified because the Respondent's "business objective was to provide a standardized, easily-identifiable, customized, consistent and professional look in accordance with its business strategy of providing quality patient[] care." Contrary to the employer in *W San Diego*, the Respondent presented no evidence that its rule prohibiting union badge reels in public, non-direct patient care areas is necessary to create a unique experience distinct from its competitors. See *Boch Honda*, supra, slip op. at 2 & fn. 6. While the Respondent does require unit employees to wear a standardized uniform, a uniform requirement alone is not a special circumstance justifying a union insignia prohibition. *P.S.K. Supermarkets*, 349 NLRB 34, 35 (2007) ("The Board has consistently held that customer exposure to union insignia, standing alone, is not a special circumstance which permits an employer to prohibit display of such insignia. Nor is the requirement that employees wear a uniform a special circumstance justifying a button prohibition.") (internal citations omitted).[6]

Furthermore, the badge reel provision is not "narrowly tailored" to address the Respondent's purported concerns of providing a uniformed image of top-quality patient care. See *Boch Honda*, supra, slip op. at 3. In *Casa San Miguel*, the Board recognized that special circumstances justified a nursing home's prohibiting a nursing assistant from wearing a smock with a union slogan and emblem printed on it outside of patient care areas where it was not "practical or possible" for the employee to change out of the smock each time the employee entered a patient care area. 320 NLRB at 540. The badge reels at issue here, in contrast, are readily detachable from employees' uniforms, and nothing prevents employees from removing a union-branded badge reel and affixing the identification badge directly to the employee's uniform when entering patient care areas. See *Enloe Medical Center*, 345 NLRB 874, 876 (2005) ("That employees might find it cumbersome to remove and later put back on their badges when moving in and out of patient care areas—and might even ultimately find it impractical to do so—does not justify the Respondent's effectively deciding this for them by flatly prohibiting employees from wearing the union badges in both patient-care and nonpatient-care areas."). Accordingly, even though it would be presumptively lawful if the Respondent had restricted it solely to direct patient care areas, the Respondent's ban on employees wearing union insignia, including on their badge reels, in other areas of the hospital is unlawful.

For these reasons, we reverse the judge and find that the Respondent violated Section 8(a)(1) by maintaining PC-261.02's badge reel policy.[7]

AMENDED CONCLUSIONS OF LAW

Substitute the following for the judge's Conclusions of Law:

1. Respondent has violated Section 8(a)(1) and 2(6) and (7) of the Act by maintaining a provision in the Memorial Health Services (MHS) "Dress Code and Grooming Standards" policy, applicable to all employees, including employees in non–patient care areas, that states, "Only MHS approved pins, badges, and professional certifications may be worn."

2. Respondent has violated Section 8(a)(1) and 2(6) and (7) of the Act by maintaining a provision in the MHS "Appearance, Grooming and Infection Prevention Standards for Direct Care Providers" policy, applicable to all employees, including employees in non–patient care areas, that states, "Badge reels may only be branded with MemorialCare approved logos or text."

3. Respondent has not otherwise violated the Act as alleged in the complaint.

ORDER

The National Labor Relations Board orders that the Respondent, Long Beach Memorial Medical Center, Inc. d/b/a Long Beach Memorial Medical Center & Miller Children's and Women's Hospital Long Beach, Long Beach, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining an overly broad provision of the "Dress Code and Grooming Standards" policy that prohibits all employees, including employees in non–patient care areas, from wearing pins, badges, and professional certifications that have not been approved by Memorial Health Services (MHS).

(b) Maintaining an overly broad provision of the "Appearance, Grooming and Infection Prevention Standards for Direct Care Providers" policy that prohibits all employees, including employees in non–patient care areas,

[6] Our dissenting colleague therefore errs when he contends that the Respondent's "standardized uniform rules" alone establish special circumstances.

[7] In reversing the judge's dismissal, and finding PC-261.02's badge reel provision facially unlawful, we need not and do not pass on whether the provision was disparately enforced in violation of Sec. 8(a)(1). Such a violation would not materially affect the remedy, given our finding that the Respondent violated Sec. 8(a)(1) by maintaining the badge reel provision.

from wearing badge reels that are not branded with MemorialCare approved logos or text.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the overly broad provision of the "Dress Code and Grooming Standards" policy, or revise it to make clear that it does not prohibit employees in non–patient care areas from wearing pins, badges, and professional certifications that have not been approved by MHS.

(b) Rescind the overly broad provision of the "Appearance, Grooming and Infection Prevention Standards for Direct Care Providers" policy, or revise it to make clear that it does not prohibit employees in non–patient care areas from wearing badge reels that are not branded with MemorialCare approved logos or text.

(c) Notify all current employees that the overly broad provisions of the "Dress Code and Grooming Standards" and "Appearance, Grooming and Infection Prevention Standards for Direct Care Providers" policies have been rescinded or, if they have been revised, provide them a copy of the revised rules.

(d) Within 14 days after service by the Region, post at its Long Beach, California facility copies of the attached notice marked "Appendix."[8] Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 1, 2015.

(e) Within 21 days after service by the Region, file with the Regional Director for Region 21 a sworn certificate of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. April 20, 2018

Mark Gaston Pearce, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER EMANUEL, dissenting in part.

The Respondent is an acute-care hospital. Its principal concern is for the safety and well-being of its patients. To that end, in October 2014, it adopted an Appearance, Grooming and Infection Prevention Standards for Direct Care Providers Policy "to promote an efficient, orderly, safe and professionally operated organization while adhering to evidence-based best practice." At the beginning of the Policy, the Respondent explains that "[b]est-practice literature provides strong evidence for the attire of healthcare providers which may prevent hospital acquired infections" and "perception of patients regarding appearance and attire has been well established in the literature." It continues by noting that one of the purposes of the Policy is that "[p]atients may lack confidence and trust in individuals that are not easily identified as healthcare professionals" and "[p]romoting standard attire will assist patients in easily identifying their care providers and in promoting satisfaction." The Policy also states that "[d]ress, appearance and grooming play an important role in conveying an image of high quality, professional healthcare to the communities we serve and maintaining our excellent reputation." Thus, in accordance with the professional literature, the Respondent adopted the Policy to provide the best possible care for its patients.

Under the Policy, direct care providers must wear identification badges that can be readily seen while on hospital premises. If employees choose to use a badge reel, it "may only be branded with MemorialCare approved logos or text."[1] It is undisputed that the Re-

[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[1] "Appearance, Grooming and Infection Prevention Standards for Direct Care Providers" (PC-261.02).

spondent lawfully imposed this requirement in immediate patient care areas. Nonetheless, the General Counsel argues that the badge reel rule is unlawful because it "does not clearly state whether it is applicable to patient or non-patient care areas and any ambiguity in this regard should be construed against Respondent." The judge found this argument unpersuasive because, as discussed below, "employees would not reasonably conclude that the badge reel rule applies in non-direct patient care areas." My colleagues, however, reverse the judge and find the rule unlawful by broadly interpreting it to apply in all areas of the hospital. I respectfully disagree and would adopt the judge's finding that the mere maintenance of the badge reel rule does not interfere with the exercise of Section 7 rights in violation of Section 8(a)(1) of the Act.[2]

The Board applies special rules when evaluating restrictions on union insignia in healthcare facilities due to concerns about the possibility of disruption to patient care. Although restrictions on wearing union insignia are presumptively invalid in non-patient care areas, restrictions on wearing union insignia in immediate patient care areas are presumptively valid. See *Casa San Miguel*, 320 NLRB 534, 540 (1995); see also *NLRB v. Baptist Hospital*, 442 U.S. 773, 781 (1979). In determining the scope of a disputed rule, the Board must consider it in its entirety without parsing its language or reading parts of it in isolation. Applying these principles, and considering the Respondent's badge reel rule in context, I believe that it was lawful.

First, as noted above, the title of the Policy in which the badge reel rule appears is "Appearance, Grooming and Infection Prevention Standards for *Direct Care Providers*" (emphasis added). I believe that, because the Policy is only directed towards "direct care providers," the badge reel rule would be understood to only apply in immediate patient care areas where direct care providers work. This conclusion about the rule's limited applicability to immediate patient care areas is reinforced by the Policy's stated scope. It applies to "all those who work in any capacity *in providing direct patient care*," even students, volunteers, and contractors, which demonstrates that it was promulgated not to restrict employees' rights but to protect its patients—all of whom are necessarily located in immediate patient care areas. Second, the Policy's stated purposes further demonstrate that the badge reel rule only applies in immediate patient care areas.[3] The Policy is to prevent the transmission of hospital-acquired infections and to promote patient trust and confidence by allowing them to readily identify their care providers. Achieving these objectives is only relevant in immediate patient care areas where patients are present and receive treatment.[4] Third, there is no evidence or contention that the badge reel rule has ever been applied to employees when they are not providing direct patient care.[5] The judge further found—and my colleagues do not dispute—that the General Counsel failed to establish that the Respondent disparately enforced the badge reel rule by only prohibiting badge reels with union logos.[6]

Fourth, even if the badge reel rule were applicable in non–patient care areas, I believe that it was justified by special circumstances. The Board has found special cir-

[2] I agree with my colleagues and the judge that the Respondent violated Sec. 8(a)(1) of the Act by maintaining that portion of Policy #318 that prohibits employees from wearing unapproved pins and badges. I also agree with my colleagues that it is unnecessary to pass on whether this policy provision would be lawful if it restricted only the attachment of pins and badges to employee identification badges.

[3] The Policy's Purpose section, in pertinent part, reads as follows:

> 1. The Professional Appearance and Grooming Policy is intended to establish appropriate appearance, grooming and infection control standards for those who are direct patient care providers at Community Hospital Long Beach, Long Beach Memorial, and Miller Children's and Women's Hospital Long Beach, including off-site clinics and satellite work locations. …
>
> 2. BACKGROUND: The Medical Center is committed to the safest care of patients including the prevention AND transmission of pathogens. Best-practice literature provides strong evidence for the attire of healthcare providers which may prevent hospital acquired infections. This policy provides clear guidance on the best method to prevent contamination by attire and its potential contribution to hospital acquired infections.
>
> 3. Additionally, perception of patients regarding appearance and attire has been well established in the literature. Patients may lack confidence and trust in individuals that are not easily identified as health care professionals. Promoting standard attire will assist patients in easily identifying their care providers and in promoting satisfaction. Dress, appearance and grooming play an important role in conveying an image of high quality, professional health care to the communities we serve and maintaining our excellent reputation.

[4] My colleagues find that the badge reel rule is not limited to immediate patient care areas. In doing so, they fail to read the rule in its entirety. The rule applies only to direct patient care providers, including even nonemployees, and its stated purpose is to improve the quality of patient care. In my view, direct care providers would reasonably understand that the rule, which is solely concerned with their interactions with patients to improve patient care, does not apply in areas where there are no patients.

[5] In light of the rule's stated scope and purposes, it is understandable that the Respondent has limited its application to immediate patient care areas even though, as my colleagues observe, direct patient care providers necessarily move throughout the hospital and spend time in non–patient care areas.

[6] The judge properly found that unlawful disparate treatment is not established merely because enforcement may have sometimes been "soft and sporadic." See, e.g., *Stabilus, Inc.*, 355 NLRB 836, 840 (2010) (lax enforcement of a rule by some supervisors did not prove that an exacting supervisor's enforcement of the rule against union supporters was disparate treatment).

cumstances justifying the proscription of union slogans or apparel when their display "may jeopardize employee safety, damage machinery or products, exacerbate employee dissension, or unreasonably interfere with a public image that the employer has established, or when necessary to maintain decorum and discipline among employees." *Komatsu America Corp.*, 342 NLRB 649, 650 (2004). Here, the Respondent has established that it promulgated the badge reel rule as part of a comprehensive set of clothing and identification requirements. Employees covered by the rule are required to wear standard uniforms that display the Respondent's embroidered logo on the upper left shoulder and the Respondent's logo on the badge reel on the upper right shoulder. As noted above, these standardized uniform rules prevent infections, insure that patients can readily identify their healthcare provider, and promote "an image of high quality, professional healthcare to the communities [the Respondent] serve[s]." I believe that this evidence is sufficient to show that allowing unofficial badge reels would unreasonably interfere with the Respondent's public image. See, e.g., *W San Diego*, 348 NLRB 372, 373 (2006); *United Parcel Service*, 195 NLRB 441, 441 (1972); see also *United Parcel Service v. NLRB*, 41 F.3d 1068, 1073 (6th Cir. 1994).[7]

For these reasons, I respectfully dissent from my colleagues' finding that the Respondent violated the Act by maintaining its badge reel rule.

Dated, Washington, D.C. April 20, 2018

William J. Emanuel, Member

NATIONAL LABOR RELATIONS BOARD

[7] In finding that the Respondent did not establish special circumstances, my colleagues contrast this case with the facts in *W San Diego*, supra, where a hotel's restrictions on union insignia in public areas were found lawful based on evidence that the hotel sought to create a unique "Wonderland" atmosphere. However, I agree with the view of former Chairman Miscimarra that the Board is not empowered to pass judgment on the sophistication or novel nature of the public image that may be at issue in a particular case. See *In-N-Out Burger*, 365 NLRB No. 39, slip op. at 1 fn. 2 (2017) (separate views of Acting Chairman Miscimarra). In the *United Parcel Service* cases cited above, for example, the Board and the court upheld restrictions on the wearing of buttons and pins primarily based on the trademark brown uniforms worn by UPS employees. Similar considerations warrant upholding the restriction on badge reels at issue in this case.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain an overly broad provision of our "Dress Code and Grooming Standards" policy that prohibits all employees, including employees in non–patient care areas, from wearing pins, badges, and professional certifications that have not been approved by MHS.

WE WILL NOT maintain an overly broad provision of our "Appearance, Grooming and Infection Prevention Standards for Direct Care Providers" policy that prohibits all employees, including employees in non–patient care areas, from wearing badge reels that are not branded with MemorialCare approved logos or text.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind the overly broad provision of the "Dress Code and Grooming Standards" policy or revise it to make clear that it does not prohibit employees in non–patient care areas from wearing pins, badges, and professional certifications that have not been approved by MHS, and WE WILL notify all employees that the policy provision has been rescinded or revised.

WE WILL rescind the overly broad provision of the "Appearance, Grooming and Infection Prevention Standards for Direct Care Providers" policy or

revise it to make clear that it does not prohibit employees in non–patient care areas from wearing badge reels that are not branded with MemorialCare approved logos or text, and WE WILL notify all employees that the policy provision has been rescinded or revised.

LONG BEACH MEMORIAL MEDICAL CENTER, INC., D/B/A LONG BEACH MEMORIAL MEDICAL CENTER & MILLER CHILDREN'S AND WOMEN'S HOSPITAL LONG BEACH

The Board's decision can be found at www.nlrb.gov/case/21-CA-157007 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Lindsay Parker and *Molly Kagel, Esqs.*, for the General Counsel.
Adam Abrahms and *Kathleen Paterno, Esqs. (Epstein Becker & Green, P.C.)*, for Respondent.
Micah Berul, Esq., for Charging Party.

DECISION

JEFFREY D. WEDEKIND, Administrative Law Judge. The complaint in this case challenges two employee dress code and appearance rules at Long Beach Memorial Medical Center and Miller Children's and Women's Hospital. The rules prohibit employees from wearing a nonapproved pin or badge reel. The General Counsel alleges that, on their face, the rules violate Section 8(a)(1) of the National Labor Relations Act because they are not expressly limited to immediate patient care areas and restrict the ability of employees to engage in protected conduct (wearing union pins and badge reels).

The General Counsel also alleges that Respondent violated Section 8(a)(1) of the Act by disparately enforcing the badge reel rule. Specifically, the General Counsel alleges that Respondent prohibited two registered nurses, who served as union representatives in their medical units, from wearing a badge reel with the union logo in patient care areas, while permitting nurses to wear other badge reels in such areas that did not have the approved logo.

A hearing to address the allegations was held on May 23 and 24, 2016, in Los Angeles. The parties thereafter filed briefs on July 20. As discussed below, the General Counsel has adequately established that the pin rule is facially unlawful, but not that the badge reel rule is facially unlawful or has been disparately enforced.

I. FACTUAL BACKGROUND

Respondent is a large urban medical facility. It includes two licensed hospitals and employs about 6000 employees, including over 2100 registered nurses (RNs) represented by the California Nurses Association/National Nurses United (CNA/NNU).[1]

To help maintain safety and security at the facility, Respondent employs its own security force, including 70 security guards and three K-9 units. Since at least 2012, it has also required all staff to wear an "ID badge" visible at all times while on the job. The ID badge displays the employee's photo, name, and title and is coded electronically to allow the employee appropriate and necessary access to hospital and parking areas by swiping it across an electronic panel. Some badges also have a color-coded stripe across them; for example, RNs have a blue stripe, and employees authorized to remove infants and children from their room or unit have a pink stripe, across their ID badge. (R. Exh. 3; Tr. 109–110, 200–201.)[2]

Since March 2014, Respondent has also maintained a "dress code and grooming" policy for all employees who work at the facility, including but not limited to those who wear uniforms. The policy (#318), which is published on Respondent's intranet, was adopted and established by Memorial Health Services d/b/a MemorialCare Health System (MHS), Respondent's parent corporation. The policy sets forth standards of "appropriate dress, appearance, and grooming" to "promote an efficient, orderly and professionally operated organization" at all MHS facilities.

The policy also lists several "examples of minimum requirements." Consistent with the security policy, the first requirement is that all employees must wear their "identification badges" with the name and picture facing out, at a level that can be readily seen. Other requirements address such things as hair (no "extreme styles or colors" allowed), and earrings or other jewelry (must be "conservative," nondangling, and not "prove to be a distraction to others").

The last requirement (#9) is the subject pin rule, which states, "Only MHS approved pins, badges, and professional certifications may be worn." Under this rule, RNs are permitted to clip various small pins to the top of the badge, including years of service pins and "I Give" pins (indicating that they donate to the medical center) issued by Respondent, and certification pins issued by professional associations or organizations

[1] There is no dispute, and the record establishes, that the Board has jurisdiction.

[2] Specific citations to the record are provided to aid review, and are not necessarily exclusive or exhaustive. In making credibility findings, all relevant factors have been considered, including the interests and demeanor of the witnesses; whether their testimony is corroborated or consistent with the documentary evidence and/or the established or admitted facts; inherent probabilities; and reasonable inferences that may be drawn from the record as a whole. See, e.g., *Daikichi Corp.*, 335 NLRB 622, 633 (2001), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003); and *New Breed Leasing Corp. v. NLRB*, 111 F.3d 1460, 1465 (9th Cir.), cert. denied 522 U.S. 948 (1997).

indicating that they have been certified in a particular specialty (e.g., pediatric nursing). (GC Exhs. 3, 20–21; Tr. 38, 65–67, 127–131; 209–211, 265–266.)[3]

Since October 2014, Respondent has also maintained two new policies applicable only to employees who provide direct patient care at the facility. Both of these policies are likewise published on Respondent's intranet. The first is a "uniform and infection prevention" policy (PC–261.01), which establishes standards of attire to assist patients in easily identifying their care providers and to prevent hospital acquired infections. It requires direct care providers to wear a standard hospital uniform, color coded by discipline and embroidered with the approved logo and their discipline when on duty. Pursuant to this new policy, RNs who provide direct patient care may no longer wear scrubs of any color or pattern. Rather, they must wear navy blue scrubs provided by Respondent with the MHS name and logo (a medical cross in a circle design) and their discipline (RN) embroidered in white on the upper left side of the scrub top.

To help prevent infections, the policy also establishes a "bare below the elbows" rule. The rule prohibits RNs and other direct care providers from wearing such things as long-sleeved jackets or wristwatches in direct patient care areas. It also specifically prohibits them from wearing lanyards around their neck to attach and extend their ID badge for inspection or swiping. As a result, RNs must either attach the badge to a retractable badge reel or attach and detach the badge directly to and from their uniform. (GC Exh. 5; see also GC Exh.7; and Tr. 51, 78, 202–205, 233, 249.)

The second new policy applicable to direct patient care providers is an "appearance, grooming, and infection prevention" policy (PC–261.02). Like the new uniform and infection prevention policy, it establishes standards of appropriate appearance for those employees who provide direct patient care in order to assist patients in easily identifying them and to prevent hospital acquired infections. Indeed, it references and repeats portions of that policy. For example, it contains a similar "bare below the elbows" rule. It also sets forth numerous specific appearance and grooming requirements. For example, like the MHS policy, it states that "identification badges" shall be worn with the name and picture facing forward. It specifically adds, however, that the badges must be worn at collar level, on the right side, so they can be readily seen. Pursuant to this rule, the new RN uniform has a small piece of fabric sown onto the scrub top on the right side so that the badge reel or badge itself can be attached to it with a clip.

The policy also includes the subject badge reel rule (#12), which states, "Badge reels may only be branded with MemorialCare approved logos or text."[4] Pursuant to this rule, Respondent provided each RN and other direct care provider with a new badge reel displaying the same MHS medical-cross logo as the uniform. At least some received the new MHS badge reel with their new uniform order in November or December 2014. Others received it directly from their managers. Respondent also provided a replacement on request if the badge reel broke, which it often did. Indeed, Respondent had its vendor modify the construction of the badge reel twice in the first 6 months to make it more durable. (GC Exhs 6, 8; R. Exhs. 10–13; Tr. 85–86, 113, 148–149; 238–240, 294–298.)

Finally, all of the foregoing policies state that it is the responsibility of the supervisors to "consistently enforce compliance" with the standards and requirements by taking appropriate corrective or disciplinary action with employees who violate them.[5]

II. ALLEGED UNFAIR LABOR PRACTICES

A. Alleged Unlawful Maintenance of the Pin and Badge Reel Rules

It is well established that, absent special circumstances, employees have a right under the Act to wear union insignia at work. However, due to concerns about disrupting patient care, the Board has adopted certain rules unique to healthcare facilities. In such facilities, a ban on wearing any nonofficial insignia in immediate patient care areas is presumptively valid.[6] However, restrictions on wearing insignia in other areas are presumptively invalid. A hospital or other healthcare facility must therefore establish special circumstances justifying such restrictions; specifically, that the restrictions are necessary to avoid disruption of healthcare operations or disturbance of patients. See *HealthBridge Management, LLC,* 360 NLRB 937 (2014), enfd. 798 F.3d 1059 (D.C. Cir. 2015); and *Washington State Nurses Assn. v. NLRB*, 526 F.3d 577, 580 (9th Cir. 2008), and cases cited there.

Here, the General Counsel contends that Respondent's pin and badge reel rules on their face apply—or would reasonably be construed by employees to apply—even in non-direct patient care areas of the facility; that the rules are therefore presumptively invalid; and that Respondent has failed to establish special circumstances justifying the application of the rules to such areas.

1. The Pin Rule

As indicated above, the MHS dress code and grooming policy containing the pin rule applies to all employees, including non-direct patient care providers.[7] Thus, it is clear that the pin

[3] Policy #318 was modified in certain respects in July 2014; for example, a requirement was added stating that "clothing must cover the back, shoulders, thighs, midriff, and must not be excessively short, tight, or revealing" (GC Exh. 4.) However, the pin rule was retained without change.

[4] This is the only rule where badge reels are specifically addressed. There is no mention of badge reels in the MHS dress code and grooming policy or Respondent's uniform policy.

[5] The subject pin and badge reel rules were apparently adopted and implemented without the Union's agreement. See Tr. 308–310. There is no contention that the Union waived the RNs' right under the Act to wear union insignia in non-direct patient care areas. See generally *AT&T*, 362 NLRB No. 105, slip op. at 5 (2015).

[6] The presumption of validity applies only to a ban on all nonofficial insignia in immediate patient care areas; it does not apply to a selective ban on only union or certain union insignia. *St. Johns Health Center*, 357 NLRB 2078, 2076, 2079 & fn. 3 (2011).

[7] Judith Fix, Respondent's senior vice president of patient care services and chief nurse officer, testified that the MHS policy applies *only* to non-direct patient care providers, as that policy was superseded by Respondent's subsequent policies applicable to direct patient care providers (Tr. 217–218). However, she later testified that direct patient

rule is not limited to direct patient care areas of the facility. Accordingly, the rule is presumptively invalid, and Respondent must show that the restriction on any employees wearing nonapproved pins in non-direct patient care areas is necessary to avoid disruption of its operations or disturbance of patients.

Respondent has failed to make the required showing. Respondent argues that the ban on wearing nonapproved pins on ID badges in all areas is justified because ID badges are part of the hospital safety and security protocol (Br. 39–42, 46–47). However, there is no substantial evidence indicating that *pins* are part of the safety and security protocol. As indicated above, the pin rule is set forth exclusively in the MHS dress code and grooming policy. Cf. *Boch Honda,* 362 NLRB No. 83, slip op. at 3 (2015), enfd. --- F.3d ---, 2016 WL 3361733, at *14 (1st Cir. June 17, 2016) (rejecting employer's assertion that its ban on unofficial pins was necessary for safety purposes, as the ban was contained in the "dress code and personal hygiene policy," which did not include any statement linking it to safety). Further, employees are permitted under the rule to wear a variety of pins on their badge in addition to professional certifications, including "I Give" pins distributed by Respondent. Cf. *London Memorial Hospital*, 238 NLRB 704, 709 (1978) (rejecting hospital's contention that its ban on nonprofessional insignia was imperative for patient care, given that the hospital encouraged employees to wear "I Care" buttons). Finally, Judith Fix, who as noted above is Respondent's senior vice president of patient care services and chief nurse officer, acknowledged that there is no limit to how many pins employees can wear on their ID badge, as long as the badge remains readable (Tr. 267).[8]

In any event, the rule on its face is not limited to wearing nonapproved pins on ID badges. Respondent argues that "no reasonable employee would read, in the context of the whole, the challenged [rule] as restricting the wearing of pins anywhere except for on an employee's ID badge" (Br. 48). However, Respondent cites no provision in its dress code and grooming policy or other policies that would reasonably be interpreted by employees to narrow the otherwise broad restriction to only badge pins.

Respondent also argues that there is no explicit ban on wearing union insignia in the policy; thus, "when read in the context of the whole," the rule "would not make a reasonable employee think they were prohibited from wearing union insignia" (Br. 50). However, on its face, the ban on all nonapproved pins would include union pins. Cf. *Albertsons, Inc.,* 351 NLRB 254, 256–257 (2007) (employer's restriction on wearing badges or pins other than name badges on its face covered union badges and pins of all types and sizes). And, again, Respondent cites no specific provision that would reasonably be interpreted by employees to narrow the otherwise broad restriction to only nonapproved pins other than union pins.

Citing Fix's testimony, Respondent also argues that employees are not prohibited from displaying union insignia in other ways while working at the facility. Fix testified that Respondent does not prohibit non-direct patient care employees, who are not required to wear a standard uniform, from wearing other items, such as jackets, lanyards, earrings, and necklaces, that display union or other insignia. Indeed, she testified that even uniformed direct care providers may display the union logo on earrings and necklaces, and could also tattoo it on their forearm or paint it on their fingernails.[9] However, there is no evidence that Respondent has communicated this to employees (other than by not explicitly prohibiting it).[10] Nor is there any evidence that Respondent's employees have regularly or routinely displayed union or other logos in such a manner at the facility during the relevant period. To the extent Respondent's brief (pp. 21–22) suggests otherwise, it is incorrect.

In any event, Respondent's burden is not satisfied simply by showing that all possible alternatives to union pins are not likewise expressly banned. Rather, as indicated above, Respondent must show special circumstances justifying the ban on union pins. This is illustrated by the very cases Respondent cites. For example, in *Albis Plastics*, 335 NLRB 923 (2001), enfd. 67 Fed. Appx. 253 (5th Cir. 2003), the Board upheld the employer's ban on nonapproved helmet stickers because the employer had shown that union or other nonapproved stickers on the employees' helmets would pose a threat to safety. The same was true in *Standard Oil Co. of California*, 168 NLRB 153 (1967). Although in both cases employees were free to display union insignia elsewhere on their clothing, the Board did not rely on this as a basis for upholding the helmet sticker ban in *Albis*, and cited it only as an additional ("furthermore") reason for upholding the similar ban in *Standard Oil*.

Respondent also argues that there is no evidence that any employee was actually prohibited from wearing a union pin.[11] However, in the absence of special circumstances, requiring management preapproval is itself an unlawful interference with

care providers are still prohibited by the appearance policy from wearing nonapproved pins on their badge or when in uniform (Tr. 250–251, 265–266, 271). Further, she acknowledged that the source of that prohibition is the MHS policy (Tr. 276).

[8] The General Counsel argues that Respondent has also permitted employees, particularly those in the pediatric units, to wear pins with cartoon characters on their badge, such as Ariel the Mermaid, Mickey Mouse, and Bugs Bunny. In support, the General Counsel cites the testimony of RN/Union Representative Brandy Welch and former RN/Union Representative Theresa Stewart, who retired in January 2016 (Tr. 65, 74, 126). However, as indicated by Respondent, their testimony is too vague and insubstantial to establish that employees have worn such pins with any regularity or frequency, or that Respondent has permitted them to do so expressly or impliedly through lax enforcement of the pin rule.

[9] See Fix's testimony, Tr. 218, 261–263. The MHS and Respondent dress code, grooming, and appearance policies prohibit visible tattoos except for employees with direct patient care responsibilities who, for infection control purposes, are not allowed to wear any clothing below the elbows to cover such a tattoo. Thus, the written policies appear to prohibit employees in non-direct patient care areas from displaying a union tattoo on their forearm.

[10] As indicated above, the MHS dress code and grooming policy requires earrings and other accessories and jewelry to be "conservative" and not "distracting."

[11] There is no evidence that employees have worn union pins while working during the relevant period. RN Welch, who as noted above is a union representative and has worked at the facility for 18 years, testified that she had seen a union pin on an employee's ID badge; however, she was not sure when or if it was during the past 2 years (Tr. 73–74).

employee rights under the Act, as the requirement may chill employees from exercising those rights. See *Lily Transportation Corp.,* 362 NLRB No. 54, slip op. at 6 (2015); and *Middletown Hospital Assn.*, 282 NLRB 541, 552–553 (1986), and cases cited there. As discussed above, Respondent has failed to show special circumstances.

Finally, Respondent argues that there was no actual approval process for pins at the facility, citing Fix's testimony that "MHS approved pins" really means "MHS distributed pins" (Tr. 273). However, as Fix acknowledged, the rule does not say that. Nor is there a substantial evidentiary basis to conclude that employees would reasonably interpret the rule to mean that. In any event, even if they did, and therefore knew for certain that union pins could not be worn, the resulting chilling effect on their rights would be no less.

2. The Badge Reel Rule

As indicated above, unlike the MHS policy, Respondent's appearance, grooming, and infection prevention policy containing the badge reel rule is expressly limited to direct patient care providers. Nevertheless, the General Counsel argues that, like the pin rule, the badge reel rule is facially unlawful because it "does not clearly state whether it is applicable to patient or non-patient care areas and any ambiguity in this regard should be construed against Respondent" (Br. 24).[12]

The argument is unpersuasive. It is true that ambiguities in employee conduct rules are construed against the employer. See, e.g., *Valley Health System LLC*, 363 NLRB No. 178, slip op. at 1 (May 5, 2016); and *Lafayette Park Hotel*, 326 NLRB 824, 828 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999). However, a rule is not ambiguous merely because it *could be* interpreted to apply to protected activity; the test is whether employees *would* reasonably interpret it to apply to such activity. *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647–648 (2004).

Here, employees would not reasonably conclude that the badge reel rule applies in non-direct patient care areas. Respondent's appearance, grooming, and infection prevention policy clearly states that its purpose is to assist patients in easily identifying their direct patient care providers and to prevent hospital acquired infections. Further, although the badge reel rule does not itself reference patient care or patient care areas, some of the other provisions and rules do. See p. 1, purpose #4 (bare-below-elbows approach is intended to prevent infection in "patient care areas"), and p. 2, policy #4 (long hair must be tied back or pulled up "during care").

Moreover, the policy specifically provides (p. 2, policy #1) that employees who come into the hospital for education or meetings, rather than to provide patient care, may wear "business casual" attire instead of "MHS logo" attire. And there is no contention or evidence that the badge reel rule has ever been applied to employees when they are not providing direct patient care. Cf. *Mt. Clemens General Hospital,* 335 NLRB 48, 50–51 (2001), enfd. 328 F.3d 837 (6th Cir. 2003) (hospital's ban on a particular union button protesting forced overtime was overbroad because supervisors required RNs to remove the button at times when they were in non-patient care areas, such as nurses lounges).[13]

B. Alleged Disparate Enforcement of the Badge Reel Rule

Even if an employer's rule is facially lawful, the disparate enforcement of that rule against union or other protected concerted activity violates the Act. See, e.g., *Shelby Memorial Home*, 305 NLRB 910, 919 (1991), enfd. 1 F.3d 550, 565 (7th Cir. 1993) (nursing home's selective enforcement of its rule restricting pins or badges against union insignia but not other insignia was unlawful). See also *Stabilus, Inc.*, 355 NLRB 836, 839 (2010); and *Nestle Co.,* 248 NLRB 732, 737 (1980), affd. mem. 659 F.2d 252 (D.C. Cir. 1981). The General Counsel alleges that such disparate enforcement occurred here when Respondent refused to allow two RNs, Brandy Welch and Theresa Stewart, to continue wearing a union badge reel in July and October 2015, respectively. As discussed below, however, the evidence fails to adequately support this allegation as well.

As noted above, both Welch and Stewart were union representatives for their respective medical units during the relevant period. It is undisputed that, notwithstanding the new appearance policy, they both regularly wore a union badge reel during much or most of 2015 without incident. The union badge reel was identical in size, shape, and function to the MHS badge reel. The only significant difference was that the face displayed the union (CNA) logo rather than the MHS logo and was encased in red rather than white plastic. Welch testified that she began wearing the union badge reel in February 2015, after the first MHS badge reel she was given broke. Stewart testified that she began wearing the union badge reel well before the new rule, and resumed doing so shortly after the new rule when her first MHS badge reel likewise broke. Elizabeth Castillo, another RN/union representative who works in the diabetes medical surgical unit, [14] testified that she also wore a union

[12] The allegation that the badge reel rule is facially unlawful was added to the complaint on the first day of hearing, after Respondent's counsel cited it in his opening statement and the General Counsel's first witness, Respondent's HR Director and custodian of records, testified about it. The General Counsel explained the delay in alleging the violation on the ground that the Regional Office was previously unaware of the rule. Respondent disputed this, asserting that the rule was quoted in the position statement it filed during the Region's investigation of the Union's charge, and therefore objected to adding the allegation. Respondent renews this objection in its posthearing brief (p. 30 fn. 30), and requests that the allegation be stricken. The request is denied, essentially for the same reasons that the General Counsel's amendment was granted (Tr. 47–48). Even if Respondent had informed the General Counsel of the badge reel rule during the investigation of the other allegations, the allegation that the rule is facially unlawful is closely related to the complaint allegation that Respondent disparately required RNs to remove the union badge reel; the new allegation was added early in the hearing during the General Counsel's case in chief; and Respondent does not assert that it was denied sufficient time to prepare its defense or otherwise suffered any prejudice.

[13] As discussed infra, RN Welch was just outside the patient care area when she was told to remove her union badge reel. However, she was on her way into that area. See Tr. 58, 304, and GC Br. 17. And the General Counsel does not cite this incident as evidence that the badge reel rule was applied outside immediate patient care areas.

[14] There are about 50 union representatives at Respondent's facility (Tr. 315–316). There is no record evidence whether the other 47 likewise wore union badge reels or were told to remove them.

badge reel throughout most of 2015. (Tr. 54–55, 75–76, 85, 88, 115, 170–171; GC Exh. 10.)

Eventually, in July 2015, Welch was told by the clinical director of her pediatric unit, Colleen Coonan, that she could no longer wear the union badge reel. Welch had been talking with Coonan and another manager just outside the pediatric unit door about a grievance matter. As Welch was leaving the conversation to enter the unit, Coonan told her that she could not wear the badge reel, she had to wear the MHS badge reel. (Tr. 58, 304.) About 3 months later, in October 2015, Stewart was likewise told to remove her union badge reel by one of the two assistant unit managers in her outpatient surgery unit, Robin Johnson. Stewart was caring for a patient when Johnson entered the room, gave her an MHS badge reel, and told her she needed to wear it under the new policy. About 2 months later, in December 2015, Castillo was also told by a manager that she had to wear the MHS badge reel.[15] (Tr. 115–117, 149, 170–171, 283–284.)[16]

The parties presented conflicting testimony regarding whether RNs and other direct care providers were allowed to continue wearing other types of non-MHS badge reels during the relevant period. For example, Fix, who is responsible for all patient care, testified that the MHS badge reel is considered part of the standard uniform and that no other type of badge reel is permitted. Further, she testified that she has never seen anyone wearing a non-MHS badge reel, even though she frequently observes and interacts with the staff during her multiple daily rounds in the patient care units and has seen other violations such as clothing below the elbows. (Tr. 233, 239, 247–248, 264).

Coonan likewise testified that the MHS badge reel is part of the uniform. She testified that she told the staff in her unit this at the time the new rule was implemented, and that she thereafter reminded anyone she saw who was not wearing the MHS badge reel. She testified that, other than Welch, she has had to remind only about four employees of the rule, whom she observed during daily "huddles" between June and September 2015 wearing a badge reel with Hello Kitty, a frog, or a princess on it. (Tr. 295, 299–305.)

Johnson similarly testified that she looked for anyone without an MHS badge reel, because the hospital director told the assistant unit managers to distribute the MHS badge reels in accordance with the policy. She testified that, in addition to Stewart, she saw only one other RN without the MHS badge reel, and that she gave her one too. Moreover, she testified that she did not even notice what kind of badge reels they were wearing, only that they were not the MHS badge reel. (Tr. 284–285.)

The General Counsel's witnesses, on the other hand, painted a distinctly different picture. Welch testified that she was unaware until the July 2015 incident with Coonan that only the MHS badge reel was allowed. Further, she testified that both before and after that incident she saw other RNs wearing badge reels with cartoon characters (Ariel the Mermaid, Spiderman, Sponge Bob, Mickey Mouse, and Batman), badge reels decorated with jewelry, and badge reels with logos for breast cancer research and organ donation (One Legacy). She testified that she saw RNs wearing such badge reels daily, including on the patient care floor, and was not aware of any manager asking that they be removed. (Tr. 58–59, 60, 64, 76, 95–96.) She also submitted a photograph she took in July 2015 (the same day as the incident with Coonan) of another RN working on her unit who was wearing a One Legacy badge reel (GC Exh. 13).[17]

Similarly, Stewart testified that she had never been instructed to wear the MHS badge reel prior to the October 2015 incident with Johnson; that it was merely recommended to be worn. She further testified that, after the incident until her retirement in January 2016, she saw nurses wearing "I Give" badge reels, badge reels with logos for the Oncologic Nurse Society (ONS), Vascular Access Certification (VAC), and Care Ambulance (an ambulance service used by the hospital), badge reels with decorative flowers (made out of the plastic safety tops of vials), and badge reels with nothing at all on them. Like Welch, she testified that she did not see any nurses being told to remove such badge reels. (Tr. 118–125.) She also submitted three photographs she took during that period. See GC Exh. 16 (close up of a VAC badge reel on an RN's uniform); GC Exh. 18 (close up of a plain black badge reel on an RN's uniform); and GC Exh. 19 (close up of an "I Give" badge reel on an RN's uniform).[18]

Castillo testified that she has also seen RNs wearing other badge reels notwithstanding the new policy. Like Welch and Stewart, she testified that she has seen One Legacy badge reels, badge reels with cartoon characters, and badge reals that say nothing at all. She has also seen badge reels covered in rhinestones, and badge reels that say PACU (one of the units in the hospital). She testified that she has seen RNs wearing such badge reels on the patient care floor, even during the past 6 months, and that no one to her knowledge said they had to be removed. (Tr. 162–164, 180.) She also submitted a photo she took on her unit floor in May 2016. See GC Exh. 23 (RN badge attached to a heart-shaped badge reel covered with rhinestones).

None of the foregoing testimony, by either the Respondent's or the General Counsel's witnesses, was particularly credible or persuasive. For example, it seems highly unlikely, based on the record as a whole (including the undisputed fact that the MHS badge reels frequently broke), that Fix has never noticed any RNs or other direct care providers wearing a non-MHS badge reel, and that Johnson has seen only one RN in addition to Stewart wearing a non-MHS badge reel. There is also reason to doubt Johnson's testimony that she did not notice or know what type of badge reel Stewart was wearing. As discussed above,

[15] Unlike the July and October incidents involving Welch and Stewart, this December incident involving Castillo is not alleged as a violation in the complaint.

[16] Coonan and Johnson are admitted supervisors of Respondent.

[17] Welch also submitted a photo she took the same day of an RN wearing a badge reel with Ariel the Mermaid on it. However, the RN was not in uniform or working in a direct patient care area at the time. (GC Exh. 12; Tr. 61, 94–95).

[18] The three photos do not show the RN's face or badge and Stewart did not otherwise identify them.

Stewart was a union representative and had been wearing the CNA badge reel for months.

However, there is also substantial reason to discount the testimony of Welch, Stewart, and Castillo. As indicated above, Respondent employs thousands of RNs and other direct care providers. Yet, not one confirmed personally wearing a cartoon-character or other type of non-MHS badge reel during the relevant period (none were called or subpoenaed to testify). Further, between the three of them, Welch, Stewart, and Castillo could offer only five photographs purporting to show an RN wearing a non-MHS badge reel in a patient care area. No explanation for this was given and none is obvious. According to their testimony, their fellow RNs are unafraid to openly wear nonapproved badge reels in front of their supervisors on a daily basis. And it is undisputed that Respondent has never actually disciplined an RN or other direct patient care provider for violating the badge reel rule or any of the other new uniform and appearance rules.

Moreover, as discussed above, Welch, Stewart, and Castillo admitted that Respondent did not tell them to remove their union badge reels until approximately 6, 9, and 11 months, respectively, after they began wearing them. On its face, this seems inconsistent with the theory that Respondent more strictly enforced the rule against union badge reels. Cf. *University of Richmond*, 274 NLRB 1204, 1210 (1985) (finding no disparate enforcement in part because a union supporter was asked to remove her union button only twice even though she wore it throughout the organizing campaign); and *Hanes Hosiery, Inc.*, 219 NLRB 338, 346–347 (1975) (finding no disparate enforcement in part because the employer did not prohibit all of the employees from wearing union buttons). And neither the General Counsel nor the Union offers a rationale for disregarding it.

All things considered, therefore, the truth is likely in the middle: some, but not many, of the RNs and other direct patient care providers have worn non-MHS badge reels at various times since the new rule became effective, and Respondent's enforcement of the new rule has been soft and sporadic, but not selective against union badge reels. Accordingly, as this falls short of a disparate-enforcement violation, the General Counsel has failed to carry the burden of proof.[19]

CONCLUSIONS OF LAW

1. Respondent has violated Sections 8(a)(1) and 2(6) and (7) of the Act by maintaining a rule, set forth in the MemorialCare Health System (MHS) dress code and grooming policy applicable to all employees, including employees in non-direct patient care areas, which states, "Only MHS approved pins, badges, and professional certifications may be worn."

2. Respondent has not otherwise violated the Act as alleged in the complaint.

REMEDY

The appropriate remedy for the violation found is an order requiring Respondent to cease and desist from its unlawful conduct and to take certain affirmative action. Specifically, Respondent will be required to rescind the unlawful MHS rule at its facility and to advise the employees that it has done so.[20] Respondent will also be required to post a notice to employees assuring them that it will not violate their rights in the same or any like or related manner in the future.

ORDER

The Respondent, Long Beach Memorial Medical Center, Inc., d/b/a Long Beach Memorial Medical Center & Miller Children's and Women's Hospital Long Beach, its officers, agents, succesors, and assigns, shall

1. Cease and desist from

(a) Maintaining a rule at its facility that prohibits all employees, including employees in non-direct patient care areas, from wearing any pins, badges, and professional certifications that have not been approved by MemorialCare Health System (MHS).

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the rule at its facility, set forth in the MHS dress code and grooming policy applicable to all employees, which states, "Only MHS approved pins, badges, and professional certifications may be worn."

(b) Publish on its intranet and distribute to all of its current employees a revised policy that does not contain the unlawful rule or that contains a lawfully worded rule.

(c) Within 14 days after service by the Region, post at its facility in Long Beach, California copies of the attached notice marked "Appendix".[21] Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates

[19] The two cases cited in the General Counsel's and the Union's posthearing briefs—*Raley's Inc.*, 311 NLRB 1244, 1245 (1993) and *Holyoke Visiting Nurses Assn.*, 313 NLRB 1040, 1047 (1994)—are factually distinguishable for the reasons indicated above. They also lack any precedential weight, as no exceptions were filed in either case to the relevant ALJ findings regarding disparate enforcement. See generally *Operating Engineers Local 39 (Mark Hopkins Intercontinental Hotel)*, 357 NLRB 1683 fn. 1 (2011); and *Trump Marina Associates LLC*, 354 NLRB 1027 fn. 2 (2009), reaffd. 355 NLRB 585 (2010), enfd. 435 Fed.Appx. 1 (D.C. Cir. 2011).

[20] The complaint does not name MHS as a party respondent and neither the General Counsel nor the Union request an order requiring MHS to rescind the rule set forth in its policy or to take any other affirmative action at its other facilities.

[21] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 1, 2015.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.[22]

Dated, Washington, D.C., August 31, 2016

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain a rule at our facility that prohibits all of our employees, including employees in non-direct patient care areas, from wearing any pins, badges, and professional certifications that have not been approved by MemorialCare Health System (MHS).

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL rescind the rule at our facility, set forth in the MHS dress code and grooming policy applicable to all employees, which states, "Only MHS approved pins, badges, and professional certifications may be worn."

WE WILL publish on our intranet and distribute to all current employees a revised policy that does not contain the unlawful rule or that contains a lawfully worded rule.

LONG BEACH MEMORIAL MEDICAL CENTER, INC., D/B/A LONG BEACH MEMORIAL MEDICAL CENTER & MILLER CHILDREN'S AND WOMEN'S HOSPITAL LONG BEACH

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/21-CA-157007 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

[22] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Long Beach Memorial Medical Center, Inc. d/b/a Long Beach Memorial Medical Center & Miller Children's and Women's Hospital Long Beach *and* California Nurses Association/National Nurses United (CNA/NNU). Case 21–CA–157007

EPSTEIN BECKER & GREEN

JUN 25 2018

CORRECTION

On April 20, 2018, the National Labor Relations Board issued a Decision and Order in the above-entitled proceeding in which the Amended Conclusions of Law were incorrect. Accordingly, the decision is now corrected to show the proper Amended Conclusions of Law as of the issuance date.

Please substitute this decision with the one previously issued.

Dated Washington, D.C. June 20, 2018

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Long Beach Memorial Medical Center, Inc. d/b/a Long Beach Memorial Medical Center & Miller Children's and Women's Hospital Long Beach *and* California Nurses Association/National Nurses United (CNA/NNU). Case 21–CA–157007

April 20, 2018

DECISION AND ORDER

BY MEMBERS PEARCE, MCFERRAN, AND EMANUEL

On August 31, 2016, Administrative Law Judge Jeffrey D. Wedekind issued the attached decision. The General Counsel filed exceptions, a supporting brief, an answering brief to the Respondent's cross-exceptions, and a reply brief. The Charging Party filed exceptions, a supporting brief, and an answering brief to the Respondent's cross-exceptions. The Respondent filed cross-exceptions, a supporting brief, an answering brief, and a reply brief to the General Counsel's and Charging Party's answering briefs. The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions, cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.[1]

Facts

The Respondent, Long Beach Memorial Medical Center, Inc., is an independent, non-profit subsidiary of Memorial Health Services (MHS), which does business as MemorialCare. The Respondent operates two licensed hospitals in an urban area of Long Beach, California, employing approximately 6000 employees, including over 2100 registered nurses represented by the Charging Party Union. To help maintain safety and security, the Respondent issues identification badges to all its staff, who are required to wear them visibly at all times while on hospital premises. Each badge includes a photograph of the employee, his or her name and job title, and electronic coding that provides the employee with access to authorized areas of the hospital.

The Respondent also requires that all direct care providers wear standard hospital uniforms. Registered nurses (RNs) must wear navy blue scrubs provided by the Respondent with the MHS name and logo and their RN discipline embroidered on the upper left side of the scrub top. RNs must either affix their identification badge directly to their uniform, detaching it each time it must be inspected or swiped, or attach it to a retractable string pulley connected to a badge reel. Since March 2014, the Respondent has maintained a "Dress Code and Grooming Standards" policy (Policy #318), which requires, in relevant part, that "[o]nly MHS approved pins, badges, and professional certifications may be worn." Since October 2014, the Respondent has also maintained an "Appearance, Grooming and Infection Prevention Standards for Direct Care Providers" policy (PC-261.02), which states, in relevant part, that "[b]adge reels may only be branded with MemorialCare approved logos or text." Thus, PC-261.02 prohibits employees from wearing badge reels branded with union insignia.

Discussion

We agree with the judge, for the reasons stated in his decision, that the Respondent violated Section 8(a)(1) by maintaining Policy #318's overly broad prohibition of non-approved pins and badges. Policy #318 is presumptively invalid because it is not limited to direct patient care areas of the Respondent's facility, and the Respondent failed to show special circumstances warranting the restriction. See *Healthbridge Mgmt. LLC*, 360 NLRB 937, 938 (2014), enfd. 798 F.3d 1059 (D.C. Cir. 2015).[2] However, we reverse the judge and find that the badge reel provision in PC-261.02 is unlawful because it applies to all areas of the hospital including non–patient care areas, and the Respondent has not demonstrated special circumstances justifying such an absolute prohibition on the display of union insignia on employee badge reels.

The judge found that the badge reel rule only applied in immediate patient care areas and was therefore presumptively lawful. He reasoned that PC-261.02 "is expressly limited to direct patient care providers" and its stated "purpose is to assist patients in easily identifying their direct patient care providers and to prevent hospital acquired infections." He further noted that other provisions of the policy also reference patient care or patient care areas. Our dissenting colleague endorses the judge's analysis, but in light of Board and judicial precedent, we do not.

[1] We shall modify the judge's recommended Order to include the Board's standard remedial language for the violations found, and we shall substitute a new notice to conform to the language in the Order as modified.

[2] In affirming the judge's findings with regard to Policy #318, we do not pass on whether the prohibition at issue would be lawful if it were limited to attaching non-approved pins and badges to the employee identification badges.

It is well established that employees have a protected right to wear union insignia at work in the absence of special circumstances. See *George J. London Memorial Hospital*, 238 NLRB 704, 708 (1978); *The Ohio Masonic Home*, 205 NLRB 357, 357 (1973), enfd. 511 F.2d 527 (6th Cir. 1975); see also *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 801–803 (1945). In healthcare facilities, the Board and the courts have modified this general rule due to concerns about the possibility of disruption to patient care. Restrictions on wearing union insignia in immediate patient care areas are presumptively valid. See *NLRB v. Baptist Hospital. Inc.*, 442 U.S. 773, 781 (1979). However, following the general rule, restrictions on wearing union insignia in non–patient care areas are presumptively invalid and violate the Act unless the employer establishes special circumstances justifying its action. See *Casa San Miguel*, 320 NLRB 534, 540 (1995).

As noted above, the badge reel provision of PC-261.02 states that "[b]adge reels may only be branded with MemorialCare approved logos or text." On its face, this requirement applies in all areas of the hospital, including non–patient care areas. Contrary to the judge and our dissenting colleague, neither the language of other provisions within PC-261.02 nor the stated purpose of that policy establishes that it is limited to immediate patient care areas. The fact that the rule may only apply to "direct patient care *providers*" (emphasis added) does not establish that it only applies in immediate patient care *areas*. See *George J. London Memorial Hospital*, 238 NLRB at 708 (policy prohibiting insignia other than "of a professional nature" unlawful because, on its face, policy applies outside immediate patient care areas). Direct patient care providers necessarily move throughout the hospital and spend time in non-patient care areas. For instance, policy 1 of PC-261.02 acknowledges that direct care providers are at the hospital for reasons other than providing direct patient care, such as for education and meetings. In addition, nothing in the rule precludes the Respondent from applying it to non-patient care areas, notwithstanding its stated purposes of allowing patients to identify their direct care providers and preventing infection. The fact that other provisions of PC-261.02 explicitly state they only apply in immediate patient care areas does not alter this analysis.[3] To the contrary, those provisions' explicit limitation to patient care areas further suggests that the badge reel rule, which contains no similar language, is not so limited.[4] At the very least, this language creates an ambiguity about the scope of the policy, which must be construed against the Respondent as the drafter. *Lafayette Park Hotel*, 326 NLRB 824, 828 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999). Absent special circumstances, then, the badge reel provision is unlawful.[5]

Within the healthcare setting, the Board will find special circumstances where an insignia restriction is "necessary to avoid disruption of healthcare operations or disturbance of patients." *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 507 (1978). The Board has found special circumstances justifying proscription of union insignia and apparel when their display may "jeopardize employee safety, damage machinery or products, exacerbate employee dissension, or unreasonably interfere with a public image that the employer has established, as part of its business plan, through appearance rules for its employees." *Bell-Atlantic-Pennsylvania*, 339 NLRB 1084, 1086 (2003), enfd. *Communications Workers of America, Local 13000 v. NLRB*, 99 Fed.Appx. 233 (D.C. Cir. 2004). However, "a rule that curtails employees' Section 7 right to wear union insignia in the workplace must be narrowly tailored to the special circumstances justifying maintenance of the rule, and the employer bears the burden of proving such special circumstances." *Boch Honda*, 362 NLRB No. 83, slip op. at 2 (2015), enfd. 826 F.3d 558 (1st Cir. 2016); see also *W San Diego*, 348 NLRB 372, 373–374 (2006) (special circumstances that justified employer's ban on buttons worn in public areas did not justify a ban on buttons worn in nonpublic areas).

Here, the Respondent has presented no evidence showing that employees in any way disrupted healthcare operations or disturbed patients by wearing badge reels branded with union insignia. The union-branded badge

[3] The judge cited PC-261.02's reference to the Respondent's "bare below the elbows" approach required in all patient care areas and policy 4 of PC-261.02, which states: "Hair (if below the shoulder) is to be tied back or pulled up to prevent any 'swing' into the patient area during care." The judge also cited policy 1, which allows employees to wear business casual clothing in addition to "MHS logo" attire when coming to the hospital for education or meetings, but policy 1 does not mention—much less narrow the scope of—the badge reel provision.

[4] Citing the same factors discussed above, our dissenting colleague argues that the badge reel policy should be read to apply only in immediate patient care areas. As we have explained, there is no merit to this view. Our colleague's suggestion that the Respondent's enforcement of the policy only with respect to immediate patient care areas supports his position is similarly misplaced. See *London Memorial Hospital*, supra (hospital's overbroad rule unlawful despite evidence it had only been enforced in immediate patient care areas).

[5] Our dissenting colleague argues that PC-261.02's stated scope "demonstrates that it was promulgated not to restrict employees' rights but to protect its patients" and would reasonably be read accordingly. But this argument gives too little weight to the broad language of the badge reel provision. And, of course, the Board need not find discriminatory motive in order to conclude that the policy is unlawful. Rather, the question is whether the policy as written applies outside immediate patient-care areas—which we find it does—and, if so, whether the Respondent demonstrated special circumstances, which we conclude it has not.

reels are the same size and shape as the Respondent's and similarly contain only a logo. Rather than point to any evidence of a disturbance or disruption, the Respondent, relying principally on *W San Diego*, supra, argues that PC-261.02's badge reel provision is justified because the Respondent's "business objective was to provide a standardized, easily-identifiable, customized, consistent and professional look in accordance with its business strategy of providing quality patient[] care." Contrary to the employer in *W San Diego*, the Respondent presented no evidence that its rule prohibiting union badge reels in public, non-direct patient care areas is necessary to create a unique experience distinct from its competitors. See *Boch Honda*, supra, slip op. at 2 & fn. 6. While the Respondent does require unit employees to wear a standardized uniform, a uniform requirement alone is not a special circumstance justifying a union insignia prohibition. *P.S.K. Supermarkets*, 349 NLRB 34, 35 (2007) ("The Board has consistently held that customer exposure to union insignia, standing alone, is not a special circumstance which permits an employer to prohibit display of such insignia. Nor is the requirement that employees wear a uniform a special circumstance justifying a button prohibition.") (internal citations omitted).[6]

Furthermore, the badge reel provision is not "narrowly tailored" to address the Respondent's purported concerns of providing a uniformed image of top-quality patient care. See *Boch Honda*, supra, slip op. at 3. In *Casa San Miguel*, the Board recognized that special circumstances justified a nursing home's prohibiting a nursing assistant from wearing a smock with a union slogan and emblem printed on it outside of patient care areas where it was not "practical or possible" for the employee to change out of the smock each time the employee entered a patient care area. 320 NLRB at 540. The badge reels at issue here, in contrast, are readily detachable from employees' uniforms, and nothing prevents employees from removing a union-branded badge reel and affixing the identification badge directly to the employee's uniform when entering patient care areas. See *Enloe Medical Center*, 345 NLRB 874, 876 (2005) ("That employees might find it cumbersome to remove and later put back on their badges when moving in and out of patient care areas—and might even ultimately find it impractical to do so—does not justify the Respondent's effectively deciding this for them by flatly prohibiting employees from wearing the union badges in both patient-care and nonpatient-care areas."). Accordingly, even though it would be presumptively lawful if the Respondent had restricted it solely to direct patient care areas, the Respondent's ban on employees wearing union insignia, including on their badge reels, in other areas of the hospital is unlawful.

For these reasons, we reverse the judge and find that the Respondent violated Section 8(a)(1) by maintaining PC-261.02's badge reel policy.[7]

AMENDED CONCLUSIONS OF LAW

Substitute the following for the judge's Conclusions of Law:

1. Respondent has violated Section 8(a)(1) of the Act by maintaining a provision in the Memorial Health Services (MHS) "Dress Code and Grooming Standards" policy, applicable to all employees, including employees in non–patient care areas, that states, "Only MHS approved pins, badges, and professional certifications may be worn."

2. Respondent has violated Section 8(a)(1) of the Act by maintaining a provision in the MHS "Appearance, Grooming and Infection Prevention Standards for Direct Care Providers" policy, applicable to all employees, including employees in non–patient care areas, that states, "Badge reels may only be branded with MemorialCare approved logos or text."

3. Respondent has not otherwise violated the Act as alleged in the complaint.

ORDER

The National Labor Relations Board orders that the Respondent, Long Beach Memorial Medical Center, Inc. d/b/a Long Beach Memorial Medical Center & Miller Children's and Women's Hospital Long Beach, Long Beach, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining an overly broad provision of the "Dress Code and Grooming Standards" policy that prohibits all employees, including employees in non–patient care areas, from wearing pins, badges, and professional certifications that have not been approved by Memorial Health Services (MHS).

(b) Maintaining an overly broad provision of the "Appearance, Grooming and Infection Prevention Standards for Direct Care Providers" policy that prohibits all employees, including employees in non–patient care areas,

[6] Our dissenting colleague therefore errs when he contends that the Respondent's "standardized uniform rules" alone establish special circumstances.

[7] In reversing the judge's dismissal, and finding PC-261.02's badge reel provision facially unlawful, we need not and do not pass on whether the provision was disparately enforced in violation of Sec. 8(a)(1). Such a violation would not materially affect the remedy, given our finding that the Respondent violated Sec. 8(a)(1) by maintaining the badge reel provision.

from wearing badge reels that are not branded with MemorialCare approved logos or text.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the overly broad provision of the "Dress Code and Grooming Standards" policy, or revise it to make clear that it does not prohibit employees in non–patient care areas from wearing pins, badges, and professional certifications that have not been approved by MHS.

(b) Rescind the overly broad provision of the "Appearance, Grooming and Infection Prevention Standards for Direct Care Providers" policy, or revise it to make clear that it does not prohibit employees in non–patient care areas from wearing badge reels that are not branded with MemorialCare approved logos or text.

(c) Notify all current employees that the overly broad provisions of the "Dress Code and Grooming Standards" and "Appearance, Grooming and Infection Prevention Standards for Direct Care Providers" policies have been rescinded or, if they have been revised, provide them a copy of the revised rules.

(d) Within 14 days after service by the Region, post at its Long Beach, California facility copies of the attached notice marked "Appendix."[8] Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 1, 2015.

[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(e) Within 21 days after service by the Region, file with the Regional Director for Region 21 a sworn certificate of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. April 20, 2018

Mark Gaston Pearce, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER EMANUEL, dissenting in part.

The Respondent is an acute-care hospital. Its principal concern is for the safety and well-being of its patients. To that end, in October 2014, it adopted an Appearance, Grooming and Infection Prevention Standards for Direct Care Providers Policy "to promote an efficient, orderly, safe and professionally operated organization while adhering to evidence-based best practice." At the beginning of the Policy, the Respondent explains that "[b]est-practice literature provides strong evidence for the attire of healthcare providers which may prevent hospital acquired infections" and "perception of patients regarding appearance and attire has been well established in the literature." It continues by noting that one of the purposes of the Policy is that "[p]atients may lack confidence and trust in individuals that are not easily identified as healthcare professionals" and "[p]romoting standard attire will assist patients in easily identifying their care providers and in promoting satisfaction." The Policy also states that "[d]ress, appearance and grooming play an important role in conveying an image of high quality, professional healthcare to the communities we serve and maintaining our excellent reputation." Thus, in accordance with the professional literature, the Respondent adopted the Policy to provide the best possible care for its patients.

Under the Policy, direct care providers must wear identification badges that can be readily seen while on hospital premises. If employees choose to use a badge reel, it "may only be branded with MemorialCare approved logos or text."[1] It is undisputed that the Re-

[1] "Appearance, Grooming and Infection Prevention Standards for Direct Care Providers" (PC-261.02).

spondent lawfully imposed this requirement in immediate patient care areas. Nonetheless, the General Counsel argues that the badge reel rule is unlawful because it "does not clearly state whether it is applicable to patient or non-patient care areas and any ambiguity in this regard should be construed against Respondent." The judge found this argument unpersuasive because, as discussed below, "employees would not reasonably conclude that the badge reel rule applies in non-direct patient care areas." My colleagues, however, reverse the judge and find the rule unlawful by broadly interpreting it to apply in all areas of the hospital. I respectfully disagree and would adopt the judge's finding that the mere maintenance of the badge reel rule does not interfere with the exercise of Section 7 rights in violation of Section 8(a)(1) of the Act.[2]

The Board applies special rules when evaluating restrictions on union insignia in healthcare facilities due to concerns about the possibility of disruption to patient care. Although restrictions on wearing union insignia are presumptively invalid in non-patient care areas, restrictions on wearing union insignia in immediate patient care areas are presumptively valid. See *Casa San Miguel*, 320 NLRB 534, 540 (1995); see also *NLRB v. Baptist Hospital*, 442 U.S. 773, 781 (1979). In determining the scope of a disputed rule, the Board must consider it in its entirety without parsing its language or reading parts of it in isolation. Applying these principles, and considering the Respondent's badge reel rule in context, I believe that it was lawful.

First, as noted above, the title of the Policy in which the badge reel rule appears is "Appearance, Grooming and Infection Prevention Standards for *Direct Care Providers*" (emphasis added). I believe that, because the Policy is only directed towards "direct care providers," the badge reel rule would be understood to only apply in immediate patient care areas where direct care providers work. This conclusion about the rule's limited applicability to immediate patient care areas is reinforced by the Policy's stated scope. It applies to "all those who work in any capacity *in providing direct patient care*," even students, volunteers, and contractors, which demonstrates that it was promulgated not to restrict employees' rights but to protect its patients—all of whom are necessarily located in immediate patient care areas. Second, the Policy's stated purposes further demonstrate that the badge reel rule only applies in immediate patient care areas.[3] The Policy is to prevent the transmission of hospital-acquired infections and to promote patient trust and confidence by allowing them to readily identify their care providers. Achieving these objectives is only relevant in immediate patient care areas where patients are present and receive treatment.[4] Third, there is no evidence or contention that the badge reel rule has ever been applied to employees when they are not providing direct patient care.[5] The judge further found—and my colleagues do not dispute—that the General Counsel failed to establish that the Respondent disparately enforced the badge reel rule by only prohibiting badge reels with union logos.[6]

Fourth, even if the badge reel rule were applicable in non–patient care areas, I believe that it was justified by special circumstances. The Board has found special cir-

[2] I agree with my colleagues and the judge that the Respondent violated Sec. 8(a)(1) of the Act by maintaining that portion of Policy #318 that prohibits employees from wearing unapproved pins and badges. I also agree with my colleagues that it is unnecessary to pass on whether this policy provision would be lawful if it restricted only the attachment of pins and badges to employee identification badges.

[3] The Policy's Purpose section, in pertinent part, reads as follows:

> 1. The Professional Appearance and Grooming Policy is intended to establish appropriate appearance, grooming and infection control standards for those who are direct patient care providers at Community Hospital Long Beach, Long Beach Memorial, and Miller Children's and Women's Hospital Long Beach, including off-site clinics and satellite work locations. …
>
> 2. BACKGROUND: The Medical Center is committed to the safest care of patients including the prevention AND transmission of pathogens. Best-practice literature provides strong evidence for the attire of healthcare providers which may prevent hospital acquired infections. This policy provides clear guidance on the best method to prevent contamination by attire and its potential contribution to hospital acquired infections.
>
> 3. Additionally, perception of patients regarding appearance and attire has been well established in the literature. Patients may lack confidence and trust in individuals that are not easily identified as health care professionals. Promoting standard attire will assist patients in easily identifying their care providers and in promoting satisfaction. Dress, appearance and grooming play an important role in conveying an image of high quality, professional health care to the communities we serve and maintaining our excellent reputation.

[4] My colleagues find that the badge reel rule is not limited to immediate patient care areas. In doing so, they fail to read the rule in its entirety. The rule applies only to direct patient care providers, including even nonemployees, and its stated purpose is to improve the quality of patient care. In my view, direct care providers would reasonably understand that the rule, which is solely concerned with their interactions with patients to improve patient care, does not apply in areas where there are no patients.

[5] In light of the rule's stated scope and purposes, it is understandable that the Respondent has limited its application to immediate patient care areas even though, as my colleagues observe, direct patient care providers necessarily move throughout the hospital and spend time in non–patient care areas.

[6] The judge properly found that unlawful disparate treatment is not established merely because enforcement may have sometimes been "soft and sporadic." See, e.g., *Stabilus, Inc.*, 355 NLRB 836, 840 (2010) (lax enforcement of a rule by some supervisors did not prove that an exacting supervisor's enforcement of the rule against union supporters was disparate treatment).

cumstances justifying the proscription of union slogans or apparel when their display "may jeopardize employee safety, damage machinery or products, exacerbate employee dissension, or unreasonably interfere with a public image that the employer has established, or when necessary to maintain decorum and discipline among employees." *Komatsu America Corp.*, 342 NLRB 649, 650 (2004). Here, the Respondent has established that it promulgated the badge reel rule as part of a comprehensive set of clothing and identification requirements. Employees covered by the rule are required to wear standard uniforms that display the Respondent's embroidered logo on the upper left shoulder and the Respondent's logo on the badge reel on the upper right shoulder. As noted above, these standardized uniform rules prevent infections, insure that patients can readily identify their healthcare provider, and promote "an image of high quality, professional healthcare to the communities [the Respondent] serve[s]." I believe that this evidence is sufficient to show that allowing unofficial badge reels would unreasonably interfere with the Respondent's public image. See, e.g., *W San Diego*, 348 NLRB 372, 373 (2006); *United Parcel Service*, 195 NLRB 441, 441 (1972); see also *United Parcel Service v. NLRB*, 41 F.3d 1068, 1073 (6th Cir. 1994).[7]

For these reasons, I respectfully dissent from my colleagues' finding that the Respondent violated the Act by maintaining its badge reel rule.

Dated, Washington, D.C. April 20, 2018

William J. Emanuel, Member

NATIONAL LABOR RELATIONS BOARD

[7] In finding that the Respondent did not establish special circumstances, my colleagues contrast this case with the facts in *W San Diego*, supra, where a hotel's restrictions on union insignia in public areas were found lawful based on evidence that the hotel sought to create a unique "Wonderland" atmosphere. However, I agree with the view of former Chairman Miscimarra that the Board is not empowered to pass judgment on the sophistication or novel nature of the public image that may be at issue in a particular case. See *In-N-Out Burger*, 365 NLRB No. 39, slip op. at 1 fn. 2 (2017) (separate views of Acting Chairman Miscimarra). In the *United Parcel Service* cases cited above, for example, the Board and the court upheld restrictions on the wearing of buttons and pins primarily based on the trademark brown uniforms worn by UPS employees. Similar considerations warrant upholding the restriction on badge reels at issue in this case.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain an overly broad provision of our "Dress Code and Grooming Standards" policy that prohibits all employees, including employees in non–patient care areas, from wearing pins, badges, and professional certifications that have not been approved by MHS.

WE WILL NOT maintain an overly broad provision of our "Appearance, Grooming and Infection Prevention Standards for Direct Care Providers" policy that prohibits all employees, including employees in non–patient care areas, from wearing badge reels that are not branded with MemorialCare approved logos or text.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind the overly broad provision of the "Dress Code and Grooming Standards" policy or revise it to make clear that it does not prohibit employees in non–patient care areas from wearing pins, badges, and professional certifications that have not been approved by MHS, and WE WILL notify all employees that the policy provision has been rescinded or revised.

WE WILL rescind the overly broad provision of the "Appearance, Grooming and Infection Prevention Standards for Direct Care Providers" policy or

revise it to make clear that it does not prohibit employees in non–patient care areas from wearing badge reels that are not branded with MemorialCare approved logos or text, and WE WILL notify all employees that the policy provision has been rescinded or revised.

LONG BEACH MEMORIAL MEDICAL CENTER, INC., D/B/A LONG BEACH MEMORIAL MEDICAL CENTER & MILLER CHILDREN'S AND WOMEN'S HOSPITAL LONG BEACH

The Board's decision can be found at www.nlrb.gov/case/21-CA-157007 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Lindsay Parker and *Molly Kagel, Esqs.*, for the General Counsel.
Adam Abrahms and *Kathleen Paterno, Esqs. (Epstein Becker & Green, P.C.)*, for Respondent.
Micah Berul, Esq., for Charging Party.

DECISION

JEFFREY D. WEDEKIND, Administrative Law Judge. The complaint in this case challenges two employee dress code and appearance rules at Long Beach Memorial Medical Center and Miller Children's and Women's Hospital. The rules prohibit employees from wearing a nonapproved pin or badge reel. The General Counsel alleges that, on their face, the rules violate Section 8(a)(1) of the National Labor Relations Act because they are not expressly limited to immediate patient care areas and restrict the ability of employees to engage in protected conduct (wearing union pins and badge reels).

The General Counsel also alleges that Respondent violated Section 8(a)(1) of the Act by disparately enforcing the badge reel rule. Specifically, the General Counsel alleges that Respondent prohibited two registered nurses, who served as union representatives in their medical units, from wearing a badge reel with the union logo in patient care areas, while permitting nurses to wear other badge reels in such areas that did not have the approved logo.

A hearing to address the allegations was held on May 23 and 24, 2016, in Los Angeles. The parties thereafter filed briefs on July 20. As discussed below, the General Counsel has adequately established that the pin rule is facially unlawful, but not that the badge reel rule is facially unlawful or has been disparately enforced.

I. FACTUAL BACKGROUND

Respondent is a large urban medical facility. It includes two licensed hospitals and employs about 6000 employees, including over 2100 registered nurses (RNs) represented by the California Nurses Association/National Nurses United (CNA/NNU).[1]

To help maintain safety and security at the facility, Respondent employs its own security force, including 70 security guards and three K-9 units. Since at least 2012, it has also required all staff to wear an "ID badge" visible at all times while on the job. The ID badge displays the employee's photo, name, and title and is coded electronically to allow the employee appropriate and necessary access to hospital and parking areas by swiping it across an electronic panel. Some badges also have a color-coded stripe across them; for example, RNs have a blue stripe, and employees authorized to remove infants and children from their room or unit have a pink stripe, across their ID badge. (R. Exh. 3; Tr. 109–110, 200–201.)[2]

Since March 2014, Respondent has also maintained a "dress code and grooming" policy for all employees who work at the facility, including but not limited to those who wear uniforms. The policy (#318), which is published on Respondent's intranet, was adopted and established by Memorial Health Services d/b/a MemorialCare Health System (MHS), Respondent's parent corporation. The policy sets forth standards of "appropriate dress, appearance, and grooming" to "promote an efficient, orderly and professionally operated organization" at all MHS facilities.

The policy also lists several "examples of minimum requirements." Consistent with the security policy, the first requirement is that all employees must wear their "identification badges" with the name and picture facing out, at a level that can be readily seen. Other requirements address such things as hair (no "extreme styles or colors" allowed), and earrings or other jewelry (must be "conservative," nondangling, and not "prove to be a distraction to others").

The last requirement (#9) is the subject pin rule, which states, "Only MHS approved pins, badges, and professional certifications may be worn." Under this rule, RNs are permitted to clip various small pins to the top of the badge, including years of service pins and "I Give" pins (indicating that they donate to the medical center) issued by Respondent, and certification pins issued by professional associations or organizations

[1] There is no dispute, and the record establishes, that the Board has jurisdiction.

[2] Specific citations to the record are provided to aid review, and are not necessarily exclusive or exhaustive. In making credibility findings, all relevant factors have been considered, including the interests and demeanor of the witnesses; whether their testimony is corroborated or consistent with the documentary evidence and/or the established or admitted facts; inherent probabilities; and reasonable inferences that may be drawn from the record as a whole. See, e.g., *Daikichi Corp.*, 335 NLRB 622, 633 (2001), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003); and *New Breed Leasing Corp. v. NLRB*, 111 F.3d 1460, 1465 (9th Cir.), cert. denied 522 U.S. 948 (1997).

indicating that they have been certified in a particular specialty (e.g., pediatric nursing). (GC Exhs. 3, 20–21; Tr. 38, 65–67, 127–131; 209–211, 265–266.)[3]

Since October 2014, Respondent has also maintained two new policies applicable only to employees who provide direct patient care at the facility. Both of these policies are likewise published on Respondent's intranet. The first is a "uniform and infection prevention" policy (PC–261.01), which establishes standards of attire to assist patients in easily identifying their care providers and to prevent hospital acquired infections. It requires direct care providers to wear a standard hospital uniform, color coded by discipline and embroidered with the approved logo and their discipline when on duty. Pursuant to this new policy, RNs who provide direct patient care may no longer wear scrubs of any color or pattern. Rather, they must wear navy blue scrubs provided by Respondent with the MHS name and logo (a medical cross in a circle design) and their discipline (RN) embroidered in white on the upper left side of the scrub top.

To help prevent infections, the policy also establishes a "bare below the elbows" rule. The rule prohibits RNs and other direct care providers from wearing such things as long-sleeved jackets or wristwatches in direct patient care areas. It also specifically prohibits them from wearing lanyards around their neck to attach and extend their ID badge for inspection or swiping. As a result, RNs must either attach the badge to a retractable badge reel or attach and detach the badge directly to and from their uniform. (GC Exh. 5; see also GC Exh.7; and Tr. 51, 78, 202–205, 233, 249.)

The second new policy applicable to direct patient care providers is an "appearance, grooming, and infection prevention" policy (PC–261.02). Like the new uniform and infection prevention policy, it establishes standards of appropriate appearance for those employees who provide direct patient care in order to assist patients in easily identifying them and to prevent hospital acquired infections. Indeed, it references and repeats portions of that policy. For example, it contains a similar "bare below the elbows" rule. It also sets forth numerous specific appearance and grooming requirements. For example, like the MHS policy, it states that "identification badges" shall be worn with the name and picture facing forward. It specifically adds, however, that the badges must be worn at collar level, on the right side, so they can be readily seen. Pursuant to this rule, the new RN uniform has a small piece of fabric sown onto the scrub top on the right side so that the badge reel or badge itself can be attached to it with a clip.

The policy also includes the subject badge reel rule (#12), which states, "Badge reels may only be branded with MemorialCare approved logos or text."[4] Pursuant to this rule, Respondent provided each RN and other direct care provider with a new badge reel displaying the same MHS medical-cross logo as the uniform. At least some received the new MHS badge reel with their new uniform order in November or December 2014. Others received it directly from their managers. Respondent also provided a replacement on request if the badge reel broke, which it often did. Indeed, Respondent had its vendor modify the construction of the badge reel twice in the first 6 months to make it more durable. (GC Exhs 6, 8; R. Exhs. 10–13; Tr. 85–86, 113, 148–149; 238–240, 294–298.)

Finally, all of the foregoing policies state that it is the responsibility of the supervisors to "consistently enforce compliance" with the standards and requirements by taking appropriate corrective or disciplinary action with employees who violate them.[5]

II. ALLEGED UNFAIR LABOR PRACTICES

A. Alleged Unlawful Maintenance of the Pin and Badge Reel Rules

It is well established that, absent special circumstances, employees have a right under the Act to wear union insignia at work. However, due to concerns about disrupting patient care, the Board has adopted certain rules unique to healthcare facilities. In such facilities, a ban on wearing any nonofficial insignia in immediate patient care areas is presumptively valid.[6] However, restrictions on wearing insignia in other areas are presumptively invalid. A hospital or other healthcare facility must therefore establish special circumstances justifying such restrictions; specifically, that the restrictions are necessary to avoid disruption of healthcare operations or disturbance of patients. See *HealthBridge Management, LLC,* 360 NLRB 937 (2014), enfd. 798 F.3d 1059 (D.C. Cir. 2015); and *Washington State Nurses Assn. v. NLRB*, 526 F.3d 577, 580 (9th Cir. 2008), and cases cited there.

Here, the General Counsel contends that Respondent's pin and badge reel rules on their face apply—or would reasonably be construed by employees to apply—even in non-direct patient care areas of the facility; that the rules are therefore presumptively invalid; and that Respondent has failed to establish special circumstances justifying the application of the rules to such areas.

1. The Pin Rule

As indicated above, the MHS dress code and grooming policy containing the pin rule applies to all employees, including non-direct patient care providers.[7] Thus, it is clear that the pin

[3] Policy #318 was modified in certain respects in July 2014; for example, a requirement was added stating that "clothing must cover the back, shoulders, thighs, midriff, and must not be excessively short, tight, or revealing" (GC Exh. 4.) However, the pin rule was retained without change.

[4] This is the only rule where badge reels are specifically addressed. There is no mention of badge reels in the MHS dress code and grooming policy or Respondent's uniform policy.

[5] The subject pin and badge reel rules were apparently adopted and implemented without the Union's agreement. See Tr. 308–310. There is no contention that the Union waived the RNs' right under the Act to wear union insignia in non-direct patient care areas. See generally *AT&T*, 362 NLRB No. 105, slip op. at 5 (2015).

[6] The presumption of validity applies only to a ban on all nonofficial insignia in immediate patient care areas; it does not apply to a selective ban on only union or certain union insignia. *St. Johns Health Center*, 357 NLRB 2078, 2076, 2079 & fn. 3 (2011).

[7] Judith Fix, Respondent's senior vice president of patient care services and chief nurse officer, testified that the MHS policy applies *only* to non-direct patient care providers, as that policy was superseded by Respondent's subsequent policies applicable to direct patient care providers (Tr. 217–218). However, she later testified that direct patient

rule is not limited to direct patient care areas of the facility. Accordingly, the rule is presumptively invalid, and Respondent must show that the restriction on any employees wearing nonapproved pins in non-direct patient care areas is necessary to avoid disruption of its operations or disturbance of patients.

Respondent has failed to make the required showing. Respondent argues that the ban on wearing nonapproved pins on ID badges in all areas is justified because ID badges are part of the hospital safety and security protocol (Br. 39–42, 46–47). However, there is no substantial evidence indicating that *pins* are part of the safety and security protocol. As indicated above, the pin rule is set forth exclusively in the MHS dress code and grooming policy. Cf. *Boch Honda,* 362 NLRB No. 83, slip op. at 3 (2015), enfd. --- F.3d ---, 2016 WL 3361733, at *14 (1st Cir. June 17, 2016) (rejecting employer's assertion that its ban on unofficial pins was necessary for safety purposes, as the ban was contained in the "dress code and personal hygiene policy," which did not include any statement linking it to safety). Further, employees are permitted under the rule to wear a variety of pins on their badge in addition to professional certifications, including "I Give" pins distributed by Respondent. Cf. *London Memorial Hospital*, 238 NLRB 704, 709 (1978) (rejecting hospital's contention that its ban on nonprofessional insignia was imperative for patient care, given that the hospital encouraged employees to wear "I Care" buttons). Finally, Judith Fix, who as noted above is Respondent's senior vice president of patient care services and chief nurse officer, acknowledged that there is no limit to how many pins employees can wear on their ID badge, as long as the badge remains readable (Tr. 267).[8]

In any event, the rule on its face is not limited to wearing nonapproved pins on ID badges. Respondent argues that "no reasonable employee would read, in the context of the whole, the challenged [rule] as restricting the wearing of pins anywhere except for on an employee's ID badge" (Br. 48). However, Respondent cites no provision in its dress code and grooming policy or other policies that would reasonably be interpreted by employees to narrow the otherwise broad restriction to only badge pins.

Respondent also argues that there is no explicit ban on wearing union insignia in the policy; thus, "when read in the context of the whole," the rule "would not make a reasonable employee think they were prohibited from wearing union insignia" (Br. 50). However, on its face, the ban on all nonapproved pins would include union pins. Cf. *Albertsons, Inc.*, 351 NLRB 254, 256–257 (2007) (employer's restriction on wearing badges or pins other than name badges on its face covered union badges and pins of all types and sizes). And, again, Respondent cites no specific provision that would reasonably be interpreted by employees to narrow the otherwise broad restriction to only nonapproved pins other than union pins.

Citing Fix's testimony, Respondent also argues that employees are not prohibited from displaying union insignia in other ways while working at the facility. Fix testified that Respondent does not prohibit non-direct patient care employees, who are not required to wear a standard uniform, from wearing other items, such as jackets, lanyards, earrings, and necklaces, that display union or other insignia. Indeed, she testified that even uniformed direct care providers may display the union logo on earrings and necklaces, and could also tattoo it on their forearm or paint it on their fingernails.[9] However, there is no evidence that Respondent has communicated this to employees (other than by not explicitly prohibiting it).[10] Nor is there any evidence that Respondent's employees have regularly or routinely displayed union or other logos in such a manner at the facility during the relevant period. To the extent Respondent's brief (pp. 21–22) suggests otherwise, it is incorrect.

In any event, Respondent's burden is not satisfied simply by showing that all possible alternatives to union pins are not likewise expressly banned. Rather, as indicated above, Respondent must show special circumstances justifying the ban on union pins. This is illustrated by the very cases Respondent cites. For example, in *Albis Plastics*, 335 NLRB 923 (2001), enfd. 67 Fed. Appx. 253 (5th Cir. 2003), the Board upheld the employer's ban on nonapproved helmet stickers because the employer had shown that union or other nonapproved stickers on the employees' helmets would pose a threat to safety. The same was true in *Standard Oil Co. of California*, 168 NLRB 153 (1967). Although in both cases employees were free to display union insignia elsewhere on their clothing, the Board did not rely on this as a basis for upholding the helmet sticker ban in *Albis*, and cited it only as an additional ("furthermore") reason for upholding the similar ban in *Standard Oil*.

Respondent also argues that there is no evidence that any employee was actually prohibited from wearing a union pin.[11] However, in the absence of special circumstances, requiring management preapproval is itself an unlawful interference with

care providers are still prohibited by the appearance policy from wearing nonapproved pins on their badge or when in uniform (Tr. 250–251, 265–266, 271). Further, she acknowledged that the source of that prohibition is the MHS policy (Tr. 276).

[8] The General Counsel argues that Respondent has also permitted employees, particularly those in the pediatric units, to wear pins with cartoon characters on their badge, such as Ariel the Mermaid, Mickey Mouse, and Bugs Bunny. In support, the General Counsel cites the testimony of RN/Union Representative Brandy Welch and former RN/Union Representative Theresa Stewart, who retired in January 2016 (Tr. 65, 74, 126). However, as indicated by Respondent, their testimony is too vague and insubstantial to establish that employees have worn such pins with any regularity or frequency, or that Respondent has permitted them to do so expressly or impliedly through lax enforcement of the pin rule.

[9] See Fix's testimony, Tr. 218, 261–263. The MHS and Respondent dress code, grooming, and appearance policies prohibit visible tattoos except for employees with direct patient care responsibilities who, for infection control purposes, are not allowed to wear any clothing below the elbows to cover such a tattoo. Thus, the written policies appear to prohibit employees in non-direct patient care areas from displaying a union tattoo on their forearm.

[10] As indicated above, the MHS dress code and grooming policy requires earrings and other accessories and jewelry to be "conservative" and not "distracting."

[11] There is no evidence that employees have worn union pins while working during the relevant period. RN Welch, who as noted above is a union representative and has worked at the facility for 18 years, testified that she had seen a union pin on an employee's ID badge; however, she was not sure when or if it was during the past 2 years (Tr. 73–74).

employee rights under the Act, as the requirement may chill employees from exercising those rights. See *Lily Transportation Corp.*, 362 NLRB No. 54, slip op. at 6 (2015); and *Middletown Hospital Assn.*, 282 NLRB 541, 552–553 (1986), and cases cited there. As discussed above, Respondent has failed to show special circumstances.

Finally, Respondent argues that there was no actual approval process for pins at the facility, citing Fix's testimony that "MHS approved pins" really means "MHS distributed pins" (Tr. 273). However, as Fix acknowledged, the rule does not say that. Nor is there a substantial evidentiary basis to conclude that employees would reasonably interpret the rule to mean that. In any event, even if they did, and therefore knew for certain that union pins could not be worn, the resulting chilling effect on their rights would be no less.

2. The Badge Reel Rule

As indicated above, unlike the MHS policy, Respondent's appearance, grooming, and infection prevention policy containing the badge reel rule is expressly limited to direct patient care providers. Nevertheless, the General Counsel argues that, like the pin rule, the badge reel rule is facially unlawful because it "does not clearly state whether it is applicable to patient or non-patient care areas and any ambiguity in this regard should be construed against Respondent" (Br. 24).[12]

The argument is unpersuasive. It is true that ambiguities in employee conduct rules are construed against the employer. See, e.g., *Valley Health System LLC*, 363 NLRB No. 178, slip op. at 1 (May 5, 2016); and *Lafayette Park Hotel*, 326 NLRB 824, 828 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999). However, a rule is not ambiguous merely because it *could be* interpreted to apply to protected activity; the test is whether employees *would* reasonably interpret it to apply to such activity. *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647–648 (2004).

Here, employees would not reasonably conclude that the badge reel rule applies in non-direct patient care areas. Respondent's appearance, grooming, and infection prevention policy clearly states that its purpose is to assist patients in easily identifying their direct patient care providers and to prevent hospital acquired infections. Further, although the badge reel rule does not itself reference patient care or patient care areas, some of the other provisions and rules do. See p. 1, purpose #4 (bare-below-elbows approach is intended to prevent infection in "patient care areas"), and p. 2, policy #4 (long hair must be tied back or pulled up "during care").

Moreover, the policy specifically provides (p. 2, policy #1) that employees who come into the hospital for education or meetings, rather than to provide patient care, may wear "business casual" attire instead of "MHS logo" attire. And there is no contention or evidence that the badge reel rule has ever been applied to employees when they are not providing direct patient care. Cf. *Mt. Clemens General Hospital*, 335 NLRB 48, 50–51 (2001), enfd. 328 F.3d 837 (6th Cir. 2003) (hospital's ban on a particular union button protesting forced overtime was overbroad because supervisors required RNs to remove the button at times when they were in non-patient care areas, such as nurses lounges).[13]

B. Alleged Disparate Enforcement of the Badge Reel Rule

Even if an employer's rule is facially lawful, the disparate enforcement of that rule against union or other protected concerted activity violates the Act. See, e.g., *Shelby Memorial Home*, 305 NLRB 910, 919 (1991), enfd. 1 F.3d 550, 565 (7th Cir. 1993) (nursing home's selective enforcement of its rule restricting pins or badges against union insignia but not other insignia was unlawful). See also *Stabilus, Inc.*, 355 NLRB 836, 839 (2010); and *Nestle Co.*, 248 NLRB 732, 737 (1980), affd. mem. 659 F.2d 252 (D.C. Cir. 1981). The General Counsel alleges that such disparate enforcement occurred here when Respondent refused to allow two RNs, Brandy Welch and Theresa Stewart, to continue wearing a union badge reel in July and October 2015, respectively. As discussed below, however, the evidence fails to adequately support this allegation as well.

As noted above, both Welch and Stewart were union representatives for their respective medical units during the relevant period. It is undisputed that, notwithstanding the new appearance policy, they both regularly wore a union badge reel during much or most of 2015 without incident. The union badge reel was identical in size, shape, and function to the MHS badge reel. The only significant difference was that the face displayed the union (CNA) logo rather than the MHS logo and was encased in red rather than white plastic. Welch testified that she began wearing the union badge reel in February 2015, after the first MHS badge reel she was given broke. Stewart testified that she began wearing the union badge reel well before the new rule, and resumed doing so shortly after the new rule when her first MHS badge reel likewise broke. Elizabeth Castillo, another RN/union representative who works in the diabetes medical surgical unit, [14] testified that she also wore a union

[12] The allegation that the badge reel rule is facially unlawful was added to the complaint on the first day of hearing, after Respondent's counsel cited it in his opening statement and the General Counsel's first witness, Respondent's HR Director and custodian of records, testified about it. The General Counsel explained the delay in alleging the violation on the ground that the Regional Office was previously unaware of the rule. Respondent disputed this, asserting that the rule was quoted in the position statement it filed during the Region's investigation of the Union's charge, and therefore objected to adding the allegation. Respondent renews this objection in its posthearing brief (p. 30 fn. 30), and requests that the allegation be stricken. The request is denied, essentially for the same reasons that the General Counsel's amendment was granted (Tr. 47–48). Even if Respondent had informed the General Counsel of the badge reel rule during the investigation of the other allegations, the allegation that the rule is facially unlawful is closely related to the complaint allegation that Respondent disparately required RNs to remove the union badge reel; the new allegation was added early in the hearing during the General Counsel's case in chief; and Respondent does not assert that it was denied sufficient time to prepare its defense or otherwise suffered any prejudice.

[13] As discussed infra, RN Welch was just outside the patient care area when she was told to remove her union badge reel. However, she was on her way into that area. See Tr. 58, 304, and GC Br. 17. And the General Counsel does not cite this incident as evidence that the badge reel rule was applied outside immediate patient care areas.

[14] There are about 50 union representatives at Respondent's facility (Tr. 315–316). There is no record evidence whether the other 47 likewise wore union badge reels or were told to remove them.

badge reel throughout most of 2015. (Tr. 54–55, 75–76, 85, 88, 115, 170–171; GC Exh. 10.)

Eventually, in July 2015, Welch was told by the clinical director of her pediatric unit, Colleen Coonan, that she could no longer wear the union badge reel. Welch had been talking with Coonan and another manager just outside the pediatric unit door about a grievance matter. As Welch was leaving the conversation to enter the unit, Coonan told her that she could not wear the badge reel, she had to wear the MHS badge reel. (Tr. 58, 304.) About 3 months later, in October 2015, Stewart was likewise told to remove her union badge reel by one of the two assistant unit managers in her outpatient surgery unit, Robin Johnson. Stewart was caring for a patient when Johnson entered the room, gave her an MHS badge reel, and told her she needed to wear it under the new policy. About 2 months later, in December 2015, Castillo was also told by a manager that she had to wear the MHS badge reel.[15] (Tr. 115–117, 149, 170–171, 283–284.)[16]

The parties presented conflicting testimony regarding whether RNs and other direct care providers were allowed to continue wearing other types of non-MHS badge reels during the relevant period. For example, Fix, who is responsible for all patient care, testified that the MHS badge reel is considered part of the standard uniform and that no other type of badge reel is permitted. Further, she testified that she has never seen anyone wearing a non-MHS badge reel, even though she frequently observes and interacts with the staff during her multiple daily rounds in the patient care units and has seen other violations such as clothing below the elbows. (Tr. 233, 239, 247–248, 264).

Coonan likewise testified that the MHS badge reel is part of the uniform. She testified that she told the staff in her unit this at the time the new rule was implemented, and that she thereafter reminded anyone she saw who was not wearing the MHS badge reel. She testified that, other than Welch, she has had to remind only about four employees of the rule, whom she observed during daily "huddles" between June and September 2015 wearing a badge reel with Hello Kitty, a frog, or a princess on it. (Tr. 295, 299–305.)

Johnson similarly testified that she looked for anyone without an MHS badge reel, because the hospital director told the assistant unit managers to distribute the MHS badge reels in accordance with the policy. She testified that, in addition to Stewart, she saw only one other RN without the MHS badge reel, and that she gave her one too. Moreover, she testified that she did not even notice what kind of badge reels they were wearing, only that they were not the MHS badge reel. (Tr. 284–285.)

The General Counsel's witnesses, on the other hand, painted a distinctly different picture. Welch testified that she was unaware until the July 2015 incident with Coonan that only the MHS badge reel was allowed. Further, she testified that both before and after that incident she saw other RNs wearing badge reels with cartoon characters (Ariel the Mermaid, Spiderman, Sponge Bob, Mickey Mouse, and Batman), badge reels decorated with jewelry, and badge reels with logos for breast cancer research and organ donation (One Legacy). She testified that she saw RNs wearing such badge reels daily, including on the patient care floor, and was not aware of any manager asking that they be removed. (Tr. 58–59, 60, 64, 76, 95–96.) She also submitted a photograph she took in July 2015 (the same day as the incident with Coonan) of another RN working on her unit who was wearing a One Legacy badge reel (GC Exh. 13).[17]

Similarly, Stewart testified that she had never been instructed to wear the MHS badge reel prior to the October 2015 incident with Johnson; that it was merely recommended to be worn. She further testified that, after the incident until her retirement in January 2016, she saw nurses wearing "I Give" badge reels, badge reels with logos for the Oncologic Nurse Society (ONS), Vascular Access Certification (VAC), and Care Ambulance (an ambulance service used by the hospital), badge reels with decorative flowers (made out of the plastic safety tops of vials), and badge reels with nothing at all on them. Like Welch, she testified that she did not see any nurses being told to remove such badge reels. (Tr. 118–125.) She also submitted three photographs she took during that period. See GC Exh. 16 (close up of a VAC badge reel on an RN's uniform); GC Exh. 18 (close up of a plain black badge reel on an RN's uniform); and GC Exh. 19 (close up of an "I Give" badge reel on an RN's uniform).[18]

Castillo testified that she has also seen RNs wearing other badge reels notwithstanding the new policy. Like Welch and Stewart, she testified that she has seen One Legacy badge reels, badge reels with cartoon characters, and badge reals that say nothing at all. She has also seen badge reels covered in rhinestones, and badge reels that say PACU (one of the units in the hospital). She testified that she has seen RNs wearing such badge reels on the patient care floor, even during the past 6 months, and that no one to her knowledge said they had to be removed. (Tr. 162–164, 180.) She also submitted a photo she took on her unit floor in May 2016. See GC Exh. 23 (RN badge attached to a heart-shaped badge reel covered with rhinestones).

None of the foregoing testimony, by either the Respondent's or the General Counsel's witnesses, was particularly credible or persuasive. For example, it seems highly unlikely, based on the record as a whole (including the undisputed fact that the MHS badge reels frequently broke), that Fix has never noticed any RNs or other direct care providers wearing a non-MHS badge reel, and that Johnson has seen only one RN in addition to Stewart wearing a non-MHS badge reel. There is also reason to doubt Johnson's testimony that she did not notice or know what type of badge reel Stewart was wearing. As discussed above,

[15] Unlike the July and October incidents involving Welch and Stewart, this December incident involving Castillo is not alleged as a violation in the complaint.

[16] Coonan and Johnson are admitted supervisors of Respondent.

[17] Welch also submitted a photo she took the same day of an RN wearing a badge reel with Ariel the Mermaid on it. However, the RN was not in uniform or working in a direct patient care area at the time. (GC Exh. 12; Tr. 61, 94–95).

[18] The three photos do not show the RN's face or badge and Stewart did not otherwise identify them.

Stewart was a union representative and had been wearing the CNA badge reel for months.

However, there is also substantial reason to discount the testimony of Welch, Stewart, and Castillo. As indicated above, Respondent employs thousands of RNs and other direct care providers. Yet, not one confirmed personally wearing a cartoon-character or other type of non-MHS badge reel during the relevant period (none were called or subpoenaed to testify). Further, between the three of them, Welch, Stewart, and Castillo could offer only five photographs purporting to show an RN wearing a non-MHS badge reel in a patient care area. No explanation for this was given and none is obvious. According to their testimony, their fellow RNs are unafraid to openly wear nonapproved badge reels in front of their supervisors on a daily basis. And it is undisputed that Respondent has never actually disciplined an RN or other direct patient care provider for violating the badge reel rule or any of the other new uniform and appearance rules.

Moreover, as discussed above, Welch, Stewart, and Castillo admitted that Respondent did not tell them to remove their union badge reels until approximately 6, 9, and 11 months, respectively, after they began wearing them. On its face, this seems inconsistent with the theory that Respondent more strictly enforced the rule against union badge reels. Cf. *University of Richmond*, 274 NLRB 1204, 1210 (1985) (finding no disparate enforcement in part because a union supporter was asked to remove her union button only twice even though she wore it throughout the organizing campaign); and *Hanes Hosiery, Inc.*, 219 NLRB 338, 346–347 (1975) (finding no disparate enforcement in part because the employer did not prohibit all of the employees from wearing union buttons). And neither the General Counsel nor the Union offers a rationale for disregarding it.

All things considered, therefore, the truth is likely in the middle: some, but not many, of the RNs and other direct patient care providers have worn non-MHS badge reels at various times since the new rule became effective, and Respondent's enforcement of the new rule has been soft and sporadic, but not selective against union badge reels. Accordingly, as this falls short of a disparate-enforcement violation, the General Counsel has failed to carry the burden of proof.[19]

CONCLUSIONS OF LAW

1. Respondent has violated Sections 8(a)(1) and 2(6) and (7) of the Act by maintaining a rule, set forth in the MemorialCare Health System (MHS) dress code and grooming policy applicable to all employees, including employees in non-direct patient care areas, which states, "Only MHS approved pins, badges, and professional certifications may be worn."

2. Respondent has not otherwise violated the Act as alleged in the complaint.

REMEDY

The appropriate remedy for the violation found is an order requiring Respondent to cease and desist from its unlawful conduct and to take certain affirmative action. Specifically, Respondent will be required to rescind the unlawful MHS rule at its facility and to advise the employees that it has done so.[20] Respondent will also be required to post a notice to employees assuring them that it will not violate their rights in the same or any like or related manner in the future.

ORDER

The Respondent, Long Beach Memorial Medical Center, Inc., d/b/a Long Beach Memorial Medical Center & Miller Children's and Women's Hospital Long Beach, its officers, agents, succesors, and assigns, shall

1. Cease and desist from

(a) Maintaining a rule at its facility that prohibits all employees, including employees in non-direct patient care areas, from wearing any pins, badges, and professional certifications that have not been approved by MemorialCare Health System (MHS).

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the rule at its facility, set forth in the MHS dress code and grooming policy applicable to all employees, which states, "Only MHS approved pins, badges, and professional certifications may be worn."

(b) Publish on its intranet and distribute to all of its current employees a revised policy that does not contain the unlawful rule or that contains a lawfully worded rule.

(c) Within 14 days after service by the Region, post at its facility in Long Beach, California copies of the attached notice marked "Appendix".[21] Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates

[19] The two cases cited in the General Counsel's and the Union's posthearing briefs—*Raley's Inc.*, 311 NLRB 1244, 1245 (1993) and *Holyoke Visiting Nurses Assn.*, 313 NLRB 1040, 1047 (1994)—are factually distinguishable for the reasons indicated above. They also lack any precedential weight, as no exceptions were filed in either case to the relevant ALJ findings regarding disparate enforcement. See generally *Operating Engineers Local 39 (Mark Hopkins Intercontinental Hotel)*, 357 NLRB 1683 fn. 1 (2011); and *Trump Marina Associates LLC*, 354 NLRB 1027 fn. 2 (2009), reaffd. 355 NLRB 585 (2010), enfd. 435 Fed.Appx. 1 (D.C. Cir. 2011).

[20] The complaint does not name MHS as a party respondent and neither the General Counsel nor the Union request an order requiring MHS to rescind the rule set forth in its policy or to take any other affirmative action at its other facilities.

[21] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 1, 2015.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply. [22]

Dated, Washington, D.C., August 31, 2016

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain a rule at our facility that prohibits all of our employees, including employees in non-direct patient care areas, from wearing any pins, badges, and professional certifications that have not been approved by MemorialCare Health System (MHS).

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL rescind the rule at our facility, set forth in the MHS dress code and grooming policy applicable to all employees, which states, "Only MHS approved pins, badges, and professional certifications may be worn."

WE WILL publish on our intranet and distribute to all current employees a revised policy that does not contain the unlawful rule or that contains a lawfully worded rule.

LONG BEACH MEMORIAL MEDICAL CENTER, INC., D/B/A LONG BEACH MEMORIAL MEDICAL CENTER & MILLER CHILDREN'S AND WOMEN'S HOSPITAL LONG BEACH

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/21-CA-157007 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

[22] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

CERTIFICATE OF SERVICE

I hereby certify that on November 5, 2018, the foregoing document is being filed electronically with the Clerk of the Court by using the CM/ECF system, thereby serving it on all parties of record.

DATED: November 5, 2018 By: /s/ Adam C. Abrahms

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