

## MEMORANDUM

**Date:** September 30, 2004  
**To:** Christopher E. Platten  
**From:** Niki Nakagawa  
**Re:** Retirees and the Wearing of Uniforms  
**File No.:** 1171.01171  
**cc:**

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### ISSUE PRESENTED

Whether a retired fire fighter faces the risk of being charged with “impersonating an officer” in wearing his/her uniform to an appropriate event (i.e. funeral, memorial service)?

### ANSWER PRESENTED

No, because a retiree in that situation does not possess the requisite criminal mental state which is required for a conviction of violating Penal Code §538e.

### ANALYSIS

In the realm of criminal law, to constitute a crime, there must be unity of act and intent. Pen Code §20. In other words, it must be proven that the defendant not only committed the act, but that he/she also possessed the requisite mens rea or mental state for the crime charged.

Penal Code §538e, in pertinent part, provides that:

“Any person, other than an officer or member of a fire department who willfully wears, exhibits, or uses the authorized uniform, insignia, emblem, device, label, certificate, card, or writing of an officer or member of a fire department or a deputy state fire marshal, with the *intent of fraudulently personating* an officer or member of a fire department or the Office of the State Fire Marshal, or of *fraudulently inducing the belief* that he or she is an officer or member of a fire department or the Office of the State Fire Marshal, is guilty of a misdemeanor.”

The use of the phrase “with the intent of” denotes that this is a specific intent crime, meaning that in order to be guilty of this offense, the defendant must have had the specific intent to fraudulently impersonate an officer.

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Where a retired fire fighter chooses to wear his/her uniform to a funeral, memorial service or other official event, it cannot be said that he/she does so with the specific intent to fraudulently impersonate an officer. Nor can it be said that he/she is wearing his/her uniform with the purpose of fraudulently inducing the belief that he/she is an officer. Rather, the display of one's uniform at a ceremonial event is meant as a symbol of one's respect and pride in the profession, as well as a symbol of one's years of service. There is nothing criminal about this act and therefore no risk that a retiree would be charged with this crime under these circumstances.

Moreover, §538e states that only those persons who are not "officer(s) or member(s) of the fire department" can be found guilty of this offense. I would therefore argue that while a retired fire fighter is no longer an "active" member of the fire department, he/she may still be considered a "member" nonetheless and is thus immune from prosecution under the code.

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